THE EXTENT OF MINORITY SHAREHOLDERS' PROTECTION IN TAKEOVERS: RIGHT ACTIONS

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Abstract

One of the characteristics of takeover in company restructuring is the protection of minority shareholders. There are limits on minority shareholders' rights to initiate proceedings against the controlling shareholders (directors or major shareholders or combination of both) of the company. Traditionally, minority shareholders only had rights of action to exercise on grounds of fraud perpetrated on the minority shareholders, illegal acts of directors, ultra vires acts etc. However, minority shareholders' rights to ventilate their grievances in takeover situations were generally suppressed by the courts; a situation that has lowered the threshold of accountability of the controlling shareholders. Other alternative paradigm of control and accountability such as the internal control model, the market control model, and the regulatory model etc. do not provide sufficient water-tight protection to minority shareholders' legitimate expectations in takeover situations. Nigerian courts have so far shown some degree of reluctance in recognising that the directors of company owe a fiduciary duty to the minority shareholders where it borders on change of corporate control. Although the provision of the Companies and Allied Matters Act (CAMA), 2004 was put in place in order to remedy the inadequate protection of minority shareholders, the judicial interpretation of this piece of legislation imposes restrictions on the rights of minority shareholders to initiate court actions. The remedies available to minority shareholders are limited to the buy-out remedy often combined with a conservative approach in share valuation. Experience in other jurisdictions shows how shareholders are entitled to a broader range of remedies in takeover situations. In Nigeria, however, neither the Chapter IV of the 1999 Constitution as (Amended) nor the provisions of CAMA on takeover bids are likely to bring about significant changes in the range and scope of the judicial remedies available to minority shareholders.This work therefore, argues for the development of a private action model in Nigerian jurisprudence and concludes that unless the courts provide sufficient locus standi (standing) for minority shareholders in litigation, the position of the minority shareholders in takeovers would still remain in quandary. The seminar makes recommendations for the introduction of a pre-action protocol for shareholders disputes and the relaxation of the law that inhibits minority shareholders' action.

Introduction

In the Nigerian company law, there are three main areas that regulate mergers and acquisitions (also referred to as reconstructions or takeovers). These three main areas of law are essentially those to do with schemes of arrangement supervised by a court, those for general reconstructions, demergers, amalgamations and so on that are not overseen by a court, and takeovers, which concern acquisitions of public companies. In order to properly do justice to the subject matter of this paper, it may be instructive to analyse key issues that could potentially inform the minority shareholder's right of action when a company undergoes reconstruction. These are the Scheme of Arrangement; Reconstruction and Takeover.

Scheme of Arrangement

By way of summary, the Scheme of Arrangement has been described as the "choice made in the gap between limping and dying".[1] Also CAMA describes "Arrangement" as "any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change affected under any other provision of this Act or by the unanimous agreement of all the parties affected thereby".[2]

Arrangement and Compromise is also defined pursuant to s.538 CAMA as essentially an arrangement by a company with the creditors and/or the shareholders or a class of them to accept less than what they are ordinarily entitled to as full satisfaction of their obligation[3].

The above definitions illustrate that a company may decide, for a number of reasons, to restructure its corporate outlook after incorporation. This may be occasioned by a company's buoyancy or due largely to a downward turn of the company's economic financial outlook. The restructuring may also require the company to carry out Internal Reorganisation,[4] or where liabilities outweigh the assets of the company. In this case, the company may also consider a scheme of arrangement with another solvent company. It therefore means that sometimes, shareholders or a class of them may be convinced to vary their rights.

An agreement may also be reached with ordinary shareholders to surrender part of their shares to preference shareholders in lieu of dividend arrears. Alternatively, preference shareholders may be pressured to cancel approved dividends or reduce the fixed rate of dividend or even to accept the conversion of their preference shares to ordinary shares. There may however, occasion an event, especially in extreme situation, where a company may resolve to sell all or part of its shares or undertakings to another company or even agree with another company to allow majority of its voting power in consideration for shares of the other company being issued to its shareholders after which it may wound up since it has no assets left.

