PRACTICE OF MANAGEMENT CONTRACT IN CORPORATE GOVERNANCE UNDER NIGERIAN LAW*

Abstract
The practice of management contract is relatively a novelty in corporate governance. The practice has grown popularity and acceptability over the years. While its relevance cannot be under estimated, concerns have been expressed that the practice has corrosive effect on the powers of the General Meeting of the company who are the owners of the company with the possibility of attracting legal liability to the company which will affect the shareholder interest by dwindling the prospects of dividends. This paper is therefore an appraisal of the corporate practice of the relevance of management contract. The research adopts the non doctrinal research methodology culminating in examination of both primary and secondary sources of law. The research concluded with the recommendation a corporate decision to cede management of the company to outsiders in the form of management contractors must involve the shareholders in a general meeting.

Keywords: Practice, Management, Contract, Corporate, Governance

1. Introduction
It needs no emphasis that the practice of management contact has gained pre-eminence in the corporate environment in modern society, with Nigeria being no exception. It has become a practice in developing countries to utilize management contract to acquire managerial competence which they lack. The Developed Countries which are rich and advanced technologically have taken of technology to explore the natural resources of the developed countries using the practice of management contract as a medium. The expectations of the developing countries are to reap the benefits from exploration and exploitation of their natural resources, grow their private enterprises, including developing and acquiring new technologies. The extent to which the developing countries actually benefited from the arrangements according to their expectation will be the subject matter of another discourse

2. Conceptual Definitions
'Management', Management is defined as 'government' control, superintendence, physical or manual heading or guidance, act of managing by direction or regulation or administration as management… of great enterprises[1]. 'Contract' means a written or oral agreement especially one concerning employment, sale or tenancy, that is intended to be enforceable by law.[2] Management contract therefore, is an arrangement by which one firm provides management know-how in all or specific area to another firm. This is a medium by which a company (the owner or local party) enters into contract with another company (the management company or consultants) under which the management or consultant company provides expertise which is lacking in the company's own managers. It has also been defined as agreement between investors or owners of a project, and a management company hired for coordinating and over seeing a contract[3].

3. Historical Background of the Concept of Management Contract
Management contract has been a common practice in advanced countries. The concept arose as a result of the exigency of providing the much needed expertise in the management of a company which in lacking in their own management[4]. In developing countries, the same is not the case as the developing countries enter into different types of arrangement with foreign investors for the development of their natural resources and at the same time insulate state owned enterprises from bureaucratic interference for the purpose of achieving efficiency.

4. Nature of Management Contracts
Management contract is an arrangement where a local party retains ownership or at least considerable majority holdings of the venture and in addition seeks to retain board policy control of the venture while t the foreign party has no equity stake in the venture as distinct from direct equity ownership.[5] This was succinctly stated as an arrangement by which a foreign firm performs managerial function for a local enterprise in which it has no ownership interest unlike in a direct investment where ownership of the receiving enterprise is vested in the management, hence control is in proportion to the degree of ownership held, is both absolute and indefinite. In the arrangement under management contract, the extent of control by the management contractor will be qualified and its duration limited.[6]

5. Legal Framework and Regulation of Management Contracts in Nigeria
The Companies and Allied Matter Act, 2020 herein after referred to as 'CAMA', is the principal legislation governing the formation and practice of corporate bodies in Nigeria. In most cases, in Nigeria most of the management contract Companies are companies incorporated outside Nigeria. s.78 of CAMA provides that a foreign company which intends to carry on business in Nigeria must secure incorporation in Nigeria with Corporate Affairs Commission. A foreign investor interested in doing business in Nigeria has to options under the current state of the law, which include; (a) Foreign direct investment,

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[1] Garner, *Black's Law Dictionary, 10th ed. (2014) West Publishing Co. United States p.389.*
[2] *Oxford Language, languages. Oup.com.*
[3]M. Luenendonk, 'Management Contract – Definition Pros and Cons, and More' (2019) <https://www.cleversison.com> accessed 12 June, 2021.
[4]D.A. Ball, *International Business; The Challenge of Global Competition (2004) 9th ed*. MC Craw Hill Publishing, United States PSS – 90 <https://www.amazon.com> accessed 12 June, 2021.
[5]O. Akerede, 'International Contract Negotiation' (1989) *The Grieve Review of Business and Property Law p.92.*
[6] *Ibid p.95.*

which involves investing in stocks and securities of an existing Nigeria company (b) Foreign direct investment, which involves establishing a business a business enterprise and acquisition of business assets in Nigeria.

