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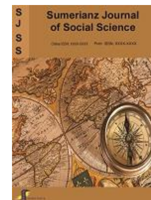

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Commutative and Retributive Justice in the Administration of Disgorgement in Insider Trading Cases—the Case for the Common Law Approach to Damages

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Abstract

Using Zambia as a case study, this article examines the efficacy of the Zambian regulatory and institutional framework for public distribution of securities in ensuring commutative justice in the administration of disgorgement by the Securities and Exchange Commission. Using the doctrinal and non-doctrinal approaches to examining the effectiveness of regulatory rules and institutions, the main findings of the study are: When it is applied to non-corporate insider traders, the statutory formula for disgorgement which is provided in the Zambian Securities Act 2016 tends to under-regulate by leaving some of the insider trading gains with the insider trader—a commutative injustice to the public; When it is applied to juristic persons (companies and other styles of bodies corporate), the formula for disgorgement which is provided in the Zambian Securities Act 2016 tends to over-regulate by taking away from the insider trader more than they actually gained from insider trading—a retributive and commutative injustice to the insider trader. The central argument of this article is that regulatory rules and institutions which promote retributive and commutative justice are likely to inspire social willingness to pay the cost of socioeconomic exchanges and regulation, and as such, are efficient. As a possible way of promoting commutative and retributive justice in the administration of disgorgement in insider trading cases, the article makes a case for the application of 'the common law approach to the award of damages' in the determination of the amount which is to be disgorged. The article also makes proposals for the repeal of the statutory formula, and its replacement with the standard formula for disgorgement which has been proposed.

Keywords: Commutative; Justice Insider Trading; Disgorgement securities markets.

1. Introduction

Using Zambia as a case study, this article examines the efficacy of the Zambian regulatory and institutional framework for public distribution of securities in ensuring commutative justice in the administration of disgorgement by the Securities and Exchange Commission. Using the doctrinal and non-doctrinal approaches to examining the effectiveness of regulatory rules and institutions, the main findings of the study are:

- When it is applied to non-corporate insider traders, the statutory formula for disgorgement which is provided in the Zambian Securities Act 2016 tends to under-regulate by leaving some of the insider trading gains with the insider trader—a commutative injustice to the public;
- When it is applied to juristic persons (companies and other styles of bodies corporate), the formula for disgorgement which is provided in the Zambian Securities Act 2016 tends to over-regulate by taking away from the insider trader more than they actually gained from insider trading—a retributive and commutative injustice to the insider trader.

The central argument of this article is that regulatory rules and institutions which promote retributive and commutative justice are likely to inspire social willingness to pay the cost of socioeconomic exchanges and

regulation, and as such, are efficient. As a possible way of promoting commutative and retributive justice in the administration of disgorgement in insider trading cases, the article makes a case for the application of 'the common law approach to the award of damages' in the determination of the amount which is to be disgorged. The article also makes proposals for the repeal of the statutory formula, and its replacement with the standard formula for disgorgement which has been proposed.

2. Background to the Problem

The jurisdiction to hear and determine insider dealing proceedings and to order disgorgement, is vested in the Zambian Capital Markets Tribunal (the CMT). Zambian Securities Act (2016b) The CMT is now operational. However, due to logistical challenges, the CMT is yet to hear and determine an insider dealing case and order disgorgement (Anonymous)

The Lusaka Stock Exchange (LuSE) is currently classified as a frontier securities market (FSM). (Anonymous) This classification implies that the LuSE is likely to transition to the status of an emerging securities market. (Anonymous) However, a notable potential constraint on the said transition are incentives and opportunities for insider dealing which are provided by the current regulatory and institutional framework for the public distribution of securities.

One of the new additions to the Zambian anti-insider trading arsenal is 'disgorgement'. Although the Zambian Securities Act 2016 provides the measure for disgorgement, the legislative guidelines (the factors) which should be applied in determining the disgorgement multiplier have not been enacted. In the absence of such guidelines, the exercise of the discretion, by the CMT, in determining the disgorgement multiplier is likely to be abused. Lack of such legislative guidelines is also likely to lead to decisions that are *ratio absurdum*. Both the abuse of the said discretion and the accumulation of decisions that are *ratio absurdum* are likely to precipitate the race-to-the-bottom in the securities market. The race-to-the-bottom may result from the likely imposition of a disproportionate measure of disgorgement (Anonymous). This raises a legitimate regulatory concern that, both under-disgorgement and over-disgorgement are likely to serve as stain on the attractiveness of a securities market. Under-disgorgement, to the extent that it leaves some of the insider trading gains with the insider, constitutes a commutative injustice to the public. Over-disgorgement, to the extent that it takes away from the insider trader more than they actually gained from insider trading, constitutes a retributive and commutative injustice to the insider trader. To the extent that under-disgorgement (under-regulation) is likely to encourage repetition or commission of the market misconduct by the offender and would-be offenders, it could be regarded as a stain on the attractiveness of a securities market. Similarly, to the extent that over-disgorgement or excessive disgorgement (over-regulation) is likely to have a chilling effect on errant, and prospective investors, it could be regarded as a stain on the attractiveness of a securities market. There is, thus, the danger that disgorgement, if misunderstood and improperly administered, is likely to serve as dead-weight on the growth-potential of a securities market.

2.1. Statement of the Problem

In light of the background to the problem which has been given above, the statement of the problem may be formulated as follows:

To what extent does the regulatory and institutional framework for the regulation of insider trading in Zambia promote commutative and retributive justice in the administration of disgorgement in insider trading enforcement?

3. Literature Review

Zambian scholarship on the regulation of insider trading in Zambia can be divided into two streams, namely:

i) The pre-2016 scholarship; and
ii) The post-2016 scholarship.

3.1. The Pre-2016 Insider Trading Scholarship

Notable among the pre-2016 works are the two works which were carried out by Mwenda in 1997 and 1999, respectively. In his seminal work on insider dealing in Zambia, Mwenda examines the effectiveness of the Zambian Securities Act 1993 in regulating insider dealing (Mwenda, 1997). The general finding of the said study is that the Securities Act 1993 did not contain adequate provisions on insider dealing. In particular, the results of Mwenda's seminal study indicate that while the said piece of legislation stipulated quite stiff criminal penalties for insider dealing, it did not provide civil remedies for pecuniary losses which resulted from insider dealing. Mwenda observed that, this state of the law gave an impression that the underlying regulatory goal of the Securities Act 1993 was to punish offenders rather than protect the interests of the market participants—particularly the investors. It is noted in the present study that disgorgement was not one of the regulatory features of the pre-2016 regulatory and institutional framework. The findings of the present study show that although civil remedies have been introduced for director-insider dealing under the Zambian Companies Act 2017, the other classes of insider dealing enjoy no such remedies. The present study finds, as Mwenda's seminal work did, that the Zambian regulatory and institutional framework for insider dealing is aimed at punishing insider dealers rather than the protection of the interests of the market participants who are injured by insider dealing. The present study makes an original contribution to the existing scholarship on the regulation of insider trading in Zambia by examining efficacy of the Zambian Securities Act 2016 in ensuring commutative and retributive justice in the administration of disgorgement.

In his subsequent work on the regulation of insider dealing in Zambia, (Mwenda) observes that one of the underlying objective of insider dealing regulation is to prevent unjust enrichment of the insider dealer. The present is

informed by this fundamental regulatory objective, and argues that to the extent that the disgorgement formula which is provided in the Securities Act 2016 leaves some of the insider trading gains with the insider trader, it is not effective. The present study makes an original contribution to the existing scholarship by proposing a formula for, and an approach to the administration of disgorgement which are likely to ensure commutative and retributive justice in the process.

3.2. The Post-2016 Insider Trading Scholarship

Due diligence revealed that besides the work of the author, (Samamba L. T., 2020b) only Mulenga's work has examined the regulation of insider trading under the Zambian post-2016 regulatory and institutional framework. (Mulenga, 2022) Mulenga's work is a principally a statement of the law on insider trading in Zambia. The author in his earlier work examined the role of effective disgorgement in the promotion of securities market participation. The results of the author's earlier study indicate that, unlike the South African Financial Markets Act 2012, the Zambian Securities Act 2016 does not provide for the distribution of the disgorged amounts to the market participants who suffer pecuniary loss on account of insider trading. The author argues there that such a shortcoming in the regulatory framework is likely to discourage market participation—especially cross-border market participation. The present study makes an original contribution to the existing scholarship by examining the efficacy of the current disgorgement regime in ensuring commutative and retributive justice in the administration of disgorgement.

