

# **The Predicaments of UK Wrongful Trading Liability in Insolvency: Implications for Nigeria and Proposal for a Resilient Approach.**

YUSUF USMAN LIMAN\*, ZURYATI MOHAMED YUSOFF\*\*, ROHANA ABDUL RAHMAN\*\*\*

## **Abstract**

Despite the intentions behind the UK's directors' wrongful trading liability provision, scholars agree that it has fallen short of its compensatory and deterrent objectives. The liability provision suffers from a low enforcement rate due to difficulties initiating claims in court, proof of intent against the director, and the impact of the provision on the directors to seek rescue measures in the insolvency vicinity. The paper adopts the doctrinal research method to show that the formulation and enforcement of wrongful trading in the UK have occasioned risks, stress, uncertainty, and dilemmas among directors, liquidators, courts, and policymakers. The paper argues that the risks, dilemmas, and uncertainty occasioned by wrongful trading liability are comparable to the symptoms and manifestations that resilience seeks to overcome. Because of this, Nigeria should adopt a resilience strategy of adjusting to risks, change, frustration, and dilemmas as a model for adaptation and dealing with the lessons discovered from the UK's wrongful trading liability experiences. The study is beneficial for providing resilient goals, resilient statutory provisions, and resilient enforcement mechanisms for Nigeria to implement towards the efficacy of the transplanted UK wrongful trading liability provided under the Companies and Allied Matters Act (CAMA), 2020, in Nigeria.

KEYWORDS: Resilient approach, wrongful trading, risks, uncertainty, dilemma.

## **I. Introduction**

The extent to which directors should be held personally liable for wrongful trading in an insolvency state has remained contentious and dilemmatic in the United Kingdom (UK). The temporary suspension of personal liability against directors for wrongful trading claims in the corona virus pandemic in the UK has exposed and re-awakens the dilemma in formulating and enforcing wrongful trading.<sup>1</sup> Since its enactment in the UK Insolvency Act, 1986, Licht aptly

---

\*PhD Candidate, School of Law, Universiti Utara Malaysia. (yusufliman5@gmail.com;yusuf\_usman\_limam@gsgg.uum.edu.my)  
\*\* Associate Professor of Law, School of Law, Universiti Utara Malaysia. \*\*\* Associate Professor of Law, School of Law, Universiti Utara Malaysia

describes it as "rules that everybody loves to hate" but still has it on statute books for decades.<sup>2</sup> The wrongful trading provision under Section 214 of the UK Insolvency Act, 1986, which corresponds with section 673(1) of the Nigeria Companies and Allied Matters Act, 2020 (CAMA), provides that company directors will be personally liable for continuing to trade or accumulate more debts in a company when they knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into Liquidation by Insolvency.

Despite the provision's intended compensatory and deterrence aims, its efficacy and use by liquidators are limited. The provision suffers from procedural and practical difficulties in interpreting the elements and initiating claims in courts against erring directors by liquidators.<sup>3</sup> The primary concern facing the UK is the ability of personal liability against directors to discourage them from taking reasonable business risks as insolvency approaches to save the company from collapse due to fear of liability.<sup>4</sup> For these reasons, this paper argues that the insolvency vicinity critical for determining wrongful trading is a period of resilience manifesting in risk, adversity, frustration and misfortune for the directors, liquidators, creditors and policymakers. It is contended that with the transplantation of the wrongful trading liability provision, Nigeria should adopt a resilient approach to confront the lessons learnt from the UK experiences.

---

<sup>1</sup> The Corporate Insolvency & Governance Act, 2020, Section 12 Initial suspension March 1 2020 to Sept 30 2020 Extended further to 26 Nov 2020 to 30 June 2021

<sup>2</sup> Amir Licht, "What's So Wrong with Wrongful Trading- On Suspending Director Liability during the Coronavirus Crisis" University of Oxford, Oxford Business Law Blog 09 June 2020 <https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/whats-so-wrong-wrongful-trading-suspending-director-liability-during> accessed 10 June 2022.

<sup>3</sup> Andrew Keay, "Wrongful Trading: Problems and Proposals" 65(1) *Northern Ireland Legal Quarterly* (2014) 63-79, at 65 DOI <https://doi.org/10.53386/nllq.v65i1.201>

<sup>4</sup> Hamiisi Junior Nsubuga, "A reconsideration of directors' liability for wrongful trading in the United Kingdom and the European Union in the COVID-19 era" INSOL INTERNATIONAL A Collection of Short Papers by INSOL Early Research (2021) 128 – 138, at 130 [insol-era-collection-2021-\(30-nov\)-\(final\).pdf](https://www.insol.org/insol-era-collection-2021-(30-nov)-(final).pdf) accessed 11 June 2022.

The paper is structured as follows. Section 2 undertakes to show the various predicaments of fear, uncertainty and dilemmas facing the director, the liquidator, the court and UK policymakers in determining and enforcing wrongful trading liability. Section 3 explores the relevance of resilience from its aims and features and justifications for its adaptation in wrongful trading liability formulation and enforcement. Section 4 provides practical resilient measures for Nigeria to adopt in formulating and enforcing wrongful trading claims against directors. Lastly, section 5 concludes the paper.

## **II. Challenges of wrongful trading provision**

### **A. The uncertainty and risks facing a director**

The pre-insolvency period more commonly called the 'insolvency vicinity or the twilight zone is a period of financial uncertainty in a company because it is the approaching period where the company begins to exhibit signs of financial distress but is not yet into insolvent Liquidation.<sup>5</sup> It is a uniquely challenging position for a director to manage the company's affairs in the twilight zone due to the heightened risks of default to creditors and the company's potential failure.

The wrongful trading provision exemplifies the uncertainty that comes with compliance with the shift of directors' duties from shareholders to the company's creditors in the vicinity of insolvency.<sup>6</sup> It is a provision that aims to mitigate and disincentive directors' incurring debts when there is no reasonable prospect of avoiding going into Liquidation.<sup>7</sup> The prudent director

---

<sup>5</sup> Andrew Keay, "The Shifting of Directors' Duties in the Vicinity of Insolvency" 24(2) *International Insolvency Review* (2015) 140-164, at 143

<sup>6</sup> Kristin van Zwieten, "Director Liability in Insolvency and Its Vicinity" 38(2) *Oxford Journal of Legal Studies* (2018) 382-409 <https://doi.org/10.1093/ojls/gqy013>

<sup>7</sup> *Ibid*

should change the strategy and focus of the company from shareholders to creditors in the UK in the insolvency vicinity.<sup>8</sup>

The strategy change expected of a director in the twilight zone is a change from a shareholder-focused duty obligation in line with running the company for the owners' interests to a creditor-interest-based duty as the company approaches insolvency.<sup>9</sup> The argument for this shift of duty direction from shareholders to creditors is because, at that time, the debt provided by creditors was more at risk of being residual claimants. In the UK, the duties owed to creditors in insolvency vicinity have been codified in the Companies Act 2006 to reflect those directors are to consider the interests of creditors in the course of their directorial decisions.<sup>10</sup> The duty of directors to consider the claims of creditors owes its genesis to several decisions delivered in Australia, notably in *Kinsela v Russel Pty Ltd (In Liquidation)*.<sup>11</sup> The decision was adopted in the UK in the 1987 decision of the Court of Appeal in *West Mercia Safetywear Ltd v Dodd*.<sup>12</sup>

The shift in focus from shareholders to creditors as insolvency approaches has not been without hitches and dilemmas from directors due to the entrenched position of company law that a company is for shareholder value maximization.<sup>13</sup> Firstly, the extent of the shift and who should enjoy primacy amongst the stakeholders (shareholders or creditors) has not been unanimous across jurisdictions in a comparative study by Gurrea-Martinez.<sup>14</sup> The appointment of the director is by the owners (shareholders), and most obligations are for their benefit under the

---

<sup>8</sup> Ibid

<sup>9</sup> Aurelio Gurrea-Martinez, "Towards an Optimal model for directors' duties in the zone of insolvency: an economic and comparative perspectives" 21(2) *Journal of Corporate Law Studies* (2021) 365-395, at 372

<sup>10</sup> UK Companies Act 2006, Sec 172(1) & 172(3)

<sup>11</sup> (1985) 4 NSWLR 722

<sup>12</sup> [1988]BCLC 250

<sup>13</sup> Arpi Karapetian, "The Impact of Emerging Preventive Restructuring Mechanisms on Directors' Duties to Creditors in the Event of (Pre-) Insolvency in the UK and the Netherlands" 9(2) *European Journal of Comparative Law and Governance* 2022 187-209, at 190

<sup>14</sup> Ibid

UK Companies Act, 2006.<sup>15</sup> With the argued shift from owners to creditors as insolvency approaches, the director faces an adjustment challenge in the way and manner to re-position his duty.<sup>16</sup> Secondly, there are no clear guidelines on how directors should re-position their minds towards fulfilling the shareholder-creditor duty shift.<sup>17</sup> Should priority be given to only the interests of the creditors at the expense of other stakeholders?