Any foreign company aspiring to conduct business in Nigeria (with the exception of those exempted) by the president must be incorporated as a separate legal entity in Nigeria. Until incorporation, such a foreign company cannot have a place of business in Nigeria, except for the receipt of notices and other documents as matters preliminary to incorporation.[7] Any act of the company done in convention of the provision of s. 78 of CAMA as stated above is void. In addition to the foregoing, s.79 of The CAMA criminalizes the act when it provided that where any foreign company fail to comply with the requirements of incorporation before doing business commits an offence and is, in addition liable to prosecution and to such penalty as the commission shall specify by regulation and the same punishment shall be meted out to every officer or agent of the company who authorizes or permitted the default or failure to comply.[8] The effect of these provisions is not only to prohibit an unregistered foreign company from carrying on business in Nigeria, but also to disable the company from exercising any of the powers of a registered company in Nigeria.[9] The powers contemplated in the foregoing provision are as provided for in the Act,[10] as follows. 'Except to the extent that the company's memorandum or any enactment otherwise provides, every company shall, for the furtherance of it authorized business or object, have all the powers of a natural person of full capacity'.

The Act did not define the full effect and meaning of the expression 'carrying on business' in relation to the foreign registered company, even in the previous version of the extant CAMA. This omission came to the fore in the case of *Ritz Pumper fabrik Gmbh and Co AG v Techno Continental Engineers & amour.*[11] If resort is to be had to other sources for the definition of the phrase, mention must also be made of Garner[12] who defines 'doing business' as synonymous with 'carrying on business', conducing or managing business. In the case cited above, the Supreme Court adopted the definition in the Black's Law Dictionary as follows; 'to conduct, prosecute or continue a particular vocation or business as a continuous operation or permanent occupation, the repetition of acts may be sufficient'.

It has been contended that where a foreign company in conjunction with a Nigeria Company jointly secures registration and the two companies in their new registered status carries on business in Nigeria, it cannot amount to contravention of S.78 of CAMA. It is the new company that is carrying on business. Accordingly, shareholdings in the new company cannot amount to carrying on business for the purpose of the section.[13] In the view of *Prince Bola Ajibola,*[14] in what appears to be a contrary argument, opined that except the company is exempted, the only situation where a foreign company can do business in Nigeria without incorporation of a local Company is when its services are required on a very urgent *ad hoc* basis as well as in emergencies such as to extinguish wild fire in the oil fields or carry out a rescue operation.

It should be noted that under the former position under the law, where a foreign company can enjoy exemption from local incorporation under the Companies (Special Provisions) Act, 1973 has now been re-enacted with the amendments introduced as reflected in s.80(1) of CAMA. The categories of foreign companies that may be granted exemption from registration include;

i. Foreign companies invited to Nigeria by or with the approval of the Federal Government to execute any specified individual project.
ii. Foreign companies which are in Nigeria for the execution of specific individual loan projects on behalf of a donor country or international organization.
iii. Foreign government – owned companies engaged solely in export promotion activities and
iv. Engineering Consultant and technical experts engaged in any individual specialist project under contract with any of the governments in the federation or any of their agencies or with any other body or persons where such contract has been approved by the federal government.

The point must be made that an unregistered company in Nigeria does not *ipso facto* lose its right to sue or be sued in its name or in the name of its agent.[15] It is the contention of this paper that the position of the law as stated in the above case is fluid and leads to fruitless litigation since judgment obtained against such unregistered company may not be easy to enforce having regard to the fact the foreign company cannot own any asset in its foreign registered name that can be attached by a judgment creditor in Nigeria. This is because, as an unregistered company lacks the legal personality to acquire property in its name in Nigeria.

6. Legal Status of a Management Company vis-a-vis the Local Company

Concerns have been expressed as to whether or not a management company can be regarded as an agent of the local Company. An agent has been defined as a person authorized by another to act for or in place of another, a representative.[16]

[7] M.P Adeleke, ' Foreign Direct investment in Nigeria' (2018) *www.dlapiper.com* accessed 13 February, 2022
[8] s.79 CAMA
[9] J.O. Orojo, *Company Law and Practice in Nigeria (2008) 5th ed. Lexis Nexis Cape Town.*
[10] *s.43, op cit.*
[11] *(1999)4 NWLR (Pt.596) 298.*
[12] B.A. Garner, *Black's Law Dictionary (2014) 10th ed. West Publishing Co. Thomson Reuters p.239.*
[13] Orojo *op.cit p.51.*
[14] O. Abayomi; 'Foreign Companies capacities to do business' *Law and business quarterly vol. 1 No.1 p.61.*
[15] *Ritz Pumen Fabrilk GMBH & Co. KG v Techno Continental Engineers Nig. Ltd (1999) 4 NWLR (pt. 598) 298.*
[16] *B. A Garner, op cit. p.75*

