Asian Journal of Education, Humanities and Social Science (ISSN:2320-9720)
Vol.01, No, 06, 2024

Research article www.ajehss.com Open Access

Regurgitation in Insider Trading Cases—The Case for The Common Law Approach to Harm

Michael Abramowicz

Formerly lecturer in Corporate and Business Law at Copper-belt University-Zambia

ABSTRACT:

The Lusaka Securities Exchange, like many other Frontier Securities Markets (FSMs) in the regional financial market—the Common Market for Eastern and Southern Africa (the COMESA Region)—and the rest of the global financial market, has the potential to transition to the status of an emerging securities market (ESM). However, a notable constraint on the potential of FSMs to develop into an ESM is prevalence of insider dealing—especially cross-border insider trading—owing to the weak territorial legislation, poor regulatory capacity and enforcement culture on the part of most domestic regulators in the COMESA region. As part of concerted regulatory efforts to nip insider dealing in the bud, some regulators around the globe have introduced a regulatory concept called 'disgorgement' whereby all the gains from insider trading—profits and losses avoided—are squeezed out of the insider dealer. Using Zambia as a case study, this article examines the Zambian legal, regulatory and institutional framework for the disgorgement of insider trading gains so as to establish whether or not it provides adequate incentives for effective administration of disgorgement and regulation of insider dealing. Using a doctrinal approach to the evaluation of legal rules, the main findings of the study are:

Making a case for the common law approach to award of damages, in the administration of disgorgement, the article makes proposals for the repeal of the statutory formula and its replacement with the proposed standard formula for disgorgement.

1. INTRODUCTION

An effective legal, regulatory and institutional framework strikes a balance between stringency of regulatory rules and the weight of punishment meted out against violations of those rules. Following the introduction of tax on current account and saving account deposits or withdrawals, anecdotal evidence seems to suggest that the rate and aggregate value of savings in commercial banks has been relatively lower. One way of encouraging saving with banks for investment would be removal of the said taxes. However, if the said taxes are taxes whose opportunity cost cannot be compensated by the substitute measure, the alternative measure would be encouraging account holders and would-be account holders to channel and venture their capital into securities markets

by investing in securities. That way, securities markets would be saving as an alternative to banks and other financial institutions by mobilizing capital and channelling it to investment.

Although securities markets have the potential of serving as an alternative to banks and other financial institutions, one of the notable constraints on growth, development 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.[1] Besides, insider trading increases transaction costs and lowers liquidity of the securities market.[2] Thus, if insider dealing is unregulated by law, the capacity of securities markets to function as an effective alternative platform for the raising of capital and investment is likely to be diminished. 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 be reduced and cause a reduction in market activity—a condition which is not good for growth of liquidity of a stock market.[3] As the United State Supreme Court has explained in the seminal insider trading case—*United States v. O'Hagan*,[4] 'investors likely would hesitate to venture their capital in a market where [insider trading] is unchecked by law'[5].[6]

One of the regulatory features that contribute to the attractiveness of a securities market to investors is the quality of investor protection. Investor protection in turn partly depends on quality regulatory rules and effective enforcement of those rules by a competent regulatory authority. Effective enforcement of regulatory rules entails effective investigation, prosecution and punishment of erring market participant.[7] 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

[1] Laura N. Beny, 'The Political Economy of Insider Trading Laws and Enforcement: Laws vs Politics? International Evidence' (2012) Law and Economics Research Paper Series, Paper No. 08-001, at 2-13 http://ssrn.com/abstract=304383 accessed 31 December 2018.
[2] *ibid*; For further empirical evidence to this effect and the 'law and economics debate' on insider dealing regulation, see, Samamba Lennox Trivedi, *Cross-border Insider Trading Regulation: Current Legal, Regulatory and Institutional Challenges* (LAP LAMBERT Academic Publishing 2020).
[3] Growth in number and volume of orders be they actual or potential is essential to increase in breadth and depth of a stock market. Higher breadth and depth increase stock market liquidity: Samamba Lennox Trivedi, 'Strategies for Increasing Liquidity of Eastern and Southern African Frontier Stock Markets' (2018) 3(3) Afr. L. J. 56, 63
[4] 521 U.S. 642 (1997), 658
[5] *ibid*
[6] Samamba Lennox Trivedi, *Corporate Disclosure Regulation in African Emerging Markets: An International Comparative Analysis* (LAP LAMBERT Academic Publishing 2020), *(forthcoming)*.
[7] 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 legal regime.

the rules. This, in the end, adds to the framework's credibility and enhances investor confidence in the financial system.[8]

However, much as stringent regulatory rules and effective enforcement are likely to raise investor confidence and encourage securities market participation, regulators, legislators and policy-makers should be warry of the chilling effect that is inherent in the imposition of inappropriate punishment—that is, punishment which is either light or excessive—for violation of regulatory rules. Regulators should ensure that the penalty imposed on an erring market participant fits the market misconduct. Such a consideration is of particular importance to frontier securities markets in Eastern and Southern Africa as it is likely to give them a competitive edge as they compete for investment with many other such markets in the region, and emerging and developed securities market within the region and elsewhere.