Reconstructions / Mergers/ Acquisition

Reconstruction occurs when a company transfers the whole of its undertaking and property to a new company under an arrangement by which the shareholders of the old company are entitled to receive some share or similar interests in the new company.[5] It includes both amalgamation and demergers, describes a company which is ceasing to exist yet not in a state of crisis. If a company or two are in a state of crisis, this does not mean that an amalgamation, merger or demerger cannot be carried out. Reconstruction, therefore, is referred to as the process of transfer of a company's or several companies' business to a new company. The old company will get put into liquidation, and shareholders will agree to take shares of equivalent value in the new company.[6] In the Nigerian jurisprudence, especially under CAMA, Reconstruction is employed

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[1]Okuribido, D. *The Scheme of Arrangement: A Viable Option for Nigerian Companies in a Downturn*? Emerging Markets Restructuring Journal, Issue No 1 – Spring 2016

[2]CAMA 2004, S.537.

[3] ibid. s.538

[4] ibid. at p.540

[5]Henry Upadhyay, Reconstruction and amalgamation and its Provision in Companies Act, 2nd Edu (Sweet & Maxwell 2014)

[6] Sealy Len and Sarah Worthington, Cases and Materials in Company Law, (8thedn,Oxford University Press 2007),

when one company is involved and the rights of the investors and sometimes of its general creditors are varied.[7] More so, Reconstruction also known as merger in Nigeria is governed by the Investments and Securities Act 2007 (ISA)[8] 2007 and also CAMA. ISA is defined Merger as any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies and one or more corporate bodies.

Takeover

A 'takeover' is defined by Weinberg and Blank as: "A transaction or series of transactions whereby a person (individual, group of individuals or company) acquires control over the assets of a company, either directly by becoming the owner of those assets or indirectly by obtaining control of the management of the company".[9] Therefore, where a person, making a take-over offer for all the shares of a company or a class of its shares, has acquired or contracted to acquire at least nine-tenths in the value of the relevant shares, he may give notice to the holder of any remaining shares that he desires to acquire those shares. He then becomes prima facie entitled and bound to acquire those shares on the same terms on which the shares of the other shareholders are to be transferred.

Takeovers may occur between the bidding and the target company. The process may be either hostile or friendly Takeovers. A friendly Takeover takes place "when the targeted firm agrees to be acquired".[10]On the other hand, Takeover may be considered "hostile" if the target company's board of directors rejects the offer, but the bidder continues to pursue it, or the bidder makes the offer without informing the target company's board in advance. Reverse takeover occurs when the target firm is larger than the bidding firm. In the course of acquisitions the bidder may purchase the share or the assets of the target company.[11]Takeover, being very similar to an acquisition, is a reorganization process involving the acquisition of all the shares of one or more companies (target company(s) by another company (acquiring company), following which the acquiring company takes over the rights and obligations of the target company(s). For the consolidation exercise, after the takeover, the legal status of the acquiring company remains unchanged and the acquired company(s) shall cease to exist as a company. However, for a Takeover to be sanctioned, a minimum of 30% of the shares of the targeted company must be bid for. An Acquisition may become a merger if more than one half of the issued share capital of a company is acquired, as a merger must not be less than 51%.

Having explained various instances where company restructuring could take place, this work directs its attention to the extent of protection of the Minority Shareholders especially in Take-over situations. It is common knowledge that takeover affects minority shareholders' interests. However, the effect of a takeover on minority shareholders' interests depends on the model of takeover employed in the specific case. Therefore, to address the issues of legitimate expectations of minority shareholders in Takeover situation and extent of protection of their

[7] CAMA 2004 s.539

[8] ISA 2007 s.34

[9]MA Weinberg, and MV Blank, *Weinberg and Blank on Take-overs and Mergers*(5thedn, Sweet & Maxwell 1989),

[10]A Rao and KS Ramesh, Fundamental of Financial Management, Theory and Practice: (Oxford University Press, 1989)

[11] ibid,

interests in Nigeria, it is therefore necessary to explain how the different takeover models are carried out and how they impact upon minority shareholders. These include tender offers, share transfer by agreement, statutory schemes of arrangement etc. Each of these methods impacts in a different way on shareholders' rights, creditors' contractual rights and obligations, employees' right to work, and the composition of the board of directors. The different methods of takeover also reveal the nature of corporate control in the particular corporate structure, whether there is a balance of power or absolute control within the company.