From the definition in the Black's Law Dictionary's definition, a person in law includes a corporate body. A management company cannot be regarded as an employee of the local Company. It could only be regarded either as an agent or independent contractor. In this case, a management contractor cannot be regarded as an independent contractor because they cannot perform the task under the contract, in their personal name but in the name of the local company. The question that may arise, therefore, is whether the local company will be vicariously liable for the torts of the management contractor having regard to the agency theory. This will depend upon the nature of tort or the duty of care that was breached by the act of the management contractor. If the duty to take care is said to be non-delegable, the Local Company will be liable as the law is that a person cannot discharge his duty of care merely by appointing, instructing or supervising a competent contractor.[17] In other instances, the general rule as to liability of independent contractor will apply and the Management Contractor will be liable for injuries or torts committed against a third party.[18] The rationale for that position of the law is that since the Local Company (The Principal) cannot control the way in which the contractor does the work, it is the Management Contractor (Independent Contractor) alone that is in a position to guard against the risk that caused the tort or injury. This is because, the risk of accident usually follows the contractor's operations rather than the Local Company (the Principal). Allocation of liability on account of damage caused to a third party falls on the Management Contractor who will be better positioned to insure against such loss and can conveniently pass on the cost in the form of a higher charges for the work executed.[19]

7. Propriety of Management Contracts vis-à-vis the Concept of *Deligatus Non Protest Deligare*

As has been noted above, the practice of Management Contract requires that the Board of Directors of a Company to whom the powers of administration and management of the company have been delegated by the General Meeting, transfers the power and authority to administer the company to another body which in this case is the Contractor, to exercise on behalf of the board. The rule of *delegatus non protest deligared* implies that a person to whom a power, trust or authority is given to act on behalf or for the benefit of another cannot delegate this obligation unless expressly authorized to do so.[20] Does the delegation of the powers by an authority divest the authority of exercise of the power? The concept of delegation implies that the powers are committed to another person or body which as a rule is always subject to resumption by the person delegating.[21] The rule, at all times is that the delegatee of the powers cannot exercise same to any greater extent than the owner of the powers.[22] It has been suggested that the agency relationship analysis between the Board and the Company will only come to play in questions of tortious and criminal liability.[23] The above qualification does not exist within the context of the case of *Faure Electric Accumulator Co*[24] where it was expressed that directors are agents for the company with powers and duties of carrying on the duties and exercising the powers of the Company. Before going further, let me pulse at this juncture to examine the nature of the powers of the Directors.

8. Nature of the Delegated Powers to the Board of Directors

It has been stated above that Directors are agents of the company by whom it acts. Accordingly, the relation between them is regulated by the law of agency.[25]This is to the extent that they act within the scope of their authority and on behalf of the company. It has been contended that the practice of management contract find justification under s.289(5) of the Act,[26] where it is provided that the directors may delegate any of their powers to a managing director or to committees consisting of such members or members of their body as they think fit and the managing director or any committee so formed shall in the exercise of the powers so delegated, conform to any regulation that may be made by the directors. It would appear to be too sweeping to rely on the provision of S.289(5) to justify a blanket transfer of the management powers of the board to a third party vide the concept of management contract, to manage the affairs of the company. The rule in law is that a person to whom the powers of another have been assigned to act as an agent cannot transfer or delegate such powers to a third party. In particular, the provision of S.305(7) of the Act[27] need to be examined in the light of the delegation of the powers of the directors to enter into management contract with a third party in relation to the management of the affairs of the company. It is provided in the law that where a director is allowed to delegate his powers under any provision of the Act, such a director shall not delegate the power in such a way and manner as may amount to an abdication of duty. As a matter of law, the duty to pay attention to the business of the company is, notwithstanding delegation consistent with service agreements. In *Fisheries Development Corporation of SA Ltd v Jorgensen,*[28] *Margo J* suggested that the old rules as formulated by *Romer J* are only relevant to non- executive directors. The import of this is that notwithstanding delegation of powers, an executive director must pay attention to the business of the company in respect of which the delegation was made. However, the distinction must be drawn that having permitted delegation, the law does not require that the director should distrust and be involved in constant supervision of those persons or body to whom the powers or tasks have been