Unlike the UK, which has codified the need to consider the interests of creditors in directors' duty formulation and the judicial recognition of the shifting nature of the duty from owner to creditors as insolvency approaches, Nigeria has not codified the consideration of creditors' interests in the CAMA, 2020. There is no equivalent judicial decision similar to *West Mercia Safetywear Ltd v Dodd*. Thus, the director in Nigeria faces the risk and uncertainty of re-adjusting focus from owners to creditors. The lack of a statutory provision or case law direction on the shifting of responsibility in the insolvency vicinity in Nigeria presents an atmosphere of risk of liability in the event of opportunistic behaviours as insolvency approaches.

The second anxiety facing a company director within the insolvency vicinity is the fear of liability which positively or negatively affects behaviour or performance.<sup>18</sup> In a qualitative interview with directors in the UK, the study established that directors primarily fear the repercussion of liability in insolvency because of the signal of incompetence it sends out.<sup>19</sup> However, the directors do not, on a large scale, frown at the role of the courts in reviewing their business decisions.<sup>20</sup> Anderson points out that the dilemma faced in the UK over time is the right

---

15 Robert McCorquodale and Stuart Neely, "Directors duties and human rights impacts: a comparative approach" *Journal of Corporate Law Studies* (2020) 1-36, DOI: [10.1080/14735970.2021.2016147](https://doi.org/10.1080/14735970.2021.2016147)

<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> Andrew Keay et al, (2020) "Reviewing Directors' Business Judgments: Views from The Field" 47 (4) *Journal of Law and Society* (2020) 639-665.

<sup>19</sup> Ibid

<sup>20</sup> Ibid.

balance between the pursuit of malpractice at insolvency and the need to protect responsible risk-taking.<sup>21</sup> Risk-taking is a common dilemma generally faced by directors when directing their companies' affairs.<sup>22</sup> Apart from the anxiety of risk-taking, the fear of failure can make directorship roles unattractive for people due to fear of liability.<sup>23</sup> More disturbing in the mind of the director is the fear of losing the business. Fear of personal liability amongst Independent Directors has reduced directorship roles in high-risk sectors, affecting boards' effectiveness.<sup>24</sup>

The uncertainty directors face leads to the likelihood of failure and affect their psychological well-being.<sup>25</sup> As pointed out by Dias and Teixeira, "Motivation may also take a deep hit with failure, creating a sense of helplessness, thus diminishing individuals' beliefs in their ability to undertake specific tasks successfully in the future and leading to rumination that hinders task performance".<sup>26</sup> Company directors and entrepreneurs in Nigeria undergo a degree of fear and depression when managing their businesses, especially when facing dwindling finances, according to Taye-Faniran and Olowo.<sup>27</sup> In a similar survey on the fear of directors in selected countries in Europe, Asia, North America and the UK, fear of insolvency liability was always at the top rank for company directors<sup>28</sup>. The importance of improving standards for judging

---

<sup>21</sup> Helen Anderson , "Directors' Personal Liability to Creditors: Theory versus Tradition" 8(2) *Deakin Law Review* (2003) 209

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> S Lakshmi Naaraayanan and Kasper Meisner Nielsen, "Does personal liability deter individuals from serving as independent directors?" 140(2) *Journal of Financial Economics* (2021) 621-643

<sup>25</sup> UCbasaran Deniz et al, "Life After Business Failure: The Process and Consequences of Business Failure for Entrepreneurs", 39(1) *Journal of Management* (January 2013) 163–202, at 171

<sup>26</sup> Artur Dias and Aurora A. C Teixeira, "The anatomy of business failure: A qualitative account of its implications for future business success", 26 (1) *European Journal of Management and Business Economics*, (2017) 2-20.

<sup>27</sup> Adebowale F Taye-Faniran and Akinseye U Olowo, "The fear of business failure and Government's role in supporting entrepreneurs in Nigeria" 24 (2) *Ife Psychologia: An International Journal* (2016), <https://hdl.handle.net/10520/EJC-59eb73596>, accessed 10 June 2022

<sup>28</sup> Allen Overy LLP & Willis Towers Watson, "6<sup>th</sup> Directors Liability: Personal Exposure to Global Risk" [file:///C:/Users/Hp%20pc/Downloads/6th-directors-liability-survey-allen-and-overy-report-2018%20\(2\).pdf](file:///C:/Users/Hp%20pc/Downloads/6th-directors-liability-survey-allen-and-overy-report-2018%20(2).pdf), accessed 05 June 2022

directors' actions in insolvency cannot be over-emphasized because they suffer from the likelihood of hindsight bias from insolvency practitioners (mainly lawyers) and judges.<sup>29</sup>

## B. The frustration of the liquidator and the dilemma of the court

The liquidator appointed to wind up the insolvent company's affairs is responsible for bringing wrongful trading claims against directors during his duty.<sup>30</sup> One of the elements necessary to establish blame against a director as insolvency approaches is the problematic determination of the 'point in time' where the director knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent Liquidation.<sup>31</sup> Determining the 'point in time' is crucial because it is a mechanism for assessing the company's financial health.<sup>32</sup> For this paper, the insolvency tests are the frequently used assessments to determine the 'point of no prospect' in the company. However, this paper aims not to provide a comprehensive analysis of insolvency tests. It is to show the judicial tension experienced by the courts and the practical difficulty faced by the liquidator and the company director in establishing the point-in-time element of wrongful trading.

The courts have been cautious in guiding with specific precision on assessing the company's financial health.<sup>33</sup> The primary criteria for determining insolvency, which is critical for a precise determination of the point-in-time requirement of wrongful trading liability, are the Cash Flow and Balance Sheet tests provided by the UK Insolvency Act, 1986 and Nigeria CAMA, 2020.

---

<sup>29</sup> Neik Strohmaier et al, "Hindsight bias and outcome bias in judging directors' liability and the role of free will beliefs" 51 (3) *Journal of Applied Social Psychology* (09 Nov 2020) 141-158, at 145

<sup>30</sup> UK Insolvency Act, 1986, Section 214

<sup>31</sup> Williams, Richard. "What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?" 78(1) *The Modern Law Review*, (2015): 55-8

<sup>32</sup> Ibid

<sup>33</sup> D Konstantinov, "WRONGFUL TRADING: COMPARATIVE APPROACH (ENGLAND AND WALES, RUSSIA AND THE USA)", 2(1) *Brics Law Journal* (2015) <https://doi.org/10.21684/2412-2343-2015-2-1-26-37>

Udofia points out that determining the point in time is an exercise that overlaps with matters within the Accounting, Management and Economics sphere. In reality, "a commercially insolvent company may be technically solvent".<sup>34</sup>

