AN ANALYSIS OF THE LEGAL FRAMEWORK ON THE DUTIES AND LIABILITIES OF COMPANY DIRECTORS AND OTHER OFFICERS IN UGANDA

BY

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SEPTEMBER, 2018
DECLARATION

I Kugonza Musimbi, hereby declare that this is my own work to the best of my knowledge and that it has never been presented before by any other person or institution for any academic award in and outside the School of Law Kampala International University or even Diploma except where acknowledgement has been made in the text.

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APPROVAL

This is to certify that this research report entitled "An Analysis of the Legal framework on the duties and liabilities of company directors and other officers in Uganda" has been under my supervision from the inception to the last page.

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(SUPERVISOR)

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Date: .................................................................
DEDICATION

I dedicate this work to the Almighty God, my beloved parents, sisters, brothers, uncles, and Aunts, relatives and friends for helping me in the course of my Education in many ways.
ACKNOWLEDGEMENT

First and foremost I return my sincere thanks to the Almighty God for having enabled me from the start do my research work up to the last. He has been with me all through the trying times laboring with me so that I could complete my book. Giving me strength, courage and knowledge, May His Name Be Praised Forever.

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List of Statutes
Companies Act 2012
Insolvency Act 2011
Partnership Act 2010
Accountants Designation Act Cap 206
Companies Director’s Disqualification Act 1986
Health and Safety at Work Act 1974
Companies’ Single Member Regulations 2016

Cases
Alexander v Automatic Telephone Company (1900) 2 Ch 56
Automatic Self Cleasing Filter Syndicate Co. Ltd v Cunningham (1906) 2 Ch 34
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Aberdeen Railway Company Ltd v Blackie Brothers (1843) ALLER 297
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Daniels v Daniels (1978)

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Elder v Elder and Watson (1952) S.C 491

Eley v Positive Government Security Life Assurance Co. Ltd (1876) 1 Ex D20

Erlanger v New Sombrero Phosphate Co. (1878) 3 App Case 1218

Foss v Harbottle (1843) 2 Hare 461

Fullham Football Club Ltd v Cabra Estates PLC (1994) 1BCLC 363

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Fire Stone Tyre and Rubber Co. Ltd v Lewellin (1956) 1 ALLER 693

Gilford Motor Co. v Horne (1933) Ch 935

Glossop v Glossop (1907) 2 Ch 370

Gantler v Stephens

Hogg v Cramphorn Ltd (1967) Ch 254

Hickman v Kent and Another (1915) 1 Ch 881
Hutton v West Cork Ry Company (1883) 23 Ch D 654 at p 671 CA
Henshaw v Roberts (1967) 1 AFR 5
Industrial Development Consultants v Cooley (1972) 1 WLR 443
Kaye Croydon Tramways Co. (1898) 1 Ch 358
Kelner v Baxter (1866) LR 2 CP 174
Littlewoods Stones v IRC (1969) 1 W.L.R 1241 C A
Law v Law
Misango v Musingire (1966) E.A 390
Mac Dougall v Gardiner (1875) 1 Ch D
Macaura v Northern Assurance Co. (1925) AC 619
Normandy v Ind Coope & Co (1908) 1 Ch 84
Prudential Assurance Co. Ltd v New man Industries
Pender v Lushington (1877) 6 Ch D 70
Percival v Wright (1902) 2 Ch 421
Panorama Development v Fidelis Furnishing Fabrics Ltd (1971) 3 ALL ER 16
Perry’s Case (1876) 34 L.T
Punt v Simons and Co. Ltd (1903) 2 Ch 506
Parker v Daily News (1962) Ch 927
Re H.R Hammer Ltd v (1959) 1 WLR 62
Reyenidje Tobacco Co. Ltd (1916) 2 Ch 426
Rayfield v Hands (1958) 2 ALLER 194
Re George Newman Ltd (1895) 1 Ch 674 CA
Re Duomatic Ltd (1969) 2 Ch 365
Re Bailey Hay and Co. Ltd (1971) 1 W.L.R. 1357
Roberta (1937) LIL Rep
Re Smith and Fawcett Ltd (1942) Ch 306 CA
Re Produce Marketing Consortium Ltd No.2 (1987) BCLC 520
Re William C Leitch Bros (1932) 2 CL 71
Re City Equitable Fire Insurance Co. Ltd (1925) Ch 407 P 428
Regal Hastings Limited (1967) 2 AC 134 HL
Salomon v Salomon & Co. Ltd (1897) AC 22
Smith v Croft
Shonowo v Adebayo (1969) NCLR 126 (Supreme Court of Nigeria)
Smith, Stone and Knight Ltd v Birmingham Corporation (1939) 4 ALL ER 116
Sentamu v UCB (1983) HCB 59
Smith v Anderson (1880) 15 Ch D 247
Taylor v National Union of Mine Workers and Tolle
Wallersteiner v Moir (1975) 91 L.Q.R. 482
Wilson v Bury (1880) 5 QBD
WM Cory & Sons Ltd v Dorman Long & Co. P.28
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CHAPTER ONE
INTRODUCTION

1.0 General introduction.

"The research analysis on the legal frameworks on the duties and liabilities of company directors and other officers in Uganda." This chapter will cover history and background of the study, statement of the problem, and objectives of the study, research questions, and scope of the research, significant of the study, research methodology, literature review, and characterization. The above mentioned areas are of significance in this study since the chapter is the very foundation and reason why am carrying out this study. In Uganda there is a variety of business organizations recognized by law such as the sole proprietorship, partnership, and the incorporated companies. The Black’s Law Dictionary defines a company as follows:

A corporation, or less commonly, an association, partnership, a union that carries on a commercial or industrial enterprise. Corporation, partnership, association, joint stock company incorporated or not and (in an official capacity) any receiver, trustee bankruptcy, or similar official or liquidating agent, for any of the foregoing issues in relation of a number of people for some common object or objects. The above definitions describe accompany as an association, however this could be a bit uncertain because all members in an association should participate in the planning, decision making and controls of the association. This cannot be attained in companies where shareholders number is in thousands. Companies have got two forms that is to say; private and public.

Section 5(1)(b) of the Companies Act 2012 defines a private company as accompany which limits the number of its members to 50 excluding past and present employees of the company who are shareholders and which by its articles, restricts the rights to transfer shares of the company to the public. These are companies whose minimum number of members is 2 people.

In public companies minimum required number for public companies is 7 and it goes up to infinity. A public company must have at least 2 directors though for a private company the statutory minimum number is one director. Officers cannot only be found in companies but also in other

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1 Garner BA(Ed) Black's Law Dictionary 9th edition p318
businesses like unincorporated associations for example clubs, trade unions among others, partnerships, cooperative societies among others.

**What is corporate governance as regards the duties and liabilities of company directors and other officers in Uganda?**

The term corporate governance is often defined as the formal system of accountability by senior management to the shareholders corporate governance and precisely where its boundaries lie are still subjects of debate. A more expansive definition includes the entire set of legal rules, relations, and behaviors that constitute the system by which a company is controlled and directed.

Economists and social scientists tend to define it broadly as the institutions that influence how business corporations allocate resources and returns and the organizations and rules that affect expectations about the exercise of control of resources in firms.

**Why corporate governance**

Good corporate governance helps to prevent corporate scandals, fraud, and potential civil and criminal liability of the organization. It is also good business because the officers of the company are obliged to perform their obligations with utmost care and good faith.

A good corporate governance image enhances the reputation of the organization and makes it more attractive to customers, investors, suppliers and in the case of non-profit organizations, contributors among others.

The principle of corporate governance helps in ensuring that the officers of companies perform their obligation with due diligence and that the fact that after incorporation the company acquires a legal existence does not stop the courts of law from enforcing the officers duties.

Companies benefit from having a leveled field upon which to conduct their competitive business once there is a known set of standards by which corporate entities are judged.

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2 Naidoo Note 7 at 1
4 Frederick D Lipman and L Keith Lipman Corporate Governance Best Practices strategies for public private and and Not for Profit Organizations (2006) at 3
Corporate governance directly attacks corruption to which most corporate entities are opposed.

Corporate governance is essential for sustainable and long term Wealth creation for enterprises and

It is important that Uganda puts in place and enforces principles of good corporate governance to reap the benefits associated with it.

Corporate governance is a very important principle aimed at protection of the creditors, shareholders over the ruling majority.

1.1 History and background of the study

The earliest business associations in England were medieval gilds which were not really trading undertaking at all, but bodies which sought to regulate the carrying on of particular trades by members individually. The first type of English organization to which name company law was applied was the merchant adventures for trading overseas. Royal charters conferring privileges on such companies are found as early as the fourteenth century, but it was not until the expansion of foreign trade and settlement in the sixteenth century that they become common. The earliest types were the so called regulated companies which were virtually extensions of the guild principles into the foreign sphere and which retained much of the ceremonial and freemasonry of the domestic guilds5.

Consequently many companies were formed without incorporation simply by their members executing deeds of settlement which resembled partnership agreements. In 1844, the first General Companies Act (an Act for the registration, incorporation and regulation of joint stock under the companies) under which any company with transferable shares or comprising more than twenty five members were incorporated by registration of the deed of settlement executed by its members. The Act was repealed by anew act Joint Stock Companies Act 1856 which made it compulsory to incorporate companies with more than twenty members. The Act of 1856 in turn was repealed by the Companies Act of 1862 under it insurance companies were for the first time able to obtain limited liability. The Companies Act 1862 was amended by later other Acts 1890, 1900, 1908, and

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5 Legal Service India.Com –Origin and Evolution of the Modern Company Law(http://www.legalserviceindia.com)
1929 to consolidate the earlier Acts. The Companies Act 1948 which was the principal Act in force in England was based on the report of a committee under Lord Cohen.

Tony Okwenye explains the brief history of company law in Uganda. It was brought to Uganda from English common law, the doctrines of equity and the Indians company Act. The common law and doctrines of equity apply to Uganda by virtue of English Law Reception Statute 1902 Order in Council. In Uganda after the First World War, it became possible to evolve and encourage commercial units. The Ugandan Companies Act is largely reenactment of the British Companies Act 1948. Since 1844 Companies have been created by registration under the Companies Act of Uganda vol 111 Laws of Uganda. This Act is a combination of the English Law and the principles of equity and natural justice. The concept of a registered company was introduced in Uganda by the colonialists who recognized companies as economic units used for conducting trade and business. Nothing has been done by the Ugandan Law Reform Commission to try and adjust most of provisions of the Ugandan’s Company Act to suit the local situation of Uganda. The companies Act No1 of 2012 is the principal legislation which commenced on 1st July 2013 under companies Act 2012 [commencement] instrument 2013.

A Company is at law separate and distinct from all its members. Lord Macnaghten observed ‘The Company is at law a different person all together from the subscribers to the memorandum’ the company had been validly formed. It has been maintained that a company is an artificial person, invisible, and intangible, created under law, with discrete legal personality, perpetual succession and common seal. It is useful to draw attention to the statutory definition of a company provided under the Ugandan company laws as follows: Section 2 of the Companies Act 2012 defines Company to mean accompany formed and registered under this Act or an existing company or a re-registered company under this Act. Section 228(3)(a) of the Companies Act A Company includes anybody corporate incorporated Uganda; and (b) a body corporate shall be taken to be the wholly-owned subsidiary of another if it has no members except that other and that others wholly-owned subsidiary and its or their nominees.

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6 Ibid
7 Company Law in Uganda
8 Cap 85
9 Salomon v Salomon and Co.Ltd (1897)
Directors and other officers are trustees and that their duties and liabilities can be explained on this basis. Often the directors and other officers in the eyes of courts of equity were themselves trustees. This was illustrated in\textsuperscript{10} where the directors of a building society were held liable for breach of trust, while the actual trustees escaped liability since they had acted only magisterially under the instruction of the directors. The officers of a corporation are the agents through which the board of director’s acts. The board makes the decisions and officers execute them. Officers mostly include president, vice president, secretary, and treasurer. Partners in a partnership business can as well be referred to as directors.

The true nature of who a director is may therefore have to be looked at in many areas. Directors have been invariably described as agents\textsuperscript{11}. Prof Gower principles of company law third edition 1969 at p 136 explained that directors have ceased to be mere agents of a company, both they and the members in general meetings are primary organs of the company between whom the company powers are divided.

The secretary is one of the officers of the company who may be said to form part of the management of the company and must be different from the director. In the 19th century the secretary was regarded to be no more than a servant or office boy of the company Note\textsuperscript{12} a company’s auditor is not an officer of the company within the meaning of section 2 of the companies Act, however he is an officer for purposes of the misfeasance proceedings regulated by the Act.

The principle of separate legal personality is thematic in corporate governance. It recognizes a company as an independent legal entity with rights and duties akin to those of human beings full capacity however, despite all those a company remains an artificial person and lacks the necessary human attributes for the realization of its object. Consequently members appoint select number of persons known as board of directors to manage and direct the activities of the company taking into consideration the best interest of the company.

In truth directors and other officers are agents of the company rather than trustees of it or its property. But as agents they stand in a fiduciary relationship to their principal the company.

\textsuperscript{10} Crimes v Harrison (1839)26 BEAR 435
\textsuperscript{11}Per Cairns L J in Ferguson v Wilson (1866)L.R 2Ch 77 89
\textsuperscript{12}(1971)87 LQR 457
Uganda duties and liabilities of company directors and other officers have been regulated by the companies Act 1 of 2012, civil procedure Rules under Order 38, Partnership Act 2010. The courts have played a considerable part in the development of company law by both the interpretation of the Companies Act and by evolving doctrines of their own such as the rules which require a company’s share capital to be kept intact for the benefit of creditors. Company law however has failed to recognize the role and rights of workers within the company. By emphasizing that in exercising their duties directors and other officers of the company like managers should consider the interests of the workers. Because a lot have been put in place but there is a problem in directors and officers exercising the duties. The situation is wanting especially when the majority shareholders are the same people involved in the management of companies as directors, secretaries among others. It is therefore upon this history and background that the study will seek to understand the liabilities and obligations of company directors and other officers.

1.2 Statement of the problem

The duties and liabilities of company directors and other officers are premised under the laws of Uganda that is to say companies Act, partnership Act, the civil procedure Rules, common law. As a result of the agent and principal this implies that directors and other officers are servants of the company and should in the best interest of the company. Though a critical analysis should be carried out to find out to what extent services are owed to the company an director become liable and how a director or any other office like a partner can escape liability.

Directors or other officers like secretaries have been subject to liability for violations of the extensive anti-fraud and disclosure requirements of the federal securities laws. Securities Act of [1933]. It is important to note that the present conceptual framework for the regulation of companies does not reflect the realities of the modern corporation since the directors and shareholders are often one, this is unsatisfactory as it affects creditors since upon incorporation a limited liability company is a separate legal entity distinct from its members.

1.3 Objectives of the Study

1. To examine what roles the director of a company and other officers can play.
2. Their liabilities incase of breach of their duties.
3. Whether directors and other officers of the company hold a fiduciary relationship with the company.
1.4 Research questions

1. What are the instances that can lead to the breach of the duties?
2. What does the law provide on the consequences of the breach?
3. What are the possible solutions available to the shareholders where the company director or officer has breached his duties?

1.5 Scope of the Research

The scope was centered on the duties and liabilities of company directors and other officers and the procedures taken into consideration when looking at these duties in relation to identifying the instances that lead to their breach. The researcher will conduct her research in Uganda and particularly Central Region, the researcher intends to find out whether one of the main concerns of company law is the protection of creditors, shareholders from abusive acts done by managers, directors among others.

1.6 Significance of the study

Business law provides for the obligation of the directors and other officers of the company. To other researchers the research findings obtained from this research will provide a stable ground to the other researchers conducting research in the related area.

1.7 Research methodology

The methodology employed is dependent upon the objectives and purposes of the research. This research is mainly reliant on library [Kampala international university library] and legal research ranging from various acts particularly the Companies Act, articles, cases, text books, internet and reports.

1.8 Literature review

Introduction

Below are some of the writings from different authors about the duties of company directors and other officers.
Robert R Pennington\textsuperscript{13} asserts that directors must not do any act which is ultra vires to the company or illegal nor without the sanction of the members in a general meeting do any act which is beyond the powers conferred on the directors by the articles.

Charlseworth\textsuperscript{14} asserted that a company has no physical but only legal existence, the management of its affairs must be entrusted to human instruments who are directors. They are not servants of the company but are rather in position of manager or managing partners. The study concurs with proposition of DJ Bakibinga company law in Uganda at p 174 ‘three aspects to this fiduciary principal, the first involves use by a director of a company’s property, information or opportunity, the second affects contracts made between a director and his company while the third impinges on situations where a director competes with the company which employs him or her’.

The research is in agreement with Prof Bakibinga due to the fact that although a company is a separate legal entity it has to be managed by the directors, secretaries, managers among others. Lyman Johnson and Dennis Garvis Scholars in their article corporate officers are advised about fiduciary duties notwithstanding that fiduciary duties are vital component of effective corporate governance. Some light was shed on whether officers are agents\textsuperscript{15}, court noted that it was matter of first impression whether officers owe fiduciary duties identical to those of directors, like directors owe fiduciary duties of care and loyalty and that the fiduciary duties of officers are the same as those of directors and section 187 provides that every company shall have a secretary. Wolters Kluwer\textsuperscript{16} explain directors liability that a director is not liable for any action taken as a director or any failure to take any action if the director performed the duties of his or her office in compliance with the statutory standard of conduct or in compliance with his or her fiduciary duties. And he can be held liable for breach of his or her fiduciary duty.

The agency relationship through its fiduciary element limits the powers of directors in corporate governance, by ensuring selfless dedication and commitment to organizational objectives, with that directors and other officers are advised to maintain distance from activities that may result in conflict of interest of the company. Table A Article 84 provides that a director interested in a contract with the company shall declare his or her interest at a meeting of the directors in

\textsuperscript{13} The Principles of Company Law
\textsuperscript{14} Principles of Company Law 5th Edition at pg 124
\textsuperscript{15} Gantler v Stephens
\textsuperscript{16} Corporate Directors and Officers
accordance with section 225 of the Act. At common law, directors and other officers owe their duties to the company not shareholders and following what has come to be known as the rule in Foss v Harbottle the proper plaintiff in action in respect of wrong alleged to be breach of directors duties is prima facie the company.