This article examines the Zambian legal, regulatory and institutional framework for the disgorgement of insider trading gains so as to establish whether or not it provides adequate safeguards for effective administration of disgorgement of gains from insider dealing. Zambia is simply used here as a case study. The observation made by author, the arguments and proposals for remedial legislative and policy reform are relevant to other jurisdictions in the region and beyond whose anti-insider dealing arsenal includes 'disgorgement'.

In this article and the foregoing context, 'effectiveness administration' refers to the availability of legal, regulatory and institutional framework, and judicial precedent which should inform the exercise of the discretion to determine the disgorgement multiplier and the quantum of disgorgement. Thus, by 'effective administration of disgorgement', we mean "the meting out of judicious decisions—decisions which are informed by certain socio-economic considerations recognized in judicial precedent as informing the exercise of the discretion reposed in the Capital Markets Tribunal (CMT) or Court, as the case may be, to determine the disgorgement multiplier—which are likely to raise investor confidence in the securities market. Here, certainty of judicial outcome and proportionality of punishment—punishment that fits the securities market misconduct—as dictated by judicial precedent, and effective enforcement of disgorgement orders are designed to serve as "a bold investor-confidence statement and a deliberate marketing strategy from the CMT, arbitral or judicial bodies and the competent securities market regulatory authority. Thus, in this mix, the said 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. Thus, the quality of regulatory rules and enforcement will certainly play an increasingly important role in buttressing competition from other securities markets and, attracting issuers and investors. In this context, weak regulatory rules, lax enforcement of stringent regulatory and imposition of un-proportional punishments for market misconduct may well contribute to the unattractiveness of a particular securities market. In the context of the soaring competition for issuers and investors

[8] G-20 Working Group 1, 'Enhancing Sound Regulation and Strengthening Transparency Final Report,' 25th March, 2009, at 45, www.g20.org/Documents/g20_wg1_010409.pdf. Accessed 22 April 2019.

among securities markets in the region, the author argues that in order to incentivize 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 make sure that the punishments meted out for breach of those rules fit the breach. A corollary argument is made by the author that excessive punishments are likely to drive issuers and investors to other competitor securities markets offering reasonable or proportional punishment for the same market misconduct. A further argument is made that light punishment (punishment which is less than the offence deserves) is also likely to drive risk-averse investors away by encouraging other market players to commit particular offences or repeat similar offences.

1.1. BACKGROUND TO THE PROBLEM

The jurisdiction to hear and determine market misconduct consisting in insider dealing, and to order disgorgement vests in the Capital Markets Tribunal (the CMT).[9] The CMT is now operational. However, empirical evidence shows that the CMT is yet to hear and determine an insider trading case and order disgorgement.[10]

The Lusaka Stock Exchange (LuSE) is currently classified as a frontier stock market (FSM).[11] This classification implies that the LuSE will transition to the status of an emerging securities market.[12] However, a notable constraint on the said transition is insider dealing.

1.2. STATEMENT OF THE PROBLEM

In light of the background to the problem under investigation given above, the statement of the problem may be formulated as follows:

Has the legal, regulatory and institutional framework for the regulation of insider dealing in Zambia provided adequate safeguards for effective administration of disgorgement of losses avoided and gains made from insider dealing?

2. ZAMBIAN SEC'S ENFORCEMENT TOOL KIT

Under the current Zambian regulatory framework, the enforcement tool kit available to SEC consists of the following regulatory tools, namely:

(i) Criminal sanctions;
(ii) Civil remedies;
(iii) Administrative penalties; and
(iv) Disgorgement.

[9] Zambian Securities Act 2016, ss 184(1), 141(1)(2)

[10] Empirical evidence gathered from questionnaires administered to the Securities and Exchange Commission (the SEC), and an interview with the Director of Enforcement and Compliance at SEC, Mrs Sichone Diana, shows that SEC is yet to prosecute and pray for a disgorgement order before the CMT.