The court looks at various factors in deciding the point in time, adopting both strict and liberal interpretations.<sup>35</sup> The liquidator is required to nominate a fixed time for the courts' assessment.<sup>36</sup> In *Re Sherborne Associates Ltd*, it was the reasoning that the liquidator had to identify an exact particular date on which the directors ought to have been aware that the company had no reasonable prospect of avoiding insolvent Liquidation.<sup>37</sup> Similarly, the court adopted a strict posture regarding the date the liquidator chooses in *Re Continental Assurance Co of London*.<sup>38</sup> However, the court was generous in *Re Kudos Business Solutions* by allowing the liquidator even to select alternative dates to prove the point in time and make a director liable for wrongful trading.<sup>39</sup> The unique burden of providing clarifications on the balance sheet test of insolvency in the UK was in the decision of *BNY Corporate Trustee Services Ltd & Ors v Eurosail*.<sup>40</sup>

One particular lesson for Nigeria is the courts' active role in fine-tuning the 'point-in-time' element in the wrongful trading provision. The sophistication, skills and expertise needed for such judicial exercise are critical and similar to the roles played by the UK courts. A timely, efficient and robust judicial system is one of the main elements required for the robust

---

<sup>34</sup> Kubi Udofia, "Establishing Corporate Insolvency: The Balance Sheet Insolvency Test" University of Oxford, Faculty of Law Blog 31 July 2019 <https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/establishing-corporate-insolvency-balance-sheet-insolvency-test>, accessed 01 June 2022

<sup>35</sup> A. Keay & P. Walton, *Insolvency Law: Corporate and Personal* 3<sup>rd</sup> edition Jordans (2012) 655.

<sup>36</sup> Andrew Keay, 'Wrongful Trading and the point of Liability' 19(9) *Insolvency Intelligence* (2006) 132-134

<sup>37</sup> [1995] BCC 40.

<sup>38</sup> [2001] BPIR 733.

<sup>39</sup> [2011] EWHC 1436. See also *Roberts v Frohlich* [2011] EWHC 257.

<sup>40</sup> UK 2007- 3BL plc [2013] UKSC 28.

enforcement of insolvency regimes across countries.<sup>41</sup> Nigeria's judicial system is currently slow, and there is a shortage of expertise in Insolvency matters.<sup>42</sup> As a result, the judges will have to build capacity in handling wrongful trading claims when initiated by liquidators. Therefore, the process and act of settling wrongful trading claims by the judges of the Federal High Court of Nigeria, which is the court with the jurisdiction over matters dealing with the 'point in time' element, will require the ability to resolve the intricacies surrounding the determination of the 'point in time' element.

### C. The dilemma of choosing between punishment and corporate rescue

During the Cork Committee deliberations on the reform of UK insolvency law leading to the passing of the Insolvency Act, 1986, one major dilemma surfaced: how to strike a balance between the survival of businesses and the imposition of personal liability against the director for wrongful trading.<sup>43</sup> The dilemma in finding an equilibrium between corporate rescue and the need to impose personal liability for wrongful trading further stems from the need to protect creditors as insolvency approaches.

The need to protect creditors' interests is justifiable due to the compensatory aim of the wrongful trading liability provision to recoup losses incurred by the continuous trading by directors leading to insolvent Liquidation.<sup>44</sup> On the other hand, the deterrence aim of the provision seeks to make irresponsible or reckless actions unattractive for directors at that period.<sup>45</sup> Hence, sustenance of confidence with the creditors is necessary due to their role in

---

<sup>41</sup> The World Bank, "Principles for Effective Insolvency And Creditor/Debtor Regimes" (2016) 1-31, at 8. World Bank - Principles of Insolvency Regimes 2016.pdf

<sup>42</sup> Ebenezer T Yebisi and Taiye J Omidoyin, "Corporate Rescue Law to the Rescue of Businesses in Trauma in Nigeria" 78 *Journal of Law, Policy and Globalization* (2018) 44- 55

<sup>43</sup> Hamiisi Junior Ndubuga, "Reinvigorating Corporate Rescue in developing Economies- a Ugandan Perspective 34 (4) *Insolvency Intelligence* (2021) 95-102.

<sup>44</sup> Richard Schulte, "Wrongful Trading: An Impotent Remedy?" 4(1) *Journal of Financial Crime* (1996) 38-46

<sup>45</sup> Ibid

providing finances to businesses critical to the survival of companies.<sup>46</sup> Even for small enterprises, bank lending constitutes the most common source of external business funding.<sup>47</sup> Thus, the tension is the double edge posture of the provision facing a director between the need to protect the funds of creditors from being diminished by discontinuing trading and the expectation of seeking the intervention of rescue mechanisms to keep the company afloat.

Tribe noted that in the deliberations before the final Cork report, Graham and Goldman, who were members of the Cork committee, expressed the dilemma the committee faced in formulating an objective test for Wrongful trading.<sup>48</sup> However, the committee only recommended an objective test during the final report. The committee adopted a subjective test during the passage of the UK Insolvency Act 1986. The objective test is the general knowledge and skill expected of a director carrying out the same functions. In contrast, the subjective test is a particular director's general knowledge, skill and experience.<sup>49</sup> Interestingly, the fraudulent trading liability provision, which had existed alone before the introduction of wrongful trading, also suffered from a similar challenge of establishing the criminal intent of directors.<sup>50</sup> The standard of proof required to prove the allegation of 'intent to defraud and dishonest intent' have made the enforcement of the liability provision ineffective.

In a clear demonstration of the dilemma faced between holding directors liable for wrongful trading and rescue, the UK temporarily suspended the provision during the Corona-

---

<sup>46</sup> Imran O Smith, "The United Nations Sustainable Development Goals, Financial Inclusion Agenda and the Efficacy of Security Interest over Movable Assets: The Case of Micro, Small and Medium Enterprises in Nigeria" 30 (2) *African Journal of International and Comparative Law* (2022) 211- 228

<sup>47</sup> Ibid.

<sup>48</sup> John Tribe, "Policy Subversion" in Corporate Insolvency: Political Science, Marxism and the role of Power Interests during the passage of Insolvency Legislation" 32 (2) *Insolvency Intelligence* (2019) 59-66

<sup>49</sup> UK Insolvency Act, 1986, Sec 214(4)(a)(b)

<sup>50</sup> Andrew Keay, "Fraudulent Trading: The Intent to Defraud Element" 35 (2) *Common Law World Review*. (2006) 121-134. doi:[10.1350/clwr.2006.35.2.121](https://doi.org/10.1350/clwr.2006.35.2.121)

Virus pandemic.<sup>51</sup> The UK Corporate Insolvency and Governance Act, 2020 (CIGA, 2020) temporarily suspended the threat of personal liability for directors of companies (except those in the financial services sector) arising from wrongful trading in two instances. The objective of the temporary suspension was to give directors room to trade continuously without the fear of personal liability for any worsening of the company's financial position or its creditors.<sup>52</sup> Another reason was for businesses to have further access to credit, including the UK Coronavirus Business Interruption Loan Scheme.<sup>53</sup>

This paper believes that the suspension of a statutory civil liability through the passage of another statute shows the corporate rescue activism stance of the UK Government. However, temporary suspension of statutory provisions is rare in practice. Instead, the initiation of legislative amendments periodically addresses concerns. The action has generated mixed feelings amongst scholars. Vaccari argued that the suspension is likely to diminish the deterrence aim of the provision, thus undermining the rule of law.<sup>54</sup> The suspension provision under CIGA 2020 suffers from poor drafting and inconsistency, providing a cosmetic approach without a holistic solution to the uncertainty and misgivings towards wrongful trading.<sup>55</sup>

From the preceding paragraphs, the lesson to be learnt by Nigeria is the fact that wrongful trading formulation will have an impact on how directors engage in corporate rescue measures. An excessive over-regulation of trading in the insolvency vicinity tends to affect the reforms

---

<sup>51</sup> UK Corporate Insolvency and Governance Act, 2020

<sup>52</sup> Ibid , Section 12(1)

<sup>53</sup> See the loan scheme, <https://www.gov.uk/guidance/apply-for-the-coronavirus-business-interruption-loan-scheme>

<sup>54</sup> Eugenio Vaccari, "Changes to UK Insolvency Rules in the Wake of Covid-19: A Much-Needed Help for Businesses or an Unjustified Harm to the Rule of Law?" In: Carla Fertsman and Andrew Fagan, (eds.) *Covid-19, Law and Human Rights: Essex Dialogues*. A Project of the School of Law and Human Rights Centre, University of Essex (2020), 127 - 136. ISBN 978-1-5272-6632-2

<sup>55</sup> Ibid

undertaken by Nigeria in the CAMA 2020 towards shifting from a liquidation culture to rescuing viable companies.