Robert Pennington explains that a director, like any other agent must account to the company for any profit he has made by the use of his powers as a director without the company's consent. The researcher concurs with him because the director or any other officer of a company has to account of any profits made in the course of the business.

The partnership Deed contains duties and obligation of partners and also the Partnership Act 2010, Duty to be faithful to each other. Every partner must be just and faithful to other partners in the firm, every partner must observe utmost good faith and fairness towards other partners in business activity, to provide full information of activities affecting the firm to the other co-partners, no information should be concealed, kept secret, to render true accounts among others. Which is the same case with the Companies Act 2012. As regards to liability of partners every partner is jointly and severally liable for all acts of the firm done while he is a partner.

Section 198 of the Companies Act 2012 provides for the duties of directors and include; act in a manner that promotes the success of the business of the company, exercise a degree of skill and care as a reasonable person would do looking after their business, act in good faith in the interest of the company as a whole.

1.8 Chapterization

Chapter One

This research paper is divided into five chapters. Chapter one covers the general introduction which includes the background to the study, statement of the problem, objectives of the study, research question, significance of the study, methodology, literature review and chapterization.

Chapter Two

17 (1843)2 Hare 461
18 The Principles of Company law on pg 400
This chapter will discuss the concept pertaining the duties and liabilities of company directors and other officers in an incorporated company.

Chapter Three

This chapter will discuss the legal framework providing for the duties and liabilities of company directors and other officers of the company.

Chapter Four

Analyze the impact of laws on the duties and liabilities of company directors and other officers in Uganda.

Chapter Five

Will contain observations, conclusion and recommendation of the study.
CHAPTER TWO
THE CONCEPT PERTAINING COMPANY LAW IN UGANDA

2.1 Formation of a company and other business entities
The purpose of company law is to regulate the formation, activity, officials and winding up of unincorporated bodies created under the Companies Act 2012. There are requirements which should be given to the registry of companies in Kampala upon incorporation. These include:

The memorandum of association which basically define the objectives of the intended company to be formed, articles of association which regulate the internal affairs of the company, the duties and liabilities of the company officers namely its directors, secretaries as well as its promoters as there are required to act within the provisions of the company’s articles of association since their acts bind the company.

However there are other officers that exist and also need to be looked at for example those in partnerships, cooperatives among other business entities.

A company or corporation is a legal and distinct entity separate and set apart from its members or shareholders. The legal personality is an artificial one which is distinguishable, one cannot touch its existence, in that what it provides is in form of services. This implies that after a company is capable of enjoying rights and being subject to duties and liabilities separately from its members. This principle was first applied in Salomon v Salomon & Co. Ltd (1897)AC 22 HL.

The members subscribed to 7 shares in cash thus Salomon held 20006 of the 20007, immediately after incorporation the company experienced difficulties and a year later was wound up.

It had sufficient assets to satisfy the debentures but nothing for the unsecured creditors.

Consequently Salomon was liable to indemnify the company against its trading debts. However on appeal to the House of Lords; The House of Lords held that the company in question had been validly formed, since the act merely required seven members holding at least one share each. The

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19 Companies Act 2012
20 DJ Bakibinga Company Law in Uganda p 2
21 Salomon v Salomon & Co. Ltd (1897)AC 22 HL
business belonged to the company and not to Salomon and Salomon was its agent and not it being the agent of Salomon.

Lord Halsbury L.C further stated
"Either the limited company was a legal entity or it was not, if it was the business belonged to it and not to Mr. Salomon. If it was not, there was no person and nothing to be an agent at all. Lord Macnaghten explained that the company is at law a different person altogether from the subscribers to the memorandum and though it may be that after incorporation, the business is precisely the same as it was before."

The issue above has been discussed in different cases like in22 to the effect that a company has in law an identity distinct from that of its subscribers, irrespective of the number of shares held by any individual so that even if a member owns 90% of the shares and as Managing Director controls the company he cannot usually be held jointly liable for its activities. The principle of corporate personality has statutory backings from the Companies Act, case law. A director for example is under obligation to work in the best interest of the company like in terms of disclosing all contracts to it. And that under insurance it is the company that has got insurable interest in its property not a member thereto. The member has to act on behalf of the company not himself or herself.

In23 Where it was emphasized that the property of the company belonged to the company not to its members. Neither the shareholder nor a creditor of a company, unless secured has an insurable interest in the access of the company. The facts of the case were that Macaura who was owner of Kill moon Estate in County Tyrone, sold the whole of the timber on the estate to a company Irish Canadian Saw Mills Ltd. In consideration for an allotment to him of 42,000 fully paid GBP1 shares. All the Company’s shares were held by Macaura. He was also an unsecured creditor of the company for an amount of GBP 19000, following the sale.

22 Dunlop Nigerian Industries Ltd v Forward Nigeria Enterprises Ltd and Farore (1976) N.C.L.R 243
23 Macaura v Northern Assurance Co.(1925)A.C 619 H.L
Macaura effected policies in his own name with the others covering timber against fire. claim brought by Macaura on the respondent company and policies was disallowed on the ground that he had no insurable interest in the timber because it belonged to the Irish Canadian Saw Mills Ltd. Lord Summer in his words explained that Macaura stood in no legal or equitable relation to the timber at all He had no concern in the subject insured, his relation was to the company not to its goods.

Macaura in addition would have sued in the names of the company because the company is an artificial legal entity, all its work has to be done by its directors, other officers or even shareholders where the directors are in breach of their duties, He should have brought the action on behalf of the company.

A promoter is a person who undertakes to take part in forming a company or who with regard to a proposed newly formed company, undertakes part in raising capital for it is prima facie a promoter of the company ,for he has taken part in setting up a company formed with reference to a given object as defined in the case of Talbatu Adenji and Others v Starcola (Nig) Ltd & Another High Court of Lagos (1972)

A promoter may do any of the following activities; arrange the preparation of the memorandum and articles of association, procure capital, prepare prospectus among others. However a person employed in a professional capacity like a lawyer, accountant cannot act as one.

A promoter stands in a fiduciary relationship to the company and consequently owes it certain fiduciary duties like disclosure, in 24 Where a syndicate led by Erlanger, a Paris banker, acquired for GBP 55,000 the lease of island in West Indies with the rights to work its phosphate deposits . The syndicate acting through Erlanger then formed the respondent company and named its directors. Many members of the public subscribed for the shares, but the real circumstances of the sale and purchase were not disclosed until 8 months later after the first phosphate shipments had proved a failure.

It was held that the transaction should be rescinded because the promoter failed to remember their fiduciary position when they appointed who were in no way independent of themselves and who

24 Erlanger v New Sombrero Phosphate Co.(1878)3 App Case 1218
did not sustain the interests of the company with ordinary diligence and care per Lord O'Hagan at pp 1255-1256.

Promoters do not possess an automatic right to remuneration from the company for their services. Since a company cannot enter into contract before it comes into existence. Normally Table A Article 34 allows directors to pay preliminary expenses from the company’s funds to the promoters.

2.1.1 Directors

The board of directors of a company manages its business from day to day subject to such control or supervision by its shareholders as is provided for by its memorandum and articles of association. Every company must have a board of directors and the minimum number of directors who may compose the board is two in the case of a public company and one in the case of a private company. The power to appoint directors is a corporate one and is exercisable in the manner laid down in the company’s articles. The law does not provide any restrictions on what the articles may provide in this respect and although it is usual for the power of appointment to be vested in the shareholders in a general meeting. A provision by which the directors themselves or even an outsider may appoint directors is valid if the articles of association are not providing for such. Power to appoint directors is exercisable in general meeting by ordinary resolution.

Modern registered companies are controlled normally by principal organs, the general meeting the managing director, the board of directors, studies show that the board of directors largely exercises only general policy control and interchangeably leaves the detailed management and policy implementation to the managing director or chief executive of the company and his managing staff as explained.

The expression director is defined under the Act Section 2 to include any person occupying the position of a director by whatever name called.

25 Section 185 of the Companies Act 2012
26 DJ Bakibinga Company Law in Uganda on pg 105
Director is also defined as any person in accordance with whose directors or instructions the directors of a company are accustomed to act. Since 1844 Companies have been created by registration under the Companies Act of Uganda. This Act is a combination of the English Law and the principles of equity and natural justice. The concept of a registered company was introduced in Uganda by the colonialists who recognized companies as economic units used for conducting trade and business. These definitions critically are not enough the true being of who a director is may therefore have to be sought elsewhere other than the Companies Act.

Directors have been described either as agent of the company under the case of Ferguson v Wilson (1866)28 or as trustees under the case of Charitable Corporation v Sutton (1742)2 ATK 400. Directors have been described either as agent of the company under the case of 28 or as trustees under the case of 29 or both.

30 Prof Gower has stated thus

"The directors have ceased to be mere agents of the company both they and the members in general meeting are primary organs of the company between whom the company’s powers are provided. Later on he adds, when refuting the notion that directors are trustees 31 3rd edition p 515-516 To describe directors as trustees seems today to be neither strictly correct nor invariably helpful.

In truth directors are agents of the company rather than trustees of it or its property. But as agents they stand in a fiduciary relationship to their principal the company.

It is quite seen that since they act for a body, they must necessarily be agents of that body. Though the artificial nature of their principal makes it difficult to discern the normal agency, The directors control the company.

Assuming that shareholders are the principals of the company the control aspect is difficult to discern since directors are not necessarily subject to the wishes of the majority of shareholders Per Chozon Hardy L.J at p.44 32. I cannot see anything in principle to justify the contention that the directors are bound to comply with the votes of resolutions of a simple majority of an ordinary

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27 Cap 85
28 Ferguson v Wilson (1866)
29 Charitable Corporation v Sutton (1742) 2 ATK 400
31 ibid
32 Automatic Self Cleasing Filter Syndicate Co. Ltd v Cunningham (1906)2 Ch 34
meeting of shareholders. It is not true to say that directors are mere agents, directors are managing partners...."

Directors exist in several capacities;

First directors:
The first directors of a company are usually named in the articles of association. If the company is incorporated as a public one, the appointment of a director by the articles is valid only if they deliver to the registrar of companies with the papers to lead to the company’s incorporation. A consent in writing to act as director signed by him or his agent and a written undertaking similarly signed to take his qualification shares from the company and to pay for them, but this undertaking is dispensed with if the director has subscribed the memorandum for his qualification shares. If the articles do not appoint the company’s 1st directors they may be appointed by the subscribers to the memorandum or a majority of their number. The appointment must be in writing, if the articles exclude Table A, the subscribers as the only members of the company may appoint the 1st directors by resolution.

Subsequent directors:
The power to appoint subsequent directors is usually exercisable by the members of the company in general meeting by ordinary resolution provided under. If the articles prescribe the maximum number of directors who may be appointed, appointment in excess of the maximum are void. Usually, however the members are empowered to increase or reduce the maximum number of directors by ordinary resolution. And then an appointment of directors in excess of the former maximum is taken to be an exercise of the power to increase the number of directors and is valid. On the other hand, the power to reduce the maximum number of directors cannot be exercised so as to remove an existing director from office before the expiration of his term of office.

A reduction of the number of directors will only operate in the future by preventing the appointment of new directors in place of those who vacate office until the number of directors will

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33 Table A 75
34 ibid
35 Table A Art 92
36 Table A 96
only operate in the future by preventing the appointment of new directors in place of those who vacate office until the number of directors has fallen below the new maximum.

When directors of a public company are appointed by members in general meeting, their appointment must be made individually by separate resolutions, unless the meeting first resolves without a dissenting vote that a composite resolution appointing two or more directors shall be put to the vote.37

The purpose of this rule is to prevent the board from coercing members into accepting candidates for the board whom they do not want, by combining the election of those candidates with the election of other candidates whom the members do want.

2.1.2 Appointment

Every public company registered under the Companies Act must have at least two directors while other companies must have at least one director.38 As earlier explained that first directors may be named in the articles. This means that they are usually appointed by the subscribers to the memorandum of association. The proper procedure is for the subscribers to meet and for a majority of them to sign a document at the meeting indicating the number of directors and the names of the first directors. However in the absence of a meeting all the subscribers should sign the appointment of the first directors by the articles is void, unless the person named in the articles are those named in the statement.

Contractual rights to appoint directors if by a company’s articles directors are to be appointed by the members in general meeting, the board cannot make a valid contract by which an outsider is empowered to appoint directors.

But if the company is governed by Table A, it seems that the board may delegate its powers to appoint additional directors by a power of attorney Table A Article 97(1) and this may prove useful when the board wishes to raise a loan from persons who are only willing to lend if they can nominate a certain number of directors to the board to protect their interests. If the articles expressly empower an outsider to appoint directors his power to do so is undoubtedly valid, and if

37 Section 194 of the Companies Act 2012
38 Section 185
the company refuses to accept his appointee, the court will compel it to do so by injunction, unless the appointee is unfit to act.

It has however been suggested, that if the outsider had to appoint a majority of the directors, the court would refuse to issue an injunction because the control of the company’s affairs would then be taken away from its members.

Although the courts are reluctant to force control on a company in this way, it is difficult to see how the court could logically refuse an injunction to the outsider merely because he has the right to appoint several directors instead of one or a few.

Formerly it used to be common for articles and directors services agreements to empower a director to assign his office to anyone he chose on his retirement. Such an assignment is only effective if it is approved by a special resolution passed by the members of the company. Because of this provision for the assignment of directorships are not now inserted in articles and service agreements. They have been replaced in practice by a power for the retiring director to nominate one director to the board, not as his assignee or successor, but simply as an ordinary member of the board, and such a nomination does not require the approval of the members.

The company is required to notify the registrar of companies of any change among its directors or secretary, to act in that capacity. 39

As regards qualifications for appointment, a person of over seventy years of age cannot be appointed a director unless:

- The company is a private one
- The company is not a subsidiary of a public company
- The articles otherwise provide or
- The appointment has been made or approved by a reason with special resolution stating his age having been given.

An un discharged bankrupt is also precluded from acting as director without the leave of the court provided by section 200 of the Act.

39 ibid
It is a criminal offence for an un discharged bankrupt to act as a director of a company or to take part in its management without leave of the court which adjudged him bankrupt. But a bankrupt is not disqualified by law from being appointed a director and although he could not act in that capacity his appointment would be effective for other purposes for example determining the number of unfilled vacancies on the board. Additionally a person who is convicted of the following offences cannot be a director

- An offence connected with the promotion formation and management of a company.
- If during winding up a person has been guilty of an offence for which he is liable for example where the business of the company has been carried on with intent to defraud creditors of the company or creditors of any person or for fraudulent purposes.
- If the person has otherwise been guilty while an officer of the company of any fraud in relation to the company or of any breach of his duty to the company. The court would normally indicate the period of disqualification.

Where a share qualification is required for appointment Table A 77, the shares should be taken up within two months of assumption of office or such shorter period as may be prescribed by the articles provided under section 193 of the Act. Failure to do so leads to vacation of the office.

A company's articles of association frequently require its directors to hold a certain minimum number of shares in the company to ensure that they have a material stake in its success and will consequently devote their best endeavors in its service. If only to preserve the value of their own investment. This minimum number of shares is known as the director's share qualification. The Rules of the London Stock Exchange formerly required the directors to hold a share qualification which was not merely nominal, but no share qualification at all is now required.

A director need not be a natural person, a corporation may be so appointed, this being found useful to enable a holding company to maintain complete control of a subsidiary.

The articles may also authorize a director to appoint an alternate director to act for him at any board meeting where he is absent. The scope of the alternative directors' powers and whether he is entitled to remuneration will depend on the terms of the relevant article.

It is also provided that the acts of a director are valid notwithstanding any defect that may after words be discovered in his appointment or qualification. This provision does not apply where there has been no appointment at all.
It was held that an equivalent section validated the actions of a duly appointed director who at a time of the relevant transaction had ceased to hold qualification shares but had later required them. Any person be it a member or an outsider can rely on the provision to validate a transaction or proceeding if he was unaware of the irregularity or was not put on inquiry.

Remuneration

2.1.3 Termination of directorship

D J Bakibinga in his book Company Law in Uganda p 109 and the Companies Act 2012 provide for the different modes of termination of company directors and include the following:

- Retirement
  
  This is usually provision in the articles for the retirement of directors by rotation. Table A Articles 89-92, for instance Article 89 Table A stipulates that one third of the directors shall retire by rotation in each year. Such retiring directors are eligible for re-election. Where Table A is followed, it is indicated that a retiring director who offers himself for re-election of such director has been put to the vote at the meeting and lost.

  Under Section 195 a director of the company which is subject to the section (viz a public company) must vacate his office at the conclusion of the general meeting commencing next after he attains the age of 70 years.

- Removal
  
  Neither the members nor the board of company have an inherent power to remove directors before the nominal expiration of their period of office in the absence of a power to do so in the articles.

  Where the articles do not specify the duration of a director’s appointment, however he holds office at will and may be dismissed by an ordinary resolution passed by the members at any time.

  The shareholders have authority to remove a director by ordinary resolution at a general meeting provided under section 195.

  This power supersedes anything contained in the articles or in any agreement between the company and the director although it does not affect a director in a private company holding office for life on 1st January 1961.

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40 Dawson v Africa Consolidated Land and Trading Co. (1898) 1 Ch 6 C.A
Special notice has to be given of any such resolution and the affected director must be availed a copy of such notice and entitled to a hearing at the meeting.
The dismissal of the director is without prejudice to any claim he may sue for compensation or damages arising from the termination of his services.
The director unfairly dismissed can only legally claim compensation if he has a binding contract entitling him either to hold his position for a fixed term or to be dismissed only after a prescribed notice.
The removal of a director under the statutory power may be costly to the company because his removal does not prejudice any right which he has to compensation for loss of office or to damages for wrongful dismissal provided under section 195(9).
Consequently, if the removal is a breach of the director's contract of employment, whether an express contract or a contract which incorporates the terms of the office articles, he may sue the company for damages. If a director is removed under a power in the articles, however whether the power was contained in the articles when the director was appointed or was subsequently inserted there in, he may only sue for damages for wrongful dismissal if he has an express contract of employment which does not empower the company to dismiss him in that way.