4. The Role Enforcement in Ensuring Retributive and Commutative Justice

The enforcement tool kit is an essential element of an effective regulatory and institutional framework for securities markets (Bazley, 2007). The quality of enforcement which comes from the use of the available enforcement tools determines the efficacy of regulatory and institutional framework in ensuring securities market cleanliness (Gakeri, 2012a). That is why an effective regulatory and institutional framework strikes a balance between the rigour of regulatory rules and the weight of the punishment which is meted out against the violations of those rules. In Zambia, following the introduction of tax on current and saving account deposits and withdrawals, anecdotal evidence suggests a decline in public savings with commercial banks. Therefore, it would appear that a possible way of encouraging savings with banks is to remove the said tax. Thus, the opportunity cost of imposing tax on bank deposits and withdrawals could be compensated by alternative policy measures such as encouraging account holders and would-be account holders to channel their capital into securities markets by investing in securities. Although securities markets are a potential substitute for banks and other financial institutions, one of the notable constraints on the attractiveness and success of securities markets is insider trading. Empirical evidence shows that there are several potential channels through which insider trading may reduce both securities market efficiency and overall economic efficiency.(Beny, 2012) Besides, insider trading increases transaction costs. (ibid). Insider trading also lowers the liquidity of the securities market (ibid, 2021). Therefore, if insider dealing is unregulated by law, the capacity of a securities market to function as an effective alternative platform for the raising of capital and investment is likely to diminish. As the author observes elsewhere:

> Where insider dealing is left unchecked by law or where enforcement of insider trading and continuous disclosure is lax, investor confidence is likely to reduce and cause a reduction in market activity—a condition which is not good for the growth of liquidity of a stock market (Anonymous, 2018). As the United State Supreme Court has explained in the seminal insider trading case—*United States v. O'Hagan*, (521 U.S, 1997) 'investors likely would hesitate to venture their capital in a market where [insider trading] is unchecked by law' (ibid). (Samamba L. T., 2021).

One of the regulatory features that contribute to the attractiveness of a securities market to rational investors is the quality of investor protection. The quality of investor protection, in part, depends on the quality of regulatory rules and effective enforcement of those rules by a competent regulatory authority (Gakeri, 2012b). Effective enforcement of regulatory rules requires effective investigation of the alleged misconduct, and the prosecution and punishment of the erring market participant (Anonymous). As the Group of Twenty Countries (G-20) observes:

> Achieving the objectives of the regulatory framework requires not only sound regulation but also effective enforcement. No matter how sound the rules are for regulating the conduct of market participants, if the system of enforcement is ineffective – or is perceived to be ineffective – the ability of the system to achieve the desired outcome is undermined. It is thus essential that participants are appropriately monitored, that offenders are vigorously prosecuted and that adequate penalties are imposed when rules are broken. A regulatory framework with strong monitoring, prosecution, and application of penalties provides the incentives for firms to follow the rules. This, in the end, adds to the framework's credibility and enhances investor confidence in the financial system (G-20 Working Group 1, 2009).

Although stringent regulatory rules and effective enforcement of those rules are generally likely to raise investor confidence and encourage securities market participation, the imposition of disproportionate punishments—punishments which are either too light or excessive—for violation of regulatory rules is likely to discourage the

participation of risk averse market participants. That is why regulators should ensure that the penalties which are imposed on the erring market participants fit the market misconduct. Such a consideration is of particular importance to frontier securities markets (FSMs) in the Common Market for Eastern and Southern Africa (the COMESA Region) since it is likely to enhance their attractiveness as they compete with other African securities markets for foreign portfolio investments (FPIs). Against this backdrop, the objective of this article is to examine the Zambian regulatory and institutional framework for the public distribution of securities—particularly the framework for the regulation of insider trading, so as to establish whether or not it provides adequate incentives for commutative and retributive justice in the administration of disgorgement in insider trading enforcement. Zambia is simply used here as a case study. And as such, the observations, arguments and proposals for remedial legislative, institutional and policy reform which have been made by the author in this article are relevant to other frontier jurisdictions within the Eastern and Southern African Region (the COMESA Region) and beyond whose anti-insider trading enforcement tool kit includes 'disgorgement'.

4.1. Meaning of Effective Administration of Disgorgement

In this article, 'effective administration of disgorgement' refers to the disgorgement of insider trading gains on the basis of efficient judicial precedent, and regulatory rules and institutions. Efficient judicial precedent, and regulatory rules and institutions are previous judicial decisions, and current regulatory rules and institutions which impose lower costs on the regulated socioeconomic behaviour and economic exchanges. This view is rationalized by the position that efficient judicial precedent and, regulatory rules and institutions encourage social willingness to pay the cost of commutative or retributive justice (Posner, 2011). In keeping with this regulatory ideal, in determining the disgorgement multiplier and quantum, the Capital Markets Tribunal (CMT) will be required to exercise judicial discretion in a manner which promotes social willingness to pay for the cost of socioeconomic exchanges and regulation. The said discretion should also be exercised in a manner which inspires willingness on the part of insider traders to surrender (pay) the insider trading gains. Further, the CMT will also be required to make decisions which promote securities market efficiency. Securities market efficiency—availability and accessibility of non-public price-sensitive information about the issuer and its securities—eliminates opportunities for insider trading (Rider and Ffrench, 1979). Fewer incidences of insider trading are likely to reduce regulatory costs for the competent regulatory authority and improve stock market liquidity. Also, in calculating the disgorgement multiplier and quantum, the CMT will be required to consider certain principles which have been pronounced in judicial precedents. Here, certainty of judicial outcome and proportionality of punishment—punishment that fits the securities market misconduct—are designed to serve as "a bold investor-confidence statement and a deliberate marketing strategy" by the CMT and the competent securities market regulatory authority. These regulatory virtues are designed to impress upon investors that their investment interests are paramount in a particular securities market. The author argues that as securities markets in the COMESA Region get increasingly internationalized, competition for issuers and investors among them is likely to stiffen. Competition for issuers and investors on the part of domestic securities markets in the region would imply that jurisdictions which have efficient regulatory rules are likely to attract a little more issuers and investors to their markets than those which have inefficient rules (Anonymous). Thus, the quality of regulatory rules and enforcement will certainly play an increasingly important role in buttressing competition from other securities markets. In this context, weak regulatory rules, lax enforcement of stringent regulatory rules and the imposition of un-proportional punishments for market misconduct might lead to the unattractiveness of a particular securities market. In the context of the increasing competition among securities markets in the region, it could be argued that in order to encourage issuer and investor participation, not only should legislators, regulators and policy-makers put in place stringent regulatory rules and ensure effective enforcement of those rules, but also ensure that the punishments which are meted out for breach of regulatory rules fit the breach. A corollary argument is made by the author that excessive punishments are likely to drive risk-averse issuers and investors to other competitor securities markets which impose reasonable or proportional punishment for the same market misconduct. It could also be argued further that the condonation of market misconduct through lax enforcement or imposition of punishment which is lighter than the offence deserves is also likely to drive away risk-averse investors by encouraging other market players to commit particular or similar offences.

4.1.1. The Enforcement Tool Kit for the Zambian Securities and Exchange Commission

Under the current Zambian regulatory framework, the following are some of the enforcement tools which are available to the SEC, namely:

a) Criminal sanctions;
b) Civil remedies;
c) Administrative penalties; and
d) Disgorgement.

4.1.2. The Regulatory purpose of Criminal Sanctions

Criminal sanctions are designed to safeguard the integrity of a securities market and the confidence of market participants (Samamba L. T., 2020a). This is achieved by deterring commission or repetition of market misconduct (ibid). In keeping with this regulatory purpose, it is important to ensure that criminal penalties are stiff enough to deter the target market misconduct (ibid). Thus, criminal sanctions serve to safeguard the interests of the entire market—the public interest (ibid). The efficacy of criminal sanctions in deterring the target market misconduct is enhanced by civil remedies (ibid).

4.1.3. The Regulatory purpose of Civil Remedies

While criminal sanctions safeguard the interests of the entire market, civil remedies are intended to redress a specific personal loss or personal pecuniary injury which is suffered by a particular market participant as a result of market misconduct (ibid). Civil remedies assure the market participants that any loss they may suffer as a result of market misconduct is civilly recoverable (ibid). As for risk-averse investors, the availability of civil remedies reassures them that, except for the financial market risk, credit risk and legal risk, there is redress/compensation for externalities such as market misconduct (ibid). Examples of civil remedies are damages, restitution, compensation and an account (Securities Act, 2016).

4.1.4. The Regulatory purpose of Administrative Penalties

Administrative penalties are designed to supplement criminal penalties (Samamba). Administrative penalties serve as exemplary enforcement measures which is designed to send a resounding strong message to would-be offenders that the SEC will not hesitate to punish certain market misconduct (ibid). Administrative penalties are also designed to deter the repetition of the misconduct which is committed by an interdicted market participant. Also, administrative penalties (fines) are a source of enforcement funds (ibid).

