Introduction
Directors are required to hold office subject to retirement by rotation or removal. Section 259 of the Companies and Allied Matters Act, Cap C20, LFN, 2004 (CAMA) provides that unless there is a contrary provision in the Articles of Association of a Company, all the directors of the company shall at the first Annual General Meeting (AGM) retire from office and at subsequent AGMs, one third of the directors, or if their number is not three or a multiple of three, the number nearest to one-third shall retire. However if the number of Directors is reduced to two then neither need retire.1

In addition to the power to remove directors under Section 262 of CAMA, the retirement by rotation process affords members of a company the opportunity of not re-electing a Director at the expiration of his period of office.

Executive Directors are also employees of the company and are charged with the management of the company on a day-to-day basis. These Directors are usually denoted by a special title, such as Finance Director, Commercial Director, etc, but their legal position remains the same as any other director of the company. The standard of care required of Executive Directors is however higher than that required of Non-Executive Directors even though all directors owe fiduciary duties to the company and must act in utmost good faith at all times.

This paper examines the statutory requirement for retirement by rotation and the implications thereof for Executive Directors, giving consideration to their dual roles on the one hand as employees and on the other hand as Directors of the Company and considers the notice period with respect to termination of Directors' service contracts.

Retirement of Directors by Rotation
In practice, many companies include a provision in their Articles which replicates Section 259 of CAMA and requires one third of the Directors to retire in turn each year. Directors up for retirement by rotation are those who have been longest in office since the date of their last election. As between persons who became directors on the same day, those to retire shall unless they otherwise agree amongst themselves, be determined by a lot. Some companies use the alphabetic order of Directors' surnames to determine the order of retirement by rotation. A retiring director is eligible for re-election and may present himself for re-election at the meeting at which he retires.

Some companies by their Articles exempt the Managing Director and other Executive Directors from retirement by rotation by stating that a Director so appointed to the office of Managing Director or any other executive position shall not whilst holding the office, be subject to retirement by rotation or be taken into account in determining the rotation of Directors and that such appointment shall be automatically determined if the Director ceases by whatever reason from being a Director. Where the Articles of a company are silent, the provisions of CAMA apply by default.

The United Kingdom Companies Act 2006 makes a distinction with respect to retirement by rotation of directors of private and public companies by

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1. Re Midley of Sons Ltd (1939) Ch. 729
separating the Model Articles for private companies and those of a public company. Under the UK Model Articles for private companies, Directors need not retire by rotation except the company’s Articles expressly contain provisions to this effect. CAMA does not make this distinction, and until otherwise amended, directors of both private and public companies (except as otherwise provided by the company’s Articles) are required to retire by rotation.

Executive Directors as Employees and Directors on the Board
CAMA does not make any distinction between Executive and Non-Executive Directors. As a corollary and going by the provisions of Section 259 and 262, once a Director is not re-elected at an AGM or is removed by the members at a general meeting, he ceases to be a Director forthwith. What CAMA does not clearly address is the consequence of removing or not re-electing a Director who happens to be an Executive Director, i.e. an employee of the Company. It however specifically provides that where a Managing Director is removed for any reason whatsoever, he shall have a claim for breach of contract (where there is a Contract) or where a contract could be inferred from the terms of the Articles and such a director has performed some services without a contract, he shall be entitled to payment on a quantum meruit basis.

Removal of an Executive Director by the Board
What then is the fate of an Executive Director whose appointment is terminated by the Board of Directors in accordance with the terms of his service contract with the company? Does he cease to be a Director of the company forthwith? The effect of section 259 of CAMA is that although the Director ceases to be an Executive Director, he remains a Director (Non-Executive) until removed by members at a general meeting in accordance with the provisions of section 262 of CAMA. It is important to state here that the procedure for the removal of a director under this section is very clear and must be strictly complied with to give effect to the removal of such a Director from the Board.

Removal of Executive Directors by Members in General Meeting
What happens where an Executive Director who is not exempt from retirement by rotation under the Articles fails to be re-elected by the members in general meeting? It can be argued that this is an uncommon occurrence as Executive Directors are usually re-elected by the members in general meeting. However, with increasing corporate governance awareness and shareholder interest in the affairs of companies, re-election of retiring directors (including Executive Directors) can no longer be taken for granted.

An Executive Director who is not re-elected by the members at an Annual General meeting or is removed in accordance with the provisions of Section 262 of CAMA ceases to be a director. Again a distinction must be made between the removal of an Executive Director under Section 262 and his non re-election at the AGM as contemplated by Section 259.

As has been established, once a Director (Executive or Non-Executive) is removed in accordance with the provisions of Section 262, he ceases from being a Director forthwith. CAMA is however not clear as to what effect the non-re-election of an Executive Director would have on the subsisting service contract or contract of employment between the Company and the Executive-Director in his capacity as an employee.

Logical reasoning would suggest that an Executive Director who is not re-elected by members at the AGM, though ceases to be a Director, remains an employee of the Company in accordance with the terms of his employment contract. The Executive Director is in the first instance an employee of the Company and then a Director. The two roles must clearly be distinguished, one from the other.

The point has also been made that by the principle of pacta sunt servanda, the Company is bound by the terms of the contract between it and an employee and would therefore need to take active steps to determine an employee’s contract in accordance with the terms contained therein should it desire to do so.