- **Resignation**

Articles usually provide that a director vacates office if he notifies his resignation of the company.

Even though there is no such provision, a director may resign unless the articles forbid him to do so as explained in 41. A resignation is effective as soon as it is notified to the company and cannot then be withdrawn without the consent of the persons entitled to appoint a new director, a director may resign only if the board consents.

Even where the articles require the resignation to be in writing, the company can validly accept a verbal resignation tendered before it in general meeting.

- **Receivership and winding up**

41 Glossop v Glossop (1907) 2 Ch 370

21
The appointment of a receiver in a debenture holders action operates as a dismissal of the company’s directors because the management of the company’s business is taken over by an outsider and the consequences are the same as if the company had closed its business down.

If a company is ordered to be wound up by the court its directors are there by dismissed, apparently for the same reasons as in the case of a receivership, it has also been said obiter that directors are dismissed by the company passing a resolution to wind up voluntarily for the purposes of an amalgamation, the company’s officers were not dismissed by the passing of the winding up resolution.

2.1.4 Disqualification of the director

Section 199 of the Companies Act provides that a person shall be disqualified from acting as a director for a period of three years if he or she fails to;

- Keep proper accounting records
- Prepare and file accounts
- Send returns to registrar
- File tax returns and pay tax or
- Allows a company to trade while insolvent

Subsection 2 provides that a person disqualified as a director to shall not

- Be a director of any company
- Act as a director before the expiry of the disqualified period
- Influence the running of a company through the director
- Be involved in the formation of a new company
- Act in a way that promotes a company

Duties of company directors and other officers

To whom do directors owe their duties to the company and not to the members either collectively or individually or to any one else interested in the company. However, more recent cases have shown that some level of duty may be owed to creditors and employees.
With regard to employees Directors are under the duty to have regard to the interest of the company employees in general. The company being an artificial person must exercise its control through an organ particular which is the Board of Directors and the powers of the directors are delegated through the Articles of Association of the company.

2.1.5 Fiduciary duties of Directors

The fiduciary duties of directors are principally designed to ensure the director's royalty, integrity and honesty.

1. The duty to avoid making a secret profit
Directors being in a fiduciary position subject to the inflexibility duty not to profit from the position of director and where he does so, he is liable to account. Held that directors who would obtain the profit by means of and in the course of the execution of their office as directors had abused their position and knowledge by virtue of their office as they had actual knowledge. The House of Lords stated that the rules of equity which insist on those by use of the fiduciary position make profit being liable to account for that in no way depends on fraud or absence of bonafide.

2. The duty to act in good faith in the interest of the company
The directors of a company are under obligation to act bonafide in the interest of the company. According to the case it was held that directors have to act bonafide in what they consider is in the best interest of the company and not for any collateral purposes. The holding from the case gives the directors the powers and the discretion to determine what is in the best interest of the company.

3. The duty to exercise the power for a proper purpose
Directors of a company must exercise their powers to a proper purpose for which such powers were given. Directors must avoid abuse of office and acting improperly.

42 Parker v Daily News (1962) Ch 927
43 Regal Hastings Limited (1967) 2 AC 134 HL
44 Re Smith and Fawcett (1942) Ch 304
In order to secure the passing of a special resolution, the directors issued new shares to five additional members. This was held to be an abuse of powers.

Bowens J

Explained; It is argued on the evidence that for the issue by the directors of shares under their powers as directors of shares under their powers as directors and therefore in fiduciary character under the general power to issue shares it would have been impossible to pass the resolution proposed.

4. Directors must not fetter their discretion

This means that directors being trustees of the company must not enter into any agreement where they agree not to exercise their powers. In the case of The directors of a company entered into an undertaking to support and refrain from opposing planning application by another planning application by another party and for the development of a certain land. The directors subsequently wanted to give evidence to a planning inquiry opposing the development and sought a declaration that they were not bound by the undertaking and were entitled to give such evidence to the inquiry as they considered to be in the best interest of the company.

Held that since the undertaking given by the directors were part of the contractual arrangements with conferred substantial benefit in the company, the directors had not improperly fettered the future exercise of their discretion by giving those undertakings.

5. The duty of avoiding conflict of interest

According to Section 198 Companies Act, it shall be the duty of any director to act in the interest of the company as a whole and this includes treating all shareholders equally to disclose the nature of his interest. Article 84 Table A

According to the above provisions and case law, a director is strictly prohibited from entering into any contract with the company where he has a personal interest in such a contract.

Where director places themselves in situations where their duties and personal interest tend to conflict, any such contract if executed is voidable at the instance of the company. The appellant company entered into a contract with the respondent firm by which the respondent firm by which

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45 Punt v Simons and Company Ltd (1903)2 Ch 506
46 Fulham Football Club Limited v Cabra Estates PLC (1994)1 BCLC 363
47 Aberdeen Railway Co. Ltd v Blackie Brothers (1843)ALLER 297
the respondent firm was to supply the applicant company with chairs made to a certain specification. The appellant took delivery of some of the chairs but refused to accept others contending that the contract was invalid because the chairman of the board of directors was the managing partner of the respondent.

The House of Lords on appeal Lord Cranworth held that the issue was whether a director is not precluded from dealing on behalf of the company with himself or with a firm of which he is partner.

A corporate body can only act through agent and directors are the body to whom corporate duties are delegated. These agents have duties to discharge of a fiduciary nature.

6. Duty not to exceed powers
That is to say directors may not act ultra vires or otherwise beyond their capacity. In48 Where the directors in an endeavor to secure control in order to forestall a takeover bid, issued unissued shares in the company to trustees to be held for the benefit of employees, the shares being paid for by the trustees out of an interest free loan from the company. Held the issue was ultra vires the directors fiduciary power, it being immaterial that it was in the interest of the company.

7. Duty of care, skill and diligence
The director is obliged to display either the same care as reasonable person would display in the conduct of his or her own affairs or that degree of skill which may be reasonably expected from a person of his or her knowledge and experience.

Directors duties of care cannot be said to be unduly burdensome as will be seen from the three propositions laid down by Romer J49 These were;

1. A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.
2. A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodic board meetings, He is not however bound to attend all such meetings that ought to attend all such meetings that he ought to attend whenever in the circumstances he is reasonably able to do so.

48 Hogg v Cramphorn Ltd (1967)Ch 254
49 Re City Equitable Fire Insurance Company Ltd (1925)Ch 407 p 428
3. In the respect of all duties that having regard to the exigencies of business and the articles of association, may properly be left to some other official, a director is in the absence of grounds for suspicion justified in trusting that official to perform such duties honestly, if a director signs a cheque without inquiring as to the purpose for which it is required and it is in fact required for an ultra vires purpose, he is negligent and liable to replace the amount of the cheque, but if the cheque comes before him in the regular course of business and is apparently for a proper purpose, he is not liable if it is misapplied.

Romer J laid down the following duties as to signing cheques:

a. If a cheque comes before the director in the regular way according to the usual practice of the company for a specific purpose apparently regular, the director is not responsible for seeing that the money is in fact required or is subsequently applied for that purpose.

b. Before signing the director should satisfy himself that a resolution of the board is passed authorizing the cheque or if it is signed between board meetings that it is confirmed at the next board meeting.

c. An authority given by the board should not be for signing numerous cheques to an aggregate amount, but should be for individual cheques, payee and amount being specified.

However, what has been said earlier as regards to relief of directors from liabilities for breach of duty in connection with their fiduciary duties applies also to their duties of care.

8. Insider trading

This involves contracts of directors with the company under the law the general principle is that a contract made by a company with one of its directors or with the company or firm in which the director is interested or has interest is voidable at the instance of the company.

Relief of directors from liability for breach of duty

The majority of the members in general meeting may after full disclosure of all material circumstances, waive a breach of fiduciary duty a director and the director may vote on the question of waiver provided that there is no fraud on the minority of the members. As explained by...
Under the general law a director could be exempted from liability for breach of duty by a provision in the articles of the company. Section 233 provides that subject to this section any provision whether contained in articles of a company or in any contract with the company or otherwise for exempting any officer of the company or any person whether an officer of the company or not employed by the company as auditor from or indemnifying him or her against, any liability which by virtue of any rule of law would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company shall be void.

Subsection 2 provides that nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him or her while that provision was in force.

This section goes on to provide that the company may under a provision referred to in sub section indemnify the officer or the auditor against any liability incurred by him or her in defending any proceedings whether civil or criminal in which judgment is given in his or her favor in which he or she is acquitted or in connection with any application under section 285 in which relief is granted to him or her by the court.

Section 285 provides that if in proceedings for negligence, default, breach of trust against an officer of a company or a person employed by a company as auditor whether he or she is or is not an officer of the company, it appears to the court hearing the case that the officer or a person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, the court may relieve him or her either wholly or partly from his or her liability on such terms as the court may think fit.

Relief can be given even when the director has done an act ultra vires the company where the company’s money was applied for a purpose which was ultra vires, but which the director acting on counsel’s opinion, thought to be intra vires.

A director does not act reasonably unless he does everything which a normal man would do in the conduct of his own affairs.

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32 of the Companies Act 2012
Liability of Directors

In carrying out his duties, certain standards are expected of a director; to avoid liability for acts done by him he must be able to show that he acted honestly and reasonably and that he ought fairly to be excused. He may be personally liable if he is negligent and makes a misrepresentation in that capacity. Disqualification of Company Directors provide that under Company the director of a company may be disqualified from acting as a director of any company for a period of between two and fifteen years depending upon the nature of the offence committed under this Act.

The circumstances in which an application may be made for the director's disqualification are as follows:

a) He has been guilty of three or more defaults in complying with companies' legislation in relation to the filing of documents with the Registrar of Companies during a period of five years prior to an application for his disqualification.

b) He is or was a director of a company which has at any time become insolvent and that his conduct as a director of that company makes him unfit to be concerned in the management of a company.

c) He has carried on business with the intention of defrauding the creditors of the company or any other person.

d) He was the director of a company which has gone into insolvent liquidation and knew or ought to have known that the company could not avoid insolvent liquidation known as wrongful trading.

A director who acts whilst disqualified or whilst an undischarged bankrupt is liable for debts incurred by the company whilst he was involved in the management of the company.

Any person including the company secretary who knowingly acts on the instructions of a disqualified director is also personally liable. In both cases, the liability is joint and several with the company and any other person who is liable.

Under the , Section 278, the director of the company may be liable to default fines or other penalties for his failure to file documents in due time with the Registrar of Companies such as the annual return, audited accounts, various notifications and resolutions, convene and old an annual general meeting among others.

54 Director's Disqualification Act 1986
55 Companies Act 2012
A director may incur personal liability under the Section 110 implies that the directors owe a duty to creditors where a company has gone into insolvent liquidation. And the director knew or ought to have known that there was no reasonable prospect that the company should avoid this situation of wrongful trading.

On application by the liquidator, the court may make a director personally liable to contribute to the company’s assets. Where the directors knew or ought to have concluded prior to the liquidation, that there was no reasonable prospect that the company would avoid going into insolvent liquidation. A director will not be personally liable when he can show that he has taken every step prior to liquidation to minimize the potential loss to the company’s creditors.

In In deciding whether a director of an insolvent company knew that there was no reasonable prospect of the company avoiding liquidation, ruled that the director be judged by the standards of a person fulfilling that function with reasonable diligence as well as the functions entrusted to that particular director.

The court held that they must have had the knowledge at the time when the accounts should have been laid before the company in general meeting in July 1986.

**Fraudulent trading**

A liquidator may apply to court for an order making a director personally liable to contribute to a company’s assets and disqualify him up to 15 years, where he is of the opinion that the director was knowingly party to the carrying on of the company’s business with intent to defraud creditors. In the case of the intent to defraud was held to be the continuance of business and the incurring of further debts when there is to the knowledge of the directors no reasonable prospect of creditors ever receiving payment of their debts.

**Liability as signatory**

The Act requires that any bill of exchange, promissory note, endorsement, cheques or order for money or goods purporting to be signed by or on behalf of the company must state the company’s name in legible characters.

An officer of the company who fails to comply with the provision is liable to a fine and in default of payment by the company become personally liable to the holder of any such cheque or bill of exchange.

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56 Insolvency Act 2011
57 Re Produce Marketing Consortium Ltd No.2 (1987) BCLC 520
58 Re William C Leitch Bros (1932) 2 Ch 71
Liability for contempt

If a company is judicially restrained from carrying on business out certain acts or gives an undertaking to that effect and the director whose duty it is to take reasonable steps to ensure that the order is obeyed deliberately fails to do so and the order is breached, then that director may be personally liable and is in contempt of his duties.

In the case of Attorney General for Tuvalu and Another v Philatelic Distribution Corp and Others (1990) BCLC245, the court stated that although the director was not knowingly party to the breach, where a company was ordered not to do certain acts or gave an undertaking to like effect and a director was aware of the order or undertaking he was under a duty to take reasonable steps to ensure that the order was obeyed and if willfully failed to take those steps and the order or undertaking was breached he can be punished for contempt.

Accordingly the director in this case was committed to prison for contempt of court notwithstanding that he was not party to the breach.

Liability for acts of Co-Directors

A director is not liable for acts of his co-directors of which he has no knowledge and in which he has taken no part as his fellow directors are not his servants or agents to impose liability on him.

Also if an ultra vires investment is made at a director's meeting, a director who was not present at the meeting is not liable for the investment merely because he was present at a meeting at which the minutes of the meeting authorizing the investment were confirmed.

If a director is fraudulent his co-directors are not liable for not discovering his fraud in the absence of circumstances to arouse their suspicions.

Nonattendance at board meetings has been held not to impose liability on a director for the acts of the board.

Other Officers

Secretaries, Auditors, Partners

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59 Attorney General for Tuvalu and Another v Philatelic Distribution Corp and Others (1990) BCLC245
60 Perry's case (1876) 34 LT 716
2.2 Secretaries

Section 187 every Company shall have a secretary and a sole director shall not at the same time also be secretary. Even though the Companies Act does not prescribe any qualification for a company secretary. Still the following are not qualified to be company secretaries;
1. A corporation, the sole director of which is the sole director of the company.
2. A sole director cannot at the same time be the secretary provided under Section 188 of the Act

Appointment of a secretary

The secretary is sometimes appointed through a clause in the Articles of Association. Article 110 Table A provides that a secretary shall be appointed by the directors of the company on such terms and conditions as they may think fit.

Subsection 2 provides that a secretary appointed under sub regulation (1) may be removed by the directors.

If a secretary is appointed by resolution of the directors, then the minute should be produced as evidence. Though a separate formal contract is usually adopted. The appointed secretary must be recorded in the register of directors and secretaries and the Registrar of Companies must be duly notified.

The legal position of company secretaries has overtime been subject to debate. In Panorama Development v Fidelis Furnishing Fabrics Ltd (1971) 3 ALLER 16 where the secretary of the company hired cars from the plaintiff using hiring agreements which he signed and stamped authorizing the plaintiff’s company business. In reality he applied the cars for his personal purposes. The plaintiff sued on the outstanding charges and the defendant company denied liability contending that the secretary acted on his own and that was not in position to bind all the company at all.

The defendant expressly relied on the Barnett case Barnett v South London Tramways Co. (1887) 18 QBD 815 in finding the defendants liable for the outstanding charges. Lord Denning observed that, times have changed a company secretary is as much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. He is certainly entitled to sign contracts connected with the

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61 Panorama Development v Fidelis Furnishing Fabrics Ltd (1971) 3 ALLER 16
62 Barnett v South London Tramways Co. (1887) 18 QBD 815
administrative pattern of the company affairs such as employing staff, ordering cars and so on. All such matters now come within the ostensive authority of a company secretary.

Qualifications of a company secretary
Section 190 provides that it is the duty of the directors of a public company to take all reasonable steps to ensure that the secretary on each joint secretary of the company is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company and who;
- Is an advocate of the High Court
- Is a person who by virtue of his or her holding or having held any other position or his or her being a member of any other body, appears to the directors to be capable of discharging those functions.

The duties and functions of the company secretary are governed by his terms and condition of appointment any other specific instructions, they include the following;

- Authentication of documents
Section 59 of the Act provides that the secretary is authorized to authenticate any document requiring authentication by the company such authentication need not be under the seal of the company such authentications are requested frequently by banks among others.

- Ensuring that the documentation of the company is accurate and orderly.

- Ensuring clerical work such as issuing notes of company meetings, preparing agenda for directors in company meetings and writing up mistakes in the company meeting. Under Section 137-139 of the Act

- Making the required returns to the company regularly.

Administrative responsibilities
In addition to the statutory duties above, Jerry PL Laic FCIS explains that modern day company secretary will also find himself engaged in the following administrative responsibilities.

Compliance
a) Making certain that the company complies with the Memorandum and Articles of Articles and drafting amendments to ensure that they are kept up to date.

b) Where the company’s securities are listed on The Stock Exchange ensuring compliance with the ‘Listing Rules’ releasing information to the market and ensuring security in respect of unreleased price sensitive information.

**Shares or shareholders**

1. Dealing with transfers, transmissions and forfeiture of shares, issuing share certificates, attending to shareholder’s queries and requests and where some of these functions are delegated to Registrars, the secretary will be responsible for liaison with them to settle matters of particular sensitivity.

2. Communicating with the shareholders through the issue of circulars payments of dividends, distribution of documentation regarding rights or capitalization issues and general shareholder relations.

3. Monitoring movements on the register of members to identify any possible stake-building in the company’s shares, maintaining a register of material interests and making timely announcements to The Stock Exchange.

4. Implementing changes in the company’s and loan structure, administering directors and employees share option schemes.

5. Where the company is involved in an acquisition or disposal, the secretary will have a number of responsibilities especially in ensuring the effectiveness of all documentation and due diligence disclosures.