4.1.6. Regulatory purpose served by Disgorgement

The primary purpose of disgorgement orders is to eliminate personal monetary gain which might serve as an incentive or motivation for engaging in insider trading (Samamba). As far as disgorgement takes away the incentives of insider dealing, it represents the common law normal measure of damages (Anonymous). Besides eliminating the incentives of insider trading, disgorgement serves as a deterrent or punitive measure (Samamba L. T. I.). It is designed to deter the repetition of market misconduct by the errant market participant; (ibid) it also designed to deter would-be offenders (ibid). In *Kokesh*, the United States Supreme Court readily identified these two aspects of disgorgement by classifying the remedy as a disincentive and a penalty (Kokesh vs SEC). By relying on (SEC vs Texas Gulf Sulfur Co), and affirming the authority as the seminal case on disgorgement in the United States, the Supreme Court stated that not only did disgorgement remove any monetary reward for violating securities laws, but also provided an effective deterrent to future violations (Kokesh). In the administration of disgorgement, any amount which is over and above the normal measure of disgorgement corresponds with the common law exemplary damages (Samamba). Thus, the dual-object of disgorgement is achieved by recovering from the errant market participant any profits which have been made and/or the losses which have been avoided by insider trading, and requiring the errant market participant to pay something over and above the amount which represents the common law normal measure of damages (ibid). This suggests that the first monetary unit which is over and above the normal measure of common law damages—which is the normal measure of disgorgement—marks the beginning of the punitive part of the remedy of disgorgement.

4.1.6.1. The Concept of Disgorgement—An Overview

The remedy of disgorgement has its origin in equitable jurisdiction (Texas Gulf Sulphur Co, 2020). And as such, courts should be guided by the established principles which guide the exercise of equitable jurisdiction. The courts should, in this respect, also draw wisdom from established equity practice (As They Say). The Zambian Securities Act 2016 (ZSA 2016) does not define the term ‘disgorgement’. Thus, recourse may be had to the Banking and Financial Services Act 2017, and the Companies Act 2017 (Zambian Securities Act, 2016d). However, the latter Acts of Parliament do not render a definition of the term ‘disgorgement’ at all. The common law does not help the matter, either. Fortunately, in Zambia, there is Supreme Court authority to the effect that where statutes, the common law or domestic jurisprudence do not render a definition of a particular term or phrase, dictionaries serve as a fall-back (Anonymous). Thus, the Oxford Dictionary of English defines ‘disgorgement’ as: (C Soanes and A Stevenson)

(i) Pouring something out;
(ii) Discharging the occupants of a building or vehicle;
(iii) Bring up or give up food (vomit);
(iv) Yield or give up funds dishonestly acquired.

Although the definition which is given in paragraph (iv) above appeals to our purposes, it is worth-noting that there is a common strand that runs through all the definitions which have been given above. That feature, is the discharge of specific substance or content which was previously contained, ingested or swallowed. In this respect, specificity relates to quantity, type and class. Thus, strictly speaking, disgorgement may be regarded as the recovery of not more or less than what was taken or gained by the erring market participant. Thus, strictly speaking, the concept of commutative justice, and of retributive justice are inherent in the concept of disgorgement (Anonymous). Considering the equitable origins of the remedy of disgorgement, this view is in tandem with the equitable principle which states that a wrongdoer cannot be allowed to profit from his wrong (Liu vs SEC). The said view also accords with the countervailing equitable principle that a wrongdoer cannot be punished for more than her/his wrong (ibid). This countervailing equitable principle is called retributive justice in criminal law. These two principles of equity give authority to the trial court to order the disgorgement of insider trading gains (which is profits made and losses avoided). This, in essence, is the normal measure of disgorgement whose multiplier is ‘1’. Recall here that the normal measure of disgorgement represents the normal measure of damages at common law. Therefore, the normal measure of disgorgement may be mathematically expressed as follows:

ND (Normal Disgorgement) = α (Alpha) or (Common Law Measure of Damages) × 1

Thus, ND = α

As will become momentarily clear, the normal measure of disgorgement equals the common law normal measure of damages. Thus, any amount which is over and above the common law normal measure of damages is not, strictly speaking, disgorgement but punishment. It represents the punitive component of gross disgorgement. Thus, any amount which is over and above the gains which have accrued to the insider (the normal measure of disgorgement or common law normal measure of damages) could be likened to the exemplary or aggravating or punitive damages which are awarded over and above ordinary damages at common law. The maximum multiplier for the punitive component of gross disgorgement is '2' (Anonymous). Thus, the punitive component of gross disgorgement could be mathematically be expressed as follows:

PD (Punitive Disgorgement) = $\alpha \times \Omega$ (Omega)

Thus, PD = $\alpha\Omega$, where Ω is a function of 'certain socio-economic factors' or characteristics of the offence.

Thus, $\Omega(x) = x_1 + x_2 + x_3 \ldots x_n \leq 2$, where '$\Omega$' is a function of '$x$', and '$x$' represents factors such as past conduct of the offender, means used to commit the offence, the amount involved, prevalence of the offence, prevalence of similar offences, impact of the market misconduct on integrity and market activity, damages recovered or recoverable, if any, administrative and other fines already imposed or imposable, if any.

Thus, $\Omega(x) \leq 2$

Assigning equal weight or value to each determinant, each factor or determinant gets 0.25. Thus:

$x = 0.25$

In the case of a reprimanded or censured first offender in infrequent cases, past conduct, prevalence of the offence and fines will ordinarily not be considered in determining the value of Ω. Thus, the value of 'Ω' could be mathematically expressed as follows:

$\Omega = x \times 5$ (the number of applicable equal-weighted factors). Thus, the value of Ω depends on the number of applicable determinants or factors, and ranges from 0.25 to 2.0 so that $\Omega \leq 2.0$).

$\Omega = 0.25 \times 5$

$\Omega = 1.25$

Thus, PD (Punitive Disgorgement) could be mathematically expressed as follows:

PD = $\alpha \times \Omega$ or $\alpha\Omega$

Thus, PD = $\alpha \times 1.25$

Therefore, PD = 1.25α (where 'α' is the value of the common law normal of damages or the normal measure of disgorgement).

Against this background, Gross Disgorgement (GD) or Total Disgorgement (TD) becomes the sum of Normal Disgorgement (ND) and Punitive Disgorgement (PD). Thus, Gross Disgorgement may be mathematically expressed as follows: (Anonymous)

GD = ND + PD

GD = $\alpha + 1.25\alpha$

4.4.2. The Measure of Disgorgement under the Zambian Securities Act 2016

In Zambia, the power, authority and jurisdiction to order disgorgement vests in the Capital Markets Tribunal (the CMT) (Zambian Securities Act, 2016f). The implied power that the SEC has with respect to disgorgement is to pray for a disgorgement order in an insider trading case which is commenced at its instance (ibid). Under the regulatory framework, the measure of disgorgement is the maximum of three times the value of profit made or loss avoided by the insider-turned-trader, whichever is higher (Zambian Securities Act, 2016a). In case of an errant company market participant, the alternative measure of disgorgement is ten per centum of the annual turnover of the company (ibid). The applicable measure of disgorgement against company insider traders is the formula which gives the higher value of disgorgement (ibid).

4.4.3. Regulatory Background to the introduction of Disgorgement in Zambia

This subsection discusses the background to the introduction of disgorgement as a regulatory tool in Zambia. By so doing, the article highlights the context within which our case for the common law approach to damages as a possible way of promoting commutative and retributive justice in the administering of disgorgement has been developed.

In Zambia, disgorgement was introduced under the Zambian Securities Act (2016c), before any form of civil recovery for insider trading was introduced (Under the Zambian Companies Act, 2017). Also, at the time disgorgement was introduced, no court decision or Capital Markets Tribunal decision had been handed down on the unconscionable character of insider trading. Thus, disgorgement appears to have been designed as a multi-faceted device that serves the regulatory role of damages at common law and restitution in equity. Consequently, in Zambia, disgorgement is designed to perform two primary regulatory roles in insider trading regulation. Firstly, disgorgement plays the regulatory role which is akin to the role of the normal measure of damages at common law by removing the incentives of insider trading—taking away from the insider profits made and losses avoided. The reasonable expectation is that absent any benefit, insiders would have no or little motivation to engage in insider trading (Anonymous). Secondly, disgorgement is designed to play the regulatory role which is played by exemplary or punitive damages at common law by imposing deterrent monetary penalties over and above the common law ordinary measure of damages (Anonymous). Once again, the reasonable expectation here is that the punitive component which falls over and above the common law normal measure of damages would deter the commission or repetition of the same or similar market misconduct. However, this statement is made with proviso that, in line with

the principles of retributive and commutative justice, the weight of the disgorgements should be proportional to the wrong of the insider trader.