Tender Offer

In a Tender Offer situation, a bidder company, or offeror, willing to obtain control over the target company, or offeree, can make an offer to all the shareholders for the whole or part of their shareholding in the company. If the offeror is already a minority shareholder in the target company, he may only need to make an offer for a small percentage of shares to obtain minority control. On the other hand, a higher percentage may need to be tendered if there has been long-standing family control and the family exercises control both through substantial shareholdings and financial devices that would enable it to initiate a proxy fight. In a company where there is strong state control, for instance because the government retains golden-shares, a tender offer for control may not be the most economical choice.

Under the ISA and CAMA, considerations can either be cash alone, shares, other financial instruments such as corporate bonds, or a combination of these means. In theory, the offeror may make an offer in relation to the percentage that it wishes to purchase. However, the law may impose conditions on such an offer, which restrict the freedom of contract. For instance, the offeror may make an offer conditional upon him obtaining 90 per cent of the shares in the company as a result of acceptance by shareholders, which will give the offeror right to purchase the remaining 10 per cent.[12]

As far as the bidder company is concerned, in general, the decision to make an offer rests with the directors without a resolution from the general meeting, unless there are concerns about a possible breach of directors' duties such as in a conflict of interests situation, which could be pre-ratified by a shareholders' resolution. The board of the target company may adopt defences to fend off the offer or force the offeror to negotiate with the board of directors, which will then have control of the structure of the offer and the style of the merger. The power to adopt defensive measures can be restricted. In Nigeria, when an offer has been made or is imminent, the power to adopt defensive measures, except in pursuance to a contract entered into earlier, is subject to approval by the shareholders at the general meeting.

In a cash-for-all offer, the offeror offers to acquire from the shareholders of the target company, at a stated cash price, all the equity shares of the target, except for any already held by or for the offeror and its subsidiaries. Because of the trouble that could be caused by the residual shareholders after the takeover, the offer is generally made conditional upon its acceptance, by a specified date, by the holders of not less than 90 per cent in value of the share to which the offer relates. This is to ensure that the offeror will acquire the right of compulsory purchase of the remaining shares related to the offer. The offeror will, however, reserve the right to declare the

[12]CAMA 2004 , s.540(1)

offer unconditional notwithstanding the fact that acceptances may relate to a lower percentage of shares only. Such a right is subject to the condition that the offeror, together with shares acquired before or during the offer, obtains a 50 per cent majority shareholding.

Shares are divided into voting shares and non-voting shares; an offer for non-voting equity share capital may not be made conditional upon any particular level of acceptances unless the offer for the voting share is conditional on the success of the offer for the non-voting share capital.4 This is to protect the non-voting shareholders' right to receive a control premium together with the voting shareholders. If the offeror offers to acquire more than one class of shares of the target, the offer for each class must be expressed to be a separate offer and the offeror may only exercise its power of compulsory acquisition in respect of each class of shares on a separate basis. Different classes of shares receive different benefits. Non-voting shares receive stable or higher dividends. Voting shares carry the right to cast votes at the general meeting and wider rights of access to corporate information in exchange for higher risks in respect of dividends. The difference between classes reflects on the need to ensure fair and equal treatment within the class but does not necessarily extend to equal treatment of the different classes. For instance, an offer may be made to acquire all the voting shares at the same price. Once the offeror has acquired voting shares that are more than 90 per cent of the shares to which the offer related, the offeror can acquire the non-voting shares without offering a higher price for them. Professor Alan Dignam had argued that the value attached to a share in a market place has no effect on the bundle of rights itself.[13] Shareholders will be treated fairly and equally within the same class but not necessarily across different classes.

The acquiring company or offeror may decide not to acquire all the shareholdings, but instead to offer to acquire from the shareholders of the target, at a stated cash price, a specified number, but not all, of the voting equity shares of the target not already held by the offeror or its associates. This situation is technically referred to as partial bid.[14] CAMA has not fully supported the idea of a partial bid because of its impact on the interests of the minority shareholders. A person who succeeded in a partial bid may be able to exercise effective control over the company. Having obtained a controlling majority, the controller will be able to initiate virtually all the issues to be discussed at the general meeting and secure the necessary resolutions. Even if a proposed course of action requires approval by super-majority vote, the controller could issue a proxy fight that will easily overpower the minority shareholders, who are without a collective voice. Notwithstanding these implications, more recently, the takeover rule has recognised that, subject to certain safeguards, partial bids are, in general terms, unobjectionable.[15] The rule is unlikely to give its consent for a partial offer for shares carrying voting rights in the target of more than 30 per cent. However, even if the rule does give its consent to a partial bid for the target's equity share amounting to more than 30 per cent, the offeror will be required n to make a comparable offer for all classes of the target's equity share capital.[16]

