AN ANALYSIS OF THE EFFICACY OF MINORITY PROTECTION UNDER NIGERIAN COMPANY LAW

BY

Ifeanyi Anthony OKOLI

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DECLARATION

I hereby declare that this dissertation entitled' *An Analysis of the Efficacy of Minority Protection under Nigerian Company Law'* has been written by me and that it is a record of my own research work. It has never been presented in any previous research work for the award of Master of Laws, LL.M. All quotations and references are indicated with specific acknowledgments.

_____ _____

Ifeanyi Anthony OKOLI Date

CERTIFICATION

This dissertation entitled: ‘’*An Analysis of the Efficacy of Minority Protection under Nigerian Company Law’* by Ifeanyi Anthony OKOLI meets the regulations governing the award of Master of Laws LL.M degree of Ahmadu Bello University, Zaria and is approved for its contribution to legal knowledge and literary presentation.

Dr. A. A. Akume Chairman Supervisory Committee	_____ Signature	_____ Date
Dr. A. R. Agom Member Supervisory Committee	_____ Signature	_____ Date
Dr. A. R. Agom Head, Dept. of Commercial Law	_____ Signature	_____ Date
Professor K. Bala Dean, School of Postgraduate Studies	_____ Signature	_____ Date

DEDICATION

This work is dedicated to Almighty God who rescued me from serious health challenges in the course of my academic programme. It was only by His Mercy that I got so far.

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ABBREVIATIONS

A.C.	Appeal Cases
AGF	Attorney General of the Federation
All E.R.	All England Reports
All NCLR	All Nigerian Commercial Law Reports
All N.L.R.	All Nigerian Law Reports
BOFIA	Banks and Other Financial Institutions Act
CA	Court of Appeal
CAC	Corporate Affairs Commission
CAMA	Companies and Allied Matters Act
Cap.	Chapter
CBN	Central Bank of Nigeria
CFRN	Constitution Federal Republic of Nigeria
Ch.	Chancery
Ch.D.	Chancery Division
EFCC	Economic and Financial Crimes Commission
FHCR	Federal High Court Reports
FRCR	Federal Revenue Court Reports
HL	House of Lords
ICPC	Independent Corrupt Practices and Other Related Offences Commission
ISA	Investments and Securities Act
K.B.	King's Bench
LFN	Laws of Federation of Nigeria
LRN	Law Reports of Nigeria
MD	Managing Director

NCLR	Nigerian Commercial Law Reports
NLR	Nigerian Law Reports
NSCC	Nigerian Supreme Court Cases
NWLR	Nigerian Weekly Law Reports
PC	Privy Council
SC	Supreme Court
SCNQR	Supreme Court of Nigeria Quarterly Reports
SEC	Securities and Exchange Commission
UILR	University of Ife Law Reports
Q.B.	Queen's Bench

ABSTRACT

This dissertation entitled *''An Analysis of the Efficacy of Minority Protection under Nigerian Company Law'* which analyzed the principle of majority rule vis-à-vis remedies for protection of minorities under Nigerian company law was aimed at ascertaining whether the Nigerian company law had made enough protection for minority shareholders in the face of majority rule, and whether such protection were adequate, realistic, practically realizable and enforceable. It is trite law that a registered company is a separate legal entity different from the shareholders or members of the company. The officers of the company are usually appointed by the general meeting to conduct the affairs of the company in a manner that would serve the best interest of the company and also the members. The shareholders of the company can be categorized into two – majority and minority shareholders. The decisions regarding the affairs of the company and issues affecting the welfare of the shareholders were ordinarily supposed to be taken at a general meeting in a democratic manner. In other words, where matters were put to vote, each member was entitled to one vote, unless a poll was taken in accordance with the provisions of the company's articles or the Companies and Allied Matters Act 2004. However, most times it was found that the majority shareholders (who may also be directors or officers of the company) would want to impose their views on the minority shareholders, in order to have their way. Similarly, the majority often ran the affairs of the company in an illegal, irregular or oppressive manner, just to satisfy their own selfish or pecuniary interests, without considering the interests of the company or the minority shareholders. In arriving at decisions at meetings and to justify the implementation of such decisions, they usually labeled them ''majority decisions'' or ''majority rule'' in order to stifle minority opinion. In such situations, what can the minority do to assert their rights and redress the wrongs being perpetrated on them by the majority or is their situation hopeless, helpless and without any remedy? It was the existence of this problem that motivated this work. The work attempted to review the adequacy cum efficacy of the remedies available to minority shareholders in the face of oppression of the majority vis-à-vis current events in company transactions in Nigeria. The sources of information used here is doctrinal method of acquiring data, thus combining several documents, including statutes, law texts, journals, law reports, pamphlets, conference proceedings, and internet to accomplish the work. In conclusion, the researcher found that the doctrine of minority protection seemed not to be much of a reality under the Nigerian company law. The research found that the lack of award of damages for personal action or representative action as provided in Section 301 of CAMA could discourage aggrieved minorities to pursue remedies. It was also found that in Section 300 (d) CAMA, the expression committing ''fraud'' is strong and connotes commission of crime; so by law of evidence, it requires a higher standard of proof, that is, beyond reasonable doubt. It was equally found in Section 301 (4) CAMA that the provision for security for cost by the court unnecessarily raises the standard of requirement for enforcement of rights or enjoyment of protection afforded a minority by that provision. Accordingly, it was recommended (among others) to provide stiffer penalties in the law and for our courts to be courageous to apply the sanctions with full weight, without prejudice to the status of the offender. It was also recommended that there is need to include the award of damages as one of the remedies available to an applicant under Section 301 CAMA especially where he could prove any financial loss suffered as a consequence of any breach by the company or director.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

When a company is incorporated, it acquires legal personality and it becomes a separate legal entity different from the members of the company.[1] However, since the company is an artificial person, it can only act and function through natural persons. These persons may be members in general meeting or the board of directors or other officers of the company, who are entrusted with the day-to-day management of the affairs of the company.[2]

In the conduct of company affairs, the management team is supposed to act in the best interest of the company. Accordingly, decisions are supposed to be reached through a democratic consensus. In other words, the issues are to be discussed at the general or board meeting, and resolutions passed by a unanimous consensus or by majority decision upon taking a vote. Even where, the majority shareholders will ultimately have their way, it is always important that the minority shareholders are allowed to have a say in the matter, before a decision affecting the company or the minority interest is reached.

In some instances, you find majority shareholders (who may be directors) who are in control of the company running the company in an illegal or irregular manner, without regard to the provisions of the law. At times they run the company in an oppressive manner to the detriment of the minority shareholders, under the cover of 'majority rule' simply because they are in the majority.

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[1] See *Salomon vs. Salomon & Co (1897) AC 22*.

[2] See Section 63 Companies and Allied Matters Act (Cap. C20 L.F.N.) 2004 (hereinafter referred to as 'CAMA').

Under such circumstances, is the minority helpless and without any remedy? Even where the law has provided for some remedies, are the shareholders aware of these remedies? In any event, how often are these remedies being utilized by minority shareholders? Also, how often are they being enforced by the courts? What is the adequacy of such remedies? It is also important to review the efficacy of these remedies vis-a-vis current events in company transactions. Can these remedies afford adequate protection to minority shareholders considering the current intrigues and realities associated with boardroom politics and struggle for control of company affairs amongst shareholders and/or directors?

It is against this background that it is sought to critically examine in this research, what remedial options are available to minority shareholders who are facing the excruciating and stifling oppressive conduct of the majority shareholders. The research will try to bring to the fore the current challenges and proffer realistic options.

1.2 Statement of the Problem

Mismanagement of company affairs is a common attitude and social malaise amongst directors and officers of the company. These directors are usually the majority shareholders and most often are in control of the company.

In such situations, the minority hardly complains and even where they do, their complaints are rarely respected. The wrongdoers under the cloak/mask of majority rule muzzle their way and take actions which are irregular or not in the best interest of the company as a whole. In fact, in most cases, the actions are rather in their own selfish interests. The actions may not only be oppressive, but also prejudicial to the interests of the minority shareholders.

This dissertation examines the question whether or not the remedies provided as minority protection under the Companies and Allied Matters Act are adequate in the face of the provisions for majority rule under Nigerian company law. Although, CAMA while affording protection to such minority shareholders by providing some remedies, such remedies seem to be inadequate given the current realities and complexities in the power game for control of company affairs. So what other options are available to minority shareholders, or should they just stand, hands akimbo and watch the so called 'majority' fritter away the assets of the company? It is these agitating questions that this work seeks to answer. We want to show whether the doctrine of minority protection is a sham or reality and whether the provision of CAMA in this regard is adequate. We want to recommend ways to improve and give more protections to the minorities, especially in the present reality in Nigeria where those who are in charge of the companies run it as their personal businesses, with total disregard to the rights of other members of the company. The banking sector in Nigeria is a clear example. The research will seek to find solutions to the problems of protection of minority shareholders.

1.3 Aim and Objectives of the Research

The principal legislation regulating management and conduct of company affairs in Nigeria, including the rights and remedies available to the shareholders, is CAMA. Most common law remedies have been enacted as part of provisions of CAMA. It therefore means that any perceived defect or inadequacy of the provisions of CAMA will invariably adversely affect the enjoyment of the rights and remedies granted to the beneficiaries therein. This dissertation aims at examining the legal and institutional framework for protection of the rights of the minority in the administration of company's affairs. In that regard, the research is set to achieve the following objectives:

(a) To examine the existing legal provisions regarding the application of principle of majority rule vis-à-vis the protection of minority interests in the administration of company matters;

(b) To examine the adequacy or otherwise of the remedies available to the minority shareholders in the face of illegal, prejudicial or oppressive conduct by the majority with a view to showing its efficacy or otherwise, given the current realities;

(c) To identify and suggest further or alternative remedies that could be utilized to afford additional protection to minority shareholders against oppressive conduct by the majority;

1.4 Justification of the Research

There is dire need to find alternative remedies to stem the oppression of the minority in view of current challenges, complexities and realities in management of company affairs. The present statutory provisions seem inadequate, and the few available remedies appear under-utilized. The law may seem to have failed if it cannot provide adequate remedy to an aggrieved minority.

The research is intended to find and suggest alternative and efficacious remedies which will afford further protection to the minority. The outcome of the research will be useful to judges, legal academics, legal practitioners, students of law, legal researchers, regulatory institutions and certainly minority shareholders.

1.5 Scope and Limitations of the Research

The research is limited to meticulously wading through the gamut of CAMA and identifying and bringing to fore statutory provisions intended to afford protection and provide remedies for minority shareholders in the face of oppression by the majority.

The research will also seek other provisions in other laws (e.g. Code of Corporate Governance, Investments and Securities Act 2007 etc) regulating company law which may have made some provisions for minority protection.

1.6 Research Methodology

Given the nature of this legal research, the research methodology to be used is doctrinal as it involved mainly the use of library. The primary source of materials for the research are statutes and regulations; while the secondary sources are law texts, journals, law reports, pamphlets, conference proceedings, and internet.

1.7 Literature Review

For a long time, the issue of the law providing adequate protection and remedies for minority shareholders against oppressive conduct by the majority has bogged jurists and legal writers without a seeming full proof answer being in the horizon. Analyses of the problem can be found in law textbooks (foreign and local), law journals (foreign and local), decided cases by superior courts contained in law reports, and unpublished dissertations. Recourse will be had to these materials, with a critical analysis of their views so as to bring to fore the adequacy or inadequacy of various researches conducted by scholars in the area of minority protection under Nigerian company law with a view to highlighting the relevant areas unattended by writers, and streamlining what the researcher intends to do here.

Gower, in his book, *Gower's Principles of Modern Company Law*[3]wrote on breach of Corporate Duties and examined the legal remedies available to minority shareholders. He analyzed the common law rule in *Foss vs. Harbottle*,[4] personal and derivative actions, and winding up on just and equitable ground. He concluded by saying that the two greatest weaknesses of the available legal remedies are that despite the increased amount of information supplied to members in annual accounts/reports, it is not likely to afford them enough evidence required to commence legal proceedings with any chances of success; and secondly, that individual members will be understandably reluctant to incur the costs of litigation. However, Gower's discussions were obviously based on the English Companies Act of 1989 and decided English cases. This research will assess the adequacy of the legal remedies available to minorities from the provisions of Nigerian local legislations.

Similarly, Davies in his book *Gower and Davies' Principles of Modern Company Law*[5]did not fare better than Gower in its foreign content bias. In fact, it discussed minority protection with peculiarities to South Asian experiences. As stated above, the researcher will dwell on minority protection with regards to Nigerian law.

Schmitthoff et al, in their book *Palmer's Company Law*[6]discussed extensively the principle of majority rule, and minority protection in such circumstances. They noted that in English company law, while the substantive aspects of the rule of the majority are not neglected, the emphasis is on the procedural character of that rule. The reason for the foundation of the rule is that in those cases, it is for the company to complain, by suing

[3]Gower, L.C.B.(1992), *Gower's Principles of Modern Company Law*, Sweet & Maxwell, London, p.643-646 and p.672.
[4]*(1843) 2 Hare 461*; 67 ER 189
[5]Davies, P.L. (2008) *Gower and Davies' Principles of Modern Company Law*, Sweet & Maxwell, London, p.609.
[6]Schmitthoff, C.M.(Ed.), (1987) *Palmer's Company Law*, Stevens & Sons, London, p.975-979.

the alleged wrongdoer, as the company is the proper plaintiff and the company is the majority. This position fails to address the peculiarities of Nigerian situation where our procedural law are not as advanced and tested as the English law. This is where the researcher intends to do some work and expose the deficiencies.