4.4.4. An Illustration of the Basic Components of Disgorgement

In order to put the illustration in proper context, let us consider the following hypothetical scenario:

A purchases 1000 XCo securities from B at K 10 per share using unpublished price-sensitive information. Six hours later, A resells the entire position to C at K 12 per share. Two hours after the deal with C is sealed, a down-grade on XCo securities is announced. Following the announcement, share prices for XCo shares plummet to K 3 per share.

4.4.4.1. The Normal Measure of Damages for B's Loss

The normal measure of damages for C's loss is the difference between the current market value and the contract price. In mathematical terms, from the hypothetical scenario which has been given above, that would give as:

$12 - 3= 9$

$9 \times 1000= 9000$

Thus, the loss which is suffered by C is K 9 000. This is the measure of damages for the loss which is suffered by C.

Profit made by A

Profit made by A equals the difference between the purchase price and the contract price on the contract with C. That is:

$12 - 10 = 2$

$2 \times 1000 = 2000$

Thus, the profit made by A is K 2 000. This is also the value of profit that B would have possibly made had A not engaged in insider trading.

Loss avoided by A

Loss avoided by A equals the difference between the contract price on the contract with B and the current price of XCo shares. That is:

$10 - 3 = 7$

$7 \times 1000 = 7000$

Thus, loss avoided by A is K 7 000.

4.4.4.1.1. Relationship between A's Profit & Losses and the Common Law Measure of Damages for B's Loss

The measure of damages for C's loss (K 9 000) is actually the sum of profit made (K 2 000) and losses avoided (K 7 000) by A. That is:

Common law normal measure of Damages (9000) = Profit made (2000) + Loss Avoided (7000)

Since A will have deprived B of a profit of K 2 000 and transferred a loss of K 7 000 to C, effective disgorgement would require that these benefits be squeezed out of A's belly. Thus, by the Zambian statutory measure of disgorgement, the following will be maximum values of disgorgement:

3×2000 (profit made) = 6000, or non-company insider trading

3×7000 (loss avoided) = 21000, or

$10 \times$ Annual Turnover of a company insider dealer (company insider trading)

Thus, when we apply the profits measure, the amount which is disgorged is K 3 000 less than the common law normal measure of damages (Anonymous). Therefore, the application of this measure would under-regulate. Thus, the profits measure which is provided by the statute—the Zambian Securities Act 2016, leaves some of the insider trading gains with the insider trader. This negative feature in the law is likely to promote commutative injustice against the public—an injury to the public interest. Consequently, the loss-avoided-measure is preferable. This would give us K 21 000 as the applicable amount of disgorgement—an amount which is K 12 000 higher than the normal measure of damages at common law or statutory disgorgement. The K 12 000, thus, represents the punitive component of gross disgorgement or Total Disgorgement (GD or TD). Since K 21 000 is higher than K 6 000, it should be preferred to the former as the measure of gross disgorgement in non-company insider trading (Zambian Securities Act, 2016e). If A were a company with an annual turnover of K 1 000 000, ten per cent is this figure translates to K 100 000—an amount which is K 91 000 over and above the common law normal measure of damages or statutory disgorgement (K 9 000). Thus, K 91 000 is the punitive component of the gross—K 100 000. Since K 100 000 is higher than K 6 000 (the profit measure) and K 21 000 (the loss-avoided-measure), it is the applicable gross measure of disgorgement in case of company insider trading (ibid). The question here is, is it just to condemn a person who has gained only K 2000 to be condemned to pay K 100 000? Is just to condemn a person to pay K 100 000 when they have only avoided a loss of K 7 000? The argument here is that the formula for disgorgement which is provided in the Zambian Securities Act 2016 violates the basic principles of commutative and retributive justice, respectively—that is, a person should not be allowed to benefit from an unconscionable bargain (his wrong doing), and that they should not be punished more than their offence deserves (proportionality).

4.4.4.1.2. Disgorgement as a way of restoring Securities Market Equilibrium

Before the act of insider trading is committed, the market is in equilibrium. As market inefficiency and other effects of insider trading—such as low liquidity—trickle into the market, the market loses its balance and shifts into disequilibrium. Therefore, the fundamental role of the common law normal measure of damages or the normal measure of disgorgement (α) is to complement subsequent disclosure of the material inside information in restoring the lost market equilibrium (Anonymous). Similarly, the punitive component of disgorgement serves to maintain the restored equilibrium by deterring subsequent commission of a particular or similar securities market misconduct.

4.4.5. Constraints Relating to Lack of a Mechanism for Determining the Value of the Disgorgement Multiplier

By referring to the 'maximum of three times the value of the gain which accrues to the insider-turned-trader', the Zambian Securities Act 2016 (ZSA 2016) suggests that the multiplier for gross disgorgement ranges from 1 to 3 (Zambian Securities Act, 2016e). However, the ZSA 2016 does not spell out the factors which should be considered in determining the value of the multiplier. Admittedly, it could be argued that the CMT will, in due course, judicially pronounce the guidelines which should inform the exercise of the discretion to determine the quantum of disgorgement. However, to the extent that it may be accepted that *material considerations* (Anonymous)—which might be pronounced by the CMT—are designed to weigh in, the disgorgement formula which is stipulated in the Zambia Securities Act 2016 may be characterised as 'entirely punitive' (Anonymous). If this view is readily accepted, then the view that the formula which is stipulated in the Zambian Securities Act 2016 (ZSA 2016) disregards the normal measure of disgorgement (the common law normal of damages) as an integral part of gross disgorgement, should also be accepted. The shortcoming which is inherent in conception of disgorgement under the ZSA 2016 may be illustrated by comparing the disgorgement value which is yielded by standard formula to that which is yielded by the ZSA formula. Drawing upon the scenario which is given in section 3.1.4.1 above, the value of alpha is as follows: α = K 9 000 (Anonymous).

Using Standard Formula

GD = ND + PD
GD = $\alpha + \alpha$ (1.25)
GD = 9000 + 9000(1.25)
GD = 9000 + 11 250
GD = **20 250**

Using the Securities Act 2016 Standard

By applying the same value of Ω (Ω =1.25), the Statutory Formula may be stated as follows:
GD = 1.25 $\times$ 7000 (the value of loss avoided by the insider-turned-trader in section 3.4.4.1 above)

Thus, GD = 8 750

As noted above, the value which was yielded by the standard formula (20 250) is the sum of the common law normal measure of damages (9 000), (Anonymous) and the punitive component (11 250) as determined by the circumstances of the case. As observed earlier, to the extent that the normal measure of damages or disgorgement is incorporated into the gross value of disgorgement, the regulator takes away the incentives of insider trading. The author argues that the elimination of the gain (profit made, and the loss avoided) is likely to discourage insiders from engaging in unprofitable insider trading. This is likely to promote commutative justice in the trade of listed securities. To the extent that, the other component of 20 250 represents the punitive component which is determined by the circumstances of the case, the regulators will be sending a strong message to the offender and would-be offender that it will not relent to punish such misconduct to the full extent of the law.

On the contrary, the 8 750 which is yielded by the statutory formula is 250 less than the total value of the gain which had accrued to the insider-turned-trader (9000) (Anonymous). Put another way, if part of the disgorged 8 750 were applied to loss avoided, only 1 750 would go to the disgorgement of profit made. Given that 2 000 is the value of the profit which was swallowed by A in our scenario above, the 1 750 falls short by 250. Thus, A, keeps the 250 after all. Not only is the 250 undue enrichment but also a fruit of a crime. Where is commutative and retributive justice here? It is also worth noting that the disgorgement which is yielded by the statutory formula (8 500) is devoid of a punitive component—which can only exist beyond the 9 000 (the total value of gain—that is the value of profit plus value of loss avoided). It is submitted that the statutory formula (the formula of disgorgement which is given in the ZSA 2016) is likely to leave the securities market in disequilibrium since the civil wrong is not fully redressed. Besides, the very lack of a punitive component which should serve to preserve the equilibrium, if it were attained at all, is likely to perpetuate the disequilibrium in the securities market. The argument of the author here is that the retained portion of the gain (250) is likely to encourage insider trading by insiders. A corollary argument is that such light punishment (punishment which is less than the offence deserves) is likely to drive risk-averse investors away—to securities market which met out proportionate punishment—by encouraging the commission of insider trading and similar offences. Thus, it is submitted that the formula for disgorgement which is provided by the ZSA 2016 is likely to under-regulate insider trading in Zambia, and promote commutative injustice against the public—injury to the public interest.

As a possible way of ensuring thorough regulation of insider dealing in Zambia, proposals are made for the adoption and implementation of the standard formula as formulated above.