[11] A Frontier Securities Market, is a securities market that is located in a developing economy and characterised by smaller size, lower liquidity, less accessibility than emerging securities markets—of which the former is but a subset—but still investible. The implication of a securities market's classification 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, Samamba Lennox Trivedi, 'Eastern and Southern African Stock Markets—A Case for their Attractiveness and Growth Potential' (2018) 3(3) African Law Journal 38, at 40, 39.

[12] *ibid*

2.1. Regulatory purposes served by Criminal Sanctions

Criminal sanctions are designed to safeguard the integrity of a securities market and the confidence of market participants.[13] This is achieved by deterring market misconduct that may compromise the integrity of the market or have a chilling-effect on market participation.[14] That is why it is important to ensure that criminal penalties are stiff enough to deter the target market misconduct.[15] Thus, criminal sanctions serve to safeguard the interests of the entire market—the public interest.[16] The efficacy of criminal sanctions to deter target market misconduct is enhanced by civil remedies.[17]

2.2. Regulatory purpose served by Civil Remedies

Whereas criminal sanctions safeguard the interests of the entire market, civil remedies are intended to redress a specific loss or pecuniary injury suffered by a particular market participant as a result of insider dealing.[18] Civil remedies assure market participants that any loss they may suffer as a result of market misconduct by other participants is civilly recoverable.[19] As for risk-averse investors, availability of civil remedies reassures them that, except for financial market risk, credit risk and legal risk, there is redress/compensation for externalities such as market misconduct.[20]

2.3. Regulatory purpose served by Administrative Penalties

Administrative penalties are designed to supplement criminal penalties.[21] Administrative penalties serve as exemplary enforcement measures designed to send a resounding strong message to would-be offenders that the SEC will not relent to punish certain market misconduct.[22] They also serve to deter repetition of the misconduct committed by an interdicted market participant. Also, administrative penalties (fines) are a source of enforcement funds.[23]

2.4. Regulatory purpose served by Disgorgement

The primary purpose of disgorgement orders is eliminating personal monetary gain which might serve as an incentive or motivation for engaging in insider dealing.[24] As far as disgorgement takes away the incentives of insider dealing, it represents the common law normal measure of damages.[25]

---

[13] Samamba Lennox Trivedi, 'New Frontiers of Insider Dealing Regulation—Towards a level Playing Field' (2021) 9 Afr. L. J. *(forthcoming)* (hereinafter ' Samamba Lennox Trivedi I')

[14] *ibid*

[15] *ibid*

[16] *ibid*

[17] *ibid*

[18] *ibid*

[19] *ibid*

[20] *ibid*

[21] *ibid*

[22] *ibid*

[23] *ibid*

[24] *ibid*

[25] 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 stating the measure of damages, and applying 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, 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 market value (fair value) and

Besides eliminating the incentives of insider dealing, disgorgement serves as a deterrent or punitive measure.[26] It is meant to deter repetition of the market misconduct by the errant market participant;[27] it also serves to deter would-be offenders.[28] Thus, any amount over and above the normal measure of disgorgement represents the common law exemplary damages.[29] Thus, the dual-object of disgorgement is achieved by recovering from the errant market participant any profits made and/or losses avoided by insider trading, and requiring the errant market participant to pay something over and above the amount representing the common law normal measure of damages.[30]

2.4.1. The Concept of Disgorgement—An Overview

The Zambian Securities Act 2016 (ZSA 2016) does not define the term 'disgorgement'. This way, recourse may be had to the Banking and Financial Services Act 2017, and the Companies Act 2017.[31] However, the latter Acts of Parliament do not render a definition of the term 'disgorgement' either. 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.[32] Thus, the Oxford Dictionary of English defines 'disgorgement' as:[33]

(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 definition (iv) appeals to our purposes, it is worth-noting that there is a common strand that runs through all the definitions given above—the common feature being the discharge of specific substance or content 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 no more than what was taken or gained by the erring market participant. This, in essence, is the normal measure of disgorgement whose multiplier is '1'. 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

Thus, the normal measure of disgorgement equals the common law normal measure of damages. It is therefore submitted that any amount over and above the common law normal measure of damages is not, strictly speaking, disgorgement but rather punishment. It represents the punitive component of gross disgorgement. Thus, any amount over and above the value accruing to the

---

the contract price of securities is the measure of damages for any loss occasioned by director-insider dealing: Zambian Companies Act 2017, ss 115, 116, 117.