It is instructive to note that under the UK Companies Act, when an Executive Director is not re-elected at the AGM, he ceases to be both a Director and an employee.

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2 Section 268 (2) (3) CAMA
3 (Latin “agreements must be kept”) The rule that agreements and stipulations, especially those contained in treaties, must be observed.
of the Company forthwith. Any subsisting service contract with the Company is automatically determined.

Shareholders’ Approval of Executive Director’s Service Contract

It is useful to the Director and the company itself if the terms of the employment for Executive Directors are spelt out in a formal service contract. A Non-Executive Director (NED) is a member of the Board of Directors without executive responsibilities and therefore not an employee of the Company. NEDs do not therefore require service contracts, simple letters of appointment would suffice.

To serve as a safeguard and to prevent Executive Directors from awarding themselves long service contracts as protection against removal by the shareholders, CAMA stipulates that any agreement between a company and a Director where the tenure of office of the Director may be continued for a period of more than five years and which incorporates terms to the effect that such contract cannot be terminated by the company by simple notice, or can only be terminated in specific circumstances, must first be approved by a resolution of the company in general meeting.

The requirement for shareholder approval applies to all companies unless the company is a wholly-owned subsidiary. In the case of a group of companies, the service contract of a Director employed by one of the subsidiaries will require the approval of the holding company. Where a Director’s service contract has more than six months to run and a new contract is entered into, if the combined term of the unexpired period of the old contract and that of the new contract taken together extend beyond five years, shareholder approval for the new contract is required.

The United Kingdom Companies Act 2006 on the other hand provides that service contracts which cannot be terminated within a period of two years (other than for breach of contract) must be approved by shareholders in general meeting. The UK Corporate Governance Code also encourages listed companies to have service contracts with a termination notice period of not more than one year. The different Codes of Corporate Governance in Nigeria are silent on this.

It may clearly be said that shorter termination notice periods in Directors’ service contracts will serve as an important safeguard for shareholders to ensure that the Directors do not become too entrenched on boards and that, in the event of termination, any terminal payments made are not excessive.

Dismissal and Compensation of Executive Directors

The removal of a Director must be distinguished from his dismissal as an employee of a company. An Executive Director has the same protection available to any dismissed employee under the law and any contractual rights conferred by his or her service contract.

An Executive Director will in the event of unlawful dismissal, dismissal not in accordance with his contract of service or in disregard of the provisions of Section 262 CAMA, have recourse to any compensation set out in the service contract as was the case in *Bernard Longe v. First Bank of Nigeria Plc* or as shall be determined in a suit for unlawful dismissal or for breach of contract.

Any compensation paid which is not by way of damages for breach of contract must be disclosed to the shareholders and approved by ordinary resolution at a general meeting.

Today a company is under a statutory obligation to provide written terms of employment to an Executive Director, as with other employees. It is advantageous to both sides to set down in no uncertain terms the details of a director’s employment in a service contract or agreement. The perception that employers or principals have the power to hire and fire at will without adherence to the applicable contract, attracts punitive damages and costs.

The director’s service agreement provides a legal framework for any executive director and should contain details of the following among others:

- The name of the employing company;
- The date of the contract and details of any notice period;
- Full details of the directors’ remuneration, including salary and other benefits;
- Any commission or profit-sharing arrangements;
- Any compensation due for early termination; and
- Any other information regarding possible liability on early termination of the contract.

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4 Section 291 (1) (3) CAMA
5 Section 291 (2) (b)
6 (2010) 6 NWLR (part 1189)
7 Section 271,272 (1) CAMA
These service contracts are intended to ensure that both the company and the director are protected. It is best practice for the Board as a whole to approve the terms of the service contract.

**Conclusion**

The rationale behind retirement by rotation is to ensure that Boards are accountable to their shareholders and would not become self-perpetuating. In practice, the retirement provision can be inconvenient and may not in itself fulfil the original intention. Indeed, most companies by their Articles exclude this provision.

The fact that CAMA does not define an “Executive Director”, or indeed make a distinction between Executive and Non-Executive Directors, leaves room for subjective interpretation. Should Executive Directors be subject to retirement by rotation? We are more inclined to take the view that they should not. An Executive Director occupies a dual status as an Employee of the Company and a Director on the Board. The routine responsibilities of Directors acting in executive capacity as key operational functionaries of a Company, vests upon them positions pivotal to the continued subsistence of companies as going-concerns.

By being subject to retirement by rotation, the status of Executive Directors as employees of a Company is jeopardized, but more importantly, the possible retirement of the Executive Director by members may not serve the company’s best interests. Questions have been raised as to what then becomes the designation of an Executive Director so retired by rotation at an AGM. Should a Finance Director for instance after he retires from being a Director become, Head of Finance? Although some would argue that these titles are purely a matter of nomenclature, the point must be made that the position a Director occupies is one which comes with responsibilities, duties and rights and should not be taken lightly.

As stated earlier many companies have provisions in their Articles excluding only the Managing Director from retirement by rotation. It is advisable for companies to adopt provisions in the Articles which exclude other Executive Directors from retirement by rotation, so that the relationship between the Company and the Director is governed solely by the Director’s service contract or other relevant agreement and determined by either party at their discretion and in accordance with the terms set forth in the agreement.

**Who We Are**

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