[13]A Dignam and J Lowry, Company Law: Core Test Series, (8thedn, Oxford University Press 2014),
[14]P Knights,Raiders
and Targets: The Impact of the Hostile Takeovers (5thedn, Oxford University Press New York 1998),
[15] ibid, p 139
[16] ibid, p 145

The consent will not be given if the offeror, or persons acting in concert with it, have acquired shares in the target either selectively or in significant numbers during the preceding twelve months or at any time after the partial offer was reasonably in contemplation.[17] This is to prevent the bidder obtaining the 30 per cent control defined by the rule, either by itself or with concerted parties, without paying the fair price for such control. Once consent has been given, the offeror, and the persons acting in concert with it, may not, during the offer period, purchase any shares in the target.

In tender offers, minority shareholders' interests may be affected in two ways. First, they may sell their shares at a price which does not incorporate the control premium. Secondly, if they do not sell their shares, their shareholding may be substantially diluted. Clearly, the internal control model cannot protect minority shareholders' interests efficiently. The market control model is also inapplicable because the minority shareholders' interests are affected exactly because of the free market mechanisms. This section has shown that the regulatory model provides a certain degree of protection. However, it will be argued in the following chapters and in the conclusion that the controllers of the company, including directors and majority shareholders, should be directly liable to minority shareholders if they harm their interests in certain situations.

Share-for-Share bid for all

In this type of bid, the acquiring company (offeror) offers to acquire from the shareholders of the target company in exchange for the issue of shares in the acquirer all the equity shares of the target, except those already held by or for the acquirer. The difference in consideration will also have an impact on the minority shareholders. An offer generally is made conditional upon its acceptance by a specified date by the holders of not less than 90 per cent in value of the shares to which the offer relates or such lower percentage as the offeror in its discretion may decide to accept. This is to make sure that control will be obtained. The effect of the above transaction will be that the former shareholders of the target company become shareholders of the acquiring (offeror) company, together with the pre-existing shareholders of the offeror company. The target company becomes a wholly-owned subsidiary of the offeror company. The result of obtaining control depends not only on the acceptance of the offer, but also on the size of the target. If the offeror is far larger than the target company, the target shareholders will own a lower percentage of shares in the parent company and, therefore, their ability to influence corporate decisions or exercise constraint in the subsidiary, i.e. the overtaken company, may be significantly diminished. On the other hand, if the target is far larger, the effective control of the offeror company may be shared between the former controller of the offeror and the former controllers of the target, or may even pass to the former controllers of the target alone.

In a share for share bid for all, the directors of the offeror company need to obtain the authority either by shareholders resolution or the articles of association to make an issue of the offer capital. Since those shares are issued for the purpose of a takeover bid, shareholders of the offeror company do not have the pre-emption right over those shares under the CAMA and SEC rules

[17]I Ramsay, I. 'Companies and Securities Law Review Committee, Report to the Ministerial Council on Partial Takeover bids' (1985) 20.

Share Buy-Back

As the term vividly implies, a buyback evokes the idea of a company using its cash to buy its own shares, in other words investing in itself. As we shall see below, in Nigeria there is a restriction placed on public companies both by the CAMA and SEC Rules to the effect that the company can only draw the cash needed for the repurchase from a specific source. Moreover, the buybacks can only be carried out in a certain manner within a certain time frame and within a certain proportion. The justification for these rules is better seen by reference to the formative stage of the Nigerian company law and their codification in the CAMA. In the past, unscrupulous company directors and promoters could create an artificial "bubble" or impression of buoyancy of the shares of a company and fuel dangerous speculative trading of the shares by repurchasing those shares with loans. In order to avoid the prevailing incidence of fraud committed on the unsuspecting members of the general public by those who were running the affairs of the company, rules were developed within the corporate law practice, and the CAMA.[18] CAMA also places a bar on companies acquiring their own issued shares or to taking advantage of any loan or financial assistance to acquire its own shares[19]

The rule is that, in order to avoid the incidence of fraud, a company cannot buy its own shares or assist another to buy it, except there are legitimate circumstances such as those mentioned by CAMA. This accords to best international practice and is meant to curb sharp practices of those controlling the affairs of the company (directors and controlling shareholders) howsoever that a lot of progress has been registered in best international corporate law practice with the rising in prominence of rules as a tool of corporate governance and corporate management accountability..