4.1.4.6. Constraints Relating to Over-Regulation of Company-Insider-Dealers

Disgorgement proper, as noted above, consists in the squeezing out of what the insider-turned-trader has actually gained through the act of insider trading. Along this line of thought, it is submitted that the punitive component of disgorgement should be informed and determined by the common law normal of damages, and the material considerations such as past conduct of the offender, prevalence of the offence, impact of the offence on market integrity and activity, et cetera. Along this line of thought also, it would be prudent for the SEC to pray before the CMT for the orders of an account, and the tracing orders for the tracing of any investments that may have been made using the gain which have been made from insider trading. Admission of this view clearly admits of the view that "the pre-requisite to *disgorgeability* is the existence of a direct and natural relationship between the act of insider trading and the gains which have been made from insider trading and/or the interest on the gain or investment of the gain. Absent such a requisite connection, property is not *disgorgeable* or at least, should not be *disgorgeable* at all. The author argues that in the absence of a direct and natural connection between the company's gain which has been made from insider dealing and its turn-over, it would incompetent to determine the value of the *disgorgeable* amount solely on the basis of the turn-over of an insider-trader-company, as the Zambian Securities Act 2016 does in section 141(2). A question may be asked, what could be the regulatory justification for taking away 100 000 from an insider-trader-company when they have only gained 2 000 from insider dealing"? The 11 250 punitive disgorgement which is taken away by the standard formula in our scenario in sections 3.1.4.1 and 3.1.4.4.1 could be rationalized by material considerations which have been discussed above. What would be the regulatory justification for taking away 91 000 over and above the gain to the offender (79 750 more than the punitive component (11 250) on the standard formula), in the absence of a direct and natural connection between the gain (the 9 000) and the annual turn-over of the company? Such a conception, certainly has no place or, at least, should not have a place in cases of insider trading. Such regulatory practice would be simply unjust. Perhaps, this sort of conception could appeal to cases which involve the breach of the continuous disclosure obligation by listed issuers. In cases of non-disclosure, failure or neglect to disclose material information relating to the issuer, its business and securities may well save the issuer millions (in avoided losses) or keep them on a profitable path (make them profits). There is thus, a requisite direct and natural connection between the losses which are avoided and the profits which are actually made, and the breach of the continuous disclosure obligation by the issuer. Thus, by disgorging the losses which have been avoided, and the profits which have been made, the law will be taking away no more than the un-disclosing issuer has gained through the misconduct.

It is however, difficult to discern a direct and natural relationship between the insider trading gains and the turn-over of the company, and the external investments of a company. Here, insider trading constitutes an external investment of the company. Thus, unless it can be proved that the illegal returns on the external investment (the profits made, and the losses avoided) have been applied to other businesses or investments of the company, disgorgement must be restricted to the gains which have been made on the external investment. It is therefore submitted that the current approach to disgorging corporate-insider trading gains is overly harsh. The author argues that if such a stance is not corrected by legislative reform, it is likely to drive company investors to other securities markets in the COMESA Region which apply the correct measure of disgorgement. As a possible way of enhancing the attractiveness of Zambian securities markets, it is proposed that a single formula—the standard formula for disgorgement which has been proposed above—be applied to all styles of investor which are involved in insider trading. It is also proposed that only that portion of the turn-over of a corporate insider-trader which bears a direct and natural connection to the insider trading gains should be reached by tracing orders, or the orders for an account in equity.

5. Insider Trading as Unconscionable Conduct

Insider trading may, arguendo, be characterised as unconscionable conduct which attracts the intervention of equitable jurisdiction to the extent that it places the outsider at a disadvantage vis-à-vis the corporate insider, and constitutes unconscientious exploitation of the outsider's ignorance. Thus, equity will readily intervene to prevent the stronger party (the informed insider) to an unconscionable bargain from acting against equity and good conscience by attempting to enforce or retain the benefit of the transaction (GE Dal Pont, 2000). Thus, an insider-turned-trader will not be allowed to enforce their rights or retain the benefit of a transaction which is tainted with insider trading. The equitable jurisdiction which is invoked to set aside an unconscionable bargain is premised on proof of:

a) A relationship between the parties which to the knowledge of the other party places the other at a special disadvantage vis-à-vis the other; and
b) Unconscientious exploitation of the disadvantage of the other party by consequent overbearing of the will of the other party (ibid).

It is without controversy that condition (i) above is readily established by the information which is exclusively possessed by the insider. But how does the resulting informational disadvantage overbear the will of the outsider? We are of the view that 'will', in this context, connotes the "bargaining position or power of the parties". If this view is correct, then the central premise of this section is that the possession or non-possession of price-sensitive information by the outsider has a bearing on their bargaining position or power. Since price-sensitive information will have a bearing on the investment decisions of the outsider, ignorance of the price-sensitive information on the part of the outsider weakens their bargaining position or power (Anonymous). Moreover, since the relationships in which one party stands in a position of disadvantage vis-à-vis the other are numerous, courts in the United Kingdom

and in Australia have identified factors from which to infer the existence of a special advantage. These factors include:

a) poverty;
b) ill health;
c) infirmity;
d) **lack of knowledge** and/or experience;
e) need for independent advice; and
f) inadequacy of consideration (Dal Pont *et al.*, 2000c).

The author argues here that the lack of information or the ignorance of the outsider may well ground a special disadvantage on the part of the outsider. The bargaining by the corporate insider using unpublished price-sensitive information could constitute an exploitation of the informational disadvantage of the outsider. Of course except in rare circumstances, in modern securities markets, traders are not induced to trade by the information which is generated by the insider-turned-trader. Quite often, the outsider traders independently enter their buy/sell orders running the foreseeable risk that their trade might be rendered unprofitable by some undisclosed material information. Despite the modern setting in securities markets, and the lack of the usual causal link between the conduct of the insider that suggests fraud and the loss of the outsider, the same old principles of equity which relates to 'protection of the victims of unconscionable bargaining' should apply for purposes of regulating modern securities markets. The law should look to the beneficiary who stands at the end of the trading chain, and make a clear distinction between mere possession, and use of unpublished material information. Thus, where X who is in possession of unpublished material information instructs his broker to sell or buy off a securities position to/from Y (Y acting through his broker/dealer), equity will not allow X to retain the benefit of such a transaction simply because the trading was actually conducted by his unsuspecting agent. Why should it? Further, where X's broker/dealer is complicit, a strong case for rescission is made. Where the broker is not complicit—is unsuspecting, equity will ask:

a) Whether or not it is not unconscionable to allow X to retain the profits which have been made, and the losses which have been avoided by the act of insider trading when, in fact, X would not have instructed his broker to buy off or sell off a certain securities position had they not been in possession of the unpublished price-sensitive information?
b) Whether or not it is not unconscionable to allow the transaction to stand when Y's broker/dealer—whose instruction is to buy at the lowest possible price, and to sell at the highest possible price—would have bargained differently or altogether decline to transact had they been in possession of the unpublished price-sensitive information too?

If the answers to both these questions are in the affirmative, there is no reason why equity should not intervene.

5.1. The Liberal and Accommodating Approach of English Courts to Unconscionability

Presently, there are other cases, such as insider trading which call for the intervention of equity on account of the inherent unconscionable character of the conduct. The Zambian Parliament has done its share by intervening in some cases of substantive unconscionability by imposing criminal sanctions. Thus, a misrepresentation in a contract for sale of real goods attracts criminal sanctions (Anonymous, 2010). Even better and progressive, is the availability of rescission for unfair contract terms (Anonymous). The Zambian Parliament has also intervened in cases of oppressive hire purchase agreements (Anonymous). Thus, oppressive terms in hire purchase agreements are not enforceable (ibid).

Although statutes look to the end—the fairness of the terms of the agreement—courts in exercising equitable jurisdiction look to the bargaining process of the trade, and particularly the conduct of the parties. Thus, the equitable doctrine of 'unconscionable dealing' is "procedural in character" (Dal Pont *et al.*, 2000a). It is not concerned with substantive unconscionability—fairness of terms—which is the province of statutes as discussed above. This characteristic of equitable jurisdiction in cases of unconscionability seems to lend support to our case for equitable intervention in cases of insider dealing. This view is rationalized by the position that insider trading constitutes unconscionable conduct in the bargaining process. The case for equitable intervention is also supported by an argument of a compelling authority that "there is no need to erect a general principle of relief against inequality of bargaining power" (Martin, 1989). Similarly, the English Supreme Court has observed that "Parliament has undertaken this essentially-legislative task, and the courts should not formulate further restrictions" (National Westminster Bank).