[26] Samamba Lennox Trivedi I, *op.cit*

[27] *ibid*

[28] *ibid*

[29] *ibid*

[30] *ibid*

[31] Zambian Securities Act 2016, s 5

[32] *Stallion Motors Ltd and African Cargo Services vs Zambia Revenue Authority* (Appeal No. 11/2012) [2014] ZMSC 83

[33] Catherine Soanes and Angus Stevenson, *Oxford Dictionary of English* (2nd Edn, Oxford University Press) at 498

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'.[34] Thus, the punitive component of gross disgorgement could be mathematically be expressed as follows:

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

Thus, PD = $a\Omega$, 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 weigh into the weight or value of Ω. Thus, the value or total weight of 'Ω' may 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 = $a \times \Omega$ or $a\Omega$

Thus, PD = $a \times 1.25$

Therefore, PD = $1.25a$ (where 'a' 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). Gross Disgorgement could be mathematically expressed as follows:

GD = ND + PD

GD = $a + 1.25a$

2.4.2. 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).[35] The implied power that the SEC has with respect to disgorgement

[34] 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)

[35] Zambian Securities Act 2016, s 141(1)

is to pray for a disgorging order in an insider dealing case commenced by the SEC.[36] 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.[37] In case of an errant company market participant, the alternative measure of disgorgement is ten per centum of the annual turnover of the company.[38] In this respect, the applicable measure of disgorgement against company insider dealers is the formula that gives the higher value disgorgement—that is comparing the result given by the 'maximum of three times the value of the gain' formula to the value yielded by 'the ten per cent of annual turn-over' formula.[39]

2.4.3. 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. Doing so will serve to highlight the context within which our case for the common law approach to damages in the administering of disgorgement has been developed.

In Zambia, disgorgement was introduced under the Securities Act 2016,[40] before any form of civil recovery for insider dealing was introduced.[41] 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 dealing. Thus, disgorgement appears to have been designed as a multi-faceted device that serves the regulatory role of damages at common law and rescission in equity.

Thus, against this backdrop, disgorgement in Zambia was designed to perform two primary regulatory roles in insider dealing regulation. Firstly, disgorgement was/is designed to play the regulatory role played by the normal measure of damages at common law by removing the incentives of insider dealing—taking away from the insider profits made and losses avoided. It was expected that absent any benefit, insiders would have no or little motivation to engage in insider dealing.[42] Secondly, disgorgement was/is designed to play the regulatory role of exemplary or punitive damages at common law by imposing deterrent monetary penalties over and above the common law ordinary measure of damages.[43] It was expected that the punitive component falling over and above the common law normal measure would serve to deter the offender from repeating the offence, and would-be offenders from engaging in the same or similar market misconduct.

2.4.4. An Illustration of the Basic Components of Disgorgement

[36] *ibid*
[37] Zambian Securities Act 2016, s 141(2)
[38] *ibid*
[39] *ibid*
[40] Zambian Securities Act 2016, s 141(1)(2)
[41] Under the Zambian Companies Act 2017 which entered into force in July 2018, any pecuniary loss caused by director-insider-dealing is civilly compensable: Zambian Companies Act 2017, ss 115, 116.
[42] Although the disgorged amount representing 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).
[43] 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.

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.

2.4.4.1. 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. That is:

12 - 3= 9

9 × 1000= 9000

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

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 × 1000 = 7000

Thus, loss avoided by A is K 7 000.

2.4.4.1.1. 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
3 × 7000 (loss avoided) = 21000, or } non-company insider dealing
10 × Annual Turnover of a company insider dealer (company insider dealing)

Thus, applying the profits measure, the amount disgorged is K 3 000 less than the common law normal measure of damages.[44] Applying this measure would under-regulate. Consequently, the loss-

[44] 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

avoided-measure is preferable. This would give us K 21 000 as the applicable amount of disgorgement—an amount that 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). K 21 000 being higher than K 6 000, is the applicable measure of gross disgorgement in non-company insider dealing.[45] Supposing 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. K 100 000 being higher than K 6 000 (the profit measure) and K 21 000 (the loss-avoided-measure), is the applicable gross measure of disgorgement in case of company insider dealing.[46]

2.4.4.1.2. Disgorgement as a way of restoring Securities Market Equilibrium

Before the act of insider dealing, the market is in equilibrium. As market inefficiency and other effects of insider dealing—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 (a) is complementing subsequent disclosure of the material inside information in restoring the lost market equilibrium.[47] Similarly, the punitive component of disgorgement serves to maintain the restored equilibrium by deterring subsequent commission of a particular or similar securities market misconduct.