### **III. Relevance of Resilience to Wrongful trading liability**

Resilience has become a concept that has continued to make inroads into diverse fields of study beyond its traditional roots and emergence in psychology and ecology. It is now commonly adopted and applied in the health sciences, engineering, communication, sociology and political science.<sup>56</sup> Its application has, however, been slower in the discipline of law. Available studies on resilience are mainly in environmental law and clinical legal studies.<sup>57</sup> Works on resilience in the field of insolvency law are also scarce. It is in this regard that this section extends the frontiers of resilience to directors' wrongful trading liability.

The quest to give a universally acceptable definition of 'Resilience' has remained elusive due to the varied definitions propounded by various disciplines. Despite the seeming variations in the description of resilience in different fields, there is a convergence that resilience refers to responding to adversity, stress and risks through adaptation and flexibility without collapse and distortions.<sup>58</sup>

Therefore, resilience as a strategy serves as a helpful model in addressing the challenges discussed in the previous section in formulating and enforcing wrong trading liability. The risks of misfortune and fear of personal liability by directors, the stress of establishing the standard of

---

<sup>56</sup> Stefan- Gobling-Reisemann, Hans Dieter Hellige & Pablo Thier, "The Resilience Concept: From its historical roots to theoretical framework for critical infrastructure Design" (2018) Universitat Bremen 1- 81, [https://www.unibremen.de/fileadmin/user\\_upload/sites/artec/Publikationen/artec\\_Paper/217\\_paper.pdf](https://www.unibremen.de/fileadmin/user_upload/sites/artec/Publikationen/artec_Paper/217_paper.pdf), accessed 04 June 2022

<sup>57</sup> J.B Ruhl, "General Design Principles Resilience and Adaptive Capacity in Legal System: Application to Climate Change Adaptation Law" 89 (5) *North Carolina Law Review* 9 (2011) 89(5) 1373- 1401; M. Mark Heckin, "Implementing Psychological Resilience Training in Law Incubators" 11 (2) *Journal of Experimental Learning* (2015)

<sup>58</sup> Steven M Southwick et al, "Resilience definitions, theory and Challenges: Inter-disciplinary Perspectives" 5 (1) *European Journal of Psychotraumatology* (2014) 25338

proof by the court and liquidator and the dilemma faced by policy maker on the right balance between punishment and rescue of companies show the enormous risk and uncertainty experienced in the UK. In considering these tensions, there is justification for adopting a resilient approach in Nigeria.

The models and attributes of resilience are relevant to formulating an effective wrongful trading liability provision. The relevance of the models and characteristics of resilience is in the area of adaptation as a model.<sup>59</sup> The three models of resilience are the compensatory model, challenge model and protective & vulnerability model.<sup>60</sup> On the other hand, the specific attributes of a resilient legal system are reliability, efficiency, scalability, modularity and evolvability.<sup>61</sup>

The relationship between the models and the attributes can be linear or complementary. The compensatory model compensates against risks faced by the promotion of an independent factor.<sup>62</sup> The compensation is to restore the loss suffered due to the risk.<sup>63</sup> In the case of wrongful trading, one of the main aims of the wrongful trading liability is to provide a regime that enables directors to contribute to creditors for the loss suffered by their decisions in insolvency. Hence, the compensatory model of resilience justifies interrogating the compensatory goal of wrongful trading. As stated in the previous section, the wrongful trading liability regime has not provided adequate compensation to creditors.

---

<sup>59</sup> J. B. Ruhl, Barbara Cosens, and Niko Soininen, *Resilience of Legal Systems In: Multi systemic Resilience*. (ed) Michael Ungar, Oxford University Press (2021) DOI: 10.1093/oso/9780190095888.003.002; Janet Ladesma, "Conceptual Frameworks and Research Models on Resilience in Leadership" *SAGE* July- September 2014 1-8; S Fergus and MA Zimmerman, "Adolescent resilience: "A framework for understanding healthy development in the face of risk" *26 Annual Review Public Health* (2005) 399-419.

<sup>60</sup> Ibid

<sup>61</sup> Ibid

<sup>62</sup> Janet Ladesma, "Conceptual Frameworks and Research Models on Resilience in Leadership" *SAGE* (July- September 2014) 1-8

<sup>63</sup> Ibid

The challenge model provides resilience factors that can incentivize the response, actions or behaviour when faced with adversity, uncertainty or misfortune.<sup>64</sup> In this model, exposure to the risk factor(s) can lead to either positive or negative outcomes, but it strengthens an individual's or system's capacity. Ladesma and Zimmerman posited that in the challenge model, inoculation and steeling are mechanisms frequently used.<sup>65</sup> Inoculation is a deliberate ingestion of a weaker risk factor in an individual or system to prepare them for a safe similar future experience.<sup>66</sup> It is akin to the medical process of vaccination or immunization to protect human beings from diseases. For example, the polio vaccination administered to children or, most recently, the coronavirus vaccination. Steeling, on the other hand, involves a non-intrusion process of mentally and psychologically preparing the mind to anticipate risks and prepare for how to overcome them.<sup>67</sup> Accordingly, the dilemma faced by the director, governments and court in formulating and enforcing wrongful trading in the UK fits the challenge resilience model. For the company director, the likelihood of insolvency risks and the need to trade cautiously with personal liability risks is a challenging example. It is also challenging for the courts to provide decisions that objectively predict the director's intention in an action of wrongful trading claims. Lastly, governments face the challenge of reconsidering the deterrence aim of the law and the need to strike a balance between saving companies for economic growth.

The protective and vulnerability model provides protective factors to prevent or cushion the effect of risks, adversity, uncertainty or misfortune.<sup>68</sup> According to Ozcan and Bulus, the

---

<sup>64</sup> S Fergus and MA Zimmerman, "Adolescent resilience : A framework for understanding healthy development in the face of risk" 26 *Annual Review Public Health* (2005) 399-419

<sup>65</sup> Ibid

<sup>66</sup> Archana Ashokan , Meenalochani Sivasubramanian and Rupshi Mitra ,” Seeding Stress Resilience through Inoculation” 4928081 *Neural Plasticity*, (2016) 1- 6, at 1.

<sup>67</sup> Jan Hölte et al, “Steeling in Later Life: Exploring Age-Specific Effects of Varying Levels of Stress on Psychological Resilience.” 92 (2) *The International Journal of Aging and Human Development* (2021) 170–96

<sup>68</sup> MA Zimmerman, “Resiliency theory: a strengths-based approach to research and practice for adolescent health” 40 (4) *Health Education Behavior* (2013) 381 doi: 10.1177/1090198113493782.

protective factors generally form stabilizing or mediating factors to moderate or eliminate exposure to the risks.<sup>69</sup> Protective factors help to neutralize the adverse effects of risk and enable positive adjustment.<sup>70</sup> In the context of wrongful trading, the determination of the liability rests on the decision taken by the director as insolvency approaches. The period in time is difficult. The director exhibits fear and apprehension due to the risk of personal liability. The question is thus whether the UK regime provides adequate resilient protections to the director to weather the storm. In this regard, the defence accorded to the director to prove that he took every step to minimize loss to creditors whilst in operation is problematic in practice. The plea of 'taking every step' is difficult in the UK due to the high threshold needed to plead a specific date or time.<sup>71</sup> Generally, Tiba argued that wrongful trading without an adequate defence for directors "make timid managers out of good managers and do not help to catch the crooks..."<sup>72</sup> In response to the deficient reason for directors to engage in risk-taking as contained in the UK provision, it propelled Australia to formulate the Safe harbour defence protection.<sup>73</sup>

The reliability and efficiency attributes are benchmarks for evaluating the principles and processes of Insolvency Law by Finch.<sup>74</sup> Mokal has criticized efficiency as lacking depth and focusing on the transaction cost type of efficiency.<sup>75</sup> However, reliability and efficiency offer legislators valuable attributes for a resilient wrongful trading liability provision in insolvency. The reliability and efficiency of wrongful trading also determine the extent of enforcement

---

<sup>69</sup> Bahadır Özcan and Metin Bulus, "Protective factors associated with academic resilience of adolescents in individualist and collectivist cultures: Evidence from PISA 2018 large scale assessment" 41 *Curr Psychol* (2022) 1740 – 1756

<sup>70</sup> Paulo César Dias and Irene Cadime, "Protective factors and resilience in adolescents: The mediating role of self-regulation" 23 (1) *Psicología Educativa* (2017) 37-43, <https://doi.org/10.1016/j.pse.2016.09.003>

<sup>71</sup> Ralls Builders Limited (In Liquidation) (2016) EWHC 243 (Ch)

<sup>72</sup> Firew Tiba, "Safe harbour carve-out for directors for insolvent trading liability in Australia and its implications" 53 (1) *University of San Francisco law review* (2019) 43-76.