Akanki in the book chapter entitled, *Protection of the Minority in Companies*[7]brilliantly traced the evolution of majority rule to the need to an alternative remedy to winding up. However, with the greatest respect, the learned author's critical analyses is more of a discourse without a practical solution for further improvement on the adequacy of the remedies. This is understandable given that the remedies were then new as the legislation on company law had barely been enacted in 1990 and probably had not been tested. The researcher is set to provide practical alternatives to the inadequate remedies.

Bhadmus in his book *Bhadmus on Corporate Law Practice*[8]discussed Protection of Minorities in Chapter Fourteen. He stated that as a general rule, the majority is supreme. However, his treatment of the remedies for the minority is skeletal without addressing the impediments in utilization. This is the area the researcher will focus.

Orojo in his book *Company Law and Practice in Nigeria*[9]discussed extensively the protection of individual membership rights, protection of corporate membership rights, the rule in *Foss vs. Harbottle* and its exceptions, as well as other minority protection provisions. However, despite the detailed discussions, he omitted to assess the adequacy of the remedies provided by CAMA for minority protection. The researcher will do a critical assessment of the adequacy of these remedies and seek further options.

[7]Akanki, E.O. (Ed.) (1992), *Essays on Company Law,* University of Lagos Press, Lagos, p.276.
[8]Bhadmus, Y.H. (2009), *Bhadmus on Corporate Law Practice*, Chenglo Limited, Enugu, p.246.
[9]Orojo, J.O. (2008), *Company Law and Practice in Nigeria (5th Edition)*, LexisNexis Butterworths, Durban, p. 205.

1.8 Organizational Layout

This research work is made of five chapters. Chapter One focuses on general introduction and preliminary issues like research problem, aims and objectives of the research, justification of the research, scope and limitations of the research, research methodology, and literature review.

Chapter Two discusses corporate personality, corporate management and nature of majority rule. This obviously entails explaining in detail the legal principle enunciated in the case of *Foss vs. Harbottle,* the statement of the rule, the reasons behind the rule, the scope of its applicability, and its codification in Nigeria.

Chapter Three deals with the main remedies and protection available to the minority shareholders. This involves detail discussion of the exceptions to the application of the general rule in *Foss vs. Harbottle*. It also discusses other remedies like personal and representative action, derivative actions and petition for relief on ground of oppressive and unfairly prejudicial conduct.

Chapter Four highlights other ancillary reliefs and protection for the minority. Such other reliefs include powers of investigation by the Corporate Affairs Commission (CAC), and winding up on the just and equitable ground. The power of CAC in instituting legal actions against the company is discussed and its efficacy analyzed. The research explores and identifies other statutory powers bestowed on other regulatory institutions which seem largely unutilized despite their potency.

Chapter Five is the conclusion and brings the research to a climax with a summary, findings and recommendations.

CHAPTER TWO

CORPORATE PERSONALITY, CORPORATE MANAGEMENT AND NATURE OF MAJORITY RULE

2.1 Introduction

A company, when it is duly incorporated acquires legal personality and becomes a distinct person in law different from its members and other officers[1]. Section 37 of CAMA provides thus:

> As from the date of incorporation mentioned, in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company…

Section 38 (1)CAMA states further thus: ‘’Except to the extent that the company’s memorandum or any enactment otherwise provides, every company shall, for the furtherance of its authorized business or objects, have all the powers of a natural person of full capacity’’

The concept of the legal personality of a company as a separate entity from its members became finally established under the common law in the classical case of *Salomon vs. Salomon & Co.*[2], where Lord MacNaghten stated the position of the law as follows:

> When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are body corporate ‘capable forthwith’, to use the words of the enactment, ‘of exercising all the functions of an incorporated company…. The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers as

[1] *Afribank (Nig.) Ltd vs. M. Ent. Ltd (2008) 12 NWLR (Pt. 1098) 225.*Orojo, J. O. Op. Cit. p. 44.
[2] Supra p.51.

> members liable, in any shape or form, except to the extent and in the manner provided by the Act.

Commenting further on the case, Lord Halsbury L.C,[3] put it bluntly thus:

> Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and nothing to be agent at all; and it is impossible to say at the same time that there is a company and there is not.

An incorporated company, "united or combined into an organized body", is recognized by law as a separate legal entity, or 'legal person' distinct from the separate personalities of the members of the company. The law treats it like "any other independent person" having rights and liabilities. A company, as a legal person, may enter into contracts, own property and even commit crimes.[4]

In the Nigerian case of *Adeniji vs. The State*[5], the Court of Appeal per Sulu-Gambari JCA, re-emphasized the distinction between the company as an artificial person and the members of the company and observed that while an act of an individual can be taken as the acts of the company in the appropriate cases where the director represents the directing minds and will of the company and can be regarded as the alter ego of the company rendering the company liable for his acts, it will be absurd and dangerous to make the individual criminally liable for the acts apparently done for or by the company without the express provisions of the statute rendering them so liable.

Although, a company is treated as a person in law, nevertheless, it is an artificial person; a mere contraption of the law for which it relies on the instrumentality of natural human

[3] Supra p. 31.
[4] Op. Cit. Section 38 (2).
[5] *(1992) 4 NWLR (Pt. 234) 248 at 263.*

being to carry out its functions. In *Bolton (Engineering) Co. Ltd vs. Graham & Sons*[6], Lord Denning, the law lord put it succinctly thus:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of those managers is the state of mind of the company and is treated by law as such…[7]

Mary Peter-Odili, JCA (as she then was) held the same view and sought refuge in the above dictum in the case of *U.T.C. (Nig.) Plc vs Philips*[8]. The same point was made by the Supreme Court per Aniagolu JSC in *Trenco (Nigeria) Ltd vs. African Real Estate and Investment Co. Ltd*[9] where he held that:

> …a corporation is an abstraction, it has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation….[10]

The brain and nerve centre of a company are those that are in charge of its management, and control its day-to-day activities. They are the set of people under the law, authorized to exercise, on behalf of the company, the powers vested on it upon incorporation. This

[6] *(1957) 1 QB p. 159;*See also *Lennard's Carrying Co vs. Asiatic Petroleum Co Ltd (1915) AC 705*.
[7] *Supra p. 172-173.*
[8] *(2012) 6 NWLR (Pt. 1295) p. 136 at 163.*
[9] *(1978) All NLR p. 124.See also Lennard's Carrying Co. Ltd. vs. Asiatic Petroleum Co. Ltd. (1915) A.C. 705 at 713-714.*
[10] *Supra p.134.*

means, when acting within the scope of their authority, their acts are taken as the acts of the company.[11]

Section 63(1) of CAMA provides:

"A company shall act through its members in general meeting or its board of directors or through officers or agents, appointed by or under authority derived from, the members in general meeting or the board of directors"

As can be seen from the section, the primary organs of a company are:

1. The General Meeting and
2. The Board of Directors.

However, what can amount to a third organ is derivative. It is really a delegation of any of the two principal organs, as can be gleaned from the section. But for the purpose of this work, we shall add as a third organ -the Managing Director. This is because of the sensitive position he occupies in a company.[12]

Gower sees this arrangement to be analogous to the constitutional system of parliamentary democracy, and we add, as it is indeed with every other true democracy. According to the learned author:[13]

> In a parliamentary democracy such as ours, legislative sovereignty rests with Parliament, while administration is left to the executive Government, subject to a measure of control by Parliament through its power to force a change of Government. It is much the same with a company, except, of course, that a company is not sovereign but has a limited competence only. Within these limits, supreme rule-making authority (in theory) rests with a general meeting of the members. Generally a simple majority vote

[11] *Adeniji vs. The State (supra). P 248.*
[12] Op. Cit. Section 263 (5)
[13] Gower, Op. Cit. p.15.

suffices, but in some cases a larger majority or other special formalities may be required.

Let us now discuss each of the three organs briefly.

2.2 The General Meeting

This is the general assembly of all the members of a company. Membership of a company is acquired in accordance with the relevant company laws. In Nigeria, Section 79 of the CAMA defines the membership of a company. According to the CAMA, a person can be a member of a company only if he is a subscriber to the memorandum of the company, or he agrees in writing to become a member or in case of a company having a share capital, he holds at least one share of the company. In all, the name of the member must be entered in the register of members of the company[14]. In another word, a member has a constituent proprietary interest in the company.

One of the rights of a member is to attend any of the general meetings of the company and to speak and vote on any resolution before the meeting.[15] The resolutions in a general meeting are reached through voting, either by show of hands,[16] or through the highest votes cast, on demand of a poll. This is another clear demonstration of principle of democracy. Once the resolution is validly reached, it assumes the position of the decision of the company. It means therefore, that a member cannot act individually on behalf of the company, but collectively, except in some cases like in a derivative action.

As has been said earlier, the General Meeting is the highest organ of a company in that it is the supreme rule making organ and also superintends other organs of a company, in accordance with the memorandum and Articles of the company and the provisions of the relevant laws. It also is the only organ that has power to alter the memorandum and

[14] Op. Cit. p.194; See *Jethwani vs. Nigeria Wire Industries Plc, (1999) 5 NWLR (Pt. 602) 326*.
[15] Op. Cit. Sections 81 and 227 (2).
[16] Ibid. Section 224.

articles of the company and to ratify any act done by any other organ which is outside their apparent authority.

2.3 The Board of Directors

Although it is possible for the General Meeting to exercise all the powers of the company under the law[17], but in reality the article as well as relevant laws will provide for board of directors[18]. While the General Meeting is the grand rule making organ of the company, the implementation of such rules rests on the board. The CAMA under Section 246 provides that every company shall have at least two directors. The board is directly in charge of the running of the business of the company in accordance with the Articles and the Act. Section 63(3) CAMA gives the board power to manage the affairs of the company and exercise all such powers of the company, subject, only to the provisions of the company's article and the Act[19].

The names of the first directors of a company are usually determined in writing by the subscribers or named in the articles. Subsequent directors are elected by the members in the General Meeting in annual basis.[20]

Like the general meeting, the board also employs voting system to reach its decisions, by way of majority of the votes cast.[21] It is the duty of the board to see that it conducts its affairs in accordance with the articles of the company and the Act. Again, the directors cannot act individually, but must act collectively as a board.[22]

[17] Ibid. Section 63(5).
[18] Ibid. Section 63 (3).
[19] *See Olawepo vs Securities and Exchange Commission (2011) 16 NWLR (Pt. 1272) p. 122 at 146.*
[20] Op. Cit. Sections 247 and 248.
[21] Ibid. Section 263 (2).
[22] *Provincial Highway Chemists (Nig.) Ltd. vs. Umaru and Ors. (1986), FHCR) p. 196*.

2.4 The Managing Director

The Board of Directors may delegate to any of its members its duty for the day-to- day running of the business of the company. This simply means that before a person can become a managing director, he must first of all be a director. Since the appointment involves a delegation of the powers of the directors, it means the managing director cannot be appointed unless the articles so provides or the company authorizes it. In reality, most companies will readily make provision for this. The CAMA, in Section 263 (5) empowers the board to appoint one of its members as a managing director and delegate any of its powers to him.[23] Although he derives his authority from the board of directors, but in practice, a Managing Director will do more than merely carrying out the decisions of the board. He will more often than not, make decisions and decide on policy, especially, in the face of urgency as happened in the case of *Virgin Tech. Ltd. vs Mohammed*[24] where the Chief Executive Officer (i.e. Managing Director) of the appellant company discovered that the 1st respondent, a director and co-sole signatory to the appellant's account had allegedly transferred the sum of N199,666,000 from the appellant's account to her personal account in Platinum Habib Bank Plc without authorization. Hence, the Chief Executive Officer commenced this action in the name of the company against the 1st respondent to restrain her from withdrawing, transferring or dissipating the money. The Court of Appeal held that the combined effect of Sections 63 and 65 of CAMA are to enable the principal officers of a company to take steps to arrest and nib in the bud activities taken by persons, which may be inimical to the company. It further held that the type of conduct anticipated by the protective provisions of sections 63 and 65 of CAMA is that which presents a unique situation or unusual conduct of business by a principal officer of the company.

[23] *Longe vs. First Bank of Nig. Plc (2006) 3 NWLR (Pt. 967) 22*.
[24] *(2009) 11 NWLR (Pt. 1151) p. 136 at 149-150.*

Apart from the Managing Director being a director, he will also have a contract of employment with the company, i.e., he is also an employee of the company whose terms of appointment will be governed by the articles of the company and contract of employment. His removal from the office of managing director does not affect his position as a director. But once he is removed as a director, he automatically ceases to be a managing director.

One of the main challenges facing the modern company law and practice, is how to provide an adequate system of checks and balances between the various organs of a company. In another word, how can the law ensure that the affairs of the company are carried out by the organs in a way that it will be beneficial to all the members of the company and that those who are managing the business of the company (i.e. the directors), do not use their privileged positions in the company to confer an undue advantage to themselves, to the detriment of the company. It should be borne in mind that, though the law ascribes a distinct personality to a company, different from its members, but, the members have enforceable beneficiary interests in the company. So what happens when the interest of a member is infringed upon by the decision of the majority which now assumes the position of the company? Or when those who are in charge of the company are running it illegally or contrary to the clear provisions of the articles or in a way that is oppressive to other members under the cover of 'majority rule' or allow the wrong done to the company to go free, possibly because they are benefiting or would benefit from the wrong; and can, of course, because of their position in the company influence the decision of the general meeting? In short, when can a minority member enforce his personal rights in the company; as well as enforce, on behalf of the company, the rights due to the company?

Company law has been so much carried away by the concept of legal personality of a company and its consequential majority rule, that one will be tempted to ask, if the minority members of the company, in line with democratic principle implied in company law, can ever have their voices heard, can ever have any reliefs, in appropriate cases; though, the majority will have their way?

