PROTECTION OF THIRD PARTY RIGHTS AND MINORITY INTEREST UNDER NIGERIAN CORPORATE LAW

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Abstract

This paper examined how third party rights and minority shareholders can be protected under Nigerian corporate law. The common law rule of Foss v. Harbottle which has been incorporated into our laws clearly made the company the proper plaintiff to seek redress in any breach of duty owed the company or an infringement of company's right and ipso facto removes third parties and minority shareholders from maintaining actions on behalf of the company. It is therefore not for individual shareholders to sue and the courts will not generally entertain a suit brought by individual shareholders, for they will not interfere in the internal management of the company. There is also the problem associated with the Ultra vires doctrine and its harsh realities on third parties who may have transacted with unscrupulous directors outside the company's objects. It is obvious that the strict application of these two rules is detrimental to the minority interest and third parties. Whilst exceptions have been provided in the law to ameliorate the problems occasioned by these principles, they seem not far reaching enough. Although this rule has some advantages which includes the prevention of multiplicity of suits and the fact that in many cases the irregularity complained of may be one that can be ratified in general meeting, it has imposed enormous hardship on members and third parties who may have dealings with the company, particularly where such dealings were carried out by unscrupulous directors who might be in control of company affairs.

Introduction

The general effect of incorporation is that from the date of incorporation, the subscribers of the Memorandum together with such other persons as may from time to time become members of the company become a body corporate by the name contained in the Memorandum capable forthwith of exercising all the functions of an incorporated company and having personal succession and a personal seal.[1] The main consequence of company incorporation is the conferment of artificial and legal personality distinct from the members.[2] Except to the extent that the company's memorandum or any other enactment otherwise provides, every company shall, for the furtherance of its business or objects, have all the powers of a natural person of full capacity.[3] It can contract, deal with property as a natural person and will incur liability and acquire rights in the same way.[4]

Being an artificial person, the company is operated by the directors and shareholders (human agents or organs) who happen to be the mind, brain and hands through which it carries out its own functions. The directors vested with the powers to manage the day- to- day activities of the company are subject to the provisions of the articles. The decision as to how to run its affairs is done democratically by the directors and shareholders at the board or general meetings as the case may be through unanimous majority vote (majority rule). This implies

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1 See *section 42* of the Companies and Allied Matters Act (CAMA) 2020

2 Salom*on v Salomon & Co* (1897) AC 22

3 O.J. Orojo, *Company Law and Practice in Nigeria*, Mbeyi & Associates, Lagos,1992, p.97

3 *Foss v Harbottle* (1843)2 Hare 461, Mbeyi & Associates, Lagos,1992, p.97

4 *Foss v Harbottle* (1843)2 Hare 461

that the wish of the majority must prevail at all times. The application of the democratic rule as in *Attorney General v. Davy*[5] per Hardwicke L.C, "…it cannot be disputed that whenever a certain number is incorporated, a major part of them may do any corporate act; or all are summoned and a major part of those that appear may do a corporate act."

It is not out of place to see directors or majority shareholders abuse these powers by recklessly engaging in transactions that are ultra *vires*, illegal to the object of the company or oppressive to minority shareholders which prejudice their interest as well as the rights of third party dealing with the company in contravention of the extant provisions of the Act. The worries are whether the interest of the minority shareholders and the rights of third party are left at the mercy of the directors and majority shareholders who tend to abuse their powers. Are there remedies and reliefs provided under the Act to redress such wrong in order to curtail the excesses of the directors and majority shareholders in the best interest of the minority shareholders, the third party and the company at large. These are issues which this work intends to address.

Protection of Third Party Rights

Many corporate doctrines of common law dealt some hardship on the third party with uphill equitable remedies which are not easily achievable, hence the relief and protection provided under the statue. The doctrine of *ultra vires* was intended to protect creditors (third party) and investors but its strict application inflicted hardship on the third party as it was presumed that any person dealing with the company should have a constructive notice of the objects of the company which is contained in the Memorandum of Association and Articles of Association which are public documents.

To ameliorate this hardship, CAMA in *Section 44* (3) provides that "notwithstanding the provisions of *subsection* (1), no act of a company, conveyance or transfer of property to or by a company shall be invalid by reason of the fact that such act, conveyance or transfer was not or made for furtherance of any of the authorized business of the company or that the company was otherwise exceeding its objects or powers." The application of this provision is that although the company may be in breach of *section 44*(1), or the exercise of power not in furtherance of its authorized business, persons dealing with the company may yet be protected since the breach does not make the act invalid.

In the same vein, *Section 92* of CAMA abolished the doctrine of constructive notice of registered documents. As provided in the Act, "except as mentioned in *section 223* of this Act, regarding particulars in the register of particulars of charges, a company or of any other particulars, documents, or the contents of documents merely because such particulars or documents are registered by the Commission or referred to in the particulars or documents so registered, or are available for inspection at an office of the company.