**Directors**

1. Preparing the directors report and coordinating the printing and distribution of the company’s interim statements and annual report and accounts in consultation with the company’s advisers.

2. Keeping directors up to date on new developments in corporate governance and advising directors of their duties, responsibilities and personal obligations.

3. Acting as a channel of communication for non-executive directors and providing them with relevant information.

**Miscellaneous**

1. Administering the registered office to include dealing with official correspondence received.

2. Maintaining a record of the group structure.
3. Involvement in payroll, credit, control, corporate finance, commercial law contract, vetting or drafting or negotiating or litigation property management, employment law, personnel administration, pensions, insurance and risk management, office administration and company car schemes.

Liabilities
The secretary as an officer of the company may be liable with the directors to default fines for noncompliance with the under Section 278.
The fiduciary duties owed by a director are not dissimilar to those which may be applied to the position held by the company secretary therefore the company secretary must as an officer of the company act in good faith in the interests of the company and not act for any collateral person. He must avoid any conflicts of interest and must not make profits from dealings for and on behalf of the company.
However, it should not be noted that a company can take out and maintain insurance for its officers against any liability arising from negligence, default and breach of duty, subject to the appropriate provision being contained within the Company’s articles.
The secretary of the company is in conclusion an officer of the company all particulars of loans made to him or her by the company must be shown on the company accounts that are laid before the general meeting.
Notwithstanding Section 187 (1), A single member company is not obliged to have a secretary.

Removal of a company secretary
Appointment of a secretary is customarily the right of the directors which cannot be exercised by the company in a general meeting unless the directors surrender their powers to the meeting.
Likewise a company general meeting cannot remove him from office whether the secretary is appointed by resolution or under an agreement. The directors may dismiss him in the same manner in which they may dismiss any other company employee provided under Table A. The termination must be recorded in the register and the registrar of company’s notified.

64 Companies Act 2012
2.3 The Company Auditor

According to Section 167(1) provides that every company shall at every annual general meeting appoint an auditor or auditor’s to hold office from the conclusion of that annual general meeting until the conclusion of the next annual general meetings.

Every company is required to appoint an auditor or auditor’s. If the company fails to appoint an auditor, an application may be made to the registrar of companies to make the appointment. A retiring auditor maybe appointed at any annual general meeting without the passing of a resolution, unless he is not qualified for reappointment.

A retiring auditor may not be reappointed if a resolution has been passed appointing another person in his place or if he has given the company notice of unwillingness to be reappointed.

Qualification of an auditor

Section 168 provides that special notice shall be required for a resolution at a company’s annual general meeting appointing a person as auditor other than a retiring auditor or providing expressly that a retiring auditor shall not be re-appointed.

The provides that in order to be appointed as an auditor, one must be a member of the professional bodies specified in the Act.

However, the following are the disqualifications of appointment of an auditor under Section 169.

A person or firm shall not be qualified for appointment as an auditor unless he or she in the case of a firm, every partner in the firm is a member of:

a. One more of the professional bodies specified in the Accountants Act or
b. The institute of Certified Public Accountants of Uganda established under the Accountants Act.

2. None of the following persons shall be qualified for appointment as auditor of a company

a. An officer or servant of the company
b. A person who is a partner of or in the employment of an officer or servant of the company or
c. A body corporate;
d. A person who by reason of being an officer or servant of the company or a partner or servant of an officer or servant of the company cannot be appointed auditor of the company a holding company or subsidiary or another subsidiary of the holding company.

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65 of the Companies Act 201
66 Accountants Designation Act Cap 206
67 Companies Act 2012
Rights of Auditors

Provided for under Section 170(3)(4)Companies Act. The following are rights of an auditor.

1. A right to access at all times the books of account and the voucher of the company.
2. To enable the auditor to obtain particulars of directors' emoluments which may not be ascertainable from the examination of the books of accounts. He is entitled to inquire from the officers of the company such information and explanations he thinks necessary for the performance of his duties.
3. The auditor is entitled to attend all general meetings of the company and to receive notice of the said meetings. He may also be heard on any point of business of these meetings which concern him as an auditor.

Duties and Functions of the Auditor

These are provided for under Section 167-170 and in the Articles of Association. These include:

- The auditor must act honestly and with reasonable skill, care and caution.
- An Auditor must acquaint himself with any other duties laid in the articles.
- Must ensure that all monies and securities of the company are actually in company possession and in proper condition.
- Must show the true financial position of the company as shown by the books of accounts. If proper books of accounts have not been kept or they did not in his opinion show the true fair view of the company affairs, he must state that fact in his report and may refuse to certify the company accounts.

In some cases even auditors these days give advice to directors or shareholders of the company as regards remedy of the company's bad management.

Independence of an Auditor

The aim of legislation concerning an auditor is to ensure that the auditor is independent. An audit is an independent check of the information which is contained in the company annual accounts and the company records used in preparation of these accounts. The audit provides some assurances that the disclosure made by the company to its shareholders pursuant to its obligations is reliable and the auditors opinion represents true and fair view the company financial state of affairs.
Though in reality, the auditor will be limited from objectively assessing the company records.

As regards to other forms of businesses that is to say sole proprietorship or sole trader, partnership, co-operative societies among others the research mainly looked at Partnerships

2.4 Partnerships

Section 2 of define a partnership as the relationship which subsists between or among persons, not exceeding twenty in number, who carry on business in common with a view of to making profit.

Business under Section 1 includes every trade, occupation or profession.

Every partner is an agent of the firm and his or her other partners for the purpose of the business of the partnership under section 5

The definition captures commercial relationship in the World. Therefore for one to be in a business he must be into some commercial venture such as selling of goods and services before a presumption of the existence of a partnership can be made thus the relationship must arise in connection with that business.

In that case the plaintiff formed a business syndicate with the defendant and each paid an amount into through central fund for management expenses. There was agreement to form a firm in a limited period of time. The partnership was not formed as agreed, the plaintiff brought an action seeking a declaration that a defendant was not a partner and that the agreement was null and void.

Held

It was held that the existence of partnership depends on the carrying on of a business in a partnership and if the partners have began to carry on the said business though permanent they are deemed to be in a partnership.

Carrying on business in common

The partnership as a necessity requires the involvement of two or more persons in an investment. A distinction is to be drawn between those participating in business and that connected to the business example a franchise agreement has been held not to amount to a partnership.

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68 the Partnerships Act 2010
69 Henshaw v Roberts (1967) 1 AFR 5
With a view of profits
Most of the problems that arise about the existence of a partnership revolve around the concept of profit sharing.
It is impossible to establish whether there is a partnership where there is no financial return in the business.

Duties of partners

Duty to render accounts
Every partner is bound to render true accounts and full information of all things affecting the partnership to any partner or his or her legal representative. Provided by Section 30 of 70

Duty of partner not to compete with firm
Where a partner without the consent of the other partners carries on any business of the same nature as and competing with that of the firm, the partner must account for and pay over to the firm all profits he or she made in that business.

Liability of partners
Section 9 of the Partnership Act 2010 provides that: a partner is liable jointly with the other partners for all debts and obligations of the while he or she is a partner.
Where a partner dies his or her estate is severally liable in due course of administration for the debts and obligations of the firm so far as they remain unsatisfied but subject to the prior payment of his or her separate debts.
A partnership business since is not a separate legal entity from its officers, the partners are held personally liable.

70 the Partnerships Act 2010
CHAPTER THREE

This chapter discussed the legal framework providing for the duties and liabilities of Company Directors and other officers in Uganda and also the issue of lifting of a veil.

3.0 Introduction

The Companies Act 2012, Partnership Act 2010, Insolvency Act 2011, are the major laws providing for the duties and liabilities of officers in Uganda.

The duties of directors are determined by the statute, common law, the constitution of the company that is to say the articles of association, contracts of employment or service, agreements and the decisions of shareholders. A director must manage the company in accordance with its constitution and the relevant statute.

Application of the Companies Act 2012

The Act applies to any director including directors who were holding position of directorship before the commencement of the Act. Irrespective of whether it is public or private company as provided by Section 1 of the Act.

The Companies Act Section 185 provides that every company other than a private company, registered after the commencement of this Act shall have at least two directors and every company registered before that date other than a private company and every private company shall have at least one director. It appears to be settled that director’s fiduciary duties are owed only to the company. Although recent developments affecting disclosure of information to shareholders and the general area of insider dealing incorporate securities have tended to question if not to object to this legal concept which is as a result of case law.

3.0.1 Statutory Duties of directors

Section 198 provides that the duties of company directors shall include the following:

(a) act in a manner that promotes the success of the business of the company;
(b) exercise a degree of skill and care as a reasonable person would do looking after their own business;
(c) act in good faith in the interest of the company and this shall include-
1. treating all shareholders equally;
2. avoiding conflicts of interest;
3. declaring any conflicts of interest;
4. not making personal profits at the company’s expense
5. not accepting benefits that will compromise him or her from third parties; and
(d) ensure compliance with this Act and any other law.

Section 197 of the Act provides that directors have a duty to disclose age to the company.

(1) A person who is appointed or to his or her knowledge proposed to be appointed director of a company at time before he or she has attained the age of eighteen years shall give notice of his or her age to the company.

(2) A person who-
(a) fails to give notice of his or her age as required by this section or
(b) acts as director under any appointment which is invalid by reason of his or her age, commits an offence and is on conviction liable to a fine not exceeding ten currency points for every day during which the failure continues or during which he or she continues to act as described in this subsection.

Section 213 of the Act provides duty to disclose payment for loss of office made in connection with takeover or transfer of shares in company.

(1) Where, in connection with the transfer to any persons of or any of the shares in a company, being a transfer resulting from-
(a) an offer made to the general body of shareholders-
(b) an offer made by or on behalf of some other body corporate with a view to the company becoming its subsidiary or subsidiary of its holding company;
(c) any offer made by or on behalf of an individual with a view to his or her obtaining the right to exercise of not less than one – third of the voting power at any general meeting of the company; or
(d) any other offer which is conditional on acceptance to a given extent, a payment is to be made to a director of the company by way of compensation for loss of office or as consideration for or in connection with his or her retirement from office, it shall be the duty of that director to take all reasonable steps to secure that particulars with respect to the proposed payment including the amount of the payment included in or sent with any notice of the offer made for their shares which is given to any shareholders.

(2) Where-
(a) A director to whom subsection (1) applies fails to take reasonable steps as provided in that subsection; or
(b) A person who has been properly required by any, such director to include the said particulars in or send them with any such notice fails to do so, he or she is liable to a fine not exceeding two hundred and fifty currency points.

It is an obligation for directors to disclose interest in contracts, Section 218 of the Act provides that subject to this section a director of a company who is in any way, directly or indirectly, interested in a contract or proposed contract with the company shall declare the nature of his or her interest at a meeting of the directors of the company.

Sub section 2 of Section 218 provides that in the case of a proposed contract the declaration required by this section to be made by a director shall be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration or if the director was not at the date of that meeting interested in the proposed contract, at the meeting of the directors held after he or she became so interested and in a case where the director becomes interested in a contract after it is made, the declaration shall be made at the first meeting of the directors held after the director becomes so interested.

The general duty to make disclosure for purposes of section 215 and 216 under Section 217 explains that a director of a company shall give notice to the company of such matters relating to himself or herself as may be necessary for the purposes of section 215 and 216.

Section 225 of the Act provides the duty of director to disclose share holdings in own company.
(1) A person who becomes a director of a company and at the time when he or she does so is interested in shares in or debentures of, the company or any other body corporate, being the company’s subsidiary or holding company or a subsidiary of the company’s holding company is under obligation to notify the company in writing, before the expiration of the five days beginning with the day following that day-
(a) of the subsistence of his or her interests at the time; and
(b) of the number of shares of each class and the amount of debentures of each class of, the company or other such body corporate in which each of his or her interest subsists at the time.

Subsection 2 provides that a director of a company is under an obligation to notify the company in writing of the occurrence, while he or she is a director, of any of the following events before the expiration of five days beginning with the day of the occurrence of the event-
(a) any event in consequence of whose occurrence he or she becomes or ceases to be, interested in shares in or debentures of the company or any other body corporate, being the company’s subsidiary or holding company or a subsidiary of the company’s holding company;
(b) the into a contract by him or her to sell any such shares or debentures; 
(c) the assignment by him or her of a right granted to him or her by the company to subscribe for shares in or debentures of the company

Subsection 3 provides that the company under subsection (2) must state the number or amount and class, of shares or debentures involved.

In 71 a holding company (L) held more than 99 percent of the share capital of its subsidiary (N). Two directors of N who had service agreements with L engaged in secret speculations in cocoa, a commodity in which N company dealt. Thus was conduct which would have justified their dismissal as directors by N company and termination of their service agreements with L. Issue was whether they were in breach of duty to the holding company. It was held by the House of Lords that they were not.

71 Bell v Lever Bros Ltd (1932)AC 161 HL;
Duty to a person or body in a fiduciary position to the company. Section 166 provides that the members have a right to receive copies of the balance sheet and auditor’s report.

(1) A copy of every balance sheet including every document required by law to be annexed to it which is to be laid before a company in general meeting together with a copy of the auditors’ report shall not less than 21 days before the date of the meeting be sent to every member of the company. Whether he or she is or is not entitled to receive notices of general meetings of the company and every holder of debentures of the company whether he or she is not entitled and all persons other than members or holders of debentures of the company being persons so entitled.

D.J Bakibinga Company Law in Uganda p 150 explains that there has been a controversial proposition of law that a director does not owe duties to a person to whom the company stands in a fiduciary relationship with him or her. This has been a majority view of the Court of Appeal in a company was formed for the purpose of receiving money from depositors and investing it upon security. The defendants were directors of the company. The plaintiff deposited £1000 with the company upon certain terms. The company went into liquidation and the plaintiff sued the defendants to recover the £1000 upon the ground that this sum was cost to him as a result of the negligence of the defendants. The Court of Appeal held that the defendants were not liable to the plaintiff.

Bramley L.J Stated

for assuming that there is a trust and a breach of it, I can see no reason on which the directors can be held personally responsible for it to the plaintiff.

Brett L.J found that a contract existed between the plaintiff and the company but the defendants could not be held liable as constructive trustees for aiding and abetting in the breach of a trust.

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72 Wilson v Bury (1880) 5 QB 43
73 Ibid
74 P 530
To these forceful expositions of the law may be compared an equally forceful dissent by Baggallary L.J who was of the view that on the facts of this case the relation of trustee and Cestui que trust existed between the company and plaintiff and that breach of trust had been committed by the company and the defendant were parties to the breach of trust. He added:

"I fully recognize as a general rule that an agent employed by a trustee is accountable to his principal only and cannot be made responsible as a constructive trustee to the cestui que trust, but I think that a distinction may and ought to be drawn between the case of a company necessarily acting by its directors and an individual trustee acting through an agent over whose actions he can exercise control. Explained by Section 218 together with Article 84(1) Table A Duty to shareholders Section 198(c)(1) treating all shareholders equally.

The legal concept is that a director does not owe duties to individual shareholders. In a director was approached by shareholders to purchase their shares at a quoted price. The director was aware of an impending takeover bid which envisaged a much higher price being offered by the prospective purchaser of the company. The director did not disclose to the shareholders his inside information about the impending take over and he accepted the shareholders’ offer. Swinfen – Eady J held that since a director owed no fiduciary duty to shareholders, he was not liable for non-disclosure.

However this decision has been the subject of much criticism that is to say in

The duty to act bonafide in the interest of the company Section 198(c) act in good faith in the interest of the company and this shall include:

(1) treating all shareholders equally;
(2) avoiding any conflicts of interest;
(3) declaring any conflict of interests;
(4) not making personal profits at the company’s expense.

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75 (1880) 6 QBD 518 at p 535
76 Percival v Wright (1902) 2 Ch 421
77 Report of the Company Law Committee (Cohen Committee) CMND 6659 (1945) Paras 86 and 87, Report of the Company Law Committee (Jenkins Committee) CMND 749(1962) Paras 89 and 99 (b)
(5) not accepting benefits that will compromise him or her from third parties;

In 1942 Lord Greene M.R postulated in\textsuperscript{78} that directors have to act bonafide in what they consider not what a court may consider is in the interests of the company and not for any collateral purpose. This statement clearly gives directors the power and discretion to determine what is in the interests of the company and thereby respects their business and commercial judgment.

With regard to the word bonafide in the test Bowen L.J observed as early as 1883\textsuperscript{79} that “bonafides cannot be the sole test otherwise you might have a lunatic conducting the affairs of the company and paying away its money with both hands in a manner perfectly bonafide yet perfectly irrational. The test must be what is reasonably incidental to and within the reasonable scope of carrying on the business of the company.”

Thus the director’s duty to act honestly and in good faith is pegged to the execution of functions in pursuance of business of the business of the company. In this case Bowen L.J repeated ibid at p 672

The test is not whether it is bona~de, but whether as well as being bonafide it is done with in the ordinary scope of the company’s business and whether it is reasonably incidental to the carrying on of the company’s business for the company’s benefit.

The provision clearly recognizes the interests of both the shareholders and employees as regards to the exercise of duties owed by the directors to the company. Though it follows that the interests of the employees and members are subordinate to the primary duty the directors owe to the company.

**Duty to exercise powers for a proper purpose. Section 198(a) act in a manner that promotes the success of the business of the company.**

Lord Green M.R in his formulation of the test for the exercising director’s powers to transfer shares indicated that in addition to exercising their discretion in the interests of the company

\textsuperscript{78} Re smith and Fawcett Ltd (1942)Ch 306 CA

\textsuperscript{79} Hutton v West Cork Ry. Company (1883)23 Ch D 654 at p 671 C.A
they may not so act for any collateral purpose. The purpose must be proper leading to the success and growth of the business.

It has been argued in K.C.K Chow adds in this respect regarding the phrase in Lord Green’s dictum “and not for collateral purpose” as being the basis for the proper purpose duty. Chow ibid concluded that it was only concerned with the bonafides of directors.

However directors will be regarded as liable for exercising their powers for purposes other than those for which they are conferred ,in this respect Gower submits that it would clarify matters if a distinction is made between an act ultra vires ,the directors because they have usurped a power which they never had.