2.5 Corporate Management and Nature of Majority Rule

Corporate management is a way in which the affairs of a company are run. As has been shown above, although the law clothes a company with legal personality, nevertheless, it requires human beings for its operations. Often times, these human operators of the company are the members of the company. In a small private company, it is possible to get all the members involved in the day-to-day management of the company. This is because the number of members is not usually too large[25]; and diversity is minimal since most of the members are usually family members or close friends. In this situation, the issue of conflict of interest may be minimal, since quite often, it may be one person that is actually the owner of the company while the other members are his nominees.[26]

But in a large company, particularly in public liability companies, it is not possible to involve all the members of the company in the day-to-day running of the business, mostly because of the large number of membership of such company and also the expansiveness of the business. Sometimes, even non members are employed to run the company. The question is how will the law ensure that these persons running the company will not use their positions for undue advantage to the detriment of the company and the other members? How will the law ensure that the persons in the helm of affairs of the company

[25] Op. Cit. Section 22 (3).
[26] *Salomon vs. Salomon & Co Ltd (supra)*.

run the business in the best interest of the company in accordance with the provisions of the articles of the company and the provisions of the relevant laws?

Section 64 of the CAMA basically confers the management of a company in two organs, namely, the board of directors and the general meeting.

While the board is in charge of the day-to-day management of the company (though they can delegate this to any one of them, commonly referred as the Managing Director)[27], the general meeting is not only there to make the ground rules of the company's management but also to supervise the activities of the board to ensure they comply with the provisions of the articles of the company through the power of the votes of the members.

Section 63 (3) and (4) of the CAMA entrusts the management of a company to the board of directors. The power is far reaching that the board is not required to obey the directions or instructions of the general meeting, provided the board acts in good faith and with due diligence, in accordance with the provisions of the CAMA and articles of the company.

Having seen that a company once incorporated is conferred with corporate personality and one of the consequences of that concept is that a company, as a metaphysical person, can sue in its own right to vindicate a wrong done to it. However, a company must act through its organ of management (the directors) and the decision to bring proceedings is generally vested in the board. The question that may arise is; what if the wrongdoers are the directors? They are hardly likely to cause the company to sue them. Besides, the courts have shown a remarkable reluctance or disinclination to interfere in the internal management of companies. The rationale for this is that the management of the companies is best left to the judgment of their directors who are supposedly more commercially aware than judges and besides, those directors would have been elected by

[27] Op. Cit. Section 64.

the majority of members. What then does a minority shareholder do? What if the majority shareholders are running down the company or mismanaging the company? What if the directors are literally engaging in "asset stripping" of the company?

In practice, in most cases, those appointed to the board are always the most influential members of the company. Their influence may be far reaching that they are likely to control the outcome of the general meeting. Since the decisions of the general meeting are reached through the democratic process of majority votes, what they need do is to influence the votes to their favours. Under such untoward situation, the dissenting faint voice of the minority will be crying wolf, but will eventually be subdued to silence.

From the foregoing, it is evident that the most important and visible organ of a company as it relates to the management of the company is the board of the directors. The board is in charge of the day-to-day running of the business of the company. As has been pointed out by Gower[28], this arrangement clearly shows how the operation of company is akin to the parliamentary system of government. The members in general meetings have the power to amend the articles of the company in accordance with the provisions of the Act, including removing any director from office[29], and also to ratify the acts of the directors which fall short of his ostensible authority[30]. On the other hand, the actual running of the company is vested on the board. In managing the affairs of the company, the board is not obligated to just follow the dictations of the general meeting slavishly. In fact, the board is empowered to take decisions or formulate policies without reference to the general meeting provided it acts within the confines of the articles of the company and the provisions of the Act.

[28] Op. Cit. p. 15.
[29] Op. Cit. Sections 47 and 48.
[30] Obadina A. D. (2005), *Corporate Governance, Transactional Authority and the Protection of Third Party in Nigeria: Comparative Perspective* U.I.J.P.B.L. Vol. 4, p. 38.

Section 63 (4) of the CAMA puts it succinctly thus:

> Unless the articles shall otherwise provide, the board of directors, when acting within the powers conferred upon them by this Act or the articles, shall not be bound to obey the directions or instructions of the members in general meeting: Provided that the directors acted in good faith and with due diligence.

Thus, this provision has finally put to rest the old common law view that the directors are mere agents of the company while the main organ is the general meeting. In the case of *Isle of Wright Railway vs. Tahourdin*[31] the English Court of Appeal per Cotton LJ refused an application by the directors of a statutory company for an injunction to restrain the holding of general meeting of one of which purposes was to appoint a committee to reorganize the management of the company, on the ground that an agent cannot stop the principal to 'interfere' in the management of the company. The law Lord held that:

> It is a very strong thing indeed to prevent shareholders from holding a meeting of the company when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter intra vires of the directors, is not for the benefit of the company[32].

However, with the turn of the century, the attitude of the courts have shifted from regarding directors as mere agents of the company. In *Automatic Self-Cleansing Filter Syndicate Co. vs. Cuninghame*[33], the Court of Appeal held that the division of powers between the board of directors and the company in the general meeting depended, in the case of registered companies, entirely on the construction of the articles of association and that where powers had been vested in the board, the general meeting could not interfere with their exercise.

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[31] *(1883) 25 Ch. D. 320.*
[32] *Supra p. 329.*
[33] *(1906) 2 Ch. 34.*

The modern doctrine has been clearly established that where the articles vest powers on the board of directors, that it is the directors, and the directors alone, that can exercise it without admitting any interference from the general meeting.[34] In *Shaw & Sons (Salford) Ltd vs. Shaw*[35], *Greer L.J* expressed the position strongly thus:

> A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors usurp the powers vested by the articles in the general body of shareholders.[36]

It is pertinent here to point out that the constitution of a company consists of two documents; the memorandum of association and articles of association. While the memorandum provides for the relationship between the company and the general public, the articles of association provides for the relationship between the company and the shareholders (members) and the shareholders among themselves. Thus, memorandum and articles of association have the effect of a contract under seal between the company and its members, and officers; and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles[37]. The articles provide the extent of the rights of a member, subject to the provisions of the Act. Apart from the general powers given to each organ of a company by the Act,[38] the members in general meeting can limit the powers by amending the articles to that effect.

[34] *Quin & Axtens vs. Salmon (1909) 1 Ch. 311*; Op. Cit. Section 63 (3) & (4).
[35] *(1935) 2 K.B. 113.*
[36] Supra *p. 134.*
[37] Op. Cit. Section 41.
[38] Ibid. Sections 63 and 64.

Until it is so done, each organ has to limit itself to the exercise of the powers vested in it by the articles and the Act.[39]

Therefore, under the modern company law, the most visible and powerful organ of a company is the board of directors. The powers of the directors are so pervasive that they are regarded as the alter ego of a company; the mind and will of a company. Lord Denning was in this frame of mind when he made his famous dictum in *Bolton (Engineering) Co. Ltd vs. Graham and Sons*[40]that a company may in many ways be likened to a human body, with a brain and nerve centre which control what it does.[41]

However, this does not mean that the board is like wild fire that can burn, or flood that can flow, without control or limitation. To pursue our analogy of a company like a democratic state further, inasmuch as there is division of functions between the organs of a company; there are also checks and balances. The Act or any other law does not allow the board of directors the latitude to deal with the affairs of the company as catches their fancy. The Act requires them at all times to act in accordance with the provisions of the Act and of the articles and also to act in good faith and due diligence.[42] Where any of the acts of the board or a director does not derive from the Act or articles, such an act is ultra vires and thus, does not bind the company. However, the general meeting has the power to ratify any of such ultra vires acts or otherwise, the wrong doer is personally liable. This personal liability may be to a third party or to the company. Now the problem is since the Act vests the management of a company, (which includes instituting legal proceedings to enforce the rights of the company against any wrong done to the company), on the board of directors, (which powers the board can delegate to a committee of its members or a

[39] Ibid. Section 48.
[40] Supra p. 159.
[41] Supra p. 172-173; Also cited in Orojo J. O. Op. Cit. p. 83.
[42] Op. Cit. Section 63 (4).

single member or a director), what happens where it is these same people in control that have committed the wrongful act against the company or would benefit from such a wrongful act and as such are not willing to institute an action to enforce the rights of the company?

Under this situation there are two options open to the company through the controlling or supervisory powers of the general meeting. One, the members in general meeting may ratify the act and as such, the wrongful act ceases to be wrongful and becomes binding on the company. Thus there is no more need for the company to sue for the hitherto wrongful act any more. Two, members may refuse to ratify the wrongful act and pass a resolution to sue the wrongdoer(s) to remedy the wrongful act[43]. However, in practice, to choose between the options is not as simple as it pretends. The decision which is supposed to be reached democratically is always full of politics, intrigues, horse trading and arm twisting. It is a forum where corporate politics show its full face unabashed. This is not surprising if we bear in mind that the most powerful members of a company are always among the directors and they can easily influence the votes of other members to their advantage.

2.6. The Principle of Majority Rule

This principle stems from the fact of the nature of a duly incorporated company which the law ascribes with the status of a legal personality. The principle entails that where any wrong is done to a company the proper plaintiff is the company itself not a member acting on his own. But however, it has been shown that a company relies on its human members or some of the members to carry out its functions[44].

[43] Ibid. Section 63 (5) (a)-(c).
[44] Ibid. Section 63.

In the case of *C.B.N. vs. Intercity Bank Plc*[45] , the Court of Appeal held that:

> By Sections 63 and 65 of the Companies and Allied Matters Act, 1990, any act of the members in general meeting, the board of directors or of a managing director while carrying on in the usual way of the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefor to the extent as if it were a natural person.

By virtue of Section 18 of CAMA, the minimum number of members to float a company is two (2); the maximum number depends on the nature of the company.[46] Again, every company is required to have a minimum of two directors for its operation.[47] Now it follows, by the fact of human nature, there will always be differences and conflicts in reaching any decision of the company: be it by the general meeting or the board of directors. To minimize this latent problem, the law in its wisdom provides that a company shall adopt a democratic process of voting in its decision making. Section 224(1) of CAMA provides thus: "At any general meeting, a resolution put to the vote shall be decided on a show of hands …''

This democratic principle of corporate governance ensures that all the members will be part of the administration and control of the company. Although in a big company, especially, public companies, it is not possible for all the members to be personally involved in the day-to-day running of the company, nevertheless, they can exercise control over the management of the company through their voting rights in the general meetings.

Ordinarily, it is the highest votes cast that will carry, depending on the type of resolution in question. If it is ordinary resolution, it is simple majority of the total votes cast but

[45] *(2009) 15 NWLR (Pt. 1165) 445*.
[46] Maximum of 50 members for a private company- Op. Cit. Section 22; No maximum number for a public company.
[47] Ibid. Section 246.

where it is special resolution, then the majority must come up to three- fourth of the total votes cast.[48]

Therefore, decisions, whether affecting the company, the members or outsiders are generally taken by the majority votes of members. Thus, where a wrong is done to the corporate rights of the company, it is the company, through the majority votes of its members to decide whether it should be treated as a wrong which should be redressed or will be ratified.

Succinctly put, where a company is to reach a decision through the general meeting, it is the majority votes of the members in the meeting that carries the day and be treated as the decision of the company, though every member has the right to cast his vote the way he likes.[49] Section 299 of CAMA lends support to this principle when it provides that ''… where irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct.'' This provision is the statutory codification of the common law principle as popularized in the classical case of *Foss v. Harbottle.*[50]

From the foregoing, it follows that it is the majority that actually rule the company. Ordinarily, this principle is not objectionable. But in practice, what may look as a majority may not be a majority at all, but a mere manipulation by some powerful members of the company especially where the resolution in question will affect their personal interest. But no matter the short come of the rule, the principle has been deeply entrenched in the modern company law.

[48] Ibid. Section 233 (1) and (2).
[49] *Clements vs. Clements Bros Ltd (1976) All ER 268*.
[50] *Supra .p. 461* (cited in Orojo, Op. Cit. p. 209). In *Mbene v. Ofili, (1968) 2 All NCLR 293*, the principle was extended to even un-incorporated associations.

2.7. The Rule in Foss vs. Harbottle[51]

Foss vs. Harbottle is a leading English precedent in corporate law. It established the legal principle that if there is a breach of duty owed to a company or an infringement of the company's right, the proper plaintiff or claimant to seek redress is prima facie the company itself. As it is 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. This is known as "the rule in *Foss vs. Harbottle*" and this principle is based on the principle of majority rule. However, a number of exceptions to this rule have been developed, and are often described as "exceptions to the rule in *Foss vs. Harbottle*".

In the said case, Richard Foss and Edward Starkie Turton were two minority shareholders in the "Victoria Park Company". The company had been set up in September 1835 to buy 180 acres of land near Manchester with the objective of:

"enclosing and planting the same in an ornamental and park-like manner, and erecting houses thereon with attached gardens and pleasure-grounds, and selling, letting or otherwise disposing thereof".

This later became known as Victoria Park, Manchester. Subsequently, an Act of Parliament incorporated the company. The claimants alleged that property of the company had been misapplied and wasted and various mortgages were given improperly over the company's property. They asked that the guilty parties be held accountable to the company and that a receiver be appointed.

[51] Supra.

The defendants were the five company directors (Thomas Harbottle, Joseph Adshead, Henry Byrom, John Westhead, and Richard Bealey) and the solicitors and architect (Joseph Denison, Thomas Bunting and Richard Lane; and also H Rotton, E Lloyd, T Peet, J Biggs and S Brooks, the several assignees of Byrom, Adshead and Westhead, who had become bankrupts.