Under *Section 51* of CAMA dealing with the mode of alteration of business of objects, the company may, at a meeting of which notice in writing has been duly given to all members (which includes the debenture holders) by special resolution alter the provisions of its memorandum with respect to object of the company; provided that if an application is made of the Court in accordance with this section for the alteration to be cancelled, it shall not have effect in so far as it is confirmed by the Court. Under *section 51* (2)(b), an application under this section may be made to the Court by the holder of not less than 15% of the company's

[5] (1741)26 ER 531

debenture (secured by a floating charge) entitling the holder to object to alterations of its objects: provided the applicant did not consent to or voted in favour of the alteration.

There is also the presumptions of regularity which provides that a person with the company or with someone deriving title under the company is entitled to make the assumptions and the company shall be stopped from denying their truth that the company's Memorandum and Articles have been duly complied with;[6] every person acting as director, secretary, managing director, or acting for members in general meeting, board of directors or managing director, as an officer or agent of the company has been duly appointed and has the authority to exercise the powers and discharge the duties; a document has been duly sealed by the company if it bears what purports to be the seal of the company attested by what purports to be the signatures of two who are assumed to be a director and the secretary of the company: provided that the person had no actual knowledge to the contrary or if, having regards to his position with or relationship to the company, he ought to have known the contrary, and assume that any one or more of the directors of eth company have been appointed to act as a committee of the board of director is or that an officer or agent of the company has the company's authority merely because the company's articles provided that the authority to act in that matter that may be delegated to a committee, an officer or agent.

Again, the liability of the company to a third party is not affected by fraud or forgery of officer in accordance with *sections 89-93* of the Act for the acts of any officer or agent, except where there collusion between the officer or agent and the third party.

A creditor, including contingent or prospective creditor of a company can apply to the court by petition for winding up of the company if the company is unable to pay its debt. A company is deemed to be unable to pay its debt if: (a) a creditor by assignment or otherwise, owed more than ₦200, 000.00 then due, has served on the company at its registered office or head office a demand requiring the company to pay the sum due and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; (b) execution or other process issued on a judgment, act or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or (c) the Court, after taking into account any contingent prospective liability of the company, is satisfied that the company is unable to pay its debts.

A creditor can make an application by petition for an order under *section 354*(2) (b) of CAMA if he alleges that the affairs of the company have been or are being conducted in a manner oppressive or unfairly prejudicial to, or discriminatory against, or in a manner in disregard of his interest; or an act or omission was, is or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, or was or is in disregard of this interest.

The demand for the registration of charges by the Act as stipulated in *section 222* to 223 of the Act, and the making of the registration a mandatory duty of the company by *section 224* of the Act is a protection of the third party's financial interest in the company as this provides notice to the public that such an interest exists hence any person subsequently transacting with the company on some collateral will not rank in priority or *pari passu* with the existing interest rather will be inferior to the first registered charge.

[6] See *section 93* CAMA

Under *Section 224* of CAMA there is a provision that it is the duty of a company to send to the Commission for registration, the particulars of every charge created by the company and of the issues of debentures of a series requiring registration under *section 222* of the Act, but registration of any such charge may be effected on the application of any person interested therein, who is entitled to recover from the company the amount of any fees properly paid by him to the Commission on the registration.

Protection of Minority Rights

Strict application of the majority rule principles as stated in *Foss v Harbottle*[7] adversely affected the minority thus prejudicial to their rights hence the need for an exception to protect them. Minority protection arises where the law allows the minority members to enforce certain rights in certain detrimental situations. The directors and officers of the company are vested with the powers to duly manage the operations of the company. The corporate sovereignty of the company allows them to carry out their duties uninterrupted. Lord Denning in *Bolton v Graham & Sons Ltd*[8] stated that "a company may in many ways be likened to a human body. It has a brain and nerve centre controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. The directors and managers represent the directing mind and will of the company and control what it does." Be that as it may, in situations where the directors are the offenders, will they authorize a suit against themselves? In *Omisade v Akande*,[9] Bello CJN (observing Lord Denning in *Wallersteiner v Moir)*[10] *explained thus:* "suppose the company is defrauded by insiders/by directors who control/ hold a majority of the shares- who can sue…? Those directors are themselves the wrongdoers, they will not authorize the proceedings to be taken against themselves if a general meeting is called, they will vote down any suggestion that the company should sue."

To ensure the protection of the minority, both the common law and statue created an exception to the majority rule and corporate sovereignty hence the minority can institute an action in court or wrong done or breach to his personal right and to the company.

Statutorily, the common law exception was codified and expanded by *section 343* of CAMA which stipulates the exception that Court on application of any member, may by injunction or declaration restrain the company or its officers from:-

(a) entering in to any transaction which is illegal or *ultra vires;*[11]
(b) purporting to do by ordinary resolution any act which by its articles or this Act required to be done by special resolution.[12]
(c) any act or omission affecting the applicant's individual rights as a member;[13]
(d) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;[14]
(e) where a company meeting cannot be called in time to be practical use in redressing a wrong done to the company or the minority shareholders;[15]

7 (1843) 2 Hare 461
8 (1957) 1 QB 159
9 (1987) 2 NWLR (Pt. 55) 158
10 (1974) 3 All ER 217
11 See *Associated Registered Engineering Co. Ltd & Ors v Yalaju Amaye* (1990) 4 NWLR Pt. 145 at 422
12 *Edward v Halliwell* (1950) 2 All ER 1064
13 *Pender v Lushington* (1887) 6 CHD 70; *Edokpolor and Co Ltd v. Sem-Edo Wire Industries Ltd (*1984) 7 SC 119
14 *Daniels v Daniels* (1987) Ch 406
15 *Hodgson v. National and Local Govt. Officials Association* (1992) 1 WLR

(f) where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of duty[16] and
(g) any other act or omission, where the interest of justice so demands.