The author argues that insider trading in-so-far-as it constitutes inequality of bargaining power in the bargaining process, and facilitates the creation of a monopoly in the use of property rights which are incorporated in the unpublished price-sensitive information, justifies the intervention of equity especially in cases where damages are not available for loss which is occasioned by insider trading. Thus, in appropriate cases, equity must intervene by ordering rescission of the bargain which is tainted with insider trading. The availability of rescission is likely to promote commutative justice in securities trade. The intervention of equity in such cases is justified by two primary goals of modern insider trading regulation, namely:

(i) Redressing specific injury of the outsider by ordering rescission or making an award of damages where damages are available and appropriate. This safeguards the interests of a specific investor. Such protection is critical to the enhancement of investor confidence and the overall integrity of the securities market;
(ii) Ensuring transparency and fairness in securities markets. Transparency and fairness are essential to creation of a level playing field in securities trade and investment. A level playing field is critical to the enhancement of investor confidence and integrity of the market as a whole. Transparency and fairness in

securities markets—securities markets as an integral part of financial markets and an alternative to banks and other financial institutions—also serves to safeguard the public interest in the growth and success of securities markets as such.

Also, by intervening in insider trading cases, equity will be complementing the regulatory efforts of SEC to ensure effective enforcement of the breaches of the continuous disclosure obligation by issuers. Effective continuous disclosure is important in that it eliminates opportunities for insider trading, and promotes commutative justice in securities trade. Thus, equitable intervention would essentially mitigate the weakness that may exist in the continuous disclosure regime, and the enforcement pattern of the SEC.

5.1.1. Equitable Intervention and the Remedy of Rescission

In the event that equity intervenes in insider dealing cases, rescission will be ordered. The money and property (securities) transferred under the contract are returned to the seller. The idea is to restore, as far as possible, the parties to their original positions.

At law the term rescission carries distinct doctrinal meanings (Dal Pont *et al.*, 2000b). For purposes of this article, the term 'rescission' connotes "the right of a party to a contract to have the contract set aside and to be restored, as nearly as possible, in the position they were before the contract was made".

The right to rescind a contract can arise at law or in equity (ibid). At law fraudulent and innocent misrepresentation or duress may give rise to a right to rescind a contract (Zambian Misrepresentation Act). Thus, in cases of insider dealing which are tainted with innocent or fraudulent misrepresentation, the outsider will have the liberty of rescinding the contract either at law or in equity. In equity, undue influence or unconscionability give rise to a right to rescind a contract. Thus, a contract which is not voidable at law may still be rescinded in equity.

Originally at common law, restitution could only be allowed in cases where parties to a contract could be restored exactly to their original positions. In the wake of the injustice which was worked by the rigidity of the common law, as usual, equity intervened by relaxing the rigorous requirement of the common law. As Fox LJ, observes in the *O'Sullivan case* (O'Sullivan):

[I]n cases where the plaintiff was seeking to obtain rescission for breach of contract, the requirement of *restitution integrum* seems to have been strictly enforced at common law (Hunt v Silk, 1804). But the equitable rules were or became more flexible. The position is stated in the dissenting judgment of Rigby LJ in *Lagunas Nitrate Co v Lagunas Syndicate* (Anonymous) , and was approved by the House of Lords in *Spence v Crawford* (Anonymous) as follows: 'Now, no doubt, it is a general rule that in order to entitle the beneficiary to rescind a voidable contract of purchase against the vendor, they must be in a position to offer back the subject-matter of the contract. But this rule has no application to the case of the subject-matter having been reduced by the fault of the vendors themselves. And the rule itself, in equity is, modified by another rule, that where compensation can be made for any deterioration of the property, such deterioration shall be no bar to rescission, but only a ground for compensation. I adopt the reasoning in the Erlanger's case (Erlanger) of Lord Blackburn as to allowances for depreciation and permanent improvements. The noble Lord, after pointing that the common law has no machinery for taking accounts or estimating compensation, says: 'But a court of equity could not give damages, and, unless it can rescind the contract, it can give no relief. And, on the other hand, it can take accounts of profits and make allowance for deterioration. And I think, the practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. This important passage is, in my opinion, fully supported by the allowances for deterioration and permanent improvements made by Lord Eldon and other great equity judges in similar cases' (O'Sullivan).

Fox LJ, went on say:

This result—the granting of rescission even if the parties will not be restored precisely in their original positions—I think, is not is not applied too literally and that the court will do what is practically just in the individual case even though *restitution integrum* is impossible (ibid).

Thus, any dividends and interests on dividends which may have been received by the purchaser of securities before they became aware of facts which gave rise to the right to rescind the contract, will be taken into account in restoring the parties to their original positions.

5.1.1.1. Circumstances under which the Right to Rescind may be Lost

In equity, the right to rescind a securities contract which is tainted with insider dealing may be lost in any of the following circumstances, namely (i) affirmation, and (ii) intrusion of third party rights (Anonymous).

A. Loss of the right to rescind through 'Affirmation'

A party who is entitled to rescind a securities contract, loses the right to rescind if, armed with knowledge of the facts which give rise to the right to rescind, s/he takes a benefit under the contract (Peyman v Lanjani). By taking and enjoying of a benefit of a dividend or interest on a dividend, the victim of insider trading will be treated as having taken a benefit under a securities contract.

A. Intrusion of Third Party Rights

Where an innocent third party to a voidable contract which is tainted with insider trading—the earlier contract—acquires rights under a subsequent contract, for value, before the victim of insider trading avoids the earlier contract, the victim loses the right to have the contract set aside (Oakes v Turquand).

6. Disgorgement as a Rescue Regulatory Measure

In the context of insider dealing regulation, there are numerous cases in which civil recovery—common law remedies such as damages or equitable relief in the form of rescission—is not available. Such cases include:

i) non-director insider dealing; (Anonymous)
ii) extra-territorial insider dealing; (Anonymous)
iii) cases in which un-published price-sensitive information is initially acquired by an unconnected outsider through cyber-theft (Anonymous).

Thus, in cases where damages or restitution are/is not available, disgorgement could serve a rescue regulatory measure. In such cases, disgorgement could be applied to safeguard the integrity of securities markets (Anonymous).

7. Analogy from the Common Law Approach to Damages

Generally, at common law, the award of damages is meant to compensate the injured party—the plaintiff—for their injury or harm. This is essentially achieved by the application of the normal measure of damages whose purpose is to put the injured party, as nearly as possible, in the position they would have been had the injury not been occasioned by the defendant. On the regulatory object which is served by the normal measure of damages, Lord Blackburn, in the case of *Livingstone v Rawyards Coal Co.* (Anonymous)*,* observes:

[T]he measure of damages is that sum of money which will put the party which has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation (Livingstone v Rawyards Coal Co).

Thus, in insider trading cases in which damages are available, the law will not only be redressing the specific injury which is suffered by an investor but also taking away from the insider-turned-trader the gains they have made from the act of insider trading. The removal of the gains, it appears, is designed to discourage corporate insiders from engaging in unprofitable insider trading. This, it could be argued, is likely to boost investor confidence and the integrity of the securities market.

In exceptional cases, however, damages which are awarded at common law may look to the punishment of the defendant market participant. Such damages are variously referred to as punitive damages, exemplary damages, vindictive damages, and even retributive damages (McGregor). As Mayne and McGregor observe:

[S]uch damages can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence, or the like, or as is sometimes put, where he acts in contumelious disregard of the plaintiff's rights (ibid).

Thus, punitive damages are awarded as a way of deterring the defendant and would-be defendants from repeating the offence or committing similar offences. In the like manner, the punitive component of disgorgement is a deterrent measure. Thus, the author argues that in much the same way the quantum of punitive damages is informed by relevant material considerations such as the conduct of the party, prevalence of the offence and its effect on the plaintiff or the market, even so should the quantum of the punitive component of disgorgement be informed by *material consideration* such as: (Anonymous)

i) the past conduct of the offender (repeat offender?);
ii) means which were used to commit the offence;
iii) the amount involved;
iv) the prevalence of the offence;
v) the prevalence of similar offences;
vi) the impact of the market misconduct on integrity and market activity;
vii) damages recovered or recoverable, if any; and
viii) administrative and other fines already imposed or imposable, if any.

In the process of incorporating the common law regulatory virtues in in the administration of disgorgement in insider trading cases, the first regulatory step should involve the squeezing out of the gains which have been made from insider trading. As demonstrated above, this could be achieved by applying the common law normal measure of damages. For those jurisdictions in the COMESA Region which do not provide any form of civil recovery for loss which is occasioned by insider trading, the normal measure of damages constitutes the normal measure of disgorgement. Similarly, in Zambia, in other cases than director-insider-trading, this is also the normal measure of disgorgement.