The court dismissed the claim and held that when a company is wronged by its directors it is only the company that has standing to sue. In effect the court established two rules. Firstly, the "proper plaintiff rule" is that a wrong done to the company may be vindicated by the company alone. Secondly, the "majority rule principle" states that if the alleged wrong can be confirmed or ratified by a simple majority of members in a general meeting, then the court will not interfere.

2.8. Statement of the Rule[52]

The Rule may be summarized as follows:

The proper plaintiff in an action in respect of a wrong done to the company or association of persons is prima facie the company or association itself. And, the court will not interfere in the internal affairs of a company at the instance of the minority if the irregularities complained of could be legally done or ratified by the majority. The Nigerian Supreme Court has held in *Agip (Nig.) Ltd. vs. Agip Petroli International*:

> The rule in Foss v. Harbottle … prevents claims by shareholders for reflective losses, and provides that if a wrong is done to a company then the company is usually the proper claimant in respect of that wrong. The rule in Foss v. Harbottle is now part of Nigerian company law and

[52] See generally, Ehi-Oshio, P. *The True Ambit of Majority Rule Under the Companies and Allied Matters Act 1990 Revisited*. Modern Practice Journal of Finance and Investment Law, Lagos, Vol. 7 No. 3-4, p. 386-403

> it is embodied in the Companies and Allied Matters Act, 1990, particularly sections 299-303 of the Act.[53]

The said section 299 of the CAMA enacts the rule as follows:

> Subject to the provisions of this Act, where irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct.[54]

The decision in *Foss vs. Harbottle* established two important principles which go to the root of corporate governance and enforcement of the rights of a company; the doctrine of corporate personality of registered companies[55]and the principle of the supremacy of the majority[56]which has its ancestry in the principle of partnership law that courts would not interfere as between partners in respect of internal irregularities which the partners could rectify[57].Firstly, the proper plaintiff in an action in respect of a wrong done to a company is prima facie the company itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company and all its members by a simple majority of the members ratify such an act, no individual member of the company is allowed to maintain an action in respect of that matter "for the simple reason that, if a mere majority of the members of the company … is in favour of what has been done, then caditquestio (in other words, the majority rule). Note that "caditquestio" means, "the matter admits of no further argument."

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[53] *(2010) 5 NWLR (Pt. 1187) p. 348 at p. 392; Onuekwusi vs Registered Trustees of the Christ Methodist Zion Church (2011) 6 NWLR (Pt. 1243) p. 341 at 361-362; Okonkwo vs National Universities Commission (2013) 15 NWLR (Pt. 1378) p.482 at 500.*

[54] Rule applied in *CBN v. Kotoye (1994) 3 NWLR (Pt.330) p.66; First African Trust Bank Ltd v. Ezegbu (1994) 4 NWLR (Pt. 367) p.149*.

[55] *Trenco (Nig) Ltd. vs. African Real Estate & Investment Co. Ltd. (1978) 11 N.S.C.C. 220; Marina Nominees Ltd. vs. Federal Board of Inland Revenue (1986) 2 NWLR (Pt. 20) 48; Wallersteiner vs. Moir (No. 2) (1975) 1 All ER 991; Berliet Nig. Ltd. vs. Francis (1987) 2 NWLR (Pt. 58) 673; Salomon vs. Salomon & Co. (1897) A.C. 22*

[56] *Edokpolor & Co. Ltd. vs. Semi-Edo Wire Industries Ltd & Anor.(1984) 7 S.C. 119*.

[57] *Carlen vs. Drury (1812) 35 E.R. 61. Featherstone vs. Cooke (1873) L.R. 16 Eq. 298, Trade Auxilliary Co. vs. Vickers Probate (1812) 21 V.R. 835*.

Another point that can be gleaned from the case at hand is the reluctance of the court to intervene in the internal management of a company. The rationale for this is that the management of companies is best left to the judgment of their directors who are supposedly more commercially aware than judges and besides, those directors would have been elected by the majority of members[58].Thus, in *MacDougall vs. Gardiner*[59]there was a motion for adjournment at a meeting but the chairman refused a demand for a poll contrary to the articles and declared the motion carried. A shareholder sought a declaration that the chairman's ruling was illegal. In holding that the court would not interfere with the internal management of the company, Mellish L.J. stated this principle clearly thus:

> In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes[60].

We doubt whether Mellish's view can be sustained today, especially as it regards to an illegal conduct. As a shareholder cannot stand and watch the directors operate a company in breach of laws, hoping that the majority will ratify such illegal conduct, which in any event will not ''legalize'' the illegality. We think a difference must be made between an ''irregular'' and an ''illegal'' conduct. We are of the opinion that while the former can be ratified by the majority, the latter cannot, as it would amount to encouragement of breach of laws.

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[58] *Edwards vs. Haliwell (1950) 2 All E.R. 1064; Edokpolor & Co. Ltd. vs. Sem-Edo Wire Industries Ltd. & Anor. Op. Cit. p.119.*

[59] *(1875)1 Ch.D. 13.*

[60] Supra p. 25.

However, Jenkins L.J**.** articulated the rule more lucidly in *Edwards v. Halliwell*[61]

> The rule in Foss v. Harbottle, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members' vote to ratify it, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been down, then caditquaestio.[62]

In the same vein, the Supreme Court of Nigeria in affirming this legal position in *Edokpolor & Co. Ltd. vs. Semi-Edo Wire Industries Ltd. & Anor*[63], observed that the court will not interfere with the internal management of companies acting within their powers and if there is a wrong done to the company for which redress is needed, it is the company that must sue.

Thus in *Ephraim Faloughi vs. Haniel Williams &Ors*[64]**,** where the plaintiff, a minority shareholder brought an action for a return of all property of the company allegedly taken by the defendants and an account of all the affairs of the company to the plaintiff; it was held that the action would not be maintained at his instance since the alleged wrongs were done to the company, unless his action was within any of the exceptions to the rule.[65]

Usually, the power to sue on behalf of the company in the first instance falls within the general powers of the board of directors as part of powers of management conferred on it by the Act. But where the board of directors is disqualified from acting or unable to act

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[61] *(1950) 2 All E.R. 1064.*
[62] Cited in Schmitthoff, C. M.(Ed.) (1987), *Palmer's Company Law Vol. 1 (24th Edition)*, Stevens & Sons, London, p.979-980.
[63] *Supra p.119.*
[64] *(1978) 4 F.R.C.R. 32.*
[65] See generally, Ehi-Oshi,P.Op. Cit. p. 386-403.

because of deadlock, the power to sue reverts to the general meeting. One of the commonest instances where the board will be unable to act is where they are the one that actually committed the wrong against the company or where any of their acts is ultra vires of the articles of the company or the provisions of the Act. Under such circumstances, they are hardly likely to cause the company to sue them. In fact, the commonest situation where the power to sue on behalf of the company usually reverts on the general meeting is where the wrong against the company is committed by the directors. Under such circumstances, there are two positions under the Act,[66] open to the general meeting. One, the members in the general meeting may through their majority votes, resolve to ratify the hitherto wrongful act. Where this is done, the act ceases to be wrongful and becomes binding on the company as its act. Ratification absolves the offending director of any liability against the company. Alternatively, the general meeting may pass resolution to institute an action on behalf of the company against the wrongdoing directors to redress the wrong done to the company. We are of the view that once any of the positions is taken, an individual member who has voted one way or the other has no locus to bring an action against the resolution of the general meeting. In the same vein, where the general meeting still has the right to exercise its power under the subsection, no member is allowed to bring an action on behalf of the company prior to the exercise of the power in one way or the other by the general meeting, *"for the simple reason that, if a mere majority of the members of the company … is in favour of what has been done, it admits no further question"*[67]**.**

In *Foss vs. Harbottle*, Wigram[68] V.C put it thus:

[66] Op. Cit. Section 63 (5) (b).
[67] *Foss vs. Harbottle (supra) p.461.*
[68] Supra.

> It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, primâ facie, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative… for the simple reason that, if a mere majority of the members of the company … is in favour of what has been done, then caditquestio.

The rule is not only limited to incorporated bodies but has also been extended to unincorporated associations in possession of a constitution or a set of rules and regulations entitling them to sue and be sued as legal entities.

Accordingly, it was applied to trade unions in *Nigerian Stores Workers Union vs. Uzor &Ors.*[69], *Mbene vs. Ofili*[70]and *Cotter vs. National Union of Seamen*[71]and to a religious community or organization in *Alhaji Iman Abubakri & Ors. vs. Abudu Smith &Ors.*[72]and *Eternal Sacred Order of the Cherubim and Seraphim vs. Adewunmi*[73].

2.9. Reasons for the Rule

The rule of law as espoused in *Foss vs. Harbottle* stems from the fact of legal status accorded to a company upon incorporation by the statute. Thus, upon incorporation, a company becomes a legal personality different/separate from its individual members who form it. Differently put, though the members may have a proprietary interest in the company, but this individual interest is not interwoven or identical with the corporate interest. It is this corporate interest that is given legal personality. Thus, while a member

[69] (1971) 2 A.L.R. Comm. 412.
[70] *Supra p.293.*
[71] *(1929) 2 Ch. 58.*
[72] *(1973) 1 All N.L.R. (Pt. 1) 730.*
[73] *(1969) N.C.L.R. 73.*

can sue to protect his personal rights in the company, such as rights to attend and vote in the general meetings of the company, he cannot sue for the right that is due to the company. It is only the company that can sue through any of its appropriate organs to enforce such rights. Ordinarily, the rightful organ to sue on behalf of the company is the board of the directors, as part of the incidence of managing the company. The right of the general meeting to exercise the power to sue ripens when the directors refuse to exercise their power under the Act and the articles. The commonest instance where the directors can refuse to exercise their power to sue on behalf of the company is where they are the wrong doers. Ordinarily, they will not like to sue themselves. Under such circumstance, the general meeting has the power to either ratify the hitherto wrongful acts of the directors or decide to bring a suit against the directors on behalf of the company. Thus, where the issue before the general meeting is whether to sue or ratify any wrongful acts of the directors, the most a member can do is to cast his vote one way or the other in respect of the issue. Once the vote is concluded and a resolution is reached, it becomes binding on the company and members of the company and the matter admits no further argument.

Once the majority has taken its decision, if the breach is not of his personal right under the company or falls under any of the recognized exceptions, the only option open to a minority member is to dispose his share in the company if he is not comfortable with how the affairs of the company are being run.

2.10. Analysis of the Rule

The rule in *Foss vs. Harbottle* to the effect that where a wrong is done to the company, it is the company alone that can sue for redress or ratify it, is in conformity with the procedural rule of civil litigation that every plaintiff must have locus standi or show a legal interest in the subject matter of the suit. The interest must not be a general or public

interest, but a personal or peculiar interest to him.[74] In *Orji vs. DMT Nigeria Ltd*.[75]the court held that:

> Locus standi can only arise from a right conferred on a plaintiff by an enabling law. In other words, the enabling law must confer on the plaintiff the right to sue. The requirement of locus standi is mandatory where the judicial power is constitutionally limited to the determination of a case or controversy or a matter which is defined by reference to criteria which include the legal capacity of the parties to the litigation.[76]

Thus, where the proper plaintiff is not before the court, the court will lack jurisdiction to entertain the claim.[77]

The effect of legal personality which a duly incorporated company is clothed with under the Act, among other rights, empowers the company to sue or be sued in relation to any right due to it in its corporate names. Section 299 of the Act specifically provides that it is only the company and the company alone that can ratify or sue for any wrong done to it. Thus, no individual member of a company has locus standi (proper plaintiff) to sue for the wrong done to the company because his personal right is separate and distinct from the corporate rights of the company. Although, every member has a beneficiary interest/right in the company; that is, the right to participate in the management of the company through the general meeting and also in the sharing of profits in the event the company makes profit, but that alone does not confer on individual members of any right to personally enforce the corporate rights of the company, save in exceptional cases.

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[74] See generally Nwadialo, F.(2000) *Civil Procedure in Nigeria,* Second Edition, Lagos, University of Lagos Press, p.31; *Adesanya vs. President of the Federal Republic of Nigeria (1981) 5 SC p.112; CCC vs. Owodumi (2000) 10 NWLR (Pt. 675) p.315*.

[75] *(2009) 18 NWLR (Pt. 1173) p.467.*

[76] Supra p. *491-492.*

[77] *Inokuju vs. Adeleke (2007) 4 NWLR (Pt. 1025) p.423*.

2.11 Exceptions to the General Rule

It is trite law that for every general rules, there are usually exceptions. This is most imperative because the rule in *Foss vs. Harbottle* leaves the minority in an unprotected position. Therefore, in order to protect the interest of minority shareholders, there has to be some exceptions to the rule. The rule has been justified on the ground that it is more convenient for the company to sue by itself as this will prevent a multiplicity of suits and needless, futile, oppressive and blackmailing actions by the minority which may lead to a tearing apart of the company, waste of time and resources. However, the rule has a major disadvantage. Under the division of powers between the General Meeting and the Board of Directors, the latter is in charge of management of the company and therefore the appropriate organ to order an action in the name of the company. Where the directors are the wrongdoers, they will not sue. This decision not to sue may be approved by the General Meeting where the directors/wrongdoers may also be the majority shareholders and in control of the votes. Consequently, if the rule in Foss v. Harbottle is rigidly adhered to, the wrongdoers would go unpunished and the minority shareholders and the company will be at the mercy of the majority hence the law admits of certain exceptions to the rule.