[17] G. Kodilinye and O. Aluko, *Nigeria Law of Torts (1999) 2nd ed. Spectrum Law Publishing, Ibadan p.256.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ndukauba v Kolomo (2001) 12 NWLR (pt. 726) 117*
[21] *Nwosu v Imo State Environmental Protection Agency (1990) 2 NWLR (pt. 135) 688.*
[22] *Derivativa Protestas non Protest esse major Primitiva* which means that a derived power can never be greater than that available at its source.
[23] J.H. Farrar. *Op. cit p. 303.*
[24] *(1888) 40 ch. D. 147.*
[25] J.O Orojo, *Company Law and Practice in Nigeria (2008) 5th ed. Lexis Nexis Durban South Africa.*
[26] *Companies and Allied Matters Act, 2020.*
[27] *Ibid.*
[28] *(1980) (4) SA 156 act 165.*

delegated. This it was reasoned, will be inconsistent with the essence of the deletion of duties.[29] Thus in *Huckerby v Elliot,*[30] a director of a gamming club was held not liable in negligence in failing to ascertain whether the club was licensed when the responsibility of obtaining the license had been delegated to someone else. Accordingly, a director is not required to watch his subordinate officers or verify the calculations of the entries in the company books provided that the board appoints a competent person to be auditor and has no ground for suspecting any foul play[31]

9. Who is a 'Director'?

S.269 of CAMA defines a director of a company as a person duly appointed by the company to direct and manage the business of the company. The word 'director' also includes any person on whose instructions and directions the directors are accustomed to act. However, the fact that a person in his professional capacity gives advice which a director acts upon customarily does not automatically render such a person director[32]. It may be necessary to examine the meaning of the phrase 'to direct and manage the business of the company'. This becomes relevant for the purpose of determining the propriety or otherwise of contracting the business of the Company to Management Contractors by the directors. To manage means to exercise administrative and supervisory powers, to conduct, control, carry on or supervise,[33] etc. It need to be emphasized that the above powers vested in the director must be exercised as a board except that a resolution in writing signed by all the directors entitled to receive notice of a meeting of directors shall be as valid and effectual as if it had been passed at a meeting of the Directors duly convened and held.[34] From the phrase, 'persons duly appointed' presupposes that where a director was not regularly or properly appointed, his acts will not bind the company except where the company describes this as such in which case, there is a rebuttable presumption that all persons who have been so described as directors have been properly appointed.[35] There is criminal responsibility attached where a person not duly appointed director holds himself out as director. Such a person commits an offence and is liable on conviction to imprisonment for a term of two years or a fine as the court may deem fit, for each day he so acts or holds himself out as a director or both such fine and imprisonment.[36] A director includes a person appointed or elected according to law, authorized to manage and direct the affairs of a corporation or company.[37] A person on whose instruction or directions the directors are accustomed to act is also referred to a director.[38] This definition excludes persons who in professional capacity give professional advice to the directors.[39]The Articles of the company may also provide for the appointment of alternate directors. An Alternate Director appointed by the directors is entitled generally to perform all the functions of his appointer in the absence of the appointor.[40] The statue of the Alternate Director is usually limited by the articles but with the possibility of eventually elevation to the full status of Director.[41]

Status of Directors

Directors are the managing organ of a company. Their status is not that of 'employees' of the company neither are they servants or member of staff of the company.[42] Although, they are not staff of the company, they are considered as officers of the company for the purpose of making the company vicariously liable for their acts in negligence while engaged in the business of the company.[43] A Director may be appointed for life, in which case he will no longer be subject to re-election in accordance with s.281 of the Act. It would appear that the appointment of a person as life director is merely window dressing having regard to the provision of the Act which makes his removal possible by an ordinary resolution, before the expiration of the period of office[44] even though he company will nevertheless be liable to pay damages for the removal of such Director whose term of office by virtue of the service contract, has not expired. In *Swindler v Northern Raincoat Co. Ltd,*[45] it was held that the Company will be implied to have undertaken to do nothing of its own accord to bring to an end the circumstances necessary to enable a person act as managing director. This position of the law does not however avail a director whose appointment is not additionally secured by a service contract, other than appointment under the Article, since the Article does not constitute a service contract between a director and the company.[46] The point has been made before that the company being an artificial person can only act through its human agents and in this case, the directors as alter ego of the company. Accordingly, the directors may enter into contract in the name of the Company and such contract shall bind the company. In *Kurubo v Zach- Motison (Nig.) Ltd,*[47] *Tobi JCA* (as he then) stated the position of the law as follows;