2.4.5. 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 accruing to the insider-turned-trader', the Zambian Securities Act 2016 (ZSA 2016) suggests that the multiplier for gross disgorgement ranges from 1 to 3.[48] However, the ZSA 2016 does not spell out factors that should be considered in determining the value of the multiplier. Admittedly, it could be argued that the CMT will, in due course, pronounce factors 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*[49]—as pronounced by the CMT—are designed to weigh in, the disgorgement formula stipulated in the Zambia Securities Act 2016 may be said to be entirely punitive.[50] If this view is readily accepted, then the view that the formula stipulated in the ZSA disregards the

---

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.

[45] See, Zambian Securities Act 2016, s 141(2)

[46] *ibid*

[47] As the disclosed material information sets into the market, the lost informational equilibrium of the market gradually returns. However, the disequilibrium resulting from the act of insider dealing still lingers 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 resulting from the act of insider dealing.

[48] See, Zambian Securities Act 2016, s 141(2)

[49] 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.

[50] 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.

normal measure of disgorgement (the common law normal of damages) as an integral part of gross disgorgement, should also be accepted.

The shortcoming inherent in this sort of conception may be illustrated by comparing the disgorgement value yielded by standard formula to that yielded by the ZSA formula. Getting back to our scenario given in section 2.4.1 above, the value of α = K 9 000.[51]

Using Standard Formula:

GD = ND + PD

GD = α + α (1.25)

GD = 9000 + 9000(1.25)

GD = 9000 + 11 250

GD = **20 250**

Using the Securities Act 2016 Standard

Applying the same value of Ω (Ω =1.25), the Statutory Formula may be stated as follows:

GD = 1.25 × 7000 (the value of loss avoided by the insider-turned-trader in section 2.4.4.1 above)

Thus, GD = 8 750

As has been established above, the value yielded by the standard formula (20 250) is the sum of the common law normal measure of damages (9 000),[52] and the punitive component (11 250) as determined by the circumstances of the case. 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 dealing. The author argues that the elimination of the gain (profit made plus loss avoided) is likely to demotivate insiders from engaging into unprofitable insider dealing. To the extent that, the other component of 20 250 represents the circumstantially-determined punitive component, 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. These two regulatory virtues combined, are likely to preserve the integrity of the securities market.

On the contrary, the 8 750 yielded by the statutory formula is 250 less than the total value of the gain accruing to the insider-turned-trader (9000).[53] Put another way, if part of the disgorged 8 750 were applied to loss avoided, only 1 750 would go the disgorgement of profit made. Given 2 000 as the value of profit 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 crime. And in actual fact, the statutory formula 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 given in the Zambian Securities Act 2016) is likely to always 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 restored equilibrium, if it were attained at all, is likely to perpetuate the disequilibrium in the securities market. Thus, the statutory formula is likely to under-regulate insider dealing in Zambia. An argument is made by the author that the retained portion of the gain is likely to encourage insider dealing by insiders. A corollary argument is made that light

[51] For the Standard Formula of Disgorgement, and value of 'α', see, sections 2.4.1 and 2.4.4.1 above.

[52] Which represents the total value of the gain accruing to the insider-turned-trader and consisting of profit made and loss avoided.

[53] See, sections 2.4.1 and 2.4.4.1 above.

punishment (punishment which is less than the offence deserves) is likely to drive risk-averse investors away—to securities market meting out proportionate punishment—by encouraging commission of insider dealing and similar offences.

As a possible way of ensuring thorough regulation of insider dealing in Zambia, proposals are made for adoption of the standard formula established herein above.