There is no doubt that under certain exceptions the law will permit minority shareholders to initiate proceedings "on behalf of the company" especially when the wrongdoers (the directors) are themselves in control and thus preventing the company from seeking legal redress. There are also various statutory remedies available to a minority shareholder personally by way of petition on the ground of just and equitable winding up or he can maintain an action against the company for unfairly prejudicial and oppressive conduct. There is also derivative action; except that in the case of derivative action the minority

proceeds on behalf of the company in the sense that the cause of action is "derived" from a wrong against the company. Under the modern company law, the exceptions can be summarized as follows:

1. Where the act complained of is illegal or is wholly ultra vires of the company.
2. Where the matter in issue requires the sanction of a special majority, or there has been non-compliance with a special procedure.
3. Where a member's personal rights have been infringed.
4. Where a fraud has been perpetrated on the minority and the wrongdoers are in control.
5. Where a company meeting cannot be called in time to be of practical use in redressing the wrong done to the company or minority shareholders.
6. Where the directors are likely to derive a profit/benefit, or have profited or benefitted from their negligence or breach of duty.
7. And other ancillary remedies.

The types of actions, which can be brought by shareholders, and the principal points of procedure governing such actions include personal actions, claim for reflective loss, representative actions (group litigation) and derivative action. We will examine these actions, remedies and their procedures presently.

CHAPTER THREE

MAIN REMEDIES AND PROTECTION FOR THE MINORITY

3.1 Introduction

The rule in *Foss vs. Harbottle* as codified by Section 299 of the CAMA, has been discovered to be prone to an abuse if it is left unmitigated. The law in its infinite wisdom understands that unchecked power has the tendency of leading to corruption and fraud. The case of company law is not different. It is evident that the principle in *Foss vs. Harbottle* has given wide and sweeping power to the majority shareholders in respect of any act done to the company especially by its directors.

Under this principle, the majority shareholders of the company have wide powers to ratify any act done to the company by any of the directors of the company. This principle as we have seen, which stems from the status of a company as a legal personality is rooted on the belief that before a company ratifies an act purportedly done for it or on its behalf, it would take a rational and critical look as to how it affects its interest. It therefore envisages that the company in the general meeting of its shareholders will always put the interest of the company in prospect whenever an issue as whether any wrongful act done to the company should be ratified or not. It entails that the general meeting as one of the organs of the company is an independent organ divorced from the control and undue influence of the board of directors or a director (who normally will be the culprit in this respect) and can reach uninfluenced decision.

However, in reality, experiences have shown that the reverse is the case. Many a times, the general meeting is a stooge of the board of directors which they use to extend the scope of their authority and influence in the company by getting it to sanction or ratify their otherwise irregular or ultra vires acts.

The truth is that the board of directors will usually comprise the most influential shareholders of the company or those with the highest number of shares. Because of their substantial interest in the company, they usually see it as their personal belonging which they can use or manipulate as they like without giving a wink about the interest of other shareholders or the company. In other words, they are the company and the company is them, thus making nonsense of the principle of independent legal personality of a company. In our situation in Nigeria, we often hear people brag that "this is my company, I can run it as I like". This mentality is not limited to private companies, but also affects the public liability companies.

The crisis in the banking sector which led to the removal and prosecution of some chief executives of some banks in Nigeria is an ugly evidence of how deep rooted is fraud in the corporate management of our companies; a situation where few people incorporate a company and float shares so as to acquire the hard earned money of the unsuspecting members of the general public for their personal use.

In the words of an eminent law lord, Lord Denning, in the case of *Northwest Holst vs. Secretary of State for Trade*[1] where he opined that

> It sometimes happens that public companies are conducted in a way which is beyond the control of the ordinary shareholders. The majority shares are in the hands of two or three individuals. These have the control of the company's affairs. The other shareholders know little and are told little.

In Nigeria, stories abound where a shareholder has not been issued with his share certificate for many years. If he has not been able to get his share certificate, how can he talk of getting his dividend or notice of general meetings? What we are labouring to say is

[1] *1978) 3 All E.R. 280 at 291.*

that in many cases, you can hardly determine what actually constitutes the majority as to rightly ratify any wrongful act of the directors.

It thus means that if any possible acts of the directors can be ratified on the authority of the rule in *Foss vs. Harbottle*, it will be amounting to fraud against both the company and minority shareholders (who may not really be minority in terms of number but simply because they are uninfluential in the affairs of the company). Thus, the law has developed a number of exceptions to curtail the harsh effect of the rule. It can be said that the exceptions as of necessity developed alongside the general principle. Even the court recognized these exceptions while laying down the general principle. Today, the exceptions have assumed a prominence in our company law jurisprudence. Nowadays, it is the exceptions that agitate the legal minds more than the general rule. These exceptions are referred to as "the exceptions to the rule in *Foss vs. Harbottle*" and are regarded as legal devices to protect the minority against the majority rule.

These exceptions which started as common law principles have received statutory confirmation. The exceptions have been codified in Section 300 of the CAMA. Not only this, other relevant Sections of the CAMA have also made copious provisions for the protection of the minority. The said section 300 of the CAMA in codifying the exceptions provides thus:

Without prejudice to the rights of members under … 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 from the following-

a. entering into any transaction which is illegal or ultra vires;
b. purporting to do by ordinary resolution any act which by its constitution or Act requires to be done by special resolution;

c. any act or omission affecting the applicant's individual rights as a member;

d. committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;

e. where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; and

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.[2]

All these are attempts not only to safeguard the interest of the minority shareholders but to make sure that the affairs of the company are run by those in charge of its affairs in an honest and transparent way for the benefit of the company and all the members in particular, and of course the public in general.

The underlying principle under these exceptions is that, in each of them, the minority shareholder is empowered to approach the court to enforce his personal rights or the right of the company in appropriate cases without waiting for the pleasure of the majority. The exceptions are now treated in detail below.

3.2 **Analysis of the Exceptions to the General Rule**

3.2.1 **Entering into any transaction which is illegal or ultra vires**

This provision should be read in community with sections 38 and 39 of the Act.

Section 38 specifically prohibits a company from exercising some certain powers. Subsection (2) of the section provides that:

> ''A company shall not have or exercise power either directly or indirectly to make a donation or gift of any of its property or funds to a political party or political association, or for any political purpose.…"

[2] See *Paul Wilson vs. Chief Okechukwu Okeke (2011) 3 NWLR (Pt. 1235) p. 456 at 472-473*.

The section makes both the company, officers of the company or any member who voted for the breach to be jointly and severally liable. It means therefore that the majority cannot ratify any conduct of the director that falls within the subsection. Apart from these express prohibitions, the directors cannot bind the company with their acts; neither is the company going to be liable where the directors engage in an illegal business, nor the company able to ratify such illegality[3]. However, this position is difficult to reconcile with the decision of the Court of Appeal in *Adeniji vs. The State*[4] where the court held that the company should be criminally liable for the conduct of its directors.

This difficulty stems from the fact that a company as a legal personality is criminally responsible[5]. The question is, since the acts of the directors done within the scope of their authority are seen as the acts of the company, how can we separate where the directors will be liable personally or where the company will bear such liability?[6] However, it seems the answer is where the ultra vires act of the director amounts to a criminal conduct, the director will be personally liable and the company through a majority vote cannot ratify such action in order to absolve the director of personal liability. Secondly, a company will not be liable where the Act provides that the director will be personally liable for a wrongful act. For example section 290 of the Act makes the director to be personally liable if he contravenes the section. It provides that where a company receives money by way of loan for specific purpose or receives money or other property by way of advance payment for the execution of a contract or project; and with intent to defraud, fails to properly apply the money or property for the designated purpose, every director or

[3] *NIB Investment W/A vs. Omisore (2006) 4 NWLR (Pt. 969) p. 172 at 198*.
[4] Supra p.248.
[5] Ali, L.H. (2008) *Corporate Criminal Liability in Nigeria*, Lagos, Malthouse Press Limited, p. 89; *DPP vs. Kent & Sussex Contractors (1944) KB 146*; *R vs. ICR Road Haulage Ltd (1944) KB 155*.
[6] Gower, Op. Cit. p. 207.

officer of the company who is in default shall be personally liable. In *PFS Ltd vs. JEFIA*[7] where the appellant company received large sums of deposit from the respondent on the undertaking to repay on maturity with interest but failed to do so, it was held that every director or officer of the company was personally liable to the party defrauded under the section.

Also in *Yalaju-Amaye vs.Arec Ltd*[8]**,** 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 which may take the issue outside of the rule in *Foss vs. Harbottle*.

Furthermore, Section 39 (1) and (2) of CAMA provides thus:

(1) A company shall not carry on any business not authorized by its memorandum and shall not exceed the powers conferred upon it by its memorandum or this Act.

(2) A breach of subsection (1) of this section, may be asserted in any proceedings under sections 300 to 313 of this Act, or under subsection (4) of this section.

The two concepts of illegality and ultra vires are related as well as different. Illegality under the Act, means either the directors doing an act which the Act prohibits or which is illegal under any other law. In this regards, it is suggested that to determine whether an act of the director is illegal that apart from the Act, the court could be guided by the principle of illegality as it relates to the law of contract.

On the other hand, ultra vires is a Latin expression used to describe acts undertaken beyond the legal powers of those purported to undertake them. As we have noted, it is the

[7]*(1998) 3 NWLR (Pt. 543) 602; Pavlides vs Jensen (1956) Ch. 565 at 573; Edwards vs Haliwell (supra) p.1064.*

[8]*(1994) 4 NWLR (Pt. 145) 422*.

Act and the constitution of a company that donate powers to the company. The law allows companies to limit or define the extent of the powers exercisable by it through its memorandum and articles of Association of the company. Any agents or directors of the company exercising the powers of the company must confine his acts within the ambit of the powers of the company as contained in the memorandum and articles of the company.

Two types of ultra vires have been identified:

(1) Ultra vires of the agent (directors)

(2) Ultra vires of the company

Under (1) above, the articles of the association, subject to the provisions of the Act, may stipulate the powers exercisable by a director or an officer of the company. Such director/officer of the company must limit himself within the scope of the powers as conferred on him by the articles. When he exceeds such powers, his acts become ultra vires (i.e. beyond the powers conferred on him by the articles).

Under (2), the memorandum of association, subject also to the provisions of the Act defines and limits the power of the company, especially as it relates to the scope of business it may engage in. Therefore, any director or other officers of the company exercising the powers of the company must bring it within the powers exercisable by the company, otherwise such power or act will be ultra vires.

The basis of ultra vires is rooted on the doctrine of total prohibition of alteration of the memorandum and articles of association even by the unanimous decision of the shareholders. In the English case of *Ashbury Railway Carriage Co Ltd vs. Riche*[9], where the objects of the company were to "make and sell" or "lend or hire" railway carriages

[9] *(1875) L.R. 7 H.L.653.*

and wagons and all kinds of railway plants, fittings, machinery and rolling sticks, and to carry on business as mechanical engineers and general contractors, to purchase, issue, work and sell mines, minerals and to buy and sell any material on commission or as agents''. The directors of the company entered into contract to finance the construction of railway in Belgium. Subsequently, the company repudiated the contract on the ground of ultra vires. The question was whether the contract was valid and if not, whether it could be ratified by shareholders. The House of Lords held that the contract was ultra vires of the company. It was further held that ratification was legally impossible if the contract was beyond the scope of the memorandum. Anyway, this is the interpretation of the Act as it stood in England as of that date (i.e.1875).

The law has greatly changed and today, the shareholders not only have unlimited powers to alter the memorandum and article of association of a company, (subject to the provisions of the Act) but also the Act gives a company duly registered unlimited power, just like a natural and biological person, to engage in any business it wishes whether the memorandum and articles contains it or not[10]. Furthermore, the Supreme Court in the case of *Orji vs D.T.M. (Nig.) Ltd.*[11]has held that by virtue of Sections 44-48 of CAMA, companies have the legal right to amend, alter or change their Memorandum and Articles of Association; and if any alteration or change is carried out in accordance with the provisions of the CAMA, a court of law is not competent to hold against the alteration or change.

It therefore means that the old case laws[12] have lost their relevance as it relates to the modern company law in the issue of ultra vires, especially in Nigeria.

[10]Op. Cit. Section 39.
[11] Supra p.496.
[12] *Ashbury Railway Carriage Co. Ltd vs. Riche (supra) p.653; Att. Gen. vs. Great Eastern Rly (1880) 5 App. Cas. 473, HL*.

Sections 45 and 46 of CAMA specifically allow a company to alter its objects by special resolution.

The reality is that there is no member of a company who would oppose any transaction of the company even though it is ultra vires, as long as it is profitable. This is because the ultimate aim of any corporate entity is usually maximization of profit. Accordingly, the rigidity of the ultra vires transaction under the common law has lost steam by virtue of Section 39 CAMA.

The practical effect of all these in relation to ultra vires doctrine is that in situations where the company decided to engage in seemingly ultra vires transaction and any party objects in court, if it is a transaction the majority shareholder intend to pursue, they will simply ask for an adjournment to regularize their position and then simply pass special resolution to this effect and therefore validate the action. The same will apply where any of the directors' acts is seemingly ultra vires. In the end, the ultra vires doctrine will be of no or little help for the minority protection.

In *Trenco (Nig) Ltd vs. African Real Estate & Investment Co. Ltd.*[13]a director and Chairman of the defendant company commissioned the plaintiff to build a hotel for his company. Subsequently, pursuant to a written instruction from the said director, the bank paid N13,000 to the plaintiff for the purpose of the building work. In all material times, the board of the defendant was not aware of the director's action and therefore could not have acquiesced or approved it. The question arose whether the defendant was bound by the director's instruction. It was held that the defendant was bound by the director's instruction.

[13] Supra p.220.