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[29] J.H. Farrar, *Company Law (1985) Butterworth & CO. Publishers Ltd London, p. 320.*
[30] *(1970) 1 ALL ER 189.*
[31] *Re City Equitable Price Insurance Ltd (1925) Ch. 407 act 430.*
[32] S.270 CAMA
[33] B.A Garner, *Black's Law Dictionary (2004) 10th ed, West Publishing Co. US p.1105.*
[34] *S. 289 (8) Op. cit.*
[35] *S. 269 (2) Ibid.*
[36] *S. 269 (3) Ibid.*
[37] *Olufosoye v Fakorede (1993) INWLR (Pt. 272) 947.*
[38] *S. 270 (1) Ibid.*
[39] *S. 270 (3) Ibid.*
[40] J.H. Farrar, *op. cit. 285.*
[41] *Longe v First Bank of Nigeria Plc (2006) 3 NWLR (PT.967) 228 act 261- 262.*
[42] *Hutton v West Cork Railway ((1883) 23 ch.) 654.*
[43] J.O Orojo, *Company Law and Practice in Nigeria (2008) 5th ed.*
[44] *S. 288 op. cite.*
[45] *(1969) 2 ALL ER 239.*
[46] *Beattie v E & F Beattie Ltd (1938) Ch. 708.*
[47] *(1992) 5 NWLR (pt. 239) 102 at 115.*

… It is therefore the law and the tradition for the human beings authorized to negotiate agreement for and on behalf of the company. Where an agreement is so executed by a person in authority, the Company is liable or deemed to be liable for the act or acts of the person.

The above position of the law derives its substance from the organic theory or alter ego of the company as emphasized in *Bolton (Engineering) Co ltd v Graham and Sons* [48] where *Denning LJ* as he then was stated that a company may be likened to the human body which has a brain and nerve center which controls its activities. It (the Company) has no hands which hold the tools and acts in accordance with the direction from the Centre. While some of the people in the Company are mere servants and agents who are not more than hands to do the work and cannot be said to be in a position to represent the minds or will of the Company, others are directors and managers who represent the directing mind and will of the company and controls what the company does. It therefore follows that the minds of the Directors of the Company represent the mind of the company.[49]

10. Liability of the Company for the Acts of the Directors

We have noted that as a legal entity without hands and minds, the company can only act through its primary organs to wit, the Members in a General Meeting, the Board of Directors and the Managing Director. The company in such circumstance shall be civilly liable for the acts of the above mentioned primary organs of the Company to the same extent as if the Company was a natural person.[50] The only qualification to the rule is that the company will not be liable if the third party seeking to hold the Company liable has actual knowledge at the time of the transaction that the General Meeting, the Managing Director or the Board of Director as the case may be, had no authority to act in the matter or had acted in an irregular manner or if having regard to his position or relationship to the Company, the third party ought to know the absence of power or of their irregularity.[51]

When a Director enters into contract on behalf of the company as an agent, as a general rule, he is not personally liable on such contract. This accords with the several principle of agency. This is however, not to say that where the director expressly makes himself liable, he will not be so liable. Apart from expressly making himself liable, a Director will be liable where he contracts in his own name without disclosing his status as agent acting for a principal.[52] Even where he contracts as a director without using expressions that bind the Company, he will be personally liable.[53] As for tort, a Director who is fraudulent or commits tort in the course of his duties will be liable to the injured partly. This arises from the rule that whosoever commits a wrong is liable for it himself even though he purports to act as an agent or servant on behalf of another.[54] However, a Director who did not authorize a fraud committed by a co- director will not be liable for such fraud.[55] A Director will also be liable personally where there is a breach of duty of care. Liability will attach to the Company for any loss sustained and action may be initiated to restrain the director from committing or continuing the breach and where the breach has been committed, proceeding may lie for damage or compensation for restoration of the property of the Company.[56] Directors are not personally liable for torts resulting from imprudence in so far as the imprudence is not of such a nature as to amount to gross negligence. The court will not make it a habit of visiting the director with consequences of error of judgement when they have acted *bona fide* with the intention of doing what is right in the best interest of the Company.[57]

A Director may also be personally liable where the Company carries on business without a minimum of two directors contrary to the provision of s.271(3) of CAMA. If the company carries on the business for more than six months with that status of fallen membership, every director or other officer who knowingly carries on the company business is liable jointly and several with the company for the debt of the Company contracted during the period. It has been noted before that the directors may delegate any of their powers to a managing director or to committees consisting of such members or members of their body as they think fit and the managing director or any committee so formed shall, in the exercise of the powers so delegated, conform to any regulation that may be made by the directors.[58] When the question of liability for negligence of the committee so appointed arise, to what extent can non members or the Company be liable for the negligence of such committee. In the absence of specific provision in the Company code till date, the courts will therefore continue to rely on common law in order to seek resolution of some of those questions.[59] When a company carries on business that is outside the authorized objects of the company, liability will not lie at common law because of the doctrine of *ultra vires*. This doctrine had been codified and recognized under the Act[60] which provides that a company shall not carry on any business expressly prohibited by its memorandum and shall not exceed the powers conferred upon it by its memorandum or this Act[58] .