The exceptions to this general rule and their limitative conditions for application are stated in Ss. 158, 160 (2) (3) to 164.[20] For instance, as derogation to the rule, a buyback will be permissible-

- For the purpose of redemption of redeemable preference shares;
- For the purpose of settling or compromising a debt or claim asserted by or against the company;
- For the purpose of eliminating fractional shares;
- For the purpose of complying with a court order;
- For the purpose of satisfying the claim of a dissenting shareholder, etc

Share buy-back is not a takeover technique but a defence technique against a hostile takeover. Because a company cannot act as its own shareholder, the repurchased shares will be absorbed by the company, and the number of outstanding shares on the market is reduced. Minority shareholders' rights and legitimate expectations may not be encumbered under this scheme due to the restrictions placed by the CAMA.

Minorities

The models discussed above have shown that the market control model alone does not provide minority shareholders with adequate protection in takeovers. The internal model does provide an

[18] CAMA 2004, ss 158 - 165
[19] ibid, SS 159 – 160(1)
[20] ibid, SS. 158, 160 - 164

answer to some of the problems by requiring shareholders' approval for certain action by the directors to be taken or for certain transactions to be carried out. However, in many situations minority shareholders do not have a real say on the takeover and, even if a resolution is required, the majority rule means that minority shareholders are likely to be outvoted. The regulatory control model is largely applied and the ISA is an illustrious example. However, it still falls short of granting minority shareholders a remedy that can be administered at their behest if their interests are unjustly compromised. This would respond to the logic of the private action model. The analysis in this seminar work will show that the private action model is undeveloped in Nigeria. It is, however, well developed in other advanced economies like the US, U.K. Germany etc. and delivers good results in terms of safeguarding shareholders rights.

The major issue provoked in the course of this work, therefore is, what is the basis on which it is possible to claim that minority shareholders should have a right to a remedy in situations where their interests have been unjustly or unfairly compromised? Should company owe a duty to the minority shareholders to act fairly to avoid harming their legitimate interests and expectations? In discussing the minority shareholders' legitimate expectations and interests in takeovers, the legitimate expectations of minority shareholders are rooted in their being capital providers. As such, minority shareholders have certain rights that are the immediate consequence of their being capital providers, namely the right to capital, to right to dividends, the right to vote, and the right to supervise. This is the basis for the shareholders' expectation that their rights will be protected. However, in the company, the majority rule may limit shareholders' rights. The focus of the shareholders' expectations shifts from the substance to the process.

The third dimension is the standing of the shareholders to bring legal action to enforce their rights as provided in CAMA.[21] The analysis will demonstrate that in the current corporate structure shareholders have an expectation that certain fundamental interests will be protected as of right and that it will be possible for them to bring proceedings when:
1)Their rights have been violated;
2)The democratic deliberative process is flawed. The theory of corporate social responsibility provides support to the idea that minority shareholders interest should be protected and shareholders' activism should not be discouraged.
This work analyses the rights of the shareholders that derive from the right to capital. It will also look at rights to fair and equal treatment. The expectation that where their rights have been violated shareholders will have locus standi to bring proceedings to enforce their rights or obtain redress will be looked into. While shareholders' expectations are mainly based on the shareholders being capital providers, this paper also explains that the same conclusion is warranted under the theory of the company as a nexus of contracts. Finally, the implications of the theory of corporate social responsibility for shareholders' expectations are analysed and conclusions are drawn.