In the jurisdictions in which civil recovery is available for all classes of insiders, the normal measure of disgorgement should be deemed to have been already satisfied by the damages which may have been recovered earlier in a personal suit by the injured investor or by the SEC in the exercise of its regulatory power to commence civil recovery suits for and on behalf of the injured investor who may have failed or neglected to commence a suit. In such cases, in computing the gross disgorgement, the normal measure of disgorgement should be denoted by '0'. Thus, disgorgement by the standard formula which has been proposed herein above:

$GD = \alpha + \alpha\Omega$

$GD = 0 + 9000\ (1.25)$

$GD = \mathbf{11\ 250}$

Thus, in cases where damages are awarded, the measure of disgorgement equals the punitive component of gross disgorgement (Anonymous). Conversely, in cases were civil recovery is not available, as noted above, the total value of disgorgement is the sum of the damages which would have been awarded and the punitive component so calculated. Thus:

Total Disgorgement (TD) = d (damages awarded) + $\alpha\Omega$

$TD = d + \alpha\Omega$
$TD = 9000 + 9000(1.25)$
$TD = 9000 + 11\,250$
$TD = 20\,250$

Thus, the total value of disgorgement in both cases—cases in which damages have been awarded and those in which damages are not available—would the same (Anonymous). This finding underscores the position that disgorgement is designed to perform the role which is performed by the normal measure of damages and exemplary damages at common law. Thus, the objective of the normal measure having been performed and achieved by invoking the common law, the statute cannot indirectly perform the same by incorporating the normal measure of damages in the disgorged amount, or it will be over-regulating. This view is also rationalized by the fundamental principle which is common to all civilized legal systems—that is, *"a person cannot be punished twice for the same breach".* It is submitted that, guided by these considerations, the Zambian Capital Markets Tribunal is unlikely to factor in the normal measure of disgorgement in cases where damages have already been recovered. This should also be the case where the SEC has instituted a civil recovery action for or on behalf of a market participant or where an injured market participant is currently prosecuting the same on their own behalf.

Once the gains from insider trading are eliminated—by an award of damages or imposition of the normal measure of damages as the normal measure of disgorgement—the second step is to ascertain the quantum of the punitive component of disgorgement guided by the *material considerations* which have been discussed above.

8. Conclusion

This article has examined the Zambian regulatory and institutional framework for the public distribution of securities so as to establish whether not it promotes commutative and retributive justice in the administration of disgorgement in insider trading enforcement. The general conclusion which has been reached in this article is that, the said framework does not do so. One of the findings that supports this conclusion is that, the Zambian Securities Act 2016 does not provide the guidelines which should be taken into consideration in determining the disgorgement multiplier and the quantum of disgorgement. The other finding which supports the general conclusion of this article is that the Capital Markets Tribunal has not yet interpreted section 141(1)(2) of the Securities Act 2016 for purposes of establishing the scope of the said provision, and the factors which should be considered in determining the weight of the disgorgement multiplier.

It was noted that, when the disgorgement formula which is provided by the Zambian Securities Act 2016 (ZSA 2016) is applied to the disgorgement of the insider trading gains which have been made by non-corporate insider traders, it tends to under-disgorge (under-regulate) by leaving some of the gains with the insider-turned-trader. It has been argued that the retention of part of the insider trading gains offends the basic objective of disgorgement which is the taking away of all the insider trading gains (profits made, and losses avoided). It has also been argued that the retention of part of the insider trading gains is likely to incentivize the repetition of a particular market misconduct, or the commission of that or similar market misconduct by the would-be offenders, and promote commutative injustice against the public—injury to the public interest. A further argument has been made in this respect that the resulting prevalence of insider trading and the commutative injustice are likely to drive risk-averse investors to other securities markets in the COMESA Region which administer disgorgement effectively. It was also noted that when the statutory formula for disgorgement is applied to corporate insider traders, it imposes a stiffer punishment on them than it does the non-corporate insider traders for the same offence. It was also noted that when the statutory formula is applied to corporate insider traders, it over-disgorges (over-regulates) by reaching even the assets of the offender which do not bear a direct or natural connection to the insider trading. It has been argued that this sort of regulatory approach is likely to promote commutative and retributive injustice against the corporate insider traders. It has also been argued, in this respect, that such excessive punishment of corporate insider traders is likely to drive them to other securities markets in the COMESA Region which impose indiscriminate and proportionate punishment for the same offence.

As a possible way of ensuring that the punishment (disgorgement) fits the offence (insider trading), proposals have been made for the replacement of the statutory formula with the standard formula. It was noted that the proposed standard formula, if implemented by legislators and policy-makers, is likely to ensure the disgorgement of all the insider trading gains by applying the common law normal measure of damages. It has been proposed that once all the gains have been taken away from the insider-turned-trader, the Capital Markets Tribunal should then determine the quantum of the punitive component of disgorgement. It has been proposed further that in exercising of the discretion to determine the value of the disgorgement multiplier, the CMT should be guided by material considerations such as:

a) the past conduct of the offender (repeat offender?);
b) the means which were used to commit the offence;
c) the amount involved;
d) the prevalence of the offence;
e) the prevalence of similar offences;
f) the impact of the market misconduct on integrity and market activity;
g) the damages recovered or recoverable, if any; and
h) the administrative fines, and other penalties already imposed or imposable, if any.

Reference

521 U.S (1997). 642. 658.

Anonymous Although the disgorged amount which represents the normal measure of damages at common law goes to the SEC—in the absence of civil recovery by the injured outsider—it is quite comforting to think that the regulator will prudently apply these funds especially in exercise of its power to commence civil recovery action for and on behalf of injured market participants who have neglected to or are unable to commence action against erring market participants: For SEC's power to commence such representative civil recovery actions, see: Zambian Securities Act 2016, s 175(1)(a)(b)(c)(2).

Anonymous Empirical evidence which was gathered from questionnaires which were administered to the securities and exchange commission (the sec), and an interview with the director of enforcement and compliance at sec, mrs sichone diana, indicates that the sec is yet to prosecute and pray for a disgorgement order before the CMT.

Anonymous A Frontier Securities Market, is a securities market that is located in a developing economy and characterised by small size, low capitalization and inadequate liquidity. Although Frontier Securities Markets are also less accessible than Emerging Securities Markets, they are still investible. The implication of a securities market being classified as frontier securities market is that, over time, the market will become more liquid and exhibit similar risk and return characteristics as the larger and more liquid emerging securities market: See, LT Samamba, 'Eastern and Southern African Stock Markets—A Case for their Attractiveness and Growth Potential' (2018) 3(3) Afri. L. J. 38, at 39, 40.

Anonymous ibid.

Anonymous A disproportionate measure of disgorgement is a measure which results in under-disgorgement or over-disgorgement. It will be established momentarily in this article that a disproportionate measure of disgorgement could create disequilibrium in the securities market and drive risk-averse investors away.

Anonymous See, sections 2.4.1 and 2.4.4.1 above.

Anonymous See, section 2.4.1 above.

Anonymous [1880] 5 App. Cas. 25.

Anonymous As noted earlier in this article, this view is rationalized by the dual role which is served by disgorgement. By the common law measure of damages which is inherent in disgorgement, the regulator will be taking away the benefits of insider dealing—profits made and/or losses avoided—from the insider. This serves to eliminate the monetary motivation for engaging into insider dealing. By the punitive component of disgorgement, the regulator will be deterring the repetition of the market misconduct by the offender, and the commission of the same or similar market misconduct by would-be offenders.

Anonymous Under the Zambian legal framework, where the words "or", "other" and "otherwise" are used in any written law they shall be construed disjunctively and not as implying similarity, unless the word "similar" or some other word of like meaning is added: Interpretation and General Provisions Act, s 4(4), Chapter 2 of the Laws of Zambia. It is therefore submitted that the Tribunal has the power to choose which of the two strands of the first limb of the statutory disgorgement formula to apply. All former British colonies and protectorates have this provision in their Interpretations Acts.

Anonymous So that the value of disgorgement (the common law normal measure of damages) represented by the Multiplier 1 (the Multiplier for the Normal Measure of Disgorgement), and the value of disgorgement represented by Multiplier 2 (the Multiplier for the Punitive Measure of Disgorgement which is two times the normal measure of disgorgement) are equal or less than three times the value of loss avoided or gains made from the act of insider dealing: See, Zambian Securities Act 2016, s 141(1)(2)(3).

Anonymous Winship, argues that disgorgement amounts are not measured by the harm to the victims and thus differs from restitution: V Winship, 'Disgorgement in Insider Trading Cases: FY2005-FY2015' (2018) 71 SMU L Rev. 999, at 1003. This statement seems to suggest that there is only one component of disgorgement—that is, the punitive component. However, as established in this article, there are two aspects of disgorgement namely, the recovery of what would be the common law measure of damages (which is measured in relation to the harm of the victim) and the imposition of what would be the common law common law exemplary damages. This view is also supported by the United States Supreme Court when it holds that "a disgorgement award which does not exceed a wrongdoer's net gains and is awarded for victims is equitable relief. Equity practice has long authorized courts to strip wrongdoers of ill-gotten gains. And to avoid transforming this into a punitive sanction, courts restricted it to an individual wrongdoer's net gains to be awarded [for victims]. And whether it is called restitution, an accounting, or disgorgement, the equitable remedy which deprives wrongdoers of their net gains from unlawful activities reflects both the fundamental principle that "it would be inequitable that [a wrongdoer] should make a profit out of his own wrong (Root vs Railway Co., 105 U.S. 189, at 207) and the countervailing equitable principle that a wrongdoer should not be punished by "paying more than a fair compensation to the person wronged" (Tilghman vs Proctor, 125 U.S. 136, at 145-146): Liu et al vs Securities and Exchange Commission, No. 18-1501 (United States Supreme Court, June 22, 2020).