[48] *(1957) IQB 159.*
[49] *S. 87(3), CAMA.*
[50] *S. 89 Ibid.*
[51] *Ibid.*
[52] *Elkington and Co v Hunter (1892) 2 ch 452.*
[53] *Ibid.*
[54] *J.O. Orojo op. cit p. 271.*
[55] *Cargil v Bower (1878) 10 ch D 502.*
[56] J.O. Orojo *op. cit p. 272.*
[57] *Ibid.*
[58] *S. 289(5) CAMA.*
[59] O.A Osunbor, *The Company Director: His Appointment Powers and duties' Essays on Company Law (1992) ed. E.O Akanki.*
[60] *S. 44(1) Ibid.*

Accordingly, the company will not be liable to a third party if the third party seeking to hold the company liable has actual knowledge at the time of the transaction in question, that the board does not have the authority to act in the matter or had acted in an irregular manner or if having regard to his position or relationship to the Company, that third party ought to have known of the absence of the power or the irregularity.[61] It has been a matter of debate whether a contract that is ultra vires a Company can *Ipso facto* be referred to as illegal. Lord Cairns LC in *Ashbury Rly Carriage and Iron Co. Ltd v Riche*,[62] expressed his view as follows;

> I have used the expression Extra vires and ultra vires. I prefer either expression very much to one which occasionally has been used in the judgements in the present case and has been used in other cases, the expression 'illegality'. In a case such as that which your Lordships have now to deal with it is not a question whether the contract is contrary to public policy and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract. The question is as to the competency and power of the company to make the contract

As for Vinelott J in *Rolled Steel Products (Holdings) Ltd v British Steel Corpn*,[63] *ultra vire* also refers to a wider sense where a transaction ostensibly within the scope of the powers of the Company expressed or implied is entered into in furtherance of a purpose which is not authorized.

12. Powers and Duties of Directors

It needs no re-emphasis here that the powers of the Directors of the company must be exercised as a board. The starting point therefore, in considering the powers of the board is examination of the Company's Constitution. There can be no doubt that the relationship between the Board and the General Meeting is contractual based on the Articles which determines the extent of the powers conferred on the Board.[64] Normally, the powers granted to the board are extensive with very few retained exclusively by the Company in a General Meeting.[65] This is further strengthened by the Act[66] where it is provided that the business of the company shall be managed by the Board of Directors who may exercise all such powers of the Company as are not required by the Act or Articles, to be performed by the members in a general meeting. Clearly therefore, the only powers capable of being exercised by the General Meeting are the residual powers not covered by the Act or Articles.

The board is not even expected to act under or take instruction from the General Meeting in so far as it acts within the confine of the Act or the Articles of the company.[67] The only proviso to the provision is that the board acts in good faith and with due diligence. To this extent, the Act has qualified the position of the law at common law.[68] In the case of *Automatic self-cleansing filter Syndicate v Cunningham* (*supra)* the supremacy of the power of the board in the management of the Company came to the fore. In that case, it was held that the division of powers between the Board of Directors and the members of the Company in General Meeting is a function of construction of the Article and that where powers have been vested in the board, the General Meeting could not interfere with the exercise. The Articles of Association were held to constitute a contract by which the members had agreed that the directors and directors alone shall manage the Company. The Court of Appeal sanctioned the refusal of the Board to carry out a sale agreement resolved upon by the Company in general meeting because in their opinion, it was not in the best interest of the company. The members cannot be heard to contend that the Articles are subject to the general rule that agents must obey the direction of their principals. This position derived from the decision of the court where it was held that the broad division of the exercise of the powers of the company is between the Company in general meeting and the Board of directors and that the Board of directors if so authorized by the Articles may delegate some or all of its powers to the managing director or a committee of the directors. Consequently where the general management of the Company is vested in the Directors, and so long as they are acting at a properly constituted Board meeting and within the powers conferred by the Memorandum and Articles of Association, a resolution of the Company in general meeting is not binding upon them.[69]

The only qualification on the exercise of the powers of the board to manage the Company in exercising the powers of the Company, is if the powers are expressly reserved by the Article for the members in a General Meeting. This is consistent with the provision of the Act[70] and the Act[71] itself has provided for circumstances where the powers of the Company may be exercised by the members in a General Meeting. These include:

a. Where the members of the board of directors are disqualified by or unable to act because of a deadlock on the board.
b. The members in a general meeting may resolve to institute legal proceedings in the name and on behalf of the company, if the board of director refuses or neglect to do so.
c. The members may also confirm or ratify any actions taken by the board of directors or
d. Makes recommendation to the board of directors regarding action to be taken by the board.