By virtue of the provision of 343(g) of CAMA, the Act has given the court discretionary power to decide issues where the interest of justice so demands.

The protections are elaborated as follows:

(a) The relief on the grounds of unfairly prejudicial and oppressive conduct by the majority or the directors is protected under this provision, *section 353* (1)(a)of CAMA. Under this provision an application to the court by petition for an order may be made by a member of the company, to seek relief on the grounds that the affairs of the company have been conducted in an illegal or oppressive manner or unfairly prejudicial or unfairly discriminatory against a member or members in a manner that has been in disregard of the interest of the member or the members as a whole or an act or omission was, is or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members in a manner that has been in disregard of the interest of the member or the members as a whole.

(b) The acts complained of are illegal or *ultra vires*. Illegal or *ultra vires* acts cannot be ratified by the company, not even by the consent of all shareholders at the general meeting. So, if the company has done something or the majority approved something illegal and *ultra vires,* any member may sue to restrain the company from such act.[17]

(c) Fraud on the Minority: The conduct of the majority or the board can also be challenged by the minority if it constitutes a fraud on minority shareholders. In *Yalaju-Amaye v AREC Ltd,*[18] the Supreme Court held that any act which amounts to an infraction of fair dealing or abuse of confidence, unconscionable conduct, or abuse of power as between a trustee and his shareholders in the management of a company is a fraud. See also *Daniels v Daniels (Supra).*[19] *Section 44(*1) of CAMA forbids a company from carrying on any business expressly prohibited by its memorandum and shall not exceed the powers conferred upon it by its memorandum or the Act whilst *Section 44* (4)(b) inter alia provides on application of any member of the company, the court may prohibit by injunction, the doing of, any act, conveyance or transfer of any property in breach of subsection 1.

(d) Irregular procedure: Purporting to do acts which are required by the Companies Act to be done by special resolution by an ordinary resolution, any individual shareholder can sue to prevent mismanagement and minority oppression. The right of holders not less than 15% in nominal value of the company's issued share capital or any class thereof, or if the company is not limited by shares, not less than 15% of the company's members.

(e) Infringement of individual rights: Every shareholder has some personal rights as a member of the company which are very fundamental, the breach of which are enforceable against the company, its management as well as the co-shareholders. The infringement of personal rights avails the individual a right of action. In *Pender v Lushington*[20], a member having the right to vote was prevented from exercising such right. So he was allowed to sue for the enforcement of this individual right. In *section*

16 *Alexander v Automatic Telephone Co* (1900) 1 Ch 56 CA
17 See also, *section 44*(4)(b) of CAMA
18 *Yalaju-Amaye v Arec Ltd* (1994) 4 NWLR(Pt. 145) 422
19 See also *Section 343*(d)of CAMA
20 (1887) 6 Ch.D 70

344 (1) (a) of CAMA, an aggrieved member who institutes a personal action is entitled to damages for loss incurred subject to a personal liability of the erring director as against the old provision of *section 301* (1) of the repealed *CAMA* 2004 which provides that he shall not be entitled to any damage. This strengthens the protection of the individual minority.

(f) Under *section 346*(2) of CAMA, there is a right of a member by leave of the court to bring derivative action on behalf of the company or its subsidiary for the purpose of prosecuting, defending or discontinuing the action. See *Agip (Nig) Ltd v Agip Petrol International*.[21]

(g) *Section 343*(g) of CAMA stipulates the exception that the court on application of any member, may by injunction or declaration restrain the company or its officers from any other act or omission, where the interest of justice so demands. By virtue of this provision, the Act has given the court discretionary power to decide issues in the interest of justice.

(h) For the purpose of minority interest protection, *section 22* (2)(a) of CAMA provides that subject to the provisions of the articles, a private company may restrict the transfer of its members, sell assets having a value of more than 50% of the total value of the company's assets.

(i) *Section 51(*2) (a) of CAMA stipulates that an application made to the court for the cancellation of resolution for the alteration of its business or object by holders of not less than 15% in nominal value of the company's issued share capital or any class thereof, or if the company is not limited by shares, not less than 15% of the company's members

(j) *Section 64*(1) of CAMA provides that where a special resolution by a public company to be re-registered as a private limited company has passed, an application to the Court for the cancellation of the resolution may be made:-

a. by the holder of 5% in nominal value of the company's issued share capital or any class of the company's issued share capital (disregarding any share held by the company as measury shares);
b. if the company is not limited by shares at least 5% of its members; or
c. by at least 50 members of the company, but not by a person who has consented to or voted in favour of the resolution.