Even under what we called illegality, the court has shown its readiness to impute the conduct of the director to the company. In *Adeniji vs. The State*[14] (where the Nigerian Court of Appeal held that:

> The director represents the directing mind and will of that company and can be regarded as the alter ego of the company rendering the company liable for his acts. It will be absurd and dangerous to make the individual criminally liable for the acts apparently done for or by the company without the express provisions of the statute rendering them so liable.[15]

It has been observed by a learned author[16] that though Section 39 (1) of CAMA will seem to preserve the ultra vires doctrine in Nigeria, the combined effect of Section 39 (3) & Section 38 have destroyed totally its effect. He proceeded to note that, "it is also very instructive to note that all executed acts are saved and shall remain unchallenged under the rule, while the acts, if they remain executory could be challenged on the ground of ultra vires, but the company may regularize its position immediately and negative the objection…."[17]

It therefore means that the provision of Section 300 (a) of the CAMA is of limited help in protecting the rights and interest of the minority shareholders of a company.

[14] Supra p.248.
[15] *Per Sulu-Gambari, JCA at p.263*; See also Orojo, Op.Cit. p. 83.
[16] Aina, K. (2000) *Doctrine of Ultra Vires is Dead*, U.I.J.P.B.L. Vol. 4, p. 37.
[17] Ibid. p.42.

3.2.2 **Purporting to do by Ordinary Resolution an act which by its Constitution or the Act requires to be done by Special Resolution**

The Act provides[18] (it can also be provided in the memorandum and articles of association) how a resolution on certain issues may be passed. Basically, there are two types of resolution; namely, ordinary and special resolution.

Ordinary resolution is one which has been passed by simple majority of votes cast by such members of the company as being entitled to so vote, either in person or by proxy at a general meeting.[19] It is the common mode used to approve the ordinary business of an annual general meeting of a company – section 214 of CAMA provides that:

> All businesses transacted at annual general meetings shall be deemed special business, except declaring a dividend, the presentation of the financial statements and the reports of the directors and auditors, the election of directors in the place of those retiring, the appointment, and the fixing of the remuneration of the auditors and the appointment of the members of the Audit Committee which shall be ordinary business.

The above suggests that ordinary resolution is the appropriate mode of approval in the more routine agenda of the general meeting.

On the other hand, special resolution is passed by a majority of three – fourths of the votes of the members as being entitled to do so, voting in person or where proxies are allowed, by proxy, at a general meeting of which not less than 21 days' notice specifying the intention to propose the resolution as a special resolution has been duly given. Provided that, if it is so agreed by majority in number of the members having the right to attend and vote at any such meeting, being a majority together holding not less than 95 percent in nominal value of the shares giving that right or, in the case of a company not

[18] Op. Cit. Section 233(1).

[19] Orojo, J. O. Op. Cit. p. 238.

having a share capital, together representing not less than 95 percent of the total voting rights at that meeting of all the members, a resolution may be proposed and passed as a special resolution at a meeting of which less than 21 days' notice has been given[20].

According to Orojo[21], special resolution is required for the more important matters such as the alteration of the object clauses, changing of the name of the company, altering the articles, the reduction in the share capital of the company etc. Apart from these statutory matters that require special resolution, the company by its constitution may provide that a matter must be carried by special resolution. Where this is so, even where the matter can ordinarily be passed by ordinary resolution, the company is bound by that provision and any act done by the majority in contravention of it is invalid. So where a special resolution is required, if the majority did not follow it or its normal procedure, the decision is invalid and does not bind the company or the minority[22].

3.2.3 Where any act or omission affects the applicant's individual rights as a member

The Act gives some bundle of inalienable rights to a member of a company which even the company through its majority cannot abrogate.

Section 81 of CAMA provides for rights attached to membership in respect of attending and speaking in the general meetings subject to the proviso therein. This provision gives credence to the democratic principle that while the majority will have the way, nonetheless, the minority must be allowed to say their minds. A member is entitled to a notice of a general meeting.[23] Failure to give him a notice of the meeting which he is entitled to receive will invalidate the meeting unless such failure is an accidental omission

[20] Op. Cit. Section 233 (2).
[21] Supra p. 238-239.
[22] *Edwards vs. Halliwell (supra) p.1064.*
[23] Op. Cit. Section 219 (1) (a).

on the part of the person or persons giving the notice.[24] However, in practice, one may ask, how helpful is the provisions of this Section 221 of the Act as a protection against the interest of a member. In fact, the scope of the section is suspect. One, does the failure to give the notice of the meeting to a member invalidate the said meeting as it affects the member. In other words, while the meeting is valid and binding on other members who received the notice, it is invalid and not binding on the member who is entitled but was not given the notice of the meeting? Two, is the whole proceeding of the meeting void and invalid because a member was wrongly not given the notice of the meeting? From the tone of the section, the latter seems to be the true interpretation of the section. But how often, if ever has it been applied in real life situation or practicable can it be applied, especially when one considers the number of members a company may have. In Nigeria, if the provision of the section is strictly applied, no company's general meeting will be valid as most companies do not border to send notices of meeting to some members especially those not having substantial number of shares. Even where they make attempt to send, the notice may not get to the member until many weeks or even months after the meeting has taken place, given our slow postal system. Or can we say that a notice published in the newspaper is a valid and sufficient notice under the section? The view of this writer is in the affirmative. This view makes more sense in the light of the present realities.

Other membership rights include the right to dividend where it is declared, the right to seek redress against oppressive and unfair treatment and rights to make various applications to the court or Corporate Affairs Commission where his right is infringed. In *Iwuchukwu vs.Nwizu*[25] where the Supreme Court of Nigeria per Adio JSC held that being

[24] Op. Cit. Section 221.
[25] *(1994) 7 NWLR (Pt. 257) 379 at 467*.

a registered shareholder in a company, the holder becomes entitled to certain rights, benefits and privileges. Except otherwise provided by the Act or the provisions of the memorandum and articles of association of the company, he has the right to sell, mortgage, or otherwise dispose of his shares; he is also entitled to receive dividends on the shares registered in his name and to keep the dividend so received for his own use.[26]

Also where the constitution of the company appropriates some rights to members of the company, such rights cannot be abrogated even by the majority members except in accordance with the provisions of the law and the constitution. Section 41 (1) of CAMA puts the effect of the memorandum and articles of the company on its members succinctly thus:

> Subject to the provisions of this Act, the memorandum and articles, when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered from time to time in so far as they relate to the company, members, or officers as such.

The provisions of the registered memorandum and articles do not only bind the current members but also other members to be duly admitted into the company in the future.[27]

It then follows therefore, that the company or other members cannot through resolution whatsoever deny any other member his personal rights in the company.

Section 300(d), (e) and (f) shall be taken together, that is:

(d) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;

[26] See Orojo Op. Cit. p. 199.

[27] *Edwards vs. Halliwell (supra) p.1064; Atwood vs. Merryweather (1867) LR,5 Eq 464; Pavlides vs. Jensen (supra) p.565*.

(e) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; and

(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.

Paragraph (d) of the subsection provides for the right of minority to approach the court where a fraud is being committed on either the company or the minority shareholders and the directors fail to take appropriate action to redress the wrong done.

Paragraph (e) envisages a situation where due to rapidity of the breach complained of, it would be impracticable to call a company meeting to redress the wrong; or where the directors are reluctant or unwilling to summon a company meeting to address the wrongful issues. In such circumstance, the law allows a member to approach the court to arrest the situation before it degenerates further.

Similarly, paragraph (f) also provides that 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, a member can bring an action to remedy the wrong.

The provisions first of all acknowledge the right of the directors to act first to protect the interest of the company as well as those other members who voted them in; but in their failure to so act, a minority is not helpless. He can approach the court on his own for an injunctive or declarative relief.

Subsection (f) presents a typical scenario where the directors will not only neglect to seek redress for the company or for the minority - where the directors are likely to derive profit or benefit or have profited or benefited from their negligence or breach of duty. In other words, where they are the very culprits.

It could be said that subsection (e) and (f) of Section 300 are the most agitating and recurring instances where the issue of minority protection has arisen – *Omisade vs Akande*[28]. It is a situation where the directors have used their privileged position to commit fraud on the company or the minority shareholders by getting the majority to ratify their fraudulent act. In that case, a company owned by two persons, one of them used his privileged position to divert a contract intended for the company to his other company that he has a beneficiary interest. The court held that it represents a clear situation where a minority can be allowed to sue.

Gower[29] has wondered aloud the precise meaning of the expression "fraud on the minority" as employed in company law. He concluded that the phrase is used somewhat loosely. There need not be actual deceit. He opines that "fraud" connotes an abuse of power analogous to its meaning in court of equity to describe a misuse of fiduciary position.

In *Cook vs.Deeks*[30], the directors improperly used their positions as managers and obtained for themselves a contract which would have gone to the company. By virtue of their position as majority shareholders, they secured the passing of a resolution at a general meeting declaring that the company had no interest in the contract, thereby ratifying and approving what was done. In an action by minority shareholders, the court held the ratification invalid as the benefit of the contract belonged in equity to the company and the directors must account for it. In *Yalaju –Amaye vs. AREC Ltd*[31],the Supreme Court of Nigeria per Nnaemeka-Agu JSC, held that fraud means any act which may amount to an infraction of fair dealing or abuse of confidence, unconscionable

[28] *(1987) 2 NWLR (Pt. 55) 158*.
[29] Gower, Op. Cit. p. 593.
[30] *(1916) 1 A.C. 554*.
[31] Supra p.422.

conduct, or abuse of power as between trustee and shareholders in the management of a company. Fraud may take the issue outside of the rule in *Foss vs.Harbottle*[32].

Finally section 300 (e) of the Act, entails what can happen where in a situation of real urgency, the waiting for the meeting to be called and resolution passed before the wrong can be redressed will result to irreparable damage either to the company or minority shareholders, because the threatened act will have been completed. Again, the situation here is where the directors are the culprit; else it is the duty of the directors to take immediate action to redress the impending wrong to the company or the shareholders, without waiting for the general meeting to be called. But this they will not do where they are the guilty ones.

Under this situation, time is of essence and any delay may cause untold hardship to the company or the minority shareholders. Thus, an aggrieved minority shareholder is empowered under this circumstance to approach the court immediately without waiting for the general meeting to be convened which may take some days, weeks or even months.

In all these situations, what the minority shareholders are entitled to, is declaration or injunction[33] as they cannot claim any damages.

3.3 Personal and Representative Action

The Act empowers aggrieved minorities to maintain personal action or representative action.

[32] See Chapter Two ante.
[33] Op. Cit. Section 300; *NIB Investment W/A vs. Omisore (supra) p. 204-205*.

What this means is that where the rights of the minority have been breached, every one of the minority has a cause of action against the company or the directors. They may decide to exercise that right of redress jointly or severally. But whether it is exercised jointly or severally, the reliefs awardable are the same- declaration or injunction.

Section 301 (1) provides that:

> Where a member institutes a personal action to enforce a right due to him personally, he shall not be entitled to any damages but to declaration or injunction to restrain the company and/or the directors from doing a particular act.

Subsection (2)

> Where a member institutes a representative action on behalf of himself and other affected members to enforce any rights due to them, he shall not be entitled to any damages but to a declaration or injunction to restrain the company and/or directors from doing a particular act.

But the court may award cost personally to him whether or not his action succeeds.[34]

Subsection (4) provides that in any proceedings by a member under Section 300 of the Act, the court may, if it thinks fit order that the member shall give security for costs.

The mode to be adopted to ventilate his grievances is therefore the choice of the minority. However, it is always better where the other minority members so agree to present a representative action. This is tidier and it avoids multiplicity of actions.

However, it must be mentioned that the remedy of a personal or representative action availed to a minority shareholder therein is not without its challenges or limitations. It is common knowledge that court actions are won or lost based on credible evidence and the probative value attached to them. The minority shareholder who proposes to sue in personal or representative capacity may soon realize that the necessary information and documents he needs to prove his case are actually in the possession of the same wrong

[34] Op. Cit. Section 301 (3).

doing directors or majority shareholders, who would not readily release them and as such would cripple or frustrate the action.

And to worsen matters, even where the personal or representative action succeeds, the only order the court can make in the circumstances is a declaration or an injunction (not award of damages) regardless of the fact that the shareholder might have suffered some damages. There is a need to review this provision to enable the court powers to award damages, so as to make the utilization of personal or representative action more attractive for protection of minority shareholders.

3.4 Derivative Action

This is an action where the minority is allowed in law to sue on behalf of the company. This is exception to the general rule of company law where the normal organs that can maintain such actions on behalf of the company are either the board of directors or the general meeting through the majority.

Being a departure from the general rule, the power is not resorted to as a matter of course. Certain circumstances must be in place to entitle a minority to be clothed with locus standi to present the action – under the derivative action.

As the name implies, the power to maintain action under this heading is derivative. It means that the power primarily resides in another person or organ. In this regard, the power normally resides in the company, which can be effectively exercised through either the board of directors or the general meeting as the primary organs of a company[35]. Where the power is exercised by any of the organs that are entitled to exercise it under the

[35] Op. Cit. Section 63 (1).

Act, it is not regarded as derivative because the acts of any of the organs truly represent the acts of the company.

On the other hand, the minority normally is a stranger to the exercise of the powers of the company. Its acts cannot validly represent the acts of the company. Therefore, to be able to validly present an action under this heading the minority has to show that the power does not belong to him as of right but to the company; and that he is deriving his power to maintain the action from the company. Thus, the action is not his personal action, but he is maintaining it on behalf of the company.

Orojo[36] in explaining the purport of derivative action puts it succinctly thus:

> The action is in reality an action by the company for wrong done to it but since it will not sue as plaintiff, provisions are made for a minority to sue on its behalf and not on behalf of the shareholders. Although the action is framed as a representative one on behalf of the aggrieved minority and other shareholders, it is, in fact, an action which should be properly brought by the company if it had not refused to do so and the action, is therefore derived from the right of the company to sue; hence it is described as derivative action.