<sup>73</sup> Ibid

<sup>74</sup> Venessa Finch, *Corporate Insolvency Law* Cambridge University Press (2009) 740

<sup>75</sup> Rizwaan Jameel Mokal, "On Fairness and Efficiency" 63 (3) *Modern Law Review* (2003) 452-467

against directors by liquidators. A less stressful and chaotic use of wrongful trading will thus increase its reliability as a tool for holding directors accountable.

Modularity is the ability of the individual unit of a system to function correctly and respond to structured component re-arrangements. At the same time, scalability refers to the ability of a system to respond to changes in size, complexity and variables.<sup>76</sup> Although modularity and scalability are adaptable attributes primarily used in computer sciences, they offer helpful, flexible insights in the formulation of the various elements of wrongful trading liability provisions, which should be able to work coherently.<sup>77</sup> The need for proper consideration of the contexts and circumstances peculiar to a jurisdiction is the subject matter of scalability. On the other hand, evolvability is the ability of a system to adapt to evolutionary change.<sup>78</sup> With its frequent use in the biological sciences and emerging areas, evolvability is relevant in wrongful trading liability formulation. It provides a resilient approach to deal with the dynamic nature of public goals and the emergence of incidences that could affect its operation. The corona-pandemic is a classic case of how an emergency and a nation's national interest could impact the regime's enforcement.

One of the challenges of resilience in law discipline has been the over-concentration of reliance on an individual's traits and ability to overcome stress.<sup>79</sup> The field of law deals with legal systems or regulatory frameworks, as in the case of wrongful trading. In wrongful trading liability, the liability formulation extends to the enforcement mechanisms (courts), government and legislators. However, wrongful trading formulation fundamentally rests on the action or

---

<sup>76</sup> B. Ruhl, Barbara Cosens, and Niko Soininen, *Resilience of Legal Systems In: Multi systemic Resilience* (ed) Michael Ungar, Oxford University Press (2021)

<sup>77</sup>It has also been applied in Contracts Law. See Henry E Smith, "Modularity in Contracts: Boilerplate and Information Flow" 104 *Michigan Law Review* (2006) 1175

<sup>78</sup>Joshua L Payne and Andreas Wagner, "The causes of evolvability and their evolution" 20 *Nat Rev Genet* (2019) 24–38, <https://doi.org/10.1038/s41576-018-0069-z>;

<sup>79</sup> 'B. Ruhl, supra note 76'

behaviour of the individual company director (s) as insolvency approaches. The central element of determination of liability is continuing to trade when the director knew or ought to know that there was no reasonable prospect of the company avoiding going into insolvent Liquidation. Thus, an analysis of wrongful trading in this paper offers a healthy balance between the individual director and the relationship with the legal system.

#### **IV. Implementing a Resilient Approach to Wrongful Trading in Nigeria**

The argument is that Nigeria benefits from resilience in the form of adaptation or modelling towards having an adequate wrongful trading liability provided under the CAMA, 2020. Based on the compensatory and punitive aims of wrongful trading, this paper argues that wrongful trading liability should have adaptive, resilient goals, resilient statutory provisions, and adaptive, resilient enforcement mechanisms.

##### **A. Adaptive Resilient goals of Wrongful Trading**

Formulating wrongful trading should provide for the goals it seeks to achieve. Is it to serve as a punitive measure, a compensation regime for creditors or a mechanism for entrenching corporate rescue? Therefore, Nigeria has to adopt the resilient feature of evolvability, which incorporates the challenge, compensatory and protective models of resilience.

In enacting the CAMA, 2020 by the National Assembly of Nigeria, the legislature should coherently insert the provision's intent under section 673(1). However, as pointed out by Dickerson, drawing inspiration from the much earlier work of Radin in 1930, determining the legislature's intent during law-making is arduous and unpractical.<sup>80</sup> It is even more difficult

---

<sup>80</sup> Reed Dickerson, "Statutory Interpretation: A Peek into the Mind and Will of a Legislature" 50 (2) *Indiana Law Journal* (1975) Article 2, at 5.

because of the conflicting nature of the purpose statement of legislation and the specific intention of a particular provision. When this conflict arises, the judiciary engages in judicial law-making.

The reforms in the CAMA 2020 aim to improve Nigeria's business climate.<sup>81</sup> The Wrongful trading liability provision is a tool for creditor protection and improving Nigeria's debt recovery problem.<sup>82</sup> In the deliberations leading to the passage of the CAMA, 2020, the legislation's goal was to transplant the UK provisions to improve the rescue of businesses. Hence, it is deducible that the aim of wrongful trading serving as a punitive mechanism was not a priority.

Therefore, the Nigerian legislature must proactively tackle any confusion likely to arise in implementing the liability provision similar to the UK measure. The National Assembly must engage in legislative promptness, flexibility and activism regarding legislative actions to the provision. The suspension, amendment or repeal of the liability provision is a step the National Assembly can activate once it aligns with public goals, considerations and difficulties of the time.

In particular, the Nigerian legislature will have to build capacity and public trust in engaging in public goals and matters relating to wrongful trading as they evolve. Generally, the National Assembly suffers from legislative ineffectiveness.<sup>83</sup> The legislature is seen as 'self-serving' and not expeditious in the law-making process.<sup>84</sup> Hence, the need for legislative promptness cannot

---

<sup>81</sup> D. E. Ufua, D.E., O. J. Olujobi, and M.E Ogbari, "Operations of small and medium enterprises and the legal system in Nigeria" 7 (94) *Humanit Soc Sci Commun* (2020) <https://doi.org/10.1057/s41599-020-00583-y>

<sup>82</sup> Friday Okafor Onamson, *Law and Creditor Protection in Nigeria Malthouse (2017) PART IV*

<sup>83</sup> A. R Kare, "Evaluating the Nigerian National Assembly's Lawmaking Output and the Implications for Legislative Effectiveness" In F.A Aremu, and A.R Bakare (eds) *Two Decades of Legislative Politics and Governance in Nigeria's National Assembly*. Palgrave Macmillan, Singapore (2021) [https://doi.org/10.1007/978-981-33-4455-6\\_6](https://doi.org/10.1007/978-981-33-4455-6_6)

<sup>84</sup> Ibid

be over-emphasized due to the impact of the liability regime on businesses which affects the socio-economic welfare of Nigeria.

#### B. Adaptive Resilient elements of Wrongful Trading

A predictable legal interpretation of the elements of wrongful trading is necessary to enhance the reliability and modularity of the liability regime to increase efficiency. As noted earlier, understanding the point in time and the director's intention are part of the reasons for the lack of wrongful trading claims in court. The resilient attributes of reliability and modularity are thus necessary for Nigeria to consider in its approach.