[61] J.O. Orojo *op. cit p.109.*
[62] *(1875) LR 7 HL 653.*
[63] *(1982) 3 ALL ER 1057 at 1076.*
[64] *Automatic self-cleansing filter syndicate Co. Ltd v Cunningham (1906) 2 Ch. 34.*
[65] J.H. Farrar *op. cit. p. 296.*
[66] *S. 87(3), CAMA.*
[67] *S. 87(4) Ibid.*
[68] *John Shaw and sons (Safford Ltd) v Shaw (1935) All ER Rep 456.*
[69] *Gramophone and Typewriters Ltd v Stanley (1908) 2KB 89.*
[70] *S. 87(3) Ibid.*
[71] *S. 87(5) Ibid.*

The overriding consideration in the exercise of the powers of the directors in the management of the company is the interest of the company. Where the exercise of the powers of the directors in a particular decision will benefit some members of the company while affecting others adversely, the director will have to consider what is fair between the two.[72]

11. Duties of Directors

The duties of directors are categorized into two units i.e. the fiduciary duty and duty of care and skill. This position which has its origin both at common and equity has now been codified in the Act[73] which provides that a director of a company stands in a fiduciary relationship towards the company and shall observe utmost good faith towards the company in any transaction with it or on its behalf. The rationale behind the fiduciary nature of the duties of a director is hinged on the fact that having granted unlimited powers to the board of director, it becomes expedient to devise some means of controlling the directors in the exercise of those powers. While conceding that the management of the company must not be shifted, unrestricted and unsupervised powers should also not be permitted.[74] The exigency of control gave rise to categorization of directors as trustees or partners or agents. Thus, in *Great Eastern Rly Co v Turner*[75] directors were regarded as trustees and therefore, the law as it applies to trust relationship has been held applicable to them. In *Reforest of Dean Coal Mining Co*,[76] the directors were considered as partners and therefore subjected to partnership law in that regard. On the other hand, directors were regarded as agents of the company in a sense[77] in which case the law as it applies to agency was applied. In all of these, they are fiduciaries subject to different rules.[78]

In any of the rules, directors are obliged to exercise reasonable care and shall as might be reasonably expected of a person of his knowledge and experience in the performance of his functions. What this means is that the directors must act bona fide in the interest of the company and must not place themselves in a position where their duties to the company will conflict with their personal interest. This carries with it the duty not to divert corporate opportunities to themselves. It is important to note that in considering what the best interest of the company is, it is the subjective opinion of the director balancing the short term interest of the members against the long term interest of the members.[79] This position has been criticized on the ground that if a subjective test is applied to the exercise of the pioneers by the directors, the result can only be to confer an absolute and uncontrolled discretion on the directors.[80] This criticism was countered by the argument that notwithstanding the subjective test, a decision of the directors could be set aside if it was such that no reasonable man could consider it to be bona fide in the interest of the company.[81] Although the directors do not owe fiduciary duties to shareholders as such the duty requires directors to treat all shareholders equally. To this extent, the directors cannot withhold payment to some shareholders while delivering payment to others of the same group of shares[82]

The best interest of the company as provided for in S.305 (3) of the Act 2020, although not defined, the popular position now is that interest of the company transcends the shareholders to include the employees. This is consistent with the model in the English Jurisdictions. Specifically, it is provided in the British Company Act[83], that the matters to which the directors of a company are to have regard in performance of their function include the interests of the company's employees in general as well as the interests of the members.[84] Although, that position has attracted criticisms, it is nonetheless commendable having regard to the pride of place employees occupy in corporate business. No wonder it now forms part of our company Act[85]

Another issue of concern that is worthy of note is the enforcement of the duty owe to the company by the directors. The provision does not afford an employee the right of action against the directors for the enforcement. This is so because the duty is owed to the company and breech of it can only be enforced by the company in line with rule in *Foss v Harbottle*.[86] This position is further buttressed by the provision of the Act which states that a duty imposed on an a director under the law is enforceable against a director by the company.[87]

A very important aspect of the fiduciary duty of directors is the duty to avoid conflict of interest of the company with personal interest of the directors. Accordingly, the directors shall not in the course of management of the affairs of the company or in the utilization of the company's property make any secret profit or achieve other unnecessary benefit.[88] The