In addressing the issue of minority shareholders' expectations, it is important to understand the origins of the debate. In doing so, it is informative to analyse the term 'minority' and its ideological connotation. The term 'minority' refers to persons that are marginalised in the decision-making or negotiating process, and are likely to face abuses by the majority. This is the

[21] ibid, ss 300 – 308, 310 - 312

basis for the protection afforded to minorities in a democratic society whatever the distinctive features of the minority may be, whether disability, wealth, race, sexual orientation, and other social disadvantages. Traditionally, ethics have been the reason for protecting minorities as well as, in more recent times, fairness, equality, and social justice.In a modern society, people advocate for a fair society that will engender freedom and prosperity to all. The degree and extent of protection of the minorities are determined by their social and cultural backgrounds Cultural and social backgrounds. Therefore, the level of the protection of the minority can be a socio-cultural fight rather than an economic debate. Even in a democratic society, the majority rule is the bedrock or cornerstone of the decision-making process. This has the effect of forcing the minority to accept the outcomes of the process and languish in silence.However, in an advanced society, there will be safeguards against any injustice on the minority by a majority acting through the democratic process, for instance in the case of the expulsion of the minority from their territory e.g. the people of Bakassi Peninsula (Nigerian territory) being expelled to the Southern Cameroun on the grounds of ceded territory. Minority deprivation could also be in the form of expropriation of the minority's property. For drastic action to be taken lawfully against a minority, there must be very strong reasons, reasonable or unreasonable in the eyes of natural law, such as national security, in the case of expulsion of a minority, or economic planning policy, in the case of expropriation of proprietary rights, and often additional safeguards such as due process or just compensation for expropriation of property. Otherwise, the society is said to be under the dictatorship of the majority, which would be able to shift resources, to which the minority is entitled, from the minority to the majority.

Shareholders and Right Actions

In the corporate world, minorities could be workers, creditors, shareholders, or other stakeholders in the company. The overview of the reasons and mechanisms for the protection of minorities in modem democracies throws more light on the issue of protection of minority shareholders. In this analysis, minority shareholders should be protected as long as they are a minority, i.e. in the position of the minority with the connotation of being powerlessly marginalised. A minority shareholder, by definition a shareholder holding less than fifty (50%) per cent of the share capital in a company, may be the controller of the company. Unfortunately, the CAMA does not define the term 'minority shareholder'. However, we are guided by several provisions in the CAMA which refer to some special rights which are enjoyed by those shareholders representing at least 15% of the issued share capital.[22]

These provisions, however, do not connote that a minority shareholder is one who represent at least 15% of the issued share capital. The minority shareholders are to be considered case by case by analysing the capital structure of the company. In effect, Minority shareholders are individuals who have minority stakes in a company that is controlled by majority shareholders. They are shareholders who own less than 50% of the total shares of a company and often the ones dependent on the will of the majority shareholders, who are in controlling position, because of the bigger amount of the share capital they own. In essence, they are small investors in companies that generally due to their small shareholding are not able to affect business decisions.
(a) Illegal or Ultra Acts:

[22] CAMA 2004 s.46(1)

Shareholders can sue both under the common law and the 1968 Nigerian Companies Act to prevent illegal or ultra vires acts, since the company is incapable of ratifying such acts, thus in the case of Parke v. Daily News[23] it was held that if the act of the company is ultra vires or illegal, any member has a right to apply to the court to set it aside. It is commendable to have this as an exception as the absence of it would negate the whole essence of corporate practice and existence.

(b) Invasion of Personal Rights of Members:
This is yet another exception that aims at ensuring the protection of the minority. This is a situation where the wrong is done to the individual member of a company and not the company itself. This may occur where the individual is denied the right to vote which is a proprietary right. This issue arose in the case of **Pender vLushington**[24] and the court granted injunction in favour of the plaintiff whose right to vote was disallowed. Happily both the first exception and this have been re-enacted in the Companies and Allied Matters Act 2004, in Sections 300(a) and 300(c) respectively.

(c) Allegation of Fraud by the Minority Like the other exceptions, this is also salutary and has been codified into our present Companies and Allied Matters Act in section 300(d). In the case of **Atwood vMerryweather,**[25] an action bought against the majority shareholders in a company who sold their mine to the company in a transaction that was tainted with fraud, was upheld. The court held that not minding the rule in **Foss v. Harbottle**, the transaction will be set aside; otherwise the fraud cannot be prevented. However it must be shown that the wrongdoers control the company.[26]

(d) Where the Company's Property is Expropriated This is akin to perpetration of fraud on the minority and where this happens the rule in **Foss v. Harbottle**[27] will be ousted, it does not matter that the expropriation was in good faith.[28] This exception ensures that the company's assets are not disposed or frittered away as such would deny the creditor of the main subject to which he looks for payment of his debts.