(k) There is a right of requisition by any member or members holding at the date of requisition not less than one-tenth of the paid-up capital of the company for directors to convene an extra-ordinary meeting of the company notwithstanding anything in the articles. Failure by the directors to convene a meeting within 21 days of the deposit of the requisition, any one or more of the requisitionists representing more than one half of the total rights of all of them may convene a meeting which shall not be held after the expiration of three months from that date.

(l) Where it becomes impracticable for any reason to call a meeting of a company in any manner in which the meetings of the company maybe called or conducted as prescribed by the articles or the Act, the Court may, either by its own motion or on the application of any member of the company who would be entitled to vote at the meeting, order a meeting of the company, to be called, held and conducted in such manner as the court deems fit. And where any such order is made, the court may give such ancillary or consequential directions as it deems expedient. The direction may include that the one member of the company present in person or by proxy may apply

[21] (2010) 5 NWLR (Pt.1187)348

to the court for an order to take a decision which shall bind all members. Upon an order of the court, such meeting called, held and conducted in accordance shall for all purpose deemed to be a meeting of the company called, held and conducted.[22]

(m) Where the Court is of the opinion that it is just and equitable that the company should be wound up,[23] the motive behind this will always be to protect the interest of the creditors and the minority.

(n) The right to apply to the Commission by at least one-tenth of members holding a class of shares or one-tenth of registered members for company not having shares for the affairs of the company to be investigated on grounds of oppressive and prejudicial conduct against the minority.[24]

Protection of Individual Membership Rights

Individual rights are those rights and privileges that are attached personally to the status of membership of the company such as entitlement to notice of meetings, voting, attendance of meetings, the right to refuse to consent to an increase in shareholding and payment of dividend when declared.[25] They are legally protected either by the statue or the memorandum and articles hence the company or any group of members cannot deprive him the enjoyment of such. If these rights are breached, the member can use in his personal capacity being that the wrong was done to him personally and not the company. He does not need the consent or approval of any other member to sue.[26] But where the injury is done to a group of shareholders for which he is part of, he can sue with the consent of the other members on representative capacity.

Unlike what was obtainable under *section 301*(1) of the repealed CAMA 2004 where a member who institutes a personal action to enforce his personal right shall not be entitled to any damage but to a declaration and injunction to restrain the company, *section 344* (1) (a) of CAMA 2020 provides for damages for any loss incurred on account of the breach of that right or to declaration or injunction to restrain the company or the directors from doing a particular act. *Section 343*(c) of CAMA provides inter alia- "without prejudice to the rights of members under *sections 346-351* and *sections 353-355* of this Act or any other provisions of this Act, the Court, on the application of any member, may by injunction or declaration restrain the company or its officers from (c) any act or omission affecting the applicant's individual rights as a member.

Protection of Corporate Membership Rights

Corporate rights are qualified minority rights which cannot be exercised by a single individual but by a member of individual members acting in co-operation; by resolution.[27] They are rights which each member has agreed to be exercised by majority at the general meeting. The actions for infringement of these rights are brought in the name of the company i.e. the company is the plaintiff. The benefit of the suit is claimed by the company. The relief sought on behalf of the company against the third party is derivative as the said claim sued to enforce belongs to the company. Where the complainant has a larger right to redress than

22 See *section 247* (1) of CAMA

23 See *section 247* (1-3) of CAMA

24 Note that this section has been modified by CAMA 2020 by reducing the number of members to minimum of one-tenth from minimum of one-quarter as per s. 314(2) of the repealed CAMA 2004. This indeed reinforced the powers of the minority hence strengthening their protection.

25 See *Clements v Clements Bros Ltd* (1976) 2 All ER 268

26 *Iwuchukwu v Nwizu* (1994)7 NWLR (Pt.257) 379 at 467

27 Orojo n.3 at 205

the company itself, the court will not grant the relief or entertain the action under this exception to the rule. The individual members are bound by the decision of the majority at the general meeting as regards to these rights in accordance to the articles. It involves the principles of submission by all members to the will of the majority provided the said will is exercised in accordance with the law and articles. Under CAMA, the rule in *Foss v Harbottle*[28] is stated in *section 341* of CAMA which provides that-

> "Subject to the provisions of this Act, where an irregularity is made in the course of a company's affairs or any wrong is done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct."

Considering the hardship the rule has meted on the minority, the court at common law relaxed the majority rule whenever it's necessary in the interest of justice. *Section 343* of CAMA with the exclusion of paragraph (c) which bothers on the protection of individual right deals with the protection of corporate right.

Forms of Action

It is a common occurrence given the application of the principles of majority rule to see the rights of the minority being infringed. The obvious is that the minority will be aggrieved by the breach. An aggrieved member may bring an action, personal or representative on derivative ground. The issue to consider to ascertain the appropriate action will depend on the cause of action, the victim of the wrong (whether the individual member or the company), who can take up the action, and the relief to be obtained. The question also to consider is whether the action to be taken should be on the ground of exceptions to the rule in *Foss v Harbottle* (*supra*) or on unfairly prejudicial acts or other infringements of other provisions of the Act and the question of law as to the remedy available and who has the right of action.