Modularity in the case of wrongful trading is vital in the process of proof before the court because all the essential ingredients of the infraction claim must be established in court on the balance of probabilities. The Nigerian Court of Appeal in *Omagbemi v FRN*<sup>85</sup> highlighted the difference between the burden of proof as a matter of law and evidential proof. The burden of evidential proof rests on the successful pleading of the elements needed to establish a claim, as aptly put by Gabriel:<sup>86</sup>

"Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the acid test applied when coming to a decision in a particular case... the court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him".

Therefore, a successful wrongful liability claim by a liquidator in Nigeria would depend on the careful consideration of the construction of the wrongful trading liability provision under CAMA to be in tune with the resilient feature of modularity. The modular approach should

---

<sup>85</sup> (2021) LCN/15515/ CA

<sup>86</sup> James Gabriel, Burden of Proof and Standard of Proof in Civil Litigation'' 25 *Singapore Academy Law Journal* (2013) 130

provide guidance and clarity in the form of sub-sections in understanding the point in time and the intent of the director to determine liability. In this regard, the National Assembly must be prepared to reform the provision to give it reliability and modularity when the problem of interpretation of the wording becomes problematic for both the liquidator and company directors.

On the flip side, the expertise of the Federal High Court of Nigeria (which is responsible for Insolvency matters, amongst others) helps interpret the wording of the provision as we have seen in UK courts. Despite the sophistication of the UK courts in handling insolvency matters, the courts still grapple with the challenge of providing clarity to the wrongful trading provision. The judges handling insolvency matters are specialists in the insolvency and companies court headed by the Chief Insolvency and Companies Court Judge, unlike in Nigeria, where the judges are non-specialists.<sup>87</sup> As emphasized by Idigbe, the Nigerian courts should exercise their discretion in providing sound and reasonable interpretations of insolvency matters that are complicated and unclear.<sup>88</sup> Thus, the modularity and reliability traits to be exhibited by the Federal High Court judges are in handling potential wrongful trading claims actions.

### C. Adaptive Resilient Enforcement

A resilient enforcement regime of wrongful trading against erring directors should have the ability to be scalable based on the peculiarities of the company, director and other public necessities. The challenge of funding wrongful trading claims by liquidators, especially in small companies, is a disincentive for liquidators. The scarcity of funds and the dilemma of the success of the claims discourage the pursuit of claims. In addition, the pervasive risks inherent in

---

<sup>87</sup> See the qualifications of the UK Insolvency & Companies Court Judges, <https://www.judiciary.uk/subject/insolvencyandcompaniescourtsjudges/>

<sup>88</sup> Anthony Idigbe, "Driving business Recovery: The Role of Courts" (2011) Lexology <https://www.lexology.com/commentary/insolvency-restructuring/nigeria/punuka-attorneys-solicitors/driving-business-recovery-the-role-of-the-courts>, accessed 11 June 2022

enforcing personal liability on directors, as we have seen during the coronavirus pandemic, suggest that the liability regime should have protective resilient features for directors.

The context within which scalability becomes practical in Nigeria is because most businesses are small-scale, and the culture of directors' liability actions is undeveloped. Hence, the likelihood of liquidators facing the challenge of funding potential wrongful trading claims in Nigeria is high, similar to their counterparts in the UK. Therefore, scalability as a resilient feature that accommodates a change in size, context, or scale is paramount to improving the liability provision's efficacy.

The dilemma and enforcement difficulties in the UK justify for Nigeria to contextualize the legal transplant of the wrongful trading provision into the CAMA, 2020. As pointed out by Ogbonnaya and Iteshi, "It is not enough to import a law simply because it has worked miracles in other places. It is better to test the law by comparing it with the community it is supposed to regulate their affairs".<sup>89</sup> In addition, Mooney argued that countries should not get lost in transplanting insolvency regimes and model laws formulated by International bodies like the UNCITRAL and World Bank without considering the local contexts of their jurisdictions.<sup>90</sup> Hence, the earliest position of scholars championed by Watson in 1974 is that the laws of a society develop from borrowing from other cultures and not from its experiences and cannot stand the scrutiny of scalability.<sup>91</sup> There is a need for Nigeria to reconsider the benefits and hazards of transplanting wrongful trading under the CAMA 2020.<sup>92</sup> The critical consideration is

---

<sup>89</sup> John O Ogbonnaya and V Chioma Iteshi, "The Jurisprudential Issues Arising from Legal Transplant: An Appraisal" 50 (1) *Journal of Law, Policy and Globalization* (2016)

<sup>90</sup> Charles W Mooney, "Lost in Transplantation: Modern Principles of Secured Transactions Law as Legal Transplants" in *Secured Transactions Law in Asia: Principles, Perspectives and Reform* (eds) Louise Gullifer & Dora Neo (2020) 20 -30, [https://scholarship.law.upenn.edu/faculty\\_scholarship/2174](https://scholarship.law.upenn.edu/faculty_scholarship/2174)

<sup>91</sup> Sital Kalantry, "Reverse Legal Transplants" 99 *North Carolina Law Review* 49 (2021)

<sup>92</sup> Helen Xanthaki, "Legal Transplants in Legislation: Defusing the Trap." 57 (3) *The International and Comparative Law Quarterly* 57 (2008): 659–73.

to question the utility of copying the UK version of wrongful trading liability in Nigeria despite its ineffectiveness in the UK.

Correspondingly, the inherent risks and fear of personal liability faced by company directors, as argued by Mba, justifies the need for Nigeria to formulate adequate resilient protections for directors' decisions in the insolvency vicinity.<sup>93</sup> The reactive step in temporarily suspending personal liability during the coronavirus pandemic in the UK is a lesson for Nigeria on the inadequacy of the liability regime to incorporate a protective resilient model. Beyond the general standard of skill of a diligent director contained in Section 673(4) of CAMA, 2020, which has proved to be problematic in interpretation, there is the need for more protections that can serve as defences to directors' actions at Insolvency vicinity or serve as a standard of judicial review in court.

Unlike the Australian model, the defence available to a director in a wrongful trading claim in the UK is not elaborate. In the Australian Corporations Act 2001, the Safe Harbour provisions serve as a defence for directors against a claim of wrongful trading if they show that they have taken one or more courses of actions which is reasonably likely to lead to a better outcome for the company.<sup>94</sup> In this circumstance, the standard of proof expected of a director in Australia is not more than a 50% chance of a spectacular result but a better outcome that is fair and worth taking.<sup>95</sup> Therefore, it is noteworthy for Nigeria to adopt a similar protective model to alleviate directors' fears, which can improve the efficacy of the liability regime.

---

<sup>93</sup> Sanford Mba, "Preventive Debt Restructuring and the Nigerian Draft Insolvency Legislation: Lessons from a Comparative Perspectives" 28 (1) *African Journal of International and Comparative Law* (2020), 66-84, at 69

<sup>94</sup> Australian Corporations Act, 2001, Section 588GA

<sup>95</sup> Firew Kebede Tiba, "Safe Harbor Carve-Out for Directors for Insolvent Trading Liability in Australia and Its Implications" 53 (1) *University of San Francisco Law Review* (2019) 43

## V. Conclusion

Resilient models and features have intense lessons that can serve as a model and provide a valuable framework for adaptation in formulating wrongful trading liability, which happens during a period of risks and uncertainties. The paper has examined the dilemmatic experience of the UK in the form of risks, fears, misfortunes and tensions experienced by company directors, courts and policymakers due to the wording of the wrongful trading provision under Section 214 of the UK Insolvency Act, 1986. The paper argued that Nigeria could overcome some of the difficulties experienced in the UK by adopting resilient goals, resilient provisions and resilient enforcement measures to formulate an effective liability. The unique nature of wrongful trading requires the assimilation of resilience features of reliability, evolvability, scalability and modularity in the overall legal framework value chain of the liability provision.

However, adopting a resilient approach in the wrongful trading formulation and enforcement in Nigeria cannot be used to "disguise or mask real structural problems".<sup>96</sup> A resilient wrongful trading liability regime can only work effectively in a legal system environment without daunting challenges. More importantly, it is imperative for policymakers in Nigeria to consider the local contexts of Nigeria in the course of legislative interventions in the CAMA due to its strategic economic importance. A good law without the necessary shock absorbers can have adverse effects that can impact its efficacy.