The director is required to avoid conflict of duty to the company and his interest Section 198 (c)(2)

There are three aspects to the fiduciary principle;

Use by a director of a company’s property, information or opportunity

Contracts made between a director and a company

Situations where a director competes with the company which employs him

The use of a company’s property, information, or opportunity explains that a director of a company is precluded from benefiting from the company’s property, information or opportunity in circumstances in which his duty to the company and his interests conflict if he does so he is liable to account for any such benefit to the company .This principle was thus put by Lord Buckmaster in the Privy Council

“But... men who assume the complete control of a company’s business must remember that they are not at liberty to sacrifice the interests which they are bound to protect and while
ostensibly acting for the company divert in their own favor business which should properly belong to the company they represent.”

In the above case, three directors of a company carrying on the business of a railway construction contractor obtained a contract in their own names to the exclusion of the company. The contract was obtained under circumstances which amounted to a breach of trust by the directors and constituted them trustees to its benefits on behalf of the company. By their votes as share holders of three fourths of the issued shares, they subsequently passed a resolution at a general meeting declaring that the company had no interest in the contract.

The privy council held that the benefit of the contract belonged in equity to the company and directors could not validly use their voting power to vest it in themselves. Lord Buckmaster added in this respect “the defendants ... were guilty of a distinct breach of duty in the course they took to secure the contract and they cannot retain the benefit of such contract for themselves but must be regarded as holding it on behalf of the company.”

Contracts with the company

The position at common law is that unless the company’s articles permit a director cannot validly enter into a contract with his company except where following full disclosure. The general meeting has approved or ratified the contract should the articles require that before the contracting with the company a director should declare his interests therein, the nature of the interest rather than mere declaration that the director is interested is required.

Clauses were inserted into the articles which invariably required disclosure to be made to a meeting of the directors provided under Section 218 which requires disclosure by directors of interests in contracts and also under Article 84 of Table A.

A director who is directly or indirectly interested in a contract or proposed contract with the company is under a duty to declare the nature of his interest at a meeting of the directors. To declare any interest in a proposed transaction or arrangement, the declaration must be made before the transaction is entered into and the prohibition applies to indirect interests as well as direct interests. For this purpose it is sufficient for the director to give general notice to the directors of the company that he is a member of a specified company or firm and is to be
regarded as interested in any contract which may subsequently be made with that company or firm provided the notice is given at a meeting of the directors or that reasonably necessary steps are taken to ensure that it is brought and read at the next meeting of the directors after it is given.

A defaulting director under Sub Section 4 is liable to a fine not exceeding two hundred currency points.

A contract entered into by the company and with regard to which a director’s interest has not been disclosed is not in effective. It is merely voidable at the option of the company. The nature of the relevant interest should be indicated and this depends on relevant circumstances. It is only the nature of interest and not all material facts which has to be disclosed.

**Competing with the company**

In general as a fiduciary duty without the consent of his beneficiaries is forbidden to compete with them. Section 32 of the Partnership Act provides for the duty of a partner not to compete with firm. It is not certain that the same rule applies to company directors, there is a provision that a director cannot be prevented from acting for a rival company. Though the approach contradicts with the equitable requirement upon a director not to place himself in a situation giving rise to a conflict between his private interest and his duties.

This seems to be the effect in both cases a director who engaged in a competitive business with his company was subjected to the equitable doctrine to account for profits derived from his position as a director.

**Exempting directors from liability**

Possible breach of a director’s fiduciary may be avoided through the company consenting to the relevant act or omission amounting to the breach of duty such consent may be manifested through relevant authority given in the articles for the act or omission in question. Before the promulgation of the equivalent of Section 206 of the Companies Act 1948 now Section 233

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48 Industrial Development Consultants Ltd v Cooley (1972) 1 WLR 443 and Canadian Aero Services Ltd v O’Malley (1973) 40 DLR 3d 371
Companies Act 2012. It was accepted that articles could effectively exempt from liability except for breaches which were fraudulent.

However Section 233 provides thus;

Subject to this section, any provision whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any officer of the company or any person whether an officer of the company or not employed by the company as auditor from or indemnifying his or her agents against any liability which by virtue of any rule of law would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company shall be void.

Issues have arisen as to how to reconcile this provision and other statutory provision relating to the director’s duty of disclosure of their interests in contracts with articles which invariably limit or attempt to abrogate that duty. A part from consent to a breach of duty arising from the articles, it could be achieved through the company in general meeting authorizing or ratifying a particular act or omission amounting to a breach of duty.

The duty of care and skill

It is provided for under Section 198(b) of the Companies Act 2012, D.J Bakibinga Company Law in Uganda p.191 explains that in other words the recognized director’s duty of care and skill is at variance with his descriptions as a trustee in his relationship to the company. However, a director may be regarded as agent for purposes of this duty with respect to agency, it is usual to distinguish between agents who exercise a particular trade or profession and who must show a degree of skill diligence consistent with that of reasonably competent and conscientious members of that trade or profession as is the case with auditors and other agents.

Directorship is an office of profit, though courts have been realistic in recognizing that both historically and traditionally “the possession of a title was often regarded as a greater qualification for office than any amount of business acumen and drive, and that the ordinary part time director was only expected to display such skill (if any) as he happened to possess and such attention to duty as he thought fit to offer.
This is however different with respect to holders of other offices in the company. Thus full time employees are expected to devote their whole time and attention during the usual working hours to the business of the company. Similarly the company’s solicitors, accountants and secretaries are expected to exhibit the normal skill members of their professions.

Managing directors are also required to show analogous diligence although the standard of skill required of them has not been determined. In\textsuperscript{84} It was indicated that the chairman of the board of directors and managing director occupied special positions within the company, consequently they were expected to be better informed with regard to the detailed machinery of control than other directors.

The \textsuperscript{85}provides for directors; The company shall always have the single member as a director but it may have such number of other director(s)as may be necessary and who are appointed in accordance with the Act.

(2) The board of the general meeting shall not have the power to remove the member director but the single member shall have the power to remove any director, chief executive or secretary through a resolution.

(3) The director(s) shall have the powers as specified in the Act.

(4) The provisions in the Act on appointment, duties, removal and transactions involving directors shall apply to directors of a single member company.

First Schedule Paragraph 9 provides for Secretary that a single member company may appoint a secretary, who shall be responsible for discharging duties and functions normally discharged by a secretary of a company.

(2) Provides that the sole director shall not be the secretary of the company.

\textsuperscript{84} Shonowo v Adebayo (1969)NCLR126 (Supreme Court of Nigeria)

\textsuperscript{85} Companies Single Member Regulations 2016 1\textsuperscript{st} schedule paragraph 8
Table A Article 80 of the Companies Act 2012 provides for the duties and powers of directors; The business of the company shall be managed by directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all powers of the company as are not, by the Act, by these regulations, required to be exercised by the company in general meeting subject to these regulations and to the provisions of the Act and to such regulations, being not inconsistent with these regulations or with the Act, as may be prescribed by the company in general meeting.

(2) A regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Article 83. Provides that the company may exercise the powers conferred upon the company by Sections 130 to 133 (both inclusive) of the Act with regard to the keeping of a branch register, and the directors may subject to the provisions of those sections, make and vary such regulations as they may think fit respecting the keeping of the branch register.

Article 84(1) of Table A provides that a director who is in any way, whether directly or indirectly interested in a contract or proposed contract with the company shall declare the nature of his or her interest at a meeting of the directors in accordance with section 225 of the Act.

(2) A director shall not vote in respect of any contract of arrangement in which he or she is interested, and if he or she does so, his or her vote shall not be counted, nor shall he or she be counted in the quorum present at the meeting.

However sub regulation 3 provides that neither of the prohibitions referred to in sub regulation (2) shall apply to;

(a) any arrangement for giving any director any security or indemnity in respect of money lent by him or her or obligation undertaken by him or her for the benefit of the company;

(b) to any arrangement for giving by the company of any security to a third party in respect of a debt or obligation of the company for which the director himself or herself has assumed responsibility in whole or in part under a guarantee or indemnity or by the deposit of a security;
It is the duty of directors to sign, draw, accept, endorse or otherwise execute all cheques, promissory notes, drafts, bills of exchange and other negotiable instruments and all receipts for moneys paid to the company as the case may be in such a manner as they may determine from time to time by the resolution as provided under Article 85 of Table A.

It is the duty of the directors to cause minutes to be made in books provided for the purpose provided under Article 86 Table A and also under Table B Article 37 of the Act.

(a) of all appointments of officers made by the directors;

(b) of all names of the directors present at each meeting of the directors and of any committee of the directors;

(c) of all resolutions and proceedings at all meetings of the company, and of committees of directors and every director present at a meeting of directors or committee of directors shall sign his or her name in a book to be kept for that purpose.

Article 34 Table B of the Companies Act 2012 provides that the business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not required to be exercised by the company in a general meeting, subject to the Act or to these articles and to such regulations not being inconsistent with the Act or these articles, as may be prescribed by the company in a general meeting.

To maintain confidentiality of the company’s affairs regarding all the transactions carried out within the company.

A director must not misuse corporate information or opportunity. In Industrial Development Consultants v Cooley (1972) 1 WLR 443, the defendant, an architect who was employed by the plaintiff while negotiating a contract, he realized that the contract wouldn’t be awarded to IDC the plaintiff, he thus terminated his contract with the plaintiff on
account of an alleged illness and obtained the contract with gas board. The IDC claimed the profit he had made.

Section 198(d) of the Companies Act 2012 provides for the directors’ duty to comply with the Act and any other law. The duty of the director is to the company.

Gower Principles of Modern Company Law explains that director’s owe their duties to the company but not individual shareholders or employers. In the directors purchased shares from their members without revealing that negotiations were on going for the sale of the Company’s undertaking at a favorite price. Held the directors weren’t in breach of duty through their non-disclosure.

3.0.1 What are the consequences of breach?

The general duties outlined above are owed by the director to the company and only the company or in limited circumstances; the shareholders will be able to enforce them as such. Remedies available for breach of these duties include injunctions, interim order, temporary injunction and then permanent injunction. An interim order is prayed for where an application is filed for a temporary and in a mini term there is a threat or imminent danger to the subject matter of the suit.

A temporary injunction is an order of court restraining the respondent from taking any action in respect of suit property pending a hearing of the main suit. The order of a temporary injunction is provided for under Section 38 of the Judicature Act. In order to prevent further breach the company through its members can decide to set aside an affected transaction entered into in breach of requirements on conflict.

Restoration of Company property held by the director and damages. A breach may also be grounds for termination of an executive directors’ service contract.

Under the Insolvency Act, a director may be personally liable for wrongful or fraudulent trading in the context of insolvency of the company and the board and each director has responsibilities under the Health and Safety at work Act breach of which may result in

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87 Percival v Wright (1902) 2 Ch 421
88 1974
criminal sanctions on a director. In certain circumstances a director may be disqualified from being a director under the Companies Directors Disqualification Act 1986.

The companies Act 2012 under section 221 provides for the liabilities arising from contravention of section 219;

(1) An arrangement entered into by a company in contravention of section 219 and any transaction entered into under the arrangement whether by the company or any other person is voidable at the instance of the company unless one or more of the conditions specified in sub section (2) are met.

(2) Those conditions referred to in subsection (1) are that—
(a) restitution of any money or other asset which is the subject matter of the arrangement or transaction is no longer possible or the company has been indemnified by any other person for the loss or damage suffered by it;

Sub section 3 provides that where an arrangement is entered into with a company by a director of the company, its holding company or a person connected with him or her in contravention of section 219, that director and the person connected and any other director of the company who authorized the arrangement of any transaction entered into under the arrangement is liable—

(a) to account to account to the company for any gain which he or she has made directly or indirectly by the arrangement or transaction and

(b) Jointly and severally with any other person liable under this subsection to indemnify the company for any loss or damage resulting from the arrangement or transaction.

Subsection 4 provides that sub section 3 is without prejudice to any liability imposed otherwise than by that subsection and is subject to the following two subsections and the liability under subsection (3) arises whether or not the arrangement or transaction entered into has been avoided under subsection (1).

However subsection 6 provides that a person connected to the director of the company and director as mentioned in subsection (3) is not liable if he or she shows that, at the time the arrangement was entered into, he or she did not know the relevant circumstances constituting the contravention.
Section 233 of the Companies Act provides for liabilities of officers and auditors

(1) Subject to this section, any provision whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any officer of the company or any person whether an officer of the company or not employed by the company as auditor from or indemnifying him or her against any liability which by virtue of any rule of law would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty in relation to the company shall be void.

3.1 Auditors

An auditor is a person appointed to audit or check the company accounts. The audit is a check on the activities of directors and the company officers. It gives confidence to shareholders that their investment aren’t being mismanaged or misappropriated.

Appointment of auditors. This is provided under Section 167 that every officer must appoint an auditor to hold office from the conclusion of that general meeting until the conclusion of the next annual general meeting.

A person or firm shall not be qualified to be appointed as an auditor of a company unless he is a person registered as an associate.

Duties of the auditor

To audit the company accounts including its annual balance sheet and profit and loss statement.

Prepare a report showing if reports have been well prepared and if they give a true and fair view of the company’s accounts.

Carry out investigations to determine if proper accounting records have been kept and whether they comply with the entries.

Section 170 of the Companies Act 2012, it is the duty of auditors to make a report to the members on the accounts examined by them and on every balance sheet, every profit and loss account and all group accounts laid before the company in a general meeting during their tenure.
of office and the report shall contain statements as to the matters mentioned in the sixth schedule to this Act.

Table F under Article 10 provides that the company secretary shall have a pivotal role in the corporate governance.

(2) The company secretary shall be empowered by the board to enable him or her to properly perform his or her duties; and shall –

(a) Provide directors individually and collectively with detailed guidance on discharging their responsibilities;

(b) Shall induct or participate in the induction of directors;

(c) Assist the chairperson and the chief executive officer in setting the annual board plan; and

(d) Administer other strategic board level matters;

(e) Provide a central source of guidance on ethics and good governance;

(f) Be subject to a fit and proper test, as also directors

A company auditor isn’t however an officer of the company as stated under section 2 of the Companies Act 2012. However, he is an officer of the company for any tort, crime or misfeasance he commits in the course of his duties. The auditor has to prepare an auditor’s report has to be open to inspection by any member. Auditors are entitled to remuneration for their services to the company.

3.2 Secretary

Secretary is provided for under Section 187 of the Companies Act. Every company shall have a secretary and a sole director shall not also be secretary. The secretary is appointed by the directors on such terms as they think fit. The directors may also remove the secretary.

Qualifications. These depend on the type of company or venture. Section 190 provides for the qualifications of company secretaries. The director must take all reasonable steps to ensure that the secretary is a person who appears to them to have the requisite knowledge and experience.
For a public company he must be an advocate of the High Court or is a member of the institute of chartered public accountant in Uganda, the institute of chartered secretaries and administrators.

The secretary is the Company’s Chief Administrative Officer. He has ostensible authority to make contracts on the company’s behalf like hiring office staff, contracts for the purchase of office equipment and hiring cars for business purposes. However, a secretary doesn’t have authority to borrow money on the company’s behalf, issue a writ or lodge a defense in the company’s name, register a transfer of shares, strike a name off the register of members, summon general meeting on his own authority.

**Duties of a secretary**

The secretary has the following duties;

Ensure that the company’s documentation is in order. That the requisite returns are made to the company’s register.

Taking minutes in meetings, sending notices to members, and counter signing documents to which the company seal is affixed.

Section 110 duties of directors, secretary, and employees: that upon the commencement of the liquidation of a company, every present or former director, secretary or employee of the company shall-

(a) disclose fully and truthfully to the liquidator all the property of the company and details of the disposal of any property by the company including property disposed of in the ordinary course of business and

(b) deliver to the liquidator or in accordance with the liquidator’s directions, all property of the company in or under his or her custody or control.

(3) A person who contravenes subsection (1) commits an offence.
3.3 The Partnership Act 2010 under Section 30 provides that it's the duty of partners to render accounts among others; every partner is bound to render true accounts and full information of all things affecting the partnership to any partner or his or her legal representative.

Duty of every partner to account to the firm for any benefit derived by him or her without the consent of the other partners from any transaction concerning the partnership or from any use by him or her of the partnership property name or business connection.

Duty of partners not to compete with firm provided by section 32 of the Partnership Act 2010. Where a partner without the consent of the other partners carries on any business of the same nature as and competing with that of the firm the partner must account for and pay over to the firm all profits he or she made in that business.

Duty of utmost good faith. Under the duty, partners are expected to be honest and fully disclose to each other matters and issues involving the firm. Each partner is expected to deal with his fellow partners honestly and to disclose any relevant facts fully and must act transparently. In [Law v Law], it was held that every partner owes a duty of disclosure of information regarding the partnership business.

Duty not to make secret profits, a partner is under a duty not to make secret profits. He must not secretly benefit from the firm’s property, firm’s name or business connections as stated under section 31 of the Partnership Act.

Duty with regard to partnership property. Every partner has a duty to hold and apply partnership property exclusively or only for the purpose of the partnership business.

Since partners have unlimited liability, every partner has a duty to stand in

3.4 Liability of partners

Section 12 of the Partnership Act 2010 provides for liability of the firm for wrongs of partners, where by any wrongful act or omission of any partner acting in the ordinary course of the
business of the firm or with the authority of his or her co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty to the same extent as the partner so acting or omitting to act.

A partner in a firm is liable jointly with the other partners for all debts and obligations of the firm while he or she is a partner provided for by Section 9 of the Act.

Sub section 2 provides that where a partner dies his or her estate is severally liable in due course of administration for the debts and obligations on the firm so far as they remain unsatisfied but subject to the prior payment of his or her separate debts.

Sub section 3 provides that the estates of a partner who dies or who becomes bankrupt or of a partner who not having been known to the person dealing with the firm to be a partner retires from the firm is not liable for partnership debts contracted after the date of the death, bankruptcy or retirement respectively.