From the dictum of the learned author above, it is clear that the company would have refused, failed or neglected to act to redress the wrong done to it before the power to present the action will revolve on the minority. Since we have agreed that a company is an artificial personality which has no independent mind and will, or legs and hands, but relies on its human organs to carry out its powers, it means that the directors or the general meeting (the principal organs of the company) must have failed to act. The commonest situation this will happen is where the directors who are in control are the wrongdoers. They will not only fail to act but will also prevent the general meeting to act

[36] Op. Cit. p. 212; See Gower, Op. Cit. p. 587.

also. In *East Pant Du United Lead Mining Co. vs. Merrywheather*[37], the owners of a derelict mine formed a company, of which they became directors and shareholders, and sold the mine to it for a substantial sum. The outside shareholders sought to relieve the company of the purchase and to recover the money paid to the sellers. An action was commenced in the name of the company but was dismissed when the miscreants secured, through the exercise of their votes, the passing of a resolution directing that the company should discontinue the proceedings. A shareholder then started another action in the name of himself and all other shareholders, except the fraudulent directors. It was held that, notwithstanding *Foss vs. Harbottle*, the court would allow an action framed in this way, since otherwise it would be impossible to set aside the fraud. In such situation, a minority can bring the derivate action on behalf of the company.

Section 303 of the Act puts it thus:

> (1) Subject to the provisions of subsection (2) of this section, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company, or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending, or discontinuing the action on behalf of the company.

For the applicant to be granted the leave sought, he must show to the satisfaction of the court the conditions stipulated under subsection (2) of the Act, which provides:

> No action may be brought and no intervention may be made under subsection (1) of this section, unless the court is satisfied that –
>
> a. the wrongdoers are the directors who are in control, and will not take necessary action;
> b. the applicant has given reasonable notice to the directors of the company of his intention to apply to the court under subsection (1) of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
> c. the applicant is acting in good faith; and
> d. it appears to be in the best interest of the company that the action be brought, prosecuted, defended, or discontinued.

[37] *(1864) 2 H. & M.254*.

It is therefore submitted that for the applicant to bring derivative action before the court, he must not only show that the wrongdoers are the directors and they are in control, but also that they will not take necessary step to bring, prosecute, defend or discontinue the action. The fact that the directors are the wrongdoers and are in control will raise rebuttable presumption that they will not take necessary action[38].

Where all the directors are involved in the wrongdoing, there will be more likelihood that they will fail to take necessary action, but where it is only one or few directors that are the wrongdoers, the other directors may be inclined to take the action. Thus, it is suggested that this is the more reason why the drafters included subsection (2) (b) to the section. The applicant should give the directors notice of his intention to apply to court to undertake the action if they fail to act. It means that the law still gives the directors the right of first refusal since it is their primary duty to take the action.

The level of control the wrongdoing director or directors wield in the company has been one of the most potent considerations that sway the mind of the court in granting or refusing an application to bring derivative action[39].

The application must be brought in good faith and it must appear that the granting of the application will be for the interest of the company. It thus seems that in granting or refusing the application, the court will consider the interest of the company rather than the personal interest of the applicant. This is so because a minority shareholder usually stands to gain nothing, apart from a sense of satisfaction in seeing justice done and perhaps some

[38] *Daniels vs. Daniels (1978) Ch. 406*.
[39] *Daniels vs. Daniels (supra);* See also *Pavlides vs. Jensen (supra) p.565*.

appreciation in the value of his shares reflecting the amount recovered from the wrongdoers.

3.4.1 Who May Apply

Section 309 stipulates the category of persons that can apply to court under the derivative action as an applicant. It means therefore for one to have locus standi to bring the application, he must show that he falls within the categories of any of the persons defined as ‘’applicant’’ in the said section. The section defines an ‘’applicant’’ to mean:

> a. a registered holder or a beneficial owner and a former registered holder or beneficial owner, of a security of a company;
> b. a director or an officer or a former director or officer of a company;
> c. the Commission; or
> d. any other person who in the discretion of the court, is a proper person to make an application under section 303 of this Act.

From the above, the applicant must be a person who has a beneficial interest in the company not a meddlesome interloper or busybody. It is also suggested that it is not enough to show that the applicant was a holder of security in the past but he must be a present holder of such security no matter the quantity. Therefore, a shareholder who has disposed all his shares, cannot validly make an application under this section because he has no interest anymore to protect in the company.

On the other hand, it may be proper for a person to make the application even where he holds no security directly but the shares are transmitted to him, for example, an administrator or executor of the estate of a deceased security holder or trustee in bankruptcy or a person to whom the shares have been transmitted[40].

[40] *Goosh's case (1872) 8 Ch. App. 266*; Palmer's Company Law 17th ed. 612; Op. Cit. Section 155.

Furthermore, a security holder may be disqualified from bringing the action if his conduct is such that will warrant such. For example, in *Prudential Assurance Co. Ltd. vs. Newman Industries Ltd*[41], the applicant was a party to the wrong done to the company; he was prevented from bringing the action.[42]

Where the application has been made or an action brought or intervened, the fact that the wrong has been approved or may be approved by the shareholders will not make the court to stay or dismiss the application or action. However, the fact of the approval by the shareholders may be taken into account by the court in making an order[43].

The provision of this section therefore puts to rest the common law position that tend to imply that derivative action will not lie where the wrong could be ratified by the shareholders in the general meeting.

In *Pavlides vs. Jensen*[44], a minority shareholder who had no voting rights complained that the directors had negligently sold an asset of the company at a gross undervalue. It was held that derivative action could not be brought since the general meeting could have ratified the directors' action or resolved not to sue in respect of it. This decision is therefore not relevant under the Nigerian Company Law in the light of the glaring provision of Section 305 of CAMA, which is to the effect that an application or action brought by way of derivative action cannot be stayed or dismissed by reason only that it is shown that an alleged breach of right or duty owed to the company has been or may be approved by the shareholders.

[41] *(1979) 3 All E.R. 507*.
[42] *Whitman vs. Watkin (1898) 78 LT 188; Towers vs. African Tug (1904) Ch. 558*.
[43] Op. Cit. Section 305.
[44] Supra p.565.

It would seem that the right to bring a derivative action is afforded to the individual member as a matter of grace. Hence the conduct of a shareholder may be regarded by a court of equity, "as disqualifying him from appearing as a plaintiff on behalf of the company".[45]

Section 304(2) provides for the range of orders the court may make under derivative action. It is suggested that the provision of the subsection is not exhaustive, such that the court cannot go outside it to make any other orders. The community reading of the section suggests that the court can make any order it deems fit considering the circumstances of the case. It therefore means that the court has the discretion either to confine itself to the orders stipulated under subsection (2) of the section or go outside it. But in all, as in exercising discretionary power in all matters, it must be judicially and judiciously exercised. It is however suggested that subsection (2) is a good guide to the court in determination of the order or orders to make.

Section 304 provides:

> 1) In connection with an action brought or intervened under section 303 of this Act, the court may at any time make any such order or orders, as it thinks fit.
> 2) Without prejudice to the generality of subsection (1) of this section, the court may make one or more of the following orders, that is an order –
> a) authorizing the applicant or any other person to control the conduct of the action;
> b) giving directions for the conduct of the action;
> c) directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the company instead of to the company;
> d) requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.

[45] *Prudential Assurance Co. Ltd. vs. Newman Industries Ltd (supra) p.507.*

Where a shareholder brings a derivative action on behalf of a company, the company must be joined in the suit and made a defendant. This is a curious procedural law reserved to the company law. This is because in the true sense of the action, the real Plaintiff is the company. How then can a person go against a person he is maintaining the action on its behalf?

The procedure could be said to be a clever and expeditious way to get around the imbroglio imposed by the doctrine of legal personality of a company with its procedure that it must be its appropriate organs that can exercise its power. The procedure suggests that the law still views the derivative action as an aberration and will not allow a minority shareholder to be elevated to the status of validly exercising the powers of the company, even in the matter of the derivative action. But for the company to be bound by the action it has to be joined as a party and the only way to do this is to make it a defendant alongside the wrongdoers. This is why we wonder whether the minority protection here is a reality?

Learned authors of *Palmer's Company Law* put it thus:

> The plaintiff is seeking to enforce, not his own right of action, but a right of action vested in or derived from company… The alleged wrongdoers are made the defendants in the action, but the company itself is joined as a nominal defendant in order that it can be bound by the judgment. If the action succeeds, any property or damages recovered go, not to the plaintiff, but to the company.[46]

The shareholder normally will sue in representative action, on behalf of himself and other shareholders excepting the wrongdoers who will be the defendants. Bringing in the other shareholders serves the purpose of ensuring that all the shareholders are bound by the result of the action.

[46] Schmitthoff, C.M. (Ed.) (1987) *Palmer's Company Law Vol. 1 (24th Edition)*, Stevens & Sons, London, p.976-977.*See also Wallersteiner vs. Moir (No. 2) (1975) 1 Q.B. 373 at 391-392*.

In maintaining the derivative action, it appears a minority shareholder may join in the action, a personal claim where the claims arise from the same transaction. Moreover, it also seems a representative claim may be joined with a derivative claim and both will submerge into one truly representative claim.[47]

Where an application for derivative action has been made and pending before the court, such application cannot be stayed, discontinued, settled or dismissed for want of prosecution without the consent of the court given upon terms as the court thinks fit[48]. But looking at the provision of the section critically, it is humbly submitted that it seems superfluous. This is because all the instances enumerated, ordinarily are always achieved with the consent of court. For example, a party cannot on his own stay a proceeding before the court. He can only apply to court for stay which the court may oblige him or not. The same applies to discontinuance of an action; and for dismissal, that is the reserve of the court either suo motu or on the application of a defendant. Even on the issue of settlement, where a case is pending before a court, it can only be validly settled with the consent and approval of the court. What we are labouring to say is that the power the section tends to confer is already in existence by virtue of practice and procedure applicable in our courts, as well as, the inherent powers of the court. Its retention does not add or remove anything from the powers of the court (as already conferred by Acts or Rules of Courts) as it regards matter before it, whether it is a derivative action or not.

Finally, the Act prohibits the court from requiring the applicant to give costs in any application made under derivative action[49]; rather the court may at anytime, order the

[47] *Prudential Assurance Co Ltd vs. Newman Industries Ltd (No. 2) (1980) 2 All ER 841; Wallersteiner vs. Moir (No. 2) (1975) 1 All ER 849*; Orojo, Op. Cit. p. 215.
[48] Op. Cit. Section 306.
[49] Op. Cit. Section 307.

company to pay to the applicant interim cost before the final disposition of the application or action.

3.5 Petition for Relief on Ground of Oppressive or Unfairly Prejudicial Conduct

The first thing to be noted is that the scope of those who can apply under this heading is wider than that under derivative action. Notable among those conferred with power to apply under this heading is a creditor of the company. This is so because as a creditor to the company, he has a substantial interest to see that the company is run in a way that will make it possible for him to realize his money.

Again, the right of the creditor to bring the action under Section 310 of the Act was formerly akin to a winding up proceeding. In fact, under the old law (i.e. Companies Act 1968) where a shareholder or creditor complained that the company was run in a manner that endangers his interest, or that the conduct of the directors are oppressive, he has an option to petition the court for winding up. The shareholder or petitioner would be entitled to be paid share of the surplus assets after the company has ceased to exist. However, this remedy is not always in the interest of the shareholder who wishes the company to continue in existence. Thus, it was infrequently or rarely resorted to.

In an attempt to ameliorate this drastic remedy and find a middle course, an alternative remedy was evolved.

Section 201 of the Companies Act, 1968 first introduced in Nigeria the alternative remedy to winding up for the purpose of relieving oppression. It empowered any member who complained that the affairs of the company were being conducted in a manner oppressive to some part of the members (including himself) to make an application to the court by

petition for such order as the court thinks fit. However, this provision proved to be less effective than was hoped. The Section was later repealed and replaced with Sections 310 – 313 of the present Act i.e. CAMA, which is more far reaching.

For one, the relief under Section 310 – 313 of the Act is wider than that of Section 201 of the Companies Act, 1968. The new provisions have done more than merely cure the defects of the repealed Section 201. It is an attempt to give persons connected with a company, a remedy against unfair acts which affect or are likely to affect them.

3.5.1 Oppressive or Unfairly Prejudicial Conduct

The Act does not define the term, however the courts in several cases have through the years construed what the term 'oppressive or unfairly prejudicial conduct' entails.

In *Re Jermyn Street Turkish Baths Ltd*[50] the English Court of Appeal held that;

> Oppression occurs when shareholders, having a dominant power in a company, either (1) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs; and when such conduct is unfair or, to use the expression adopted by Viscount Simonds in *Scottish Co-operative Wholesale Society Ltd vs. Meyer*[51]'burdensome, harsh and wrongful' to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the company's affairs … Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor.

Similarly, Nigerian courts have had causes to interpret the expression "oppression or unfairly prejudicial conduct". In *Ogunde vs. Mobil Films (W/A) Ltd*[52]the court held that,

[50] *(1971) 3 All ER184 at 199.*
[51] *(1958)3 All ER 66 at 71.*
[52] *(1976) 2 FRCR 10.*

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.

Section 311 of the Act provides that a member can apply to the court on the ground that the affairs of the company are being conducted in an illegal or oppressive manner. Under Subsection (1) of the said section, the conduct could be illegal or oppressive. The inclusion of the illegality of the conduct of the directors or the majority of the shareholders under the Act makes the scope wider than what is obtainable under the common law.

It thus gives an aggrieved minority member an option under which section of the Act to apply to court where the conduct is illegal depending on the type of relief he desires.