---

<sup>96</sup> Hamideh Mahdiani & Michael Ungar, "The Dark Side of Resilience" 2 *Adversity & Resilience Science* (2021) 147-155.

## FOOTNOTES

1. The Corporate Insolvency & Governance Act, 2020, Section 12 Initial suspension March 1 2020 to Sept 30 2020 Extended further to 26 Nov 2020 to 30 June 2021
2. Amir Licht, “What’s So Wrong with Wrongful Trading- On Suspending Director Liability during the Coronavirus Crisis” University of Oxford, Oxford Business Law Blog 09 June 2020 <https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/whats-so-wrong-wrongful-trading-suspending-director-liability-during> accessed 10 June 2022.
3. Andrew Keay, “Wrongful Trading: Problems and Proposals” 65(1) *Northern Ireland Legal Quarterly* (2014) 63-79, at 65 DOI <https://doi.org/10.53386/nlq.v65i1.201>
4. Hamiisi Junior Nsubuga, “A reconsideration of directors’ liability for wrongful trading in the United Kingdom and the European Union in the COVID-19 era” *INSOL INTERNATIONAL A Collection of Short Papers by INSOL Early Research* (2021) 128 – 138, at 130 [insol-era-collection-2021-\(30-nov\)-\(final\).pdf](https://www.insol.org/insol-era-collection-2021-(30-nov)-(final).pdf) accessed 11 June 2022.
5. Andrew Keay, “The Shifting of Directors' Duties in the Vicinity of Insolvency” 24(2) *International Insolvency Review* (2015) 140-164, at 143
6. Kristin van Zwieten, “Director Liability in Insolvency and Its Vicinity” 38(2) *Oxford Journal of Legal Studies* (2018) 382–409 <https://doi.org/10.1093/ojls/gqy013>
7. Ibid
8. Ibid
9. Aurelio Gurrea-Martinez, “ Towards an Optimal model for directors’ duties in the zone of insolvency: an economic and comparative perspectives” 21(2) *Journal of Corporate Law Studies* (2021) 365-395, at 372
10. UK Companies Act 2006, Sec 172(1) & 172(3)

11. (1985) 4 NSWLR 722
12. [1988]BCLC 250
13. Arpi Karapetian, “The Impact of Emerging Preventive Restructuring Mechanisms on Directors’ Duties to Creditors in the Event of (Pre-) Insolvency in the UK and the Netherlands” 9(2) *European Journal of Comparative Law and Governance* 2022 187-209, at 190
14. Ibid
15. Robert McCorquodale and Stuart Neely, “Directors duties and human rights impacts: a comparative approach” *Journal of Corporate Law Studies* (2020) 1-36,  
DOI: [10.1080/14735970.2021.2016147](https://doi.org/10.1080/14735970.2021.2016147)
16. Ibid
17. Ibid
18. Andrew Keay et al, (2020) “Reviewing Directors’ Business Judgments: Views from The Field” 47 (4) *Journal of Law and Society* (2020) 639-665.
19. Ibid
20. Ibid.
21. Helen Anderson , "Directors' Personal Liability to Creditors: Theory versus Tradition"  
8(2) *Deakin Law Review* (2003) 209
22. Ibid
23. Ibid
24. S Lakshmi Naaraayanan and Kasper Meisner Nielsen, “Does personal liability deter individuals from serving as independent directors?”140(2) *Journal of Financial Economics* (2021) 621-643

25. UCbasaran Deniz et al, “Life After Business Failure: The Process and Consequences of Business Failure for Entrepreneurs”, 39(1) *Journal of Management* (January 2013) 163–202, at 171
26. Artur Dias and Aurora A. C Teixeira, "The anatomy of business failure: A qualitative account of its implications for future business success", 26 (1) *European Journal of Management and Business Economics*, (2017) 2-20.
27. Adebowale F Taye-Faniran and Akinseye U Olowo, “The fear of business failure and Government’s role in supporting entrepreneurs in Nigeria” 24 (2) *Ife Psychologia: An International Journal* (2016), <https://hdl.handle.net/10520/EJC-59eb73596>, accessed 10 June 2022
28. Allen Overy LLP & Willis Towers Watson, “6<sup>th</sup> Directors Liability: Personal Exposure to Global Risk” [file:///C:/Users/Hp%20pc/Downloads/6th-directors-liability-survey-allen-and-overly-report-2018%20\(2\).pdf](file:///C:/Users/Hp%20pc/Downloads/6th-directors-liability-survey-allen-and-overly-report-2018%20(2).pdf), accessed 05 June 2022
29. Neik Strohmaier et al, “Hindsight bias and outcome bias in judging directors’ liability and the role of free will beliefs” 51 (3) *Journal of Applied Social Psychology* (09 Nov 2020) 141-158, at 145
30. UK Insolvency Act, 1986, Section 214
31. Williams, Richard. “What Can We Expect to Gain from Reforming the Insolvent Trading Remedy?” 78(1) *The Modern Law Review*, (2015): 55–8
32. Ibid
33. D Konstantinov, “WRONGFUL TRADING: COMPARATIVE APPROACH (ENGLAND AND WALES, RUSSIA AND THE USA)”, 2(1) *Brics Law Journal* (2015) <https://doi.org/10.21684/2412-2343-2015-2-1-26-37>

34. Kubi Udofia, "Establishing Corporate Insolvency: The Balance Sheet Insolvency Test" University of Oxford, Faculty of Law Blog 31 July 2019  
<https://www.law.ox.ac.uk/business-law-blog/blog/2019/07/establishing-corporate-insolvency-balance-sheet-insolvency-test>, accessed 01 June 2022
35. A. Keay & P. Walton, *Insolvency Law: Corporate and Personal* 3<sup>rd</sup> edition Jordans (2012) 655.
36. Andrew Keay, 'Wrongful Trading and the point of Liability' 19(9) *Insolvency Intelligence* (2006) 132-134
37. [1995] BCC 40.
38. [2001] BPIR 733.
39. [2011] EWHC 1436. See also *Roberts v Frohlich* [2011] EWHC 257.
40. UK 2007- 3BL plc [2013] UKSC 28.
41. The World Bank, "Principles for Effective Insolvency And Creditor/Debtor Regimes" (2016) 1-31, at 8. World Bank - Principles of Insolvency Regimes 2016.pdf
42. Ebenezer T Yebisi and Taiye J Omidoyin, "Corporate Rescue Law to the Rescue of Businesses in Trauma in Nigeria" 78 *Journal of Law, Policy and Globalization* (2018) 44- 55
43. Hamiisi Junior Ndubuga, "Reinvigorating Corporate Rescue in developing Economies- a Ugandan Perspective 34 (4) *Insolvency Intelligence* (2021) 95-102.
44. Richard Schulte, "Wrongful Trading: An Impotent Remedy?" 4(1) *Journal of Financial Crime* (1996) 38-46
45. Ibid

46. Imran O Smith, “The United Nations Sustainable Development Goals, Financial Inclusion Agenda and the Efficacy of Security Interest over Movable Assets: The Case of Micro, Small and Medium Enterprises in Nigeria” 30 (2) *African Journal of International and Comparative Law* (2022) 211- 228
47. Ibid.
48. John Tribe, “Policy Subversion” in Corporate Insolvency: Political Science, Marxism and the role of Power Interests during the passage of Insolvency Legislation” 32 (2) *Insolvency Intelligence* (2019) 59-66
49. UK Insolvency Act, 1986, Sec 214(4)(a)(b)
50. Andrew Keay, “Fraudulent Trading: The Intent to Defraud Element” 35 (2) *Common Law World Review*. (2006) 121-134. doi:[10.1350/clwr.2006.35.2.121](https://doi.org/10.1350/clwr.2006.35.2.121)
51. UK Corporate Insolvency and Governance Act, 2020
52. Ibid , Section 12(1)
53. See the loan scheme, <https://www.gov.uk/guidance/apply-for-the-coronavirus-business-interruption-loan-scheme>
54. Eugenio Vaccari, “Changes to UK Insolvency Rules in the Wake of Covid-19: A Much-Needed Help for Businesses or an Unjustified Harm to the Rule of Law?” In: Carla Fertsman and Andrew Fagan, (eds.) *Covid-19, Law and Human Rights: Essex Dialogues*. A Project of the School of Law and Human Rights Centre, University of Essex (2020), 127 - 136. ISBN 978-1-5272-6632-2
55. Ibid
56. Stefan- Gobling-Reisemann, Hans Dieter Hellige & Pablo Thier, “ The Resilience Concept: From its historical roots to theoretical framework for critical infrastructure