Section 11 of the Act provides for liability of minor partner on attaining majority. A person who has been admitted to the benefits of partnership while still a minor shall on attaining the age of majority be liable for all obligations incurred by the partnership from the date of his or her admission unless he or she gives public within a reasonable time of his or her repudiation of the partnership.

Section 13 provides for liability for wrongs joint and several. A partner is liable jointly and severally with his or her co-partners for everything for which the firm becomes liable under Section 14 while he or she is a partner in the firm.

Section 16 of the partnership Act provides for persons liable by holding out. Sub section 1 provides that any person who by words spoken, written or by conduct represents himself or herself or who knowingly suffers himself or herself or who knowingly suffers himself or herself to be represented as a partner in a particular firm is liable as a partner to anyone who has, on the faith of any such representation given credit to the firm.
Whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

Section 47 provides for limited liability partnership

(1) A limited liability partnership may be formed in the manner prescribed by this Act.

(2) A limited liability partnership shall consist of not more than twenty persons and shall have one or more persons called general partners who shall be liable for all debts and obligations of the firm.

Sub section 4 of the Act provides that a limited liability partner shall not during the continuance of the partnership either directly or indirectly draw out or receive back any part of his or her contribution to the partnership and if a limited liability partner draws out or receives back any part of his or her contribution he or she shall be liable for the debts and obligations of the partnership up to the amount so drawn out or received back.

There is no separate legal entity from the partners themselves and accordingly the partners suffer the burden. Un limited liability for the debts and other liability of the partnership unless the contrary is stated, a partnership is dissolved upon the death of one of the partner. This is characteristic of partnership is a disadvantage as the continuity of the business is not guaranteed.

3.5 Lifting of the corporate veil

Lifting the corporate veil is provided for under section 20 of the Companies Act 2012 to mean disregarding the corporate personality of a company in order to apportion liability to a person who carries out any act. Once a company is incorporated it becomes a legal entity, separate and distinct from its members and shareholders and capable of having its own rights, duties and obligation and can sue or be sued in its own name. This is commonly referred to as the doctrine or principle of corporate personality the case of Salomon v Salomon explains very well the principle of corporate personality. Although this principle applies, there are
circumstances where the courts have intervened to ignore the doctrine of corporate personality especially in dealing with group companies and subsidiaries and where the corporate form is being used as a vehicle to perpetrate fraud. Upholding that principle in every case that comes up would result into a miscarriage of justice.

Under this situation I examined the situation where the court may lift the veil of incorporation and pin the person who breached the duties that were encompassed to him by the company’s article. Section 20 of the Companies Act 2012 provides that the High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where save for a single member company, the membership of a company falls below the statutory minimum, lift the corporate veil. In the HC of Lagos stated that in particular circumstances for example where the device of incorporation is used for some illegal or improper purpose, the court may disregard the principles that a company is an independent legal entity and lift the veil of corporate identity so that if it is proved that a person used a company he controls as a cloak for an improper transaction, he may be personally liable to a third party.

The legal technique of lifting of a veil is recognized under 2 heads that is to say statutory lifting of the veil and Case law lifting of the veil.

3.6 Statutory lifting of veil

Where the number of members is below legal minimum. Under Section 20 & section 49 of the Companies Act if a company carries on business for more than 6 months after its membership as fallen below the statutory minimum ,(2 for private companies except for a single member company and 7 for public companies),every member during the time the business is carried on after the 6 months and who knows that the company is carrying on business with less than the required minimum membership is individually liable for the company’s debts incurred during that time .In such a case therefore the corporate veil is lifted in order to hold those members personally liable for the company’s debts incurred during that time.

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Dunlop Nigerian Industries Ltd v Forward Nigerian Enterprises Ltd & Farore 1976 N.C.L.R 243
Holding and subsidiary companies. Where companies are in a relationship of holding and subsidiary companies, group accounts are usually presented by the holding company in a general meeting. In this regard, the holding and subsidiary companies are regarded as one for accounting purposes and the separate nature of the subsidiary company is ignored. Section 157 & 158 of the Companies Act requires each company to keep proper books of accounts with respect to-

- Money received by the company and from what source
- Money spent and what it was spent on.
- All sales and purchases of goods made by the company.
- The assets and liabilities of the company.

These accounts are meant to give a true and fair view of the state of the company’s affairs and to explain its transactions. Directors of the company are required at least once a year to lay before the company in a general meeting a profit and loss account (or income and expenditure account for non-profit making companies) plus a balance sheet.

Where the company is not mentioned in the bill of exchange Section 56 of the Companies Act that a bill of exchange shall not be deemed to have been signed on behalf of a company if not made in the name of the company, by or on behalf of the company or on account of the company by any person acting under the company's authority. The Companies Act prohibits any officer of the company from signing or authorizing to be signed a bill of exchange on behalf of the company in which the company's name is not mentioned in legible characters or clear letters. Any officer who does this is personally liable on that bill of exchange for the money or goods for that amount unless it is duly paid by the company. Therefore the corporate veil in such circumstance is lifted in order to hold that officer of the company personally liable.

Reckless and fraudulent trading

Under section 20, it is provided that if in the course of winding up, it appears that any business has been conducted recklessly or fraudulently, those responsible for such business may be held liable without limitation of liability for any of the company’s debts or liabilities.
Taxation

Under the Income Tax Act Section 10 of the Act provides that the veil of incorporation may be lifted to ascertain where the control and management of the company is exercised in order to determine whether it is a Ugandan company for income tax purposes.

Investigation into related companies

Section 175 provides that where an inspector has been appointed by the Registrar to investigate the affairs of a company, he may if he thinks it fit also investigate into the affairs of any other related company and also report on the affairs of that other related company and also report on the affairs of that other company so long as he feels that the results of his investigation of such related company are relevant to the main investigation.

3.7 Lifting the veil under case law

Where there has been fraud or improper conduct;

The veil of incorporation may also be lifted where the corporate personality is used as a mask for fraud or illegality. In Horne was the former employee of Gilford Motor Co. He agreed not to solicit its customers when he left employment. He then formed a company which solicited the customers. Both the company and Horne were held liable for breach of the covenant not to solicit. The company that Horne formed was described as a mere cloak or sham for the purpose of enabling him to commit a breach of the covenant.

Where the company acts as agent of the shareholders;

Where the shareholders of the company use the company as an agent, they will be liable for the debts of the company. Agency is a relationship which exists whenever one person authorizes another to act on his or her behalf. Where such relationship exists the acts of the agent are taken to be the acts of the principal. In case of liability it is the principal who is held liable and not the agent. Thus where shareholders employ or use the company as an agent, then those shareholders will be personally liable for the acts of the company as principals behind the agent.

91 Gilford Motor Co v Horne (1933) Ch 935
Public interest or policy

Sometimes, courts have disregarded the separate legal personality of the company and investigated the personal qualities of its shareholders or the persons in control because there was an overriding public interest to be served by doing so. In, a company incorporated in England whose shares except one were held by German nationals resident in Germany brought an action during the First World War. All its directors were also German nationals in Germany, which was an enemy country at the time. The court disregarded the fact that the company had a British nationality by incorporation in England and rather concentrated on the control of the company’s business and where its assets lay, in determining the company’s status.

In determining residence of a company for tax purposes

The court may look behind the veil of the company and its place of registration so as to determine its residence. The test for determining residence is normally the place of its central management and control. Usually this is the place where the board of directors operate. But it can also be the place of business of the Managing Director where he holds a controlling interest. Professor Gower explains that the test for determining residence is normally the place of its central management and control. Usually this is the place where the board of directors operates. In the plaintiff Company was incorporated in England for the purposes of selling in England tyres made in Germany by a Germany company which held majority shares in the English company. Following the outbreak of war between England and Germany in 1914, the plaintiff sued the defendant company for payment of a trade debt. The defendant company alleged that the plaintiff company was an alien enemy company and that payment of the debt would be trading with the enemy. In the course of deriving judgment, Four Law Lords indicated that a company could have an enemy character.

Company deemed trustee for shareholders;

Although uncommon, the courts are prepared in some cases to hold that the company holds property in trust from the shareholders. In the court relied on trust doctrines as a means of

92 Daimler Co Ltd v Continental Tyre and Rubber Co.(1916)A.C 307
93 Ibid
94 Littlewoods Stores v IRC(1969)1 W.L.R 1241 C.A
ignoring the corporate personality principle in a tax case which concerned a holding and subsidiary company. Littlewoods which was the holding company bought a capital asset and vested in a property holding company which was its wholly owned subsidiary. It then tried to get a tax advantage by arguing that the subsidiary was a separate legal personality. It was held that the tax advantage could not be allowed and the veil of incorporation was lifted on the ground that the subsidiary held the property on trust for the holding company.

**Cases of associated companies**

There are situations where the courts are prepared to treat a subsidiary company as an agent of the holding company and as conducting the latter's business for it. In other words the veil is lifted in tax cases in the interest of revenue. In a parent company was held liable on a bill of lading signed on behalf of a wholly owned subsidiary.

**Demystifying the corporate veil**

Over the corporate veil over the years, some three basic theories have been developed and still continue to develop by which corporations may be held responsible for statutory or other crimes. Vicarious liability, identification theory and locating fault in the corporation's organizational structures, policies, cultures.

In vicarious liability, a master is held responsible for the wrongs of a servant. The master need not be personally liable for such an act or omission. This responsibility is signed to both the individuals and corporations.

Theory of identification, is where the state of mind or the directing mind of the corporation is attributed to the corporation itself. It is used by Canada and England. The development of the theories for a long time, the courts interpreting the Common Law of England and Canada only hold a corporation liable under vicarious liability. This was accommodated in tort but not for crimes since crimes require mens rea.

**Ratifying Corporate Acts**

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95 Case of Roberta (1937)L1L Rep
96 Corporate Criminal Liability in Uganda
Normally in law, a company is bound only by resolution of its organs such as the board of directors or a duly constituted general meeting or duly authorized agents. The issue therefore arises as to whether a resolution which is passed by members without a properly convened meeting of the board of the board of members binds the company. In Lindley L.J indicated thus; individual assets given separately preclude those who have given separately preclude those who have given them from complaining of what they have sanctioned but for the purpose of a binding company in its corporate capacity, individual assets given separately are not equivalent to the assent of a meeting.

Thus the law looks at the collective actions of directors or members in order to determine the acts of the company. This approach is endorsed in the Salomon case itself, where Lord Davey indicated that the company is bound in a matter intra vires by the unanimous agreement of its members.

In the words of Professor Gower emphasis relying on what now seems clear is that there does not have to be unanimous agreement of all members but merely agreement or tacit acquiescence of all members entitled to vote on the matter.

3.8 The ultra vires doctrine

The object clause of the memorandum of association of a company contains the object for which the company is formed. An object of the company must not be beyond the object clause otherwise it will be ultra vires. Ultra vires means beyond powers and such an act which is beyond the object clause is void and cannot be ratified by the company. Ultra vires can also be used to describe a situation where the directors of a company have exceeded the powers delegated to them, where a company exceeds the powers conferred upon its memorandum of association, it is not bound by it because it lacks the capacity to incur responsibility for that action, but when the directors of a company exceed the powers delegated to them the company in a general meeting may choose to ratify their act or omission.

The doctrine of ultra vires was developed to protect the investors and creditors of the company. Due to the fact that a company is prevented from employing the money of the investors for a purpose other than those stated in the object clause of the memorandum. Thus the investors of the

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97 Re George Newman Ltd (1895) 1 Ch 674 CA
company are assured that their money will not be employed for activities which they did not have in contemplation at the time they invested their money into the company.

**Liabilities of Directors on ultra vires transaction**

Liability towards the company. It is the duty of the directors to ensure the funds of the company are used only for legitimate purposes of the company. Consequently if the funds of the company are used for a purpose of foreign to its memorandum, the directors may be held personally liable. Thus a shareholder can sue the directors to restore to the company funds which they employed in transactions which the company is not authorized to engage in.

Liability towards third parties. The directors of a company are treated as agents of the company and therefore have a duty not to go beyond the powers that the company gives them. Where the director represents to third parties that the contract entered into by them on behalf of the company is within the powers of the company while in reality the company does not have such powers under its memorandum, the directors may be held personally liable to the third party for the loss on account of breach of warranty of authority. However to make directors liable, the following conditions must be fulfilled.

- There must be a representation of authority by the directors. It should be a representation of fact not law.
- By such representation, the directors must have induced the third party to make a contract with the company in respect of a matter beyond the powers of the company.
- The third party must have acted on such inducement to enter into the contract and must prove that if it had been for that inducement he would not have entered into that contract.
- That as a result, the third party suffered.

However there are exceptions to the ultra vires doctrine; property acquired investments made by the company using money from ultra vires transactions.

Activities which are not expressed by the memorandum but are implied by law.
CHAPTER FOUR
ENFORCEMENT AND PROTECTION OF THE SHAREHOLDER’S RIGHTS AND CREDITORS IN UGANDA

4.0 Introduction
As briefed in the previous chapter, this chapter covers an analysis of Laws on the enforcement and protection of shareholder’s rights and creditor’s in Uganda as regards duties and liabilities of company directors and other officers and how are they enforced. As well it, includes the findings as to whether the enforcement mechanism and protection mechanism applied are effective or not, this is by looking o the role played by the government, the Companies Act 2012 therefore this chapter presents a decisive analysis and findings of the afore mentioned enforcement and protection mechanisms. Enforcement of shareholder’s rights has given shareholders a right to advocate for their rights and sue the directors in case they are in breach of their duties due to the fact that although the company is an existing legal entity corporate and distinct from its members still it is run by the directors and other officers. Because it has no arms, no legs it is an artificial legal entity which cannot be seen or touched.

It is intended to consider how corporate duties either on the part of shareholders or its officials are enforced. Although the effect of incorporation has been to overcome several procedural problems, it has not totally eliminated those which manifest themselves when there is a dispute within the corporate power structure. In99 explains that in contrast to a breach of duty within the partnership structure which entails an action by the wronged partner for an account, where the breach of duty is on the part of company directors or controllers, the other shareholders have no locus stand. This is because corporate duties are owed not to them but to the company itself, consequently it is only the company which is capable of suing in respect of breach thereof. However a difficulty arises when those to be sued are the proper authority for instituting the proceedings in the company’s name.

4.1 What is Enforcement?
Various scholars have attempted to define enforcement in their various fields of specialization and they all come to the same similar definitions, there are philosophical, ethical, economic and legal

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99 DJ Bakibinga Company Law in Uganda p 198
definitions of enforcement. Black’s Law Dictionary defines enforcement as the act or process of ensuring compliance with the law. It is the process of compelling the compliance with the law, mandate, command, decree or agreement. The (un) enforcement of corporate officer’s duties explains that over the past few decades, officers have arguably become some of the most important individuals in the corporation. From the implosions of Enron and WorldCom to the success of the companies like Apple and Microsoft to the Wall Street crisis that sunk the World into near global recession corporate officers have played a role in each of these story lines.

Fiduciary duties thus play a vital role in checking the considerable power and authority of officers. If there is an effective enforcement scheme share, that holds officers accountable. For this article the term corporate officer or officer refers to non-director officers or persons who serve as both a director and an officer in the corporation but are acting in their officer capacity. Fiduciary duties are the primary constraints on the power given to both the directors and the officers of the corporation. As well illustrated by Randy J Holland, Delware director’s fiduciary duties stating that fiduciary are an equitable response to the power that is conferred upon directors as a matter of statutory law.

Role of government on enforcing director’s duties and other officers in company law

In explains that ever since Uganda gained independence from Britain in 1962, it has not relented on tearing up its colonial documents. Uganda continues to rely on legal frameworks designed and implemented during the colonial era, such dependency is noticeable in Uganda’s system of company law a vital part of the legal framework was regulated by the companies Act 1961 (a product of the colonial era designed in line with the English Companies Act 1948.

Reliance on British legal ideas is not an issue for company law alone, areas such as matrimonial law (Marriage Act 1904), Intellectual property law (Trade Marks Act 1953) and insolvency law (before the enactment of Insolvency Act 2011 was regulated by the Bankruptcy Act 1931 a replica of the British Bankruptcy Act 1914) still depend on statutory frameworks from the colonial period.

Section 198 of the companies Act 2012, has codified the duties of directors however, the statutory expression of the duties is essentially the same as the existing duties established by case law.

100 Megan W. Shaner’s article
101 Chirsps Nyombi’s article in the New vision
Besides that are the directors even aware of their duties? Very much doubtable and lead we back to the question of legal enforcement.

The main challenge of the law reformers was to strike the right balance between managerial freedom and investor protection. (While offering easy access to the corporate form) a question that arises is how well has the Ugandan government done in setting this balance? The Law Reform Commission has done a remarkable job in striking this balance but the main issue remains legal enforcement, awareness and continuous legal development which cannot be guaranteed.

The use of Enforcement Agencies

The police is one of the enforcement agencies that protect shareholders rights over the majority share holders. The police is directed by the Police Act Cap 303 Section 4 of the Act provides for functions of the force and one being to enforce the laws of Uganda.

Section 21 provides for general powers and duties of a police officer, One of them is that a police officer shall in the performance of the functions of his or her office detect and bring offenders to justice.

Section 24(1) provides arrests as a preventive action, a police officer who has reasonable cause to believe that the arrest and detention of a person is necessary to prevent that person from causing loss or damage to property.

Section 29 provides that a police officer who is lawfully on any premises or any other place may seize anything there if he or she has reasonable ground to believe that the thing might be used as an exhibit in relation to an offence which he or she is investigating and that it is necessary to seize that thing in order to prevent it from being concealed, lost, tampered with or destroyed.

Section 31 gives police powers to institute criminal proceeding before a magistrate, apply for summons, warrants, and search warrants or undertake any other legal process as may be necessary against a person charged with an offence.

Role of court in enforcement
In a general rule, common law does not impose a criminal liability on corporations. Corporations are legal persons that have their own identity or personality independent and or separate from its directors and shareholders. The owners enjoy the benefit of limited liability wherein they are not liable for the company’s debts or other obligations personally.