2.4.6. Constraints relating to over-regulation of Company-Insider-Dealers

Disgorgement proper, as has been established above, consists in the squeezing out of what the insider-turned-trader has actually gained through the act of insider dealing. It has also been established above that the punitive component of disgorgement should be informed and determined by the common law normal of damages and material considerations such as past conduct of the offender, prevalence of the offence, impact of the offence on market integrity and activity, et cetera, as discussed above. Along this line of thought, it would be prudent for the SEC to pray before the CMT for orders of accounts and tracing orders for the tracing of any investments that may have been made using the gain from insider dealing. Admission of this view clearly admits of the view that "the pre-requisite to *disgorgeability* is existence of a direct and natural relationship between the act of insider dealing and the gains from insider dealing 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 from insider dealing and its turn-over, determining the value of *disgorgeable* amount on the strength of the turn-over of an insider-trader-company, as the Zambian Securities Act 2016 does in section 141(2), is conceptually misplaced. A question may be asked, what could be the regulatory justification to taking away 100 000 from an insider-trader-company when they have only gained 9 000 from insider dealing"? The 11 250 punitive disgorgement taken away by the standard formula in our scenario in sections 2.4.1 and 2.4.4.1 could be rationalized by material considerations discussed above. What is 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 dealing. This sort of conception appeals to cases involving breach of breach of 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 avoided and the profits made, and breach of the continuous disclosure obligation by the issuer. Thus, by disgorging the losses avoided and the profits 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 gains from insider dealing and the turn-over of the company for the profits are made and losses avoided on the external investment—securities investment. Consequently, unless it can be proved that the returns on the external investment have been applied to other businesses or investments of the company, disgorgement must be restricted to the gains on the external investment. It is

therefore submitted that the current approach to disgorging gains by insider-dealing-companies amounts to over-regulation and 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 region meting out proportional 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 proposed above—be applied to all styles of investors involved in insider dealing. It is also proposed that only that portion of the turn-over of an insider-trader-company bearing a direct and natural connection to the gains on insider dealing should be reached by orders for accounts or tracing in equity.

3. INSIDER DEALING AS UNCONSCIONABLE CONDUCT

Insider dealing may, arguendo, be said to constitute unconscionable conduct attracting 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 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.[54] Thus, an insider-turned-trader will not be allowed to enforce their rights or retain the benefit acquired under a transaction tainted with insider dealing.

The equitable jurisdiction to set aside an unconscionable bargain is premised on proof of:

(i) 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

(ii) Unconscientious exploitation of the disadvantage of the other party by consequent overbearing of the will of the other party.[55]

It is without controversy that condition (i) above is readily established by the information exclusively possessed by the insider. But how does that resulting informational disadvantage overbear the will of the outsider? We are of the view that 'will' as used above denotes "bargaining position or power of the parties". If this view is correct, then the central premise of this section could be that 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 overbears their bargaining position or power.[56]

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 existence of a special advantage. These factors include:

(i) poverty;

(ii) ill health;

---

[54] G.E. Dal Pont, D.R.C. Chalmers and J.K. Maxton, *Equity and Trusts: Commentary and Materials* (Sydney, LBC Information Services 2000) at 284 (hereinafter 'Dal Pont, Chalmers & Maxton (2000)').

[55] *ibid*

[56] 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".

(iii) infirmity;
(iv) **lack of knowledge** and/or experience;
(v) need for independent advice; and
(vi) inadequacy of consideration.[57]

The author argues that lack of information or 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 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 information 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.

The Liberal and Accommodating Approach of English Courts to Unconscionability

Presently, there are other cases, such as insider dealing which call for intervention of equity on account of the inherent unconscionable character of the conduct involved. 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.[58] Even better and progressive, is the availability of rescission for unfair contract terms.[59] The Zambian Parliament has also intervened in cases of oppressive hire purchase agreements.[60] Thus, oppressive terms in hire purchase agreements are not enforceable.[61]

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 deal, and particularly the conduct of the parties. Thus, the equitable doctrine of 'unconscionable dealing' is "procedural in character".[62] 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 dealing 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".[63] Similarly, the English Supreme Court

[57] Dal Pont, Chalmers & Maxton (2000), at 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).
[58] See, the Zambian Competition and Consumer Protection Act No. 24 of 2010, s 47
[59] See, Zambian Competition and Consumer Protection Act 2010, s 53(1)(2)(3)
[60] Zambian Hire Purchase Act, Ch 399, s 8
[61] *ibid*
[62] Dal Pont, Chalmers & Maxton (2000), at 284, *op.cit*
[63] Jill E. Martin (ed), *Hanbury & Maudsley—Modern Equity* (13th edn, Sweet & Maxwell 1989) at 794 (hereinafter 'Jill E. Martin (1989)').

has observed that "Parliament has undertaken this essentially-legislative task, and the courts should not formulate further restrictions".[64]

The author argues that insider dealing in-so-far-as it constitutes inequality of bargaining power in the bargaining process, and facilitates creation of a monopoly in the use of property rights incorporated in the unpublished price-sensitive information justifies intervention of equity especially in cases where damages are not available for loss occasioned by insider dealing.