- Design” (2018) Universitat Bremen 1- 81,  
[https://www.unibremen.de/fileadmin/user\\_upload/sites/artec/Publikationen/artec\\_Paper/217\\_paper.pdf](https://www.unibremen.de/fileadmin/user_upload/sites/artec/Publikationen/artec_Paper/217_paper.pdf), accessed 04 June 2022
57. J.B Ruhl, “ General Design Principles Resilience and Adaptive Capacity in Legal System: Application to Climate Change Adaptation Law” 89 (5) *North Carolina Law Review* 9 (2011) 89(5) 1373- 1401; M. Mark Heekin, “ Implementing Psychological Resilience Training in Law Incubators” 11 (2) *Journal of Experimental Learning* (2015)
  58. Steven M Southwick et al, “ Resilience definitions, theory and Challenges: Inter-disciplinary Perspectives” 5 (1) *European Journal of Psychotraumatology* (2014) 25338
  59. J. B. Ruhl, Barbara Cosens, and Niko Soininen, *Resilience of Legal Systems In: Multi systemic Resilience*. (ed) Michael Ungar, Oxford University Press (2021)  
DOI: 10.1093/oso/9780190095888.003.002; Janet Ladesma, “Conceptual Frameworks and Research Models on Resilience in Leadership” *SAGE* July- September 2014 1-8; S Fergus and MA Zimmerman, “Adolescent resilience: “A framework for understanding healthy development in the face of risk” 26 *Annual Review Public Health* (2005) 399-419.
  60. Ibid
  61. Ibid
  62. Janet Ladesma, “Conceptual Frameworks and Research Models on Resilience in Leadership” *SAGE* (July- September 2014) 1-8
  63. Ibid
  64. S Fergus and MA Zimmerman, “Adolescent resilience : A framework for understanding healthy development in the face of risk” 26 *Annual Review Public Health* (2005) 399-419

65. Ibid
66. Archana Ashokan , Meenalochani Sivasubramanian and Rupshi Mitra ,” Seeding Stress Resilience through Inoculation” 4928081 *Neural Plasticity*, (2016) 1- 6, at 1.
67. Jan Höltge et al, “Steeling in Later Life: Exploring Age-Specific Effects of Varying Levels of Stress on Psychological Resilience.” 92 (2) *The International Journal of Aging and Human Development* (2021) 170–96
68. MA Zimmerman, “Resiliency theory: a strengths-based approach to research and practice for adolescent health” 40 (4) *Health Education Behavior* (2013) 381 doi: 10.1177/1090198113493782.
69. Bahadir Özcan and Metin Bulus, “Protective factors associated with academic resilience of adolescents in individualist and collectivist cultures: Evidence from PISA 2018 large scale assessment” 41 *Curr Psychol* (2022) 1740 – 1756
70. Paulo César Dias and Irene Cadime, “Protective factors and resilience in adolescents: The mediating role of self-regulation” 23 (1) *Psicología Educativa* (2017) 37-43, <https://doi.org/10.1016/j.pse.2016.09.003>
71. Ralls Builders Limited (In Liquidation) (2016) EWHC 243 (Ch)
72. Firew Tiba, “Safe harbour carve-out for directors for insolvent trading liability in Australia and its implications” 53 (1) *University of San Francisco law review* (2019) 43-76.
73. Ibid
74. Venessa Finch, *Corporate Insolvency Law* Cambridge University Press (2009) 740
75. Rizwaan Jameel Mokal, “On Fairness and Efficiency” 63 (3) *Modern Law Review* (2003) 452-467

76. B. Ruhl, Barbara Cosens, and Niko Soininen, *Resilience of Legal Systems In: Multi systemic Resilience* (ed) Michael Ungar, Oxford University Press (2021)
77. It has also been applied in Contracts Law. See Henry E Smith, “Modularity in Contracts: Boilerplate and Information Flow” 104 *Michigan Law Review* (2006) 1175
78. Joshua L Payne and Andreas Wagner, “The causes of evolvability and their evolution” 20 *Nat Rev Genet* (2019) 24–38, <https://doi.org/10.1038/s41576-018-0069-z>;
79. ‘B. Ruhl, supra note 76’
80. Reed Dickerson, "Statutory Interpretation: A Peek into the Mind and Will of a Legislature" 50 (2) *Indiana Law Journal* (1975) Article 2, at 5.
81. D. E. Ufua, D.E., O. J. Olujobi, and M.E Ogbari, “Operations of small and medium enterprises and the legal system in Nigeria” 7 (94) *Humanit Soc Sci Commun* (2020) <https://doi.org/10.1057/s41599-020-00583-y>
82. Friday Okafor Onamson, *Law and Creditor Protection in Nigeria* Malthouse (2017)  
*PART IV*
83. A. R Kare, “Evaluating the Nigerian National Assembly’s Lawmaking Output and the Implications for Legislative Effectiveness” In F.A Aremu, and A.R Bakare (eds) *Two Decades of Legislative Politics and Governance in Nigeria’s National Assembly*. Palgrave Macmillan, Singapore (2021) [https://doi.org/10.1007/978-981-33-4455-6\\_6](https://doi.org/10.1007/978-981-33-4455-6_6)
84. Ibid
85. (2021) LCN/15515/ CA
86. James Gabriel, Burden of Proof and Standard of Proof in Civil Litigation”” 25 *Singapore Academy Law Journal* (2013) 130

87. See the qualifications of the UK Insolvency & Companies Court Judges,  
<https://www.judiciary.uk/subject/insolvencyandcompaniescourtsjudges/>
88. Anthony Idigbe, "Driving business Recovery: The Role of Courts" (2011) Lexology  
<https://www.lexology.com/commentary/insolvency-restructuring/nigeria/punuka-attorneys-solicitors/driving-business-recovery-the-role-of-the-courts>, accessed 11 June 2022
89. John O Ogbonnaya and V Chioma Iteshi, "The Jurisprudential Issues Arising from Legal Transplant: An Appraisal" 50 (1) *Journal of Law, Policy and Globalization* (2016)
90. Charles W Mooney, "Lost in Transplantation: Modern Principles of Secured Transactions Law as Legal Transplants" in *Secured Transactions Law in Asia: Principles, Perspectives and Reform* (eds) Louise Gullifer & Dora Neo (2020) 20 -30,  
[https://scholarship.law.upenn.edu/faculty\\_scholarship/2174](https://scholarship.law.upenn.edu/faculty_scholarship/2174)
91. Sital Kalantry, "Reverse Legal Transplants" 99 *North Carolina Law Review* 49 (2021)
92. Helen Xanthaki, "Legal Transplants in Legislation: Defusing the Trap." 57 (3) *The International and Comparative Law Quarterly* 57 (2008): 659–73.
93. Sanford Mba, "Preventive Debt Restructuring and the Nigerian Draft Insolvency Legislation: Lessons from a Comparative Perspectives" 28 (1) *African Journal of International and Comparative Law* (2020), 66-84, at 69
94. Australian Corporations Act, 2001, Section 588GA
95. Firew Kebede Tiba, "Safe Harbor Carve-Out for Directors for Insolvent Trading Liability in Australia and Its Implications" 53 (1) *University of San Francisco Law Review* (2019) 43

96. Hamideh Mahdiani & Michael Ungar, “The Dark Side of Resilience” 2 *Adversity & Resilience Science* (2021) 147-155