Personal Action

A personal action arises in a situation where the infringement is done to the individual rights of a member. The breach affects his rights of entitlement to notice of meetings, voting, and payment of dividends when declared. This situation can occur under *section 343*(c) of the Act. Under this section, the individual member is bringing the action in his own name as the plaintiff. The benefits of the suit are accruable to him. This is provided under *section 344*(1) of CAMA. Where a member institutes a personal action to enforce a right due to him personally, he is subject to subsection (2) entitled to- (a) damages for any loss incurred on account of the breach of that right; or (b) declaration or injunction to restrain the company or directors from doing a particular act. The court may also award cost to him personally whether or not his action succeeds. The novel provision of subsection (2) which make the directors liable to for the wrongdoing to be personally liable in damage to the aggrieved member; and the payment of damages to the member in subsection (1) as against the provision of *section 301* (1)of the repealed CAMA has strengthened the protection of the individual member and widen the liability of the directors hence the directors will be more careful in the exercise of their duties as personal liabilities awaits them for doing otherwise.

Representative Action

A representative action arises when the personal right of a member and that of other members are infringed and a member sues for himself and on behalf of others for the relief

[28] *Foss v Harbottle* n.4

of the injury caused to him and others being that the injury were caused by the same illegal conduct. This he does with the consent of the other members.

This situation can occur under *section 343*(c). In this situation, the individual member is bringing the action in his own name for himself and on behalf of other affected members as the plaintiff. The benefits of the suit are accruable to him and other affected members.[29]

Derivative Action

The rule is that the company is the proper plaintiff to bring forth a wrong against the company. This also implies that the majority and directors decide whether or not to institute an action for redress of the said wrong. In a situation where the director declines to do so because of their involvement, a member may apply for a leave of court to bring an action on behalf of the company. Derivative action is an action derived from the right of the company to sue. The benefits of the suit go to the company and not the member.

Section 346 provides that subject to the provision of subsection (2), an applicant may apply to the court for leave to bring an action in the name or on behalf of the company or a company's subsidiary, or to intervene in an action to which the company or the company's subsidiary is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company or the company's subsidiary. (2) No action may be brought and no intervention may be under sub-section 1, unless the court is satisfied that-

(a) a cause of action has arisen from an actual or proposed act or omission involving negligence, default, breach of duty or trust by a director or a former director of the company;
(b) the applicant has given reasonable notice to the directors of the company of his intention to apply to the court under sub-section 1;
(c) the directors of the company do not bring, diligently prosecute, defend or discontinue the action;
(d) the notice contains a factual basis for the claim and the actual or potential damage caused to the company;
(e) the applicant is acting in good faith; and
(f) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.

(3) An action under this section may be against a director or any other person.
The novel provision of *section 346* (3) has made the directors to bear the consequences of their action in the course of their job as directors hence widening their liabilities. Note that the action for leave of the Court is by way of originating summons.

In connection with an action brought or intervened under *section 346*, the court may, at any time, make any such order or orders as it deems fit. The court may make an order

(a) authorizing the applicant or any person to control the conduct of the action;
(b) authorizing the applicant or any other person to control the conduct of the action; giving directions for the conduct of the action;
(c) directing that any amount adjudged payable by a defendant in the action is paid, in whole or in part, directly to former and present security holders of the company instead of to the company; and

[29] See *section 344* of CAMA

(d) requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.

Also *section 348* of CAMA provides that an application made under *section 346* of CAMA shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company has been or may be approved by the shareholders of such company, but evidence of approval by the shareholders may be taken into account by the court in making the order under *section 347.*

No security for cost is required from an applicant in a derivative action. The court may at any time order the company to pay to the applicant an interim cost before the final disposition of the application or action.[30]

In the case of *Agip (Nig) Ltd v Agip Petrol International,*[31] the Supreme Court applied the combined provisions of *section 303*(2) (now *section 346* (2) of CAMA 2020) and Rule 2(1)(2) of the Companies Proceeding Rule to streamline the procedure to adopt in commencement of derivative action suit as follows:

> "A minority shareholder who intends to bring derivative action in the name of the company must first and foremost apply for leave of court by way of originating summons on notice to the company. The shareholders will require the court's consent to sue. The derivative action must be commenced with the claim form referred to in Rule 2(2) of the Companies Proceedings Rules, and an application by the shareholders for the court's permission or leave to continue the claim. The company must be made a defendant for the technical requirement of ensuring that the company is bound by any judgment given. The hearing of the shareholder's application will therefore proceed in the manner of an ordinary interim application with both sides afforded the opportunity to submit evidence and address. The company must be given notice of such hearing so that the company or the directors may be able to appear to present their view of the shareholder's case…"

The court held that this *procedure* constitutes condition precedent hence non-compliance is not a mere technical rule of procedure but one rather goes to the root of a case and robs the court of jurisdiction.