(e) Interest of Justice: Still under the Common Law: this constitutes an exception. In the case of **Russel v. Wakefield Water Works Co**.[29] it was stated that: Any other case in which the aim of justice require is within the exception…the rule in Foss v. Harbottle is a general one but it does not apply to a case where the interest of justice require it to be dispensed with. This appears to be the most important exception as it covers the other exceptions. The whole of the exceptions can be said to be based on interest of justice. It is an available leeway to circumvent the harshness of the rule in Foss v. Harbottle18 and can even be exploited in such a way as to displace the entire rule, depending of course, on the special circumstance each case presents.

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[23] [1847] 1 Ph. 790 and [1875] 1 Ch. D. 13 11 (1962) ALL ER 929
[24] (1887) 6 Cu. D 70, See also Wood v. Odessa Waterworks Co. (1889) 42 Ch. D 636
[25]3 (1867) LR EQ. 464n 37 LJ Ch. 35
[26][1887] 9 Ch. APP 350. See also Cook v. Deeks (1916) AC 354 15
[27] Supra
[28] Alexander v. Automobile Telephone Co. (1900) 2 Ch. 56
[29]7 (1875) CR 20 LQ. 474 at 482

Shareholder's *Locus Standi* (Standing)

The problem of shareholders' standing is closely linked with the protection of their rights. The rights conferred upon the shareholders by the legal and regulatory system would be useless if the shareholders did not have standing to bring enforcement action against the company or the controllers of the company when their rights have been denied. It is, therefore, necessary, to determine the proper forum for the resolution of shareholders' disputes. While there is a need for an institution to enforce the rights to which shareholders are entitled, such an institution does not need to be the court. Other institutions having the nature of an independent tribunal could have the same function as the traditional judiciary. A shareholder as a provider of capital is entitled to the right to legal action to protect his rights directly or to enforce the duty of the directors, which will indirectly protect his rights. When the law confers rights upon legal and natural persons, the standing to enforce these rights is essential to the very essence of the democratic deliberative process. If the process impinges upon these rights, the system must provide an avenue for redress. It is important to state that litigation instituted by an individual shareholder based on minor harm caused by directors should not distort a company's operation. Simply put, an individual shareholder should not be able to bring a case against the board of directors for alleged unfair conduct towards him, which caused minimum injury. An example could be an action brought on the grounds that the shareholder was not able to ask questions at the general meeting due to time constraint. Therefore, there must be a balance between the interests of the company, represented by the board, and the interests of the shareholders.

On the other hand, if the board's conduct amounts to a manifest capital expropriation, an individual shareholder is justified in bringing the case in court. The application of the balance of interests test serves the purpose of preventing floodgate litigation brought by minority shareholders against the board. Minority shareholders, as stakeholders in the company, have the expectation that the directors will take into account their interests and the management of the company. Should the internal control mechanism fail, shareholders have the expectation that their interests will be protected by the legal system.

Conclusion

The conclusion of the analysis of the link between locus standi and shareholders' rights is that shareholders should be entitled to bring a suit as of right in two circumstances: 1) when their rights have been violated; 2) when the democratic deliberative process is flawed. This corresponds to their legitimate expectations in a democratic society. However, a balance of interests test which incorporates public policy considerations, may limit these legitimate expectations. The court has been reluctant to lift the corporate veil to protect shareholders rights. However, there are several cases in which the court recognized the need to pierce the corporate veil. In Littlewoods **Sotres v IRC**,[30] Lord Denning said: "The doctrine laid down in Salomon's case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest.

[30][1969] 1 WLR 1241

In **DHN Ltd v Tower Hamlets,**[31] the court also said that: "This group is virtually the same as a partnership in which all three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company D.H.N. should be treated as that one." In **Re A Company**, the Court of Appeal stated that 'the court will use its power to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration'

Conclusively, there is no doubt that several statutory provisions are in place to remedy the unsatisfactory outcome generated by the common law restrictions on minority shareholders' private actions.

[31][1976] 1 WLR 852, 860.