[72] *Mills v Mills (1938) 60 CLR 150.*
[73] *S. 305(1), CAMA.*
[74] *(1872) 8 Ch. APP 149 at 152.*
[75] *(1878) 10 Ch. D 450 at 453.*
[76] Ferguson v Wilson *(1866) 2 Ch. APP 77 at 89.*
[77] J.H Farrar *op. cit. p. 307.*
[78] J.H Farrar *op. cit.*
[79] *Allen v Gold Reefs of West African Ltd (1900) 1 Ch. 656.*
[80] Re Smith & Fawcett Ltd (1942) Ch. 304.
[81] *Shuttle Worth v Cox Bros & Co (Meriden head) Ltd (1927) 2 KB 9 at 18.*
[82] *Galloway v Halle Concerts Society (1915) 2 Ch. 233.*
[83] S.309 (1) British Company Act, 1985.
[84] *The previous position at common law was that directors were not entitled to have regard to employees' interests. However, the decision of the court in Panko v Daily News Ltd (1962) Ch. 927 S.309 (1) British Company Act, 1985.*
[85] *S. 305 (4) 0p. Cit.*
[86] *(1843) 2 Hare 461.*
[87] *S. 305 (9) Op. Cit.*
[88] *S. 306 (1) Ibid.*

phrase 'unnecessary benefit' has been held to be ambiguous.[89] The courts have nevertheless permitted directors to retain profits made with benefit of corporate information on the ground that the companies were unable and unwilling to exploit the information.[90] This decision has been criticized as having the tendency of leading to abuse. This is because the directors themselves are the directing body and minds of the company who will take a decision as to whether or not to exploit the information. Where personal interest is involved on the part of the directors, a decision of unwillingness to exploit such information cannot be farfetched. The duty not to misuse corporate information outlives the tenure of office of the director. Therefore, a director who has resigned from the company is still accountable and can be restrained by an injunction from misusing the information received by virtue of his previous position as a director of the company.[91] This fiduciary duty of the directors also carries with it the duty to disclose their interest in any contract with the company.

12. Duty of Care and Skill

Before now, the law on directors' duty of care and skill was found in the formulation of the case of *Re City Equitable Fire Insurance Co.*[92] In that case, it was decided that a director need not exhibit in the performance of his duties a greater degree of skill than is expected from a person of his knowledge and experience. Accordingly, he is not liable for mere errors of judgment. This decision has been criticized because from the standard in that case, if a company appoints a moron as its director, the standard expected from him is that of a moron and not the standard required to keep the business of the company afloat.[93] The position of the law has now changed in what appears to be response to the criticisms as can now be in the provision of the company Act[94] which provides that every director of a company shall exercise the powers and discharge the duties of his office honestly, in good faith and in the best interest of the company and shall exercise that degree of care, diligence and skill which a reasonably prudent director would exercise in comparable circumstances. Thus, that standard has now departed from the subjective test of the individual director to that of a prudent director in the objective test. It must be mentioned further that it is provided that the same standard of care is now required of both executive and non- executive directors.[95]

13. Conclusion

It can now be seen from the foregoing that the practice of management contract is fall out of the departure from the subjective old position of the law which ties accesses the performance of a director to the personal skill and experience of such director. There is no doubt that this unhealthy for corporate interest. This is because the law does not require any special skill to become a director of company. The practice of management contract is therefore an intervention to attract the requisite skills into corporate governance. However, as desirable as it is, it would appear that the provision of the law which permits the directors to delegate their management functions to a managing director or committee of director is not enough to accommodate ceding the entire management of the company to an outsider under the toga of management contract. Even the provision of S. 289(5) of the Act that appears to power the practice of management contract does not appear to contemplate ceding the corporate management to outsiders since the law that the delegation must be in favour of a managing director or to committee consisting of such member or members of their body and such managing director or any committee so formed shall conform to the regulations made by the directors. It is therefore the recommendation of this paper that before ceding corporate management to an outsider in the form of management contract, it must involve the impute of the shareholders in general meeting. This is because the individual shareholder does not have the right of action against the management contractor on account any wrong that may affect the interest of the individual shareholder in the corporate governance.

[89] O.A Osunbor *op. cit. p. 144.*
[90] *Queensland Mines v Hudson (1978) 52 Australian Law Jovani Report 339.*
[91] *S. 306 (6) op. cit.*
[92] (1925) Ch. 407.
[93] Re Brazilian Rubber Plantation and Estate Ltd (1911) 1 Ch. 425.
[94] S. 308 op. cit.
[95] O.A Osunbor O.p Cit. P. 146; S. 308 (4) Op. Cit.