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.[65] 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.[66] At law fraudulent and innocent misrepresentation or duress may give rise to a right to rescind a contract.[67] 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 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*:[68]

[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.[69] 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*[70] , and was approved by the House of Lords in *Spence v Crawford*[71] 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[72] of Lord

[64] *National Westminster Bank plc v Morgan* [1985] A.C 686, at 693 (HL).
[65] Dal Pont, Chalmers & Maxton (2000), at 1015, *op.cit*
[66] *ibid*
[67] Zambian Misrepresentation Act, Ch 69, s 2(a)(b)
[68] *O'Sullivan v Management Agency and Music Ltd* [1985] 1 Q.B. 428

[69] See, *Hunt v Silk* (1804) 5 East 449.
[70] [1899] 2 Ch 392, at 456.
[71] [1939] 3 ALL ER 271, at 285
[72] *Erlanger v New Sombrero Phosphate Co* (1878) 3 APP. Cass. 1228, at 1278-79

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'.[73]

4. 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;[74]

(ii) Extra-territorial insider dealing;[75]

(iii) Cases in which un-published price-sensitive information is initially acquired by an unconnected outsider through cyber-theft.[76]

Thus, in cases where damages or restitution are/is not available, disgorgement could serve a rescue regulatory measure. In such cases, disgorgement could serve to safeguard the integrity of securities markets. This view is rationalized by the dual role served by disgorgement. By the common law measure of damages 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 repetition of the market misconduct by the offender, and commission of the same or similar market misconduct by would-be offenders.

5. ANALOGY FROM 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 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

---

[73] *O'Sullivan,* at 466, *op.cit*

[74] 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').*

[75] See, 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.

[76] '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 attracting the intervention of equitable jurisdiction and remedies such as rescission.

have been had the injury not been occasioned by the defendant. On the normal measure of damages and regulatory object served by the normal measure of damages, Lord Blackburn, in the case of *Livingstone v Rawyards Coal Co.*[77], 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.[78]

Thus, in insider trading cases in which damages are available, the law will not only be redressing specific injury suffered by an investor but also taking away from the insider-turned-trader the gains from the act of insider trading. Removal of the gains serves to demotivate engaging in unprofitable insider dealing. This serves to boost investor confidence and the integrity of the securities market.

In exceptional cases, however, damages 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.[79] 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.[80]

Thus, punitive damages are awarded as a way of deterring the defendant and would-be defendants from repeating the offence or committing similar offences. It is submitted that punitive damages serve to safeguard the cleanliness of securities markets.

In the context of disgorgement, it submitted that the normal measure of disgorgement, which is also the normal measure of damages at common law, serves the regulatory purpose served by the common law normal measure of damages as discussed above. It is also submitted that the punitive component of disgorgement serves the regulatory objective served by punitive damages. 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:[81]

(i) past conduct of the offender;
(ii) means used to commit the offence;
(iii) the amount involved;
(iv) prevalence of the offence;
(v) prevalence of similar offences;
(vi) 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.

---

[77] [1880] 5 App. Cas. 25.
[78] *Livingstone v Rawyards Coal Co.* [1880] 5 App. Cas. 25, at 39
[79] Harvey McGregor (ed), *Mayne and McGregor on Damages* (12th edn, Sweet & Maxwell 1961), para 207, at p. 196
[80] *ibid*
[81] See, section 2.4.1 above.

In the process of incorporating the common law regulatory virtues in disgorgement, the first regulatory step should consist in wiping out the gains from insider dealing by applying the common law normal measure of damages. For jurisdictions without any form of civil recovery for loss occasioned by insider dealing, the normal measure of damages constitutes the normal measure of disgorgement. Similarly, in Zambia, in other cases than director-insider-dealing, this is also the normal measure of disgorgement.

In jurisdictions in which civil recovery is available for all classes of insiders, the normal measure of disgorgement should be treated as already satisfied by the damages already recovered in a personal suit by the injured investor or by the SEC for and on behalf of the injured investor who had failed or neglected to commence a suit. Consequently in computing the gross disgorgement, the normal measure of disgorgement should be denoted by '0'. Thus, disgorgement by the standard formula proposed herein above:

GD = α + αΩ

GD = 0 + 9000 (1.25)

GD = **11 250**

Thus, in cases where damages have already been awarded, disgorgement by the proposed standard formula equals the punitive component of gross disgorgement in cases where civil recovery is not available.[82] It is submitted that in cases where damages have been awarded to the injured investor, all the standard formula would permit is imposition of the punitive component. And, in such cases, the total value of disgorgement is the sum of the damages awarded and the punitive component so calculated. Thus:

Total Disgorgement (TD) = d (damages awarded) + αΩ

TD = d + αΩ

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.[83] This finding underscores the position that disgorgement is designed to perform the role 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 that 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 case where the SEC has conduct of 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.