In the celebrated case of Salomon v Salomon, Lord MacNaghten stated that, the corporation is at law a different person altogether from the subscribers. This separation extends also to directors. However, there are instances where this separation (corporate veil) can be set aside to apportion blame especially on the directors which has earlier been discussed in the previous chapter.

In the Ugandan case of Court noted that the legal personality of a company does not protect a director or shareholder for the purpose of defrauding the company itself or members of the public. The case denotes the long held common law position on circumstances that a company’s corporate veil can be pierced in. The company is never held liable for any wrong but the directors and shareholders can be held liable where company directors or members of the public are being defrauded.

The Companies Act provides for regulatory or statutory offences for officers, directors and members who engage in fraud, misrepresentation and misfeasance for which penalties range from fines to imprisonment for life and also there are penalties for false statements. Section 197(1)(2)(a) provides that a person who fails to give notice of his or her age as required by this section, or acts as director under any appointment which is invalid by reason of his or her age commits an offense and is on conviction liable to a fine not exceeding ten currency points for every day during which failure continues or during which he or she continues to act as described in this subsection.

Section 218(4) a director who fails to comply with the above provisions is liable to a fine not exceeding two hundred currency points.

Where the registrar has reasonable cause to believe that the provisions of the law are not being followed, he or she may call on the company concerned to produce all or any information in writing. The registrar may then cause a company to be investigated on application of members to court.

102 Corporate Criminal Liability: A necessary shift in Uganda Jurisprudence
103 (1897) Ac 22
.Grounds for that are the company business is being conducted with intent to defraud its creditors or other persons. These investigations can even lead to winding up of the company if it is found to be expedient.

In Uganda it is safe to say that corporate entities do not bear a legal responsibility for the actions of its directors, shareholders or other officials acting in the course of duty where such persons are found to have acted ultravires, they are held personally liable. It is only in circumstances that a company is wound up because of its inability to pay its debts.

4.2 Why have enforcement of these duties?
The law grants the rights and provides for the exclusive exploitation of these duties once the law is in place it is assumed that the society will abide by the same. The trend as discussed earlier is in favor of the managerial group which group is assuming controlling power in the company. As a shareholder he or she has been left at the mercy of the board and the majority or controlling shareholders. And in the process the minority shareholders are bound to be aggrieved by the actions, omissions or decisions made or taken in the company. As it is known the decisions or powers of the company are vested with one of the two organs that is the shareholders and the Board.

In exercising their powers or taking decisions, these two make decisions on the basis of the majority rule in other words those who own more than 50% control the company. In other words substantial power is placed in the hands of those who control more than half of the votes on the board or at the shareholders meetings. And thus minority members must accept the decisions of the majority as a fact of business life.

So the frustrated or aggrieved shareholders or minority shareholder may turn to the law for protection. This protection is provided for under the Companies Act Section 21 that once the memorandum and articles of association have been signed they constitute a contract. Subsection (1) provides that subject to this Act, the memorandum and articles shall, when registered, bind the company and the members of the company to the same extent as if they had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and articles.
(2) All money payable by any member to the company under the memorandum or articles shall be a debt due from him or her to the company.

However, in doing so, the aggrieved shareholders must prove that not only is the beneficiary of that contract but also that he is a member or shareholder in that company. There are many instances where that contract may be breached:

- Where the directors mismanage the company by involving it in ultravires transactions
- He or she may also institute an action against directors who may have denied him or her dividends already declared.
- Where directors embezzle or misappropriate company’s property or funds.
- Where company shareholders try to expropriate or even steal funds of the company.

In other words where the directors and other officers of the company breach their duties as expressly provided under the Act.

To institute an action in the court of law under any of the above one must also satisfy the procedures laid down. Whether or not the shareholder will succeed in the above action will depend on the procedures laid down under the common law and statutory law.

4.3 Enforcement of rights under common law

An action under the rule in where the plaintiffs complained inter alia that directors of the company had sold their own land to the company, at a price which was excessive and kept for themselves the proceeds of such sale, court observed that the act of directors even if it was true, it was not an injury to the plaintiffs but also to the company as a whole. That where a company has also been injured the proper person to sue for such a wrong would be the company and court dismissed the suit. The effect of the ruling in Foss and Harbotle is that in a case where something injurious has been done to the company, the proper plaintiff to sue for that wrong is not an individual or group of shareholders but the company itself.

The justification from the ruling in F & H was intended to curb unnecessary litigation as pointed out in the case of where court observed that the action could not be brought by shareholder if

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105 Foss v Harbotle
106 Mac Dougall v Gardiner (1875)1 Ch D 13 C.A
the chairman was wrong the company alone could sue, if every dispute in the internal management of the company had to be brought to court, court will be overwhelmed with cases. This principle is the one commonly referred to as the Proper plaintiff principle which explains that the court will not entertain all suits, a rule in corporate law explains in this way that shareholders have no cause of action in law for any wrongs which may have been inflicted upon a corporation.

In other words the company is normally the proper plaintiff in an action to enforce a duty owed to the company by directors or controlling shareholders and where the breach of duty can be condoned by an ordinary resolution of the members, in general meeting, no individual member or minority of members may sue. A general meeting may be held so that the members may by ordinary resolution decide whether to sue or not.

In107, two members took proceedings on behalf of themselves and all others except those who were defendants against the directors of a company to compel them to make good losses sustained by the company owing to the directors buying their own land for the company’s use and paying themselves a price greater than its value. Held, as there was nothing to prevent the company from taking the proceedings, if it thought fit to do so, the action failed. Court observed that even if the act of the directors was true, the injury was not to the plaintiff alone but also to the company as a whole and court dismissed the case as observing that such cases where the company has also been injured, it is the company to sue for such wrongs and not the individual shareholder.

The rule avoids multiplicity of suits and also the litigation at the suit of a minority of the members is futile if the majority do not wish it.

The case of Salomon v Salomon explains it clearly that individual members are distinct from the metaphysical body called the company.

The rule in F V H is subject to a number of exceptions judgments of Lord Vigram where he says that you cannot deprive people of their property and civil rights. In these cases even an individual shareholder may bring a minority shareholders action on behalf of himself and all other shareholders except those who are defendants and may join the company as a defendant. The directors are usually defendants. The following are the exceptions to the general rule;

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107 (1843)2 Ha 461 Supra
(1) Where what has been done amounts to a fraud by the majority of the members on the minority and the wrong doers are in control of the company in general meeting. In case where a shareholder brought a minority shareholders action to compel the directors to account to the company for the profits made out of the construction contract which they took in their own names.

(2) Where the act complained is illegal or ultra vires the company, such an act cannot be condoned by the majority of the members.

(3) Where the matter is one which can be validly done or sanctioned not by a simple majority but only by some special majority example a special resolution which has not been obtained if an action could not be brought in this case the company could in breach of the articles, do de facto by ordinary resolution that which according to its regulations can only be done by a special resolution.

(4) Where there is infringement of the personal rights of a shareholder. Once the individual rights of a shareholder have been infringed or about to be infringed, the aggrieved shareholder can maintain a personal action. Notwithstanding the fact that the company may also have been injured in the process. As it was well explained in Hickman v Kent and Anor (1915) 1 Ch 881 where every shareholder has a right to vote.

(5) Where there is a breach of Articles of Association. The Articles of Association constitute a contract not only between the shareholders inter se but also between the shareholders and the company and as such, the law requires that the articles must be observed by the respective parties to the contract. For example if the articles require that a particular transaction be carried out by a specified number of members who must endorse or sign on the transaction without this endorsement and individual members entered into the transaction. Then an aggrieved shareholder has recourse to court for protection as a personal action. Hickman had been expelled from the company whose articles contained a clause that any dispute between a member and the company should be referred to arbitration. Hickman took the company to court, instead of going for arbitration, as stipulated in the memorandum and articles. The company applied to stop the court proceedings on the ground that recourse to court was not open to members of the company.

108 Cook v Deeks (1916) 1 AC 554
109 Pender v Lushington (1877)
110 Hickman v Kent and Anor (1915) 1 Ch 881
who according to the memorandum and articles could only recourse to arbitration. The court accepted the company’s reasoning and stopped the court proceedings.

The company is bound to each individual member. Every member may enforce his rights against the company by legal action, by virtue of the existence of the memorandum and articles of association. In a clause in the articles provided that Eley would be employed for life as the company’s lawyer. Eventually, Eley became a shareholder. At a later, the company ended his services. Relying on the clause in the articles, Eley sued the company. It was held that the articles bound the company to its members in their capacity as members.

The members are bound to each other. Articles constitute a contract between the members inter se. It was held that where the articles of a private company gave a personal right to a member, such right was enforceable directly against another member.

(6) Where the interest of justice require the intervention of court. In the shareholders complained that the defendants who were also the majority shareholders that they had sold the Company’s plot of land to one of the director’s at 4000 pounds. And four years later the director sold it at 120,000 pounds, there was no evidence of fraud, but there was evidence of negligence on the part of the majority shareholders and directors. Court held that a minority shareholder can maintain personal action against the majority shareholders and directors. Even where there is no fraud but as long as it can be proved that there was direct benefit of themselves to the directors. However, for the plaintiff to succeed under this exception should not just allege simple or gross negligence on the part of the director but he must show that the directors disregarded their duties or their laws of protecting the Company’s interest.

(7) Litigation by the company (the majority rule). The members of a company express their wishes at general meeting by voting for or against the resolutions proposed. However the will of the majority of the members usually prevails and if the appropriate majority has obtained a resolution binds all the members including those who voted against it Charles Worth and Cain in their book explain that sometimes the majority is a simple majority.

111 Eley v Positive Government Security Life Assurance Co. Ltd (1876) 1 EX D20
112 Rayfield v Hands (1958) 2 All ER 194
113 Daniels v Daniels
114 Company Law 10th Edition p 308
and sometimes it is a three quarters majority for example an ordinary resolution is a resolution passed by a simple majority of the votes of the members entitled to vote and voting. A special resolution is a resolution passed by a three fourths majority of the votes of such members called the majority rule.

The rule in Foss v Harbottle, subject to certain exceptions, if a wrong is done to a company or if there is an irregularity in its internal management which is capable of confirmation by a simple majority of the members, the court will not interfere at the suit of a minority of the members. DJ Bakibinga in his book Company Law explains that it has for a long time been the law that where it is legally necessary to enforce a duty owing to the company, the only plaintiff is the company itself. This notion stems from the rule in Foss v Harbottle however, since the company is in reality a fiction the power to litigate on its behalf must be vested in some person or group. It has in this respect been suggested that the rule ibid rests on the basic premise of the majority rule and control by the majority in general meeting of the use of the corporate name in litigation. The above however was emphasized in

The trend in the latter part of the 19th century and the early years of this century had indeed been (when objection was raised as to the use of the company’s name as a plaintiff in an action). For the court to act on the majorities views regarding the litigation if they were ascertainable or to postpone a decision on the objection until a general meeting was called to ascertain the majority’s wishes. Which confirms that a company member’s right to vote may not be interfered with, because it has a right of property.

The concept of majority shareholder control over the company litigation however stands in contradiction to the view provided by Article 80 of Table A which explains that the business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company and may exercise all such powers of the company as are not by the Act or by these regulations required to be exercised by the company. In general

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115 P 198
116 (1843)2 Hare 461
117 Mac Dougall v Gardiner (1875)1 Ch D
118 Pender v Lushington (1877)6 Ch D 70

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meeting subject to these regulations or with the Act and among those powers directors have powers over litigation.

A question may be raised is the director’s powers on litigation exclusive?

D J Bakibinga’s book\textsuperscript{119} explains that the issues arises as to whether this power over litigation is exclusive to the board of directors, an aspect raised by the case of\textsuperscript{120} a case among other cases which tend to establish that when a power is vested in the board of directors either by a specific article or under the general delegation clause, the directors right to exercise the power is exclusive and not susceptible to interference by the shareholders in a general meeting. This implies that once a clause like this appears in the company’s articles of association the members in general meeting are therefore precluded from initiating litigation.

Therefore thus appears to be a conflict between Automatic Self Cleansing line which establish the board’s exclusive right to institute legal proceedings in the company’s name. It may be concluded that while in \textit{Foss v Harbottle} line of the cases establish the right of the general meeting to authorize litigation, the importance of the contractual effect of the articles of association which give wide powers to the board of directors has attended to undermine that assumption. However in the case of Automatic Self Cleansing line of cases where a company has an article that gives powers of litigation to the board of directors, lies with the board. On strict interpretation of the articles the power is valid though it tends to conflict with some of the leading scholars of company law.

(8) Litigation by a member. Minority protection. If the wrong complained of amounts to an infringement of the personal rights of a shareholder, he can petition under a personal action notwithstanding that it is the company that has been wronged.\textsuperscript{121} where a general meeting purported to alter articles of association to the detriment of the plaintiff, it was also stated that some 9 shareholders attended that meeting and voted in favor of the resolution, Sir Udo Udoma CJ, held that the action could be cancelled in so far as what was complained of infringed on the rights of the plaintiff. Both under the general law and under the Companies Acts there is some exception of the minority of the members against acts of the

\textsuperscript{119} p 200
\textsuperscript{120} Automatic Self Cleansing (1906)2 Ch 34
\textsuperscript{121} Misango v Musigire (1966)E.A 390

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majority. A strict application of the general principal laid down in *Foss v Harbottle* appears to be harsh and unjust with regard to minority shareholders as although substantive right has been accrued to them, still they are barred from obtaining justice under the rule and have to submit to the wrongs done by the majority of the members that control the company and the minority members have no say due to their small strength of number. The following are examples of minority protection are;

1. Under the general law, the doctrine that the majority of the members must not commit a fraud on the minority but must act bonafide for the benefit of the company as a whole. A situation where a fraud on the minority has been committed by the majority who themselves control the company, in an individual shareholder was able despite *Foss v Harbottle* to bring an action to recover the company’s property from those who had taken it and who by their voting power prevented the company itself from suing. Again an alteration of articles must not be in fraud of the minority.

2. The other exceptions to the rule in *Foss v Harbottle* in which cases an individual member may bring a minority shareholders action. For example where the act alleged is ultra vires or illegal. The cases of the support of unlawful strike and a transaction violating the financial assistance respectively.

3. The various sections of the Act intended to protect a minority of members under some minority sections even a single shareholder can defy the majority. A member can petition the court to wind up the company on ground that it is just and equitable that the company be wound up.

4. A member can petition the court for relief other than a winding up order where the company’s affairs are being conducted in a manner oppressive to some of the members including him.

5. *Daniels v Daniels* where three minority shareholders claimed that Mr. and Mrs. Daniels had acted negligently in making the company sell land to Mrs. Daniels at a very low price although it was worth a lot of more money, it was held that the plaintiffs had the right to sue in such circumstances. The company sold land to the second defendant for GBP 4,250

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122 *Cook v Deeks*
123 *Taylor v National Union of Mineworkers and Smith v Croft no.2*
124 (1978)
on the instruction of the first and second defendant as directors. Later the land was sold by
the second defendant for GBP 120,000. The plaintiffs who were minority shareholders
brought an action against the defendant alleging that the land was sold to the defendant at
an undervalue. The defendants applied to strike out the action as not disclosing a reasonable
cause of action as it did not allege fraud or any other cause justifying a minority shareholder
action.

Templeman J (as he then was) held that minority shareholders action was maintainable where
directors use their powers intentionally or un intentionally , fraudulently or negligently in a
manner which benefits them at the expense of the company.

In another case of\textsuperscript{125}, the directors issued shares and required some people who took up the
shares to make payments in respect of those shares but the directors did not themselves make
payments in respect of those shares which they had taken up. A minority shareholders action
was allowed and although fraud was discounted the basis of the action was said to be breach
of duty.

Lindley M.R observed in this regard that the charge is that the directors were guilty of a breach
of duty in procuring those contracts and in taking advantage of them so as to benefit themselves
at the expense of the shareholders ibid p.64.

Any other case where the interest of justice requires that the general rule prescribing suit by
the company should be disregarded. With this which is not so well established, all the others
could be summarized by saying that an individual shareholder can always sue, notwithstanding
the rule in F v H when what he complains of could not be validly effected or ratified by an
ordinary resolution as explained by Gower at p 645.

The difficulty however arises in applying this principle by preventing a member’s action
simply because the company could have rectified, the wrong complained of when in fact it has
not had an opportunity to decide whether or not to do so.

\textsuperscript{125} Alexander v Automatic Telephone Co.(1900)2 Ch 56

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In the case of\(^{126}\) where the court held that an individual shareholder could sue on the ground that directors in issuing additional shares had exercised their powers improperly. However court also held that their action could be confirmed by the general meeting and gave the company the opportunity to do so provided that the directors undertook not to exercise their votes on the new shares. This seems to suggest that simply because an action could be ratified by the general meeting will not necessarily preclude a minority shareholders' action either in a personal capacity or on behalf of the company from being commenced. However it would be stayed if it is subsequently ratified.

An ultra vires act cannot be ratified by the company additionally each member has a right to ensure that the funds of the company are used for its proper objects. A member can also institute a personal action where the act complained of is illegal. The capacity on the part of a member to restrain an ultra vires or illegal act exists even when a member has in the past been privy to the act complained of.

With regard to the special majority exception the best illustration is provided by Edward v Halliwell where the constitution of a trade union indicated that contributions by members were not to be altered until a ballot vote of the members had been taken and two thirds of the majority secured. A delegate meeting of the union without taking any ballot passed a resolution increasing the contributions of the members. The plaintiffs sued, it was held that the resolution was invalid Jenkins L.J indicated that if the company alone were allowed to sue in case of this nature, a company which had broken its own rules by doing something without a special resolution which could only be done validly by a special resolution, would effectively be allowed to do by ordinary resolution that which according to its own regulations could only be done by special resolution. Court concluded that the matter complained of amounted to an evasion of the personal rights of members.

(9) The minority shareholders action and the appointment of a receiver

In the matter of company developments limited (un reported Ch D 14 June 1978) during the course of proceedings against the shareholders in control of the board of directors whose alleged misconduct included in the breach of trust and fiduciaries duties respectively, the

\(^{126}\) Hogg v Cramphorn Ltd (1967)Ch 254
chancery court appointed a receiver on an exparte application. This appointment was confirmed subsequently before all the parties. The purpose of the appointment was to remove control of the company from the hands of the board of from the hands of the board from whom it could suffer additional harm.