Remedy for Oppressive and Unfairly Prejudicial Conduct

There is no statutory definition of Oppressive or unfairly prejudicial conduct. The Court over the years construed the expression, "oppressive conduct", as used in the Act to mean not keeping to the accepted standard of honesty and fairness and with lack of regards for other shareholders interest. For example, where those who control the company have persistently disregarded the provisions of the company's constitution ie there is continual or persistent interference in the affairs of the company against the wishes of other shareholders, (see *Re-Harmer Ltd)*[32] or if those who control the company remain inactive,(see *Scottish Co-operative Wholesale Society Ltd v Meye)r*[33] per Viscount Simmonds, oppressive conduct that are burdensome, harsh and wrongful to the other members of the company or some of them, and

30 See *section 351* of CAMA. See also *Bamford v. Bamford* (1969) 1 All ER 96-99
31 (2010) 5 NWLR (Pt. 1187) 349
32 (1959) 1WLR 1112
33 (1959)A.C 324

lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs.

In a similar vein, Karibi-Whyte, J in *Ogunade v Mobile Films (WA) Ltd*[34] relying on Scottish Co-operative Wholesale Society case, stated *inter alia that* " the oppression or fraudulent conduct of the majority must be harsh, burdensome and wrongful and must represent a consistent pattern of conduct intentionally directed at the oppressed minority over a period of time. Thus, negligence in conducing the affairs of a company or lack of business ability or inefficiency will not be sufficient."

In the event of oppressive or unfairly prejudicial conduct, *section 353*(1) (a) provides remedy open to an aggrieved member. He can make an application to the court by petition for an order under *section 354* in relation to the company. The member as to this section includes personal representative of a deceased member and any person to whom shares has been transferred or transmitted by operation of law. *Section 354*(1) provides that "an application for the relief on the ground that the affairs of a company are being or have been conducted in an illegal or oppressive manner may be made by the court by petition."

The grounds for the relief as stipulated in *section 354*(2) provides that an application to the court for relief in relation to a company may be made by a member on the following grounds:-

(i) that the affairs of the company are being or have been conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members or in manner that is or has been in disregard of the interest of a member or the members as a whole; or

(ii) an act or omission or a proposed act or omission, by or on behalf of the company or a resolution or a proposed resolution, of a class member, was, is or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was, is or would be in a manner which is in disregard of the interests of a member or members as a whole.

Upon successful petition to the court by the petitioner, the court may make the following orders to grant relief in respect of the matter complained of as stipulated by *section 355*(2):

(a) that the company be wound up;
(b) for regulating the conduct of the affairs of the company in figure;
(c) for the purchase of the shares of any member by other members of the company;
(d) for the purchase of the shares of any member by the company and for the reduction accordingly for the company's capital;
(e) directing the company to institute, prosecute, defend or discontinue specific proceedings, or authorizing a member or the company to institute, prosecute, defend or discontinue specific proceedings in the name or on behalf of the company;
(f) varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract;
(g) directing an investigation to be made by the Commission;
(h) appointing a receiver or a receiver and manager of property of the company;

34 (1976) 2 FRCR 10

(i) restraining a person from engaging in specific conduct or from doing a specific act or thing; or
(j) requiring a person to do a specific act or thing.

Investigation of Company's Affairs by the Commission

This is another instrument of protection of the minority shareholders that has been provided under the Act. The purpose is to ensure proper administration and management of the affairs of the company. It is important to note that public companies are managed in such a way which is beyond the control of the ordinary shareholders. The majority of the shares are in the hands of two or three individuals who control the affairs of the company. The other shareholders know little and are told little. There is Annual General Meeting which few attend. The whole management of the company is in the hands of the directors who are self-perpetuating oligarchy and virtually unaccountable.[35]

Against this background, the Commission is empowered by *sections 357*(1) of CAMA to appoint one or more competent inspectors to investigate the affairs of a company and report to them in such manner as it may direct.

In stating persons who can prompt an investigation into the affairs of the company, *section 357*(2) of the extent Act stipulates that the appointment may be made:-

(a) in the case of a company having a share capital, on the application of members holding at least one-tenth in the number of the class of shares issued.
(b) in the case of a company not having share capital, on the application of at least one-tenth in number of the persons on the company's register of members; and
(c) in any other case, on the application of the company.

The extant Act under section 357(2(a))(b)modified the minimum requirement of one-quarter of shareholders or registered members of eth company as provided by section 314(2) of the repealed CAMA 2004 to one-tenth hence empowering the minority the more.

This is a step in the right direction by the legislature considering the fact that in Nigerian experience, most people hold small units of shares, hence achieving the one-quarter will be mostly unrealistic. The addition of new subsections (4) and (5) to encourage the employees of the company to comply with the request of the inspector as to information concerning the company's affairs without discrimination by the company and if relieved on that ground shall be entitled to a compensation calculated as if he had attained maximum age of service or had served the maximum period of service in accordance with his terms of employment or conditions of service of the company, has strengthened the achievement of the purpose of the investigation.