Anonymous Unconnected' here is used to stress the "lack of a previous business relationship or connection with an issuer on the part of the person who trades in securities using the unpublished price-sensitive information". Under the current Zambian legal framework, an 'insider' is a person who is a director or employee of the issuer or any other person with a previous business relationship or connection with an issuer: See, Samamba Lennox Trivedi I, op.cit. Although such cases may not qualify as 'insider dealing' cases, they may well

ground unconscionability and as such attract the intervention of equitable jurisdiction, and the grant of remedies such as rescission.:

Anonymous Samamba lennox trivedi, 'non-criminalization of extra-territorial securities market misconduct as a constrain on growth of cross-border trade in securities' (2017) the international journal of multi-disciplinary research 1-16.:

Anonymous Although at common law, exemplary damages go to the pocket of the successful injured litigant, the exemplary portion of disgorgement goes to the SEC and is to be applied to capital market development and investor education.

Anonymous Under the Zambian legal framework, civil recovery for director-insider-dealing has been introduced: See, Zambian Companies Act 2017, ss 115, 116. This is despite the fact that there are numerous newly introduced classes of insiders besides 'directors' under the Zambian Securities Act 2016: See, Zambian Securities Act 2016, s 2 (definition of 'insider').

Anonymous Where the right to rescind arises at law, bars to rescission may include 'impossibility of restitutio integrum.

Anonymous In this context, an argument could be made that a possible way of nipping insider trading in the bud is ensuring effective enforcement—investigation, prosecution and imposition of punishment—of the anti-insider trading regulatory regime.

Anonymous [1939] 3 ALL ER 271, at 285.

Anonymous [1899] 2 Ch 392, at 456.

Anonymous See, sections 2.4.1. and 2.4.4.1 above.

Anonymous As securities markets get increasingly integrated in eastern and southern Africa, tariff and geographical barriers to trade are likely to reduce. This is likely to increase access to deeper and broader markets. However, in the absence of a uniform regulatory and institutional framework for the region, regulatory rules and institutions for a particular market to the extent that they impose entry, listing and trading costs on issuers and investors, will still play a critical role in facilitating access to that market. Inefficient regulatory rules and institutions, to the extent that they impose higher costs on issuers and investors, are likely to act as non-tariff barriers to international trade and deny them access to foreign markets. Conversely, efficient regulatory rules and institutions, to the extent that they impose lower costs on issuers and investors, are likely to promote access to foreign markets and increase international trade. Professor Coffee observes that effective regulatory rules and effective enforcement of those rules are likely to encourage the migration of issuers to foreign securities markets: See, JC Coffee, 'Racing Towards the Top: The Impact of Cross-listing and Stock Market Competition on International Corporate Governance' (2002) 102(7) Colum. L. Rev 1757-1831.:

Anonymous Zambian hire purchase act, ch 399, s 8.

Anonymous Zambian competition and consumer protection act 2010, s 53(1)(2)(3).

Anonymous The incentives consist in the profits made and or losses avoided. The profits made plus the losses avoided equals the normal measure of damages at common law; the purposes of the normal measure of damages at common law is to put the injured party, so far as money can do, in the position s/he would have been in had the contract been performed or had the tort not been committed. The rule which stipulates the measure of damages, and applies both to contracts and torts, was succinctly laid down by Lord Blackburn in Livingstone v Rawyards Coal Co. [1880] 5 App. Cas. 25, at 39. There, his Lordship stated that "the measure of damages is that sum of money which will put the party which has been injured, or who has suffered loss, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation". The Zambian Companies Act 2017 adopts this measure of damages by stipulating that the difference between the fair value and the contract price of securities is the measure of damages for any loss which is occasioned by director-insider dealing: Zambian Companies Act 2017, ss 115, 116, 117. The fair value of a security is determined on the basis of information which is known to the director or is publicly available at the time of acquisition or disposition: Zambian Companies Act 2017, s 215(2). Although the Zambian Companies Act 2017 equates the fair value of a security to its market value, the two terminologies are different. Market value is determined by forces of supply and demand (demand and supply being functions of a number of distinct sets of factors). To the contrary, fair value of a security takes into account other surrounding circumstances of a particular securities deal than the information which is possessed by the trader or is publicly available. Thus, fair value is a broad measure of a security's worth which is also takes into account an issuer's assets and liabilities, and its profit potential, the credit ratings of the issuer and its securities, and the availability of the security for sale or collateral purposes in a securities market.:

Anonymous The information granting a special advantage to the corporate insider should be material non-public information such that the uninformed outsider would upon knowledge readily say This is not what I would have bargained had I been in possession of this information as I now do, or "I would have bargained better had I been armed with this information which I now have.

Anonymous See, sections 3.1.4.1, and 3.1.4.4.1, respectively, above.

Anonymous For the Standard Formula of Disgorgement, and value of 'α', see, sections 3.4.1 and 3.4.4.1 above.:

Anonymous The punitive measure is not designed to go towards the redress of the injury of the market participants. No portion of it goes to making good the loss of participants occasioned by insider dealing. Thus, the securities market disequilibrium resulting from the loss caused by the act of insider trading is not eliminated from the market.:

Anonymous Material considerations such as (i) past conduct of the offender (ii) prevalence of the offence and similar offence (iii) impact of the offence on the integrity and activity of/in the securities market (iv) fines and administrative imposed (v) damages awarded.:

Anonymous Which represents the total value of the gain which accrue to the insider-turned-trader and consisting of profit made and loss avoided.

Anonymous As the disclosed material information trickles into the market, the lost informational equilibrium of the market is gradually restored. However, the disequilibrium which results from the act of insider dealing would still linger in the market. It is thus, the role of disgorgement (that is, by way of the normal measure of damages or the normal measure of disgorgement, and the punitive measure of disgorgement) to take care of the disequilibrium which results from the act of insider dealing.:

Anonymous Stallion motors ltd and african cargo services vs zambia revenue authority (appeal no. 11/2012) [2014] zmsc 83.

Anonymous Commutative justice is the ideal that, except in limited cases of unconscionable bargains such as misrepresentation, undue influence, economic duress and fraud, socioeconomic exchanges which have been concluded between the parties which are sui generis and of sound minds should be upheld by the courts and enforced by regulatory authorities. Commutative justice is also an ideal that a person who is guilty of conversion or destruction of property should not be ordered to pay more than the loss which is suffered by the owner of the property: See, WR White, 'The Natural Law and Commutative Justice' (1956) The Catholic Lawyer 31-40. The argument here is that, insider trading is unconscionable behavior which justifies an order of court to set aside an insider trading tainted bargain, and the intervention of the competent regulatory authority through administration of disgorgement. Retributive justice is the ideal that\.

Anonymous (2010). The zambian competition and consumer protection act no. 24 of 2010, s 47.

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Dal Pont, Chalmers and Maxton (2000b). at 1015, op.cit.

Dal Pont, Chalmers and Maxton (2000c). 284, op.Cit. For an authoritative judicial position in the united kingdom to this effect, see: National westminster bank plc v morgan [1985] a.C 686 (hl). This house of lords decision in effect disapproved the wider statements made in lloyds bank ltd v bundy [1975] q.B 326. For an authoritative judicial position in australia, see: Commercial bank of australia ltd v amadio [1983] 15 clr 447, at 462, per mason j (high court of australia).

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Hunt v Silk (1804). 5 East 449.

ibid:

ibid (2021). For further empirical evidence to this effect and the 'law and economics debate' on insider dealing regulation, see, lt samamba, cross-border insider trading regulation: Current legal, regulatory and institutional challenges (revised edn, sk omniscriptum publishing.

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Liu vs SEC op.cit.

Livingstone v Rawyards Coal Co [1880] 5 App. Cas. 25, at 39.

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Securities Act (2016). ss 194(4)(c)(d). 202(1):
Texas Gulf Sulphur Co (2020). Kokesh; Liu et al vs SEC, No. 18-1501. *United States Supreme Court, June 22*:
Under the Zambian Companies Act (2017). which entered into force in July 2018, any pecuniary loss which is caused by director-insider-dealing is civilly compensable: Zambian Companies Act 2017, ss 115, 116.:
Zambian Misrepresentation Act Ch 69, s 2(a)(b).
Zambian Securities Act (2016a). 141(2):
Zambian Securities Act (2016b). 141(1(1)): 2-184.
Zambian Securities Act (2016c). s 141(1)(2).
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