Secondly, the aim was to enable the parties to the proceedings to get factual information about the past conduct and affairs of the company. It is apparent that Templeman J indicated that the receiver had power, if he so wished, to conduct an investigation into the past affairs of the company.

(10) A statutory derivative action.

A derivative action differs from a personal action in the sense that although a shareholder is allowed to sue personally, he is not suing on his own behalf but on behalf of the company because the company itself is unable to sue for that wrong. The reason behind the principle is that when the people who are supposed to sue, they may not do it. However, the courts have insisted that a derivative action should not be utilized as means of side stepping rule in Foss v Harbottle. The latest effort in introducing the derivative action in statutory form in Britain appears from the British Companies Act 1985, it is provided

(1) Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be prejudicial.

(2) If the court is satisfied that a petition under this section is well founded it may make such order as it thinks fit for giving relief in respect of the matters complained of.

The derivative action and the rule in Foss v Harbottle

The requisites by 127 explains that the prerequisites for a derivative action in company law have been amply discussed as the following:

The wrong complained of must involve a fraud on the minority resulting into the expropriation of the property of the company or the minority shareholders, known as a breach of the directors’ duties of subjective good faith or conduct which leads to the passing of resolutions which are not bonafide in the interest of the company as a whole.

The plaintiff must show that the alleged wrong doers control the company. In the decision by Vinelott J attempted to modify this requirement. The chancery court postulated that an exception to the rule in Foss v Harbottle which allows a minority shareholder action is not limited to situations where the alleged wrong doer has voting control of the company but applies wherever the wrong doer, though not holding the majority of the shares in the company was shown to be able by manipulating his position in the company to ensure that the majority would not allow a claim to be brought for the alleged wrong.

The company must be joined to the action as defendant. A general meeting purported to alter the Articles of Association to the detriment of the plaintiff. It was also stated some shareholders had attended that meeting and voted in favor of the resolution, Sir Udo Uduma C.J held that the action could be cancelled in so far as what was complained of infringed.

Derivative action is a remedy available to the minority shareholders which can enable them enforce their rights on behalf of themselves and the other shareholders irrespective of the wrong doers. The case of also explains an exception to the rule in Foss v Harbottle, where an individual shareholder can bring a derivative action to remedy a wrong done to the company arising from any breach of duty irrespective of whether the wrong doers are in control.

Mr David Sugarman stated ibid

Here then is a new exception to the rule in Foss v Harbottle although it embraces fraud on a minority, it is not limited ....in that sense. It comes close to giving effect to what has been called a justice exception. This however is to express the ambit of the decision in traditional terms which minimize its innovative nature. The judgments are not defined by reference to the perimeter of directors fiduciary duties nor the exceptions to the rule in Foss v Harbottle.

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128 Prudential Assurance Co Ltd v New man Industries
129 Misango v Musigire (1966) E.A 390
130 Wallersteiner v Moir (1975)91 L.Q.R 482
substance a general right to litigate for corporate wrongs on behalf of the company is recognized. This cuts across both the scope of director’s duties and the exceptions. All exceptions are subsumed into this more potent derivative action.

Dr Daniel Prentice explained that;

Although the judgment of the Court of Appeal in the above case has the hallmark of one that was carefully crafted, on one critical point it is far from clear. It could plausibly he argued that the court only dealt with the issue of costs and its decision has no bearing on the problem of the standing of a minority shareholder to commence an action, a point that went by default ibid where no objection was raised to the standing of Mr Moir to maintain the counterclaim. This reservation about the reach of the decision is strengthened by the facts that the breach of the duty by Dr Wallersteiner’s case fell within the fraud on the company exception to the rule in Foss v Harbottle. In other words would the indemnity procedure apply if the alleged wrong was manifestly ratifiable?

(11) Representative Action

A legal action in which one or a few members of a class sue on behalf of themselves and other members of the same class. A law suit brought by the shareholders of a company on its behalf, for the enforcement of a corporate right. However in all the actions, the plaintiff must have clean hands.

(12) The alternative remedy to winding up under the Act a company can be wound up if is just and equitable to do so. Before the shareholder can have the matter entertained under this section, he must satisfy the following conditions; He must petition the court that the company be wound up for just and equitable reasons. The Companies Act permits a member of the company who complains that the affairs of the company are being conducted in a manner oppressive to some parts of the members, himself inclusive to petition the court for relief, the provision was so restrictively interpreted that petitioners under it only succeeded in 3 cases.

The petitioner must be a contributory that is he must be a shareholder who is liable to contribute to the assets of the company during its winding up

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He must satisfy the court that although there is another remedy open to him, he is not acting unreasonably in not seeking that other remedy instead of winding up the company.

The petitioner must satisfy the court that after the winding up, there will still be something tangible for sharing among shareholders, if the company is heavily indebted (insolvent) then the section can be invoke. A question can be raised what wrongs can be entertained under the just and equitable clause? The following have been accepted as major grounds for winding up the company under the just and equitable clause.

a. Deadlock between directors who are also the only shareholders; in two directors who were also the only shareholders only communicated through a secretary. The directors hated each other such so much that the company had to be wound up.

b. Loss of substratum of the company (i.e. object for which the company was formed) where a company was formed for an illegal or fraudulent purpose, it can wound up under the just and equitable laws

The Act also provides that a shareholder of a company may apply to court for a declaratory order determining any rights of a shareholder in terms of the Act, the companies memorandum of incorporation or any rules of the company for appropriate orders to protest the rights of the shareholder or rectify any harm done to the shareholder by the company.

Where any person is entitled to apply for a remedy under the Act, the right extends to persons acting on his behalf, a person acting as a member of or in the interest of a group or class of persons, a person acting in public interest or an association acting in the interest of its members.

(14) The oppression section under the relief against oppression

Section 247 of the Act provides a member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members including himself or herself or in a case falling within section 178(5) may make a complaint to the registrar by petition for an order under this section.

131 Aloro Abdul Hakim Business Association 11
132 Reyenidje Tobacco Co Ltd (1916) 2 Ch 426
(b) that to wind up the company would unfairly prejudice that part of the members but otherwise the facts would justify the petitioning for a winding up order on the ground that it was just and equitable that the company should be wound up.\footnote{Elder v Elder and Watson (1952) S.C 491} the court observed that oppression as a visible departure from the standards of fair dealing and the violation of the conditions of fair play on which every shareholder is entitled to rely. For one to rely on the plea of oppression, he must satisfy the court that although the facts justify the winding up of the company, such winding up would be unfair to him. That as such should be rewarded a remedy under section 211 now 247, the oppression section.

Where the court is satisfied with the petition, it may make an order directing how the company’s affairs are to be conducted in future or an order that the petitioner be bought out of the company. The order is for the petitioner only to be bought out but no other oppressed members.

The petitioner must prove that the act being complained of is not an isolated event but a continuing process.

He must satisfy the court that the oppression is not only limited to himself but that also affairs of the company are being conducted in an oppressive manner. In\footnote{Re H.R Hammer Ltd (1959) 1 WLR 62} a father who gave gifts of shares to sons continued to run the company as his own and to disregard wishes of other shareholders and company directors and even resolutions of the board of directors. It was held that oppression amounts to a conduct by the majority which is harsh, burdensome and wrongful.

Inspection and investigations

These can be initiated either by the registrar or the members themselves; investigation by the members can be initiated in two circumstances: applying to court to carry out the investigation under section 173 of the Act the registrar may appoint one or more competent inspectors to investigate the affairs of a company and to report in such manner as the registrar directs.
(a) In the case of a company having a share capital on the application either or not less than two hundred members or of members holding not less than one-tenth of the shares issued;
or
(b) In the case the company not having a share capital, on the application of not less than one fifth in number of the persons on the company’s register of members.

However, the applicants may be required to pay a deposit of shs 10,000 before the commencement of the investigation, they must also prove that they are not malicious.

Investigation by court

The court may order for the appointment of inspectors to look into the affairs of the company if from the registrar’s report either: the company business is conducted in a fraudulent or unlawful or oppressive manner or members have not been given all the information they are entitled to, promoters or management are guilty of misfeasance.

Misfeasance proceedings

Is also another remedy open to shareholders who want to enforce a company’s rights? He is not enforcing his own rights, a shareholder who is also a contributory can apply to court for an order to examine the conduct of promoters, directors, or any other officer or a member who has been guilty of misfeasance or breach of trust to the company. Misfeasance deals with only the wrongs involving misappropriation of funds or property. Where the proceedings are successful the guilty officer may be ordered to pay or replace funds. Such officer may also be liable to criminal proceedings. However the officer concerned may be excused by relying on section 233 which stipulates that an officer may be excused from breach of duty or negligence if he pleads that he was acting reasonably and honestly in the circumstances.

4.4 Corporate irregularities and personal shareholders rights

The basic difficulty here stems from the need to reconcile case law which seems to limit corporate litigation as a right predominantly belonging to the majority of shareholders in general meeting, with the personal shareholder’s right to enforce the Articles of Association, as a basic contractual obligation. The majority shareholder rule essentially prescribes an
individual shareholder’s action where the matter complained of can be put right by the shareholders in general meeting. As explained by 135

However, issues arise as to which matter can be rectified by the majority in general meeting and which cannot.

(a) The Mac Dougall and Pender dilemma

In *MacDougall v Gardiner*, the Court of Appeal held that a member had no locus standi to complain about the breach of an article entitling him to demand a poll in general meeting. James L.J stated thus:

I cannot conceive that there is any equity on the part of the shareholder on behalf of himself and the minority to say...we have a right and every individual has a right to have a meeting held in strict form in accordance with the articles.

The Court of Appeal was saying that where you have irregularities relating to the internal management of the company (in this instance its conduct of a general meeting) these are capable of being corrected by the majority of members and should not be subject of litigation by an individual member even if they are at the same time breaches of the articles of association.

The plaintiff in Mac Dougall case did not complain that his own vote was excluded, he was suing on behalf of the company. Here the plaintiff sues in his own name. A question that may arise is that is Foss v Harbottle irrelevant to the personal action?

In *Pender v Lushington*, the right of a shareholder to vote according to the company’s Articles of Association was upheld by the English Court of Appeal Jessel MR stated in this;

Whether he votes with the majority or the minority, he is entitled to have his vote recorded, an individual right in respect of which he has a right to sue. In the case of 136 Astbury J dismissed the action on ground that the company had not been joined as plaintiffs. The implication was that the wrong complained of was a wrong to that company. Court of Appeal reversed Astbury J’s decision

135 DJ Bakibinga Company Law p 203
136 Normandy v Ind Coope & Co (1908) 1 Ch 84
and held that the plaintiff's action was well conceived. The court further agreed that the notice complained of did not give a sufficiently full and frank disclosure to the shareholders of the facts upon which they were asked to vote and the resolutions were not therefore binding.

Swinfen Eady L.J thought that the plaintiff could maintain the action because his private rights as a shareholder had been infringed and justice required that he be entitled to bring the action.

Another important aspect was discussed by\textsuperscript{137} which is that is Mac Dougall v Gardiner a limitation on the personal action?

In the case of\textsuperscript{138} Swifen Eady J tried to tackle the problem by saying that the majority can ratify a breach of an article where the article in question amounts only to a limitation of the general powers of the company, other attempts at dealing with the problem indicate that a majority cannot ratify what in substance is an alteration of the articles or what is a breach amounting to a complete transformation of the company a fundamental alteration of policy. However such suggestions still leave the issue as to which breaches are ratifiable and which are not largely unresolved.

Measures that are available to directors in order for them to escape liability. Article on director's liabilities and corporate governance in insolvency cases worldwide.

**Filing for bankruptcy**

A bankruptcy filing is a clear hallmark of insolvency and consequently, that the bankruptcy court approved for business decisions made post filing which may insulate officers and directors from attack by creditors.

**Insurance or indemnity funds**

Directors can request that the corporation purchase a director and officers liability policy, establish an indemnity fund or provide a combination of the two to reduce the exposure to directors in the event of a creditor law suit. It has now become a common practice for public corporations to purchase insurance for liabilities resulted from shareholder derivative action.

\textsuperscript{137} DJ Bakibinga Company Law in Uganda P.210
\textsuperscript{138} Boschoek Proprietary Ltd v Fuhe (1906)1 Ch 148
Other Measures

Directors should not assume that the safest course is to stop trading. Directors must take every step expected to minimize loss to creditor.

Directors and other officers of the company should carry out business review to reduce expenditure.

Directors should insist on frequent board meeting.

Directors and other officers like auditors should ensure that proper books of accounts are kept and up to date.

Activities which are not expressed by the memorandum but are incidental or related to or reasonably necessary for the company to carry out its express objects.

Ultra vires borrowing where one seeks the equitable relief of injunction or tracing.
CHAPTER FIVE

5.0 Introduction
The duties and liabilities of company directors and other officers emanate from the common law principles of due diligence towards the company. Where a company is on the verge of collapsing, the directors mostly have got a duty towards it, its shareholders and creditors. Court cases have not only considered the directors to the company but also its shareholders and creditors and that in performance of their duties they have to act in good faith, in the interest of the company they have, they have to avoid the habit of making secret profits and that the failure to observe all that they will be held personally liable.

5.1 Observations
The principle of corporate personality seems to suggest that in the exercise of their duties that is to say officer’s duties in a company have to do it in the best interest of the company, because if they go beyond what they are supposed to do like acting ultra vires, they will be held personally liable or responsible.

This probably points to the fact that creditors and shareholders rights are paramount and that they have to be taken as a priority so that the business economy can grow as expected.

5.2 Findings
In my research I discovered that though the principle of corporate personality makes companies distinct from their members, they can sue or be sued but although the principle is clear it has been subjected to some exceptions and they arise where officers act outside their scope making the company suffer losses, They can be pinned personally responsible if they do not use their powers vested in them very well.

5.3 Recommendations
The United Kingdom (British Companies Act) which was uprooted and imposed to Uganda during the reception of the English law into Uganda has been amended several times and therefore there is still need for Uganda Law Reform Commission to make sure that the Act suits the current situation. Both in terms of economic, social politically and culturally. Though still the Act remains intact even though there have been several attempts to amend it.
The Uganda Companies Act should contain also provisions that will make shareholders and creditors responsible in other words holding them liable in case of any breach of their obligations. In addition to that it should be able to provide the role that is to say the duties of workers in the company because its main focus is always on the directors and other officers of the company in general as regards other forms of businesses that is to say partnership business, co-operations among others.

The effectiveness of company meetings should be emphasized. This is so because directors rarely attend meetings which serve as a loophole in the fulfillment of their duties which they owe to the company.

There should be proper management in books of accounts, monitoring them regularly so that the shareholders and creditors of the company are not disadvantaged brought about by the improper imbalances of the books of accounts which for example provide for the profit and loss statements that have accrued to the company in the financial year.

There is need to sensitize the public on the operation of the law. Many people in our Uganda today lack the knowledge on how they can fight for their rights, they are not aware of the Companies Act which can provide a remedy to them in case directors or other officers breach their duties.

Business law should not only stop in the law school, other colleges like ICT, engineering humanities should also get that chance of knowing how people can startup businesses due to the fact our economy in order for it to develop, it needs a lot of business entrepreneurs.

Discouraging people from becoming directors. The provision of liabilities of the directors tends to discourage people from taking on the director job. This is because the duty of care imposed on them is high and also the consequence of breach of duty is also severe due to the fact they pressure imposed onto them is too much.

Creditors should also take measures in their protection. Creditors do not need the benefit of regulation, for they are able to take care of themselves by means of

“an entire armory of techniques D Goddard Corporate Personality –Limited Recourse and its limits in C. Rickett and R Grantham (Ed’s) Corporate Personality in the 20th Century (Oxford 1998) 22. These include the Creditor’s ability to negotiate the terms of the contract, he enters into with the
company. The creditor also has the opportunity of putting the contract his forming with the company under an insurance cover. This will protect them in case of anything that goes wrong. The company therefore protecting the creditors’ rights is seen as giving them a little bit too much.

5.4 Conclusion
This case study on the duties and liabilities of company directors and other officers in Uganda emphasizes directors’ duties and shareholders rights in the company. The Companies Act plays a role in the protection of shareholders rights and enforcement of directors and other officer’s duties.

It is well established in English Law and the law applying in other Common Wealth Countries, that certain times in life of the company, the interests of shareholder and creditors is paramount. The directors and other officers in performance of their duties should do that not only to the company but also to its creditors and shareholders’ interests at large.

The Laws of Uganda have created clear lines between the Companies running day to day businesses that is Companies Act 2012 (As Amended) and the ones that can no longer run day to day businesses which are on the verge of collapsing and a receiver, an administrator, has been appointed to handle their businesses which is the Insolvency Act 2011.

Company Laws in Uganda have gone ahead to acknowledge other forms of businesses which have also got their statutes like the Partnership businesses regulated by the Partnership Act 2010.

Company law has led to the establishment of a lot of companies due to the fact that the shareholders and creditors are assured of relief where any factor that is likely to lead to the closure of the company is to occur. That is to say when the company can no longer pay its debts and is put under liquidation or receivership. The creditors can be able to repossess their money that they had given the company.

Our Uganda today is among the countries that are growing at a faster rate because of the laws under the businesses that encourage investors to bring in a lot of funds leading to the development of companies.
The leading case of\textsuperscript{139} has paved way for many entrepreneurs to start up business excluding them from personal liability due to the fact that companies once incorporated have been seen as having legal entity in other words can sue or be sued on their own behalf. This however does not take away the whole responsibility, Section 20 of the Act provides for instances where a veil of incorporation has been lifted and the people responsible are held liable for some acts like tax evasion, fraud, or where save for private company, the membership of the company falls below the statutory minimum making loss to company. The aggrieved shareholders can sue on the Company’s behalf since the company is a fiction and the officers to sue sometimes are the ones in the mess.

\textsuperscript{139} Salomon v Salomon
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