Circumstances under which the Commission will be satisfied with an application to investigate the company:

(a) the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or in manner which is unfairly prejudicial to some part of its members;
(b) any actual or proposed act of omission of the company(including an act or omission on its behalf) is or would be prejudicial, or that the company was formed for any fraudulent or unlawful purpose;

[35] See *Northwest Holst v Secretary of State for Trade* (1978) 3 All E.R 280 per Lord Denning

(c) persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members; and

(d) the company's members have not been given all the information with respect to its affairs which they might reasonably expect.[36]

Comparative Analysis of the Application of Rule in Foss v Harbottle: The Indian and Nigerian Experience

The rule in *Foss v Harbottle supra* is not absolutely applicable in the Indian corporate system and the rights of minority are protected by law to a large extent. The action of the legislature and the court has clearly separated the boundaries in relation to the minority protection and when they can institute an action against the company when their interest is prejudiced. In the case of *ICICI Ltd v Parasrampuria Synthetic Ltd,*[37]*,* the Delhi High Court held *inter alia* that mechanical and automatic application of the rule in the Indian situation and corporate realities would be improper and misleading as it vastly had a large number of small shareholders. This is because India has a substantial state-supported funding. The state's shareholding may be small but the financial institutions which provide most of the funding and support corporate activities are state-controlled and are thus accountable to the citizens of the nation. Strict application of the majority rule will amount to giving the majority shareholders much power then ignoring the financial institutions which are the driving force behind the company.

The exceptions to the rule as aforementioned are all applicable in India. That notwithstanding, Indian courts have been hesitant to apply the rule in instances where larger public interest is at stake. Where the interests of workers and public funds are involved, Indian courts generally do not apply majority rule and proper plaintiff rule. In *National Textile Workers' Union and Ors v P.R. Ramakrishnan and ors,*[38] a constitutional bench of the Supreme Court held that workmen cannot be denied the right to be heard before an order adverse to them is passed by a company judge because this would violate *audi alterram partem* which is a basic rule of natural justice.

In the case of *S. Manmohan Singh v S. Balbir Singh*,[39] the court held that a powerful alternative remedy exists in favour of aggrieved shareholders in the form of a claim of oppression and mismanagement. The provision was held to be an alternative remedy independent of the rule in *Foss v Harbottle* and only the statutory requirement of *locus standi* must be fulfilled. It is not necessary for the Plaintiff to show that he falls under an exception to the majority rule.

The court held in *Bharat Insurance Co Ltd v Kanhaiya Lal*[40] that although a company is the best judge of its affairs with regard to its internal management, an *ultra vires* application of its assets cannot be considered as internal management and any member may bring action. Good faith is a key ingredient in determining maintainability of such action since it is for the purpose of doing justice to the company. If the plaintiff's conduct is also tainted or if there is inordinate delay, his claim may not be accepted.

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36 See *section 258* (2) of CAMA

37 JT2000 (8) SC 270

38 1983 (3) SCC 105

39 ILR1975DELHI427

40 Air 1935 Lah 792

In the case of *Dhakeswari Cotton Mills v Nil Kumal Chakravorty,*[41] a special resolution was introduced in a general meeting to increase the monthly allowance and commission of the Managing Directors which was decided by a show of hands since no poll was demanded. The plaintiff sought a declaration that the resolution was not binding since it did not have the appropriate majority. The Chairman had declared that 218 had voted for and 78 had voted against the resolution which on the face of it shows that it failed. The court ruled in favour of the plaintiff.

Section 245, relating to prevention of oppression and mismanagement permits shareholders and depositors of a company to take up any matter of mismanagement or fraudulent practice with the tribunal. Shareholders and depositors under this section can not only restrain the company's management from continuing the unlawful act but can also claim damages and compensation for any damage done to them. Therefore, this act imposes both civil and criminal liability on the directors, managers, and management of the company for corrupt practices and unlawful conduct.

Derivative Action

The concept of derivative action is new to India and has been introduced in the Companies Act, 2013 for the first time under 'Chapter XVI, Prevention of Oppression and Mismanagement'. *Section 245* of the Companies Act, 2013 provides that shareholders i.e. either member(s) or depositor(s) can file an application before the National Company Law Tribunal ("NCLT") on behalf of the other members or depositors in order to:

> restrain the company from committing an act which is *ultra vires* the Articles or Memorandum of the company, restrain the company from breaching any provision of the Articles or Memorandum, to declare a resolution altering the Memorandum or Articles as void if it suppresses material facts or was obtained by mis-statement to the members or depositors, restrain directors from acting on such resolutions, restrain the company from acting contrary to the provision of the Act or any other law in force, restrain the company from acting against a resolution passed by the shareholders, claim damages, compensation or any other suitable action as enumerated under *Section 245*(1)(g) against the company, its directors, the auditor, audit firm of the company, an expert, advisor, consultant or any other person misleading statement made to the company.