[82] See, sections 2.4.1 and 2.4.4.1 above.
[83] See, sections 2.4.1. and 2.4.4.1 above.

Once the gains from insider dealing 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 ascertaining the quantum of the punitive component of disgorgement guided by the *material considerations* discussed above.

6. CONCLUSION

This article has examined the Zambian legal, regulatory and institutional framework for the regulation of insider dealing so as to establish whether or not it has provided adequate safeguards for effective administration of disgorgement of gains from insider dealing. The general conclusion reached in this article is that, the said framework has not provided the much-needed incentives for effective administration of disgorgement of gains from insider dealing. One of the findings that supports this conclusion is that, the Zambian Securities Act 2016 does not stipulate factors that should be taken into consideration in determining the disgorgement multiplier and ultimately the quantum of disgorgement. The other finding that 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 factors which should be considered in determining the weight of the disgorgement multiplier.

The article has established that, when the stipulated statutory formula for disgorgement is applied to disgorgement of insider trading gains by human insider traders, it tends to under-regulate by allowing the insider-turned-trader to retain part of those gains. An argument has been made that the retention of part of the gains from insider dealing offends the basic objective of disgorgement which is the taking away of all the gains from insider dealing. An argument has also been made that the retention of part of the insider trading gains is likely to incentivize repetition or commission of the market misconduct by the offender and would-be offenders. A further argument has been made in this respect that the resulting prevalence of insider dealing is likely to drive risk-averse investor to other securities markets in the region offering proportional punishment for the same offence. The article has also established that when the stipulated statutory formula for disgorgement is applied to company insider traders, the punishment imposed is overly oppressive, reaching even unconnected resources of the offender. An argument has been made that such excessive punishment of company insider traders is likely to drive them to other securities markets in the region imposing indiscriminate and proportionate punishment for the same offence.

As a possible way of ensuring that the disgorged amounts fit the market misconduct, proposals have been made for the replacement of the statutory formula with the standard formula. The proposed standard formula will require disgorgement of all the gains from insider dealing by applying the common law normal measure of damages. Once all the gains have been taken away from the insider-turned-trader, the Capital Markets Tribunal should proceed to determine the quantum of the punitive component of disgorgement. In exercising the discretion to determine the value of the disgorgement multiplier, it has been proposed that the CMT be guided by factors such as:

a) past conduct of the offender;
b) means used to commit the offence;

c) the amount involved;
d) prevalence of the offence;
e) prevalence of similar offences;
f) impact of the market misconduct on integrity and market activity;
g) damages recovered or recoverable, if any; and
h) administrative fines, and other penalties already imposed or imposable, if any.

The punitive component should be determined by multiplying the value of the common law measure of damages by the value of the disgorgement multiplier as determined by the proposed considerations stated above. The gross or total disgorgement must be a sum of the common law normal measure of damages and the punitive component as illustrated in sections 2.4.1 and 2.4.4.1 above.

An argument has been made that by applying the common law normal measure of damages, the CMT and the SEC will be removing the incentives of insider dealing—profits made and losses avoided. An argument has also been made that the removal of the incentives of insider trading is likely to discourage insiders from engaging in unprofitable insider trading. A further argument has been made that by the commensurate punitive component, the CMT and the SEC will be deterring repetition and commission of the market misconduct and similar market misconduct by the offender and would-be offenders. A further argument has been made that, these two virtues of the proposed standard formula of disgorgement—that is, the normal measure of damages, and the punitive component determined as proposed herein—are likely to enhance investor protection and the integrity of securities markets in the region.

Even more importantly, the SEC should embark on investor education by explaining the regulatory objective of disgorgement, its components and the purpose served by each component. Such an undertaking should serve as a springboard for explaining several other regulatory tools such as administrative fines and other imposable statutory penalties. Knowledge of the character, components and objective of a regulatory measure is likely to enable market participants appreciate what they are being punished for, why they are being punished, and the appropriate weight of the punishment for particular breaches of regulatory rules. Thus, when punishment is imposed by the regulator, an erring market participant will know whether or not the regulator is being lenient or imposing excessive punishment. That way, regulatory measures are likely to be obeyed. Market participants are also likely to appreciate that regulation is for their own good and the good of the entire market, and not a disguised form of broad-daylight-robbery.