While considering the application, the NCLT takes into account:

(a) whether the applicants are acting in good faith;
(b) evidence as to the involvement of any person other than the directors or officers of the company;
(c) whether the applicants could have pursued the action in their own and individual rights;
(d) evidence as to the views of the members or depositors who have no personal interest, direct or indirect in the matter in question;
(e) whether the cause of action is an act or omission that is yet to occur can be authorized by the company before it occurs or ratified by the company before it occurs;
(f) whether the cause of action is an act or omission that has already occurred which can be ratified by the company.

41 ILR (1938) 1 CAL 90

Further, *Section 245*(5) of the Companies Act 2013 states that if the application filed is admitted, the Tribunal shall issue a public notice to all the members of the class by publishing the same and shall consolidate all similar applications prevalent into a single application. This section states that two class action applications for the same cause of action shall not be allowed and that the cost for derivative suit shall be borne by the company or the person responsible for the oppressive act. The Companies Act, 2013 makes the decision of the NCLT binding on the company and all its members, depositors, auditors, consultant, advisor or any persons associated with the company. The Act makes punishable any non-compliance with NCLT decision and also applicants whose claims are found to be vexatious or frivolous.

Prevention of Oppression and Mismanagement

A representative action may be brought for prevention of oppression and mismanagement, which include cases where the majority acts in a manner that oppresses the minority; or where the affairs of the company are being conducted in a manner prejudicial to public interests or oppressive to any member(s) or in a manner prejudicial to the interests of the company including an adverse material change in the management or control of the company. Since these proceedings are initiated for the benefit of the company, it can be considered a form of derivative action and find specific place in the scheme of the Indian company law under the Companies Act. In order to obtain relief, the Company Law Board can be approached by:

1. Not less than one hundred (100) shareholders, or not less than one-tenth of the total number of members; or
2. Members holding not less than one-tenth shares capital of the company, provided all the dues on the shares have been paid by the applicants.

The individual member's action in these exceptional cases may be described as "*representative*" because it is brought on behalf of himself and persons other than himself who would go along with him to protect their legitimate corporate rights. When relief is sought against third parties for the company's benefit, the action may also be described as derivative, because the individual member sues to enforce a claim which belongs to the company, and his right to sue is derived from it.

The plaintiff shareholder can complain in a derivative action of wrong committed before he became a member. In this case, the court will only allow a derivative action to proceed if it is brought for the benefit of the company. And so, if the plaintiff's motive is to benefit a rival concern which encouraged him to sue and has indemnified him against costs, the action will be stayed. It is thus submitted that an important aspect of enforcing a corporate membership right requires that the action should be brought for the benefit of the company.

Therefore, we can conclude that the rules of Majority and Proper Plaintiff derived from *Foss v Harbottle* are not applied directly to the Indian scenario. All the exceptions listed in this study are applicable in India also.

From the foregoing, India and Nigeria being Commonwealth countries have some similarities and slight differences in practice in relation to the application of the rule in *Foss v Harbottle.* The following observations were made:

(a) In relation to the exceptions to the rule, both countries apply the common law provision with slight modification and improvement in codifying them by Nigeria. *Section 343*(g) provides any other act or omission, where the interest of justice so demands. By virtue of the new provision of 343(g), the Act has given the court discretionary power to decide in the interest of justice.

(b) Nigeria has since the inception of CAMA in 1990 provided for derivative action which requires a member to bring an application for leave of the court to institute an action on behalf of the company (see *section 353* of CAMA 2020). The derivative action was put into law for the first time in India under *section 245* of the Companies Act, 2013 with a required minimum of "Not less than one hundred (100) shareholders, or not less than one-tenth of the total number of members; or members holding not less than one-tenth of the issued shares capital of the company, provided all the dues on the shares have been paid by the applicants." This invariably makes the institution of derivative action difficult to achieve hence leaving a window for oppression and mis-management by the directors.

(c) The claim of damages on personal action by a member was barred by CAMA prior to the enactment of CAMA 2020 which by *section 344* (1)(a) hence widening the liabilities of the erring directors by making them personally liable for the damages to the aggrieved member. In India however, the right of claim of damages has always been their law prior to the 2013 Act.

(d) The peculiarity of the business environment of India as to government involvement in companies, no matter how little the investment, makes the court hesitate in the application of the rule, (see *ICICI Ltd v Parasrampuria Synthetic Ltd (supra).* Also, where the interest of workers and public funds are involved, Indian courts generally do not apply the majority rule and proper plaintiff rule (See *National Textile Workers' Union and Ors v P.R. Ramakrishnan and Ors (supra)).*In Nigeria, the involvement of government in companies has been removed via privatization of public interest, hence there is no more public interest to protect.

Conclusion

There has been a remarkable improvement in the protection available to third parties and minority interest under Nigerian corporate law. These improvements include statutory remedies for protection of minority interest and third parties against the excesses and oppression of the majority as well as the amelioration of the harsh realities of the strict application of the ultra *vires* doctrine under the common law. Under the present corporate regime, a number of minority rights have been provided in statutes coupled with the fact that a third party need not know what is in the Memorandum and Articles of association before he can deal with the company. These have tended to improve corporate governance, the relationship of members of the company as well as outsiders dealing with the company.