As we have seen, illegality of the conduct of those controlling the company or the majority is a ground for a minority to apply to court under Section 300 of the Act, but the reliefs he can claim under the said section is limited to injunction and declaration.

But where the application is brought under Section 311 of the Act, the applicant has a wider range of reliefs to claim. Section 312 empowers the court on an application made under the heading to make the orders enumerated therein under subsection (2) of the section. The orders include:

(a) The winding up of the company;

(b) Regulating how the affairs of the company should be conducted in the future;

(c) Order for the purchase of the shares of any member by the members of the company;

(d)directing that an investigation be made into the affairs of the company by the Corporate Affairs Commission; etc.

So, where the conduct complained of is bordered on illegality and the applicant will not be satisfied merely on restraining the threatened act or declaration especially where the conduct has been completed, it is suggested that it is better for an applicant to approach the court under Section 311 of the CAMA.

Apart from the issue of illegal conduct, the section covers other conducts though not illegal but can be said to be oppressive way of running the affairs of the company, on the shareholders.

Subsection (2) of section 311 provides that a member may make the application on the ground that:

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

It is not only a member or members that are empowered to make the application but also all other persons mentioned in Section 310 of the Act.

From the tone of Section 311 of the Act, it can be said that it is the most embracing of all the provisions of the Act providing for the protection of minority members of the company or other persons with substantial interest in the company. The section can be

likened to what is obtainable under Section 46 of the 1999 Constitution of the Federal Republic of Nigeria (as amended), as it relates to the enforcement of the fundamental rights of the citizen under the constitution.

Under the company law, this Section 311 of the Act, therefore is a provision that seeks to empower those who are directly concerned with the company either as members, creditors, directors, those to whom shares are transferred to or transmitted to, the CAC as the supervisory agency over companies registered under the Act and indeed, to all other persons who, in the discretion of the court is a proper person to make the application where they allege that oppressive or prejudicial and unfairly conduct has been done or is threatened to be done against the applicant. The applicant does not have to wait for the oppressive act or omission to have been completed before he will approach the court. In any event, neither the fact that the conduct has been completed will leave the applicant without any remedy. Thus, as it has been submitted earlier, it is the most comprehensive channel to enforce the rights accruable to the applicant. The fact that the conduct will be ratified by the company or has been ratified will not affect the right of the applicant to bring the application under section 311 of the Act.

The application is by way of petition, however, unlike a direct petition for winding up, a petition under Section 311 of the Act need not be advertised unless it is last resort to winding up.[53] In making the application, it is not enough to merely allege that a conduct is unfairly prejudicial, oppressive or illegal. The applicant must show the circumstances of the oppression and illegality. Thus, the applicant must plead all the relevant facts that will prove the allegation.[54]

[53] *Impress Angelo Farsure SPA vs. A-G of the Federation, Suit No: FHC/L/M/101/30/81 of 7/4/81 (unreported)*, cited by Orojo , Op. Cit. at p. 218.
[54] *Solanke vs. Ogunmenfun (unreported) Suit No: FHC/L/M/137/81 of 11/8/83*, cited by Orojo, Ibid.

There is currently an improved role for the Commission in securing relief for the minority and in protecting the public interest, as Section 310 of the Act includes the Commission as one of the parties that can petition for relief against oppressive, prejudicial or discriminatory conduct.[55]

Here the Commission may act to protect the interest of an oppressed minority just as the minority could exercise his right of remedy under the provisions of the said section 311. However, we are of the view that the institutional power of the Commission in this regard becomes useful in a situation where the minority cannot afford the time and exorbitant cost of litigation or for some other reasons cannot pursue the remedy.

Also, the right to petition on the ground that the affairs of a company are being conducted in disregard to public interest is unique and exclusive to be exercised by the Commission. It is to be noted that this right is not available to shareholders, directors, officers and creditors mentioned in Section 310.

Although, ‘’public interest’’ may be a wide concept, it cannot just be confined to the interests of the investing public in company’s securities or company’s affairs. It could extend to activities which are detrimental to social, moral, political and economic interests of the country; including activities which are contrary to public policy will normally provide ground for petition by the Commission. Accordingly, the Commission will have power to bring a petition under Section 311 against a company engaged in human/child trafficking, gun running and sponsoring terrorism etc.

[55] Op. Cit Section 311 (2) (c).

If the Court is satisfied that the petition is well founded it may make such order as it thinks fit in order to give relief regarding the maters complained of. The Court can make a wide range of orders under Section 312. These include an order that the company be wound up, an order for regulating the conduct of the company's affairs in future, an order for the purchase of a member's shares by other members or by the company.[56] More importantly, the Court can even make an order directing an investigation by the Commission into the company's affairs.[57]

[56] Ibid. Section 312 (2) (a-d).
[57] Ibid. Section 312 (2) (g).

CHAPTER FOUR

ANCILLARY REMEDIES AND PROTECTION FOR THE MINORITY

4.1 Introduction

Apart from the main remedies as treated in the previous chapters, we will in this chapter deal with other ancillary remedies meant to protect all the members of the company. The main differences between the protection of law as treated in the previous chapters and this chapter basically lie on the scope of the protection and the mode of enforcement of the rights.

Basically, the protective remedies treated in this chapter are more of the institutional roles played by the relevant authorities to protect both the members of a company and the public from the unconscionable acts of those in charge of the affairs of the company. Thus, some minimum standard of honesty and transparency is expected in the running of the affairs of a company in Nigeria. One important aspect of this is that the heat is removed from the minority members from pursuing their rights under the company; such duty is now shifted to the relevant bodies charged with the responsibility to see that the affairs of a company are conducted transparently. Only what is required of an aggrieved member is to make complaint to the relevant body and then, the body will take up his case for him.

Again, the mode of enforcement is different. Under the previous chapter, the rights can only be enforced through application to court. While under the current chapter, the

application is sent to the Corporate Affairs Commission or the Securities and Exchange Commission or other relevant bodies.[1]

Obviously, the reliefs intended by the applicant will determine under which mode to resort to. Where his intention is to stop through court injunction a deleterious act of the directors on the company or to enforce a right personal to him; or to see that the affairs of the company should be conducted in a way that will be fair on all the members of the company; then he will definitely apply to the court under the relevant sections of the Act, viz; Sections 300, 303, 310. In other words, where he intends to obtain an order of the court to stop an act or enforce his right; he will come under any of the provisions treated under the previous chapters. But on the other hand, where he thinks that the affairs of the company is conducted in a questionable manner but he does not have tangible evidence which will make him succeed in court, he may apply to the Commission (CAC) to investigate the company and its management. An important aspect of this, is that the Commission has the statutory right to investigate a company, and is in a better position to assess the management and affairs of the company because of its competence than the applicant. Where the company or its management is found culpable, it is now the Commission rather than the applicant that will take the matter up against the erring party by referring the matter to the appropriate authorities for sanction or even prosecution where a crime has been committed.

Thus, investigation of a company's affairs by the Commission and other statutory checks on the affairs of a company are meant as a way to give voice to the voiceless members of the company, be it shareholders or the creditors of the company and to protect the general public against some desperate directors or officers of a company. The dictum of Lord

[1] Example, The Economic and Financial Crimes Commission; Independent Corrupt Practices and Other Related Offences Commission; Central Bank of Nigeria etc

Denning in an English case in explaining the workings of the Department of Trade (which is similar to CAC) is instructive in other to fully appreciate the significance of the current provisions of Section 314 of CAMA, which may have evolved from the lessons experienced in England. In *Northwest Holst Ltd vs. Secretary of State for Trade & Ors.*, the law Lord opined:

> It is important to know the background of the legislation. It sometimes happens that public companies are conducted in 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. These have control of the company's affairs. The other shareholders know little and are told little. They receive the glossy annual reports. Most of them throw them into wastepaper basket. There is an annual general meeting but few of the shareholders attend. The whole management and control are in the hands of the directors. They are a self-perpetuating oligarchy; and are virtually unaccountable. Seeing that the directors are the guardians of the company, the question is asked: quis custodiet ipsos custodies? Who will guard the guards themselves? It is because companies are beyond the reach of ordinary individuals that this legislation has been passed so as to enable the Department of Trade to appoint inspectors to investigate the affairs of a company.[2]

If the above can be said of companies in a country where there is a culture of public accountability, then it is more glaring and relevant in Nigeria where the culture of corruption and impunity are well entrenched and those in charge of public affairs do not care about the interest of other members or the organization. If anything, it is suggested that the mechanism be given more biting than just lying there in the statute books.

Some of the powers and remedies offered by these relevant bodies are treated as follows.

[2] *(1978) 3 All E.R. 280 at 291-292*.

4.2 **Investigation of Companies and their Affairs**

The Act[3] does not give statutory definition of "investigation of company's affairs". This could be deliberate, so as not to unwittingly restrict its scope. However, the Act has made elaborate provisions to cover relevant issues that may be said to fall under the scope. Anyway, we may resort to other sources to find definition for our term.

The Black's Law Dictionary[4], defines ''investigate'' as, "to inquire into (a matter) systematically; to make an official inquiry." While the "the affairs of a company" has been held to mean its business affairs, its goodwill, profits or losses, contracts and assets, including its control over subsidiaries – and it makes no difference who is conducting those affairs[5]. Thus, we can safely say that investigation of the affairs of a company means the official inquiry into the business, good will, profits and losses, contracts and assets, management, including the control over subsidiaries – of a company.

There are two types of investigation of a company under the Act:

1. Investigation of a company's affairs[6]
2. Investigation of the ownership of the company[7].

However, the first type of investigation will be accorded more prominence since it is more directly relevant to the protection of the minority shareholders which is the crux of this work.

[3]Companies and Allied Matters Act, 2004.
[4]Bryan, A. G. (Ed.) (2009), *Black's Law Dictionary (9th Edition)*, Thomson Reuters, Minnesota, p.902.
[5]*R vs. Board of Trade, Ex Parte St. Martins Preserving Co. Ltd (1965) Q.B. 603*.
[6]Op. Cit. Section 314.
[7] Ibid. Section 326.

Section 314 (1) empowers the Commission to appoint one or more competent inspectors to investigate the affairs of the company and to report on them in such manner as it may direct. The appointment may be made by the Commission in the following circumstances:

1. On the application of members of the company;
2. On the order of the court that the company be investigated;
3. On the Commission's own motion.

4.2.1. Investigation based on Application by Members

Where a member of a company is of the suspicion that the affairs of a company are being conducted illegally, irregularly or are being mismanaged, such member can bring an application to CAC to appoint inspectors for investigation into the affairs of the company. In the case of a company having a share capital, the application may be brought by members holding not less than one-quarter of the class of shares issued. In the case of a company not having a share capital, by not less than one quarter in number of the persons on the company's register of members; and in any other case, on application of the company.[8] The applicant shall support the application by such evidence as the Commission may require for the purpose of showing that the applicant or applicants have good reason for requiring the investigation[9].

The required minimum number of applicants here, is considered very high, and this will likely impede and stifle effective utilization of the machinery of investigation. It should be realized that in Nigeria, most company shareholdings are largely held in small units. It is not easy to muster one quarter of shares or members (who are usually docile) to pursue such a public cause like corporate investigation, which they think may not confer any

[8] Ibid. Section 314 (2).

[9] Ibid. Section 314 (3); See Umenweke, M.N. et al, *Powers and Duties of the Corporate Affairs Commission as a Regulatory Body in Nigeria*www.cacnigeria.org, visited 14th September, 2014.

personal benefit on them. In this regard, it is suggested that the CAMA should be amended by reducing the minimum number of members who can bring the application for investigation, to say, one-tenth of the members of the company or persons holding one-tenth of the issued shares. It is strongly believed that reduction in the minimum number of applicants will not open the floodgate to frivolous applications as the applications are required under Section 314 (3) CAMA to be supported by such evidence as the CAC may require for the purpose of showing that the applicant or applicants have good reason for requiring the conduct of the investigation. It would appear that despite provision of process of investigation in CAMA, this tool is under-utilized in Nigeria and there is need to encourage its utilization by removing any seeming hurdles.

The beauty of this provision appears to be that where a member thinks that the affairs of the company is conducted in a questionable manner but he does not have tangible evidence which will make him succeed in court, he may apply to CAC to investigate the company and its management. An important aspect of this, is that CAC has the statutory right to investigate a company, and is in a better position to assess the management and affairs of the company because of its competence than the applicant. Where the company or its management is found culpable, it is now the CAC rather than the applicant that will take the matter up against the erring party by referring the matter to the appropriate authorities for sanction or even prosecution where a crime has been committed.

Thus, investigation of a company's affairs by the CAC and other statutory checks on the affairs of a company are meant as a way to give voice to the voiceless members of the company, be it shareholders or the creditors of the company and to protect them against some desperate directors or officers of a company.

4.2.2. Investigation based on Application by the Company

It is not only members who have a right to apply to CAC for investigation into the affairs of a company. The CAC may also order an investigation into company affairs on the application of a company. Although such an application may be uncommon, it may still be brought when there is an internal dispute and the aggrieved members seek an independent investigation by the CAC. However, it should be noted that whether the investigation is initiated by members or the company, Section 314 (3) CAMA prescribes that the application will be supported by such evidence as the CAC may require for the purpose of showing that the applicant has good reason for requiring an investigation. This requirement seems to be similar to showing a prima facie case, although the main objective is to minimize frivolous, unmeritorious and vexatious applications; and this is commendable.

4.2.3.Investigation by Order of Court

As an ancillary or substantive relief in any legal action, the court may make an order that the affairs of a company should be investigated if it is satisfied that the affairs of the company are being conducted in an illegal manner or oppressive manner. By virtue of Section 315 (1) CAMA, if a court by order declares that the affairs of a company ought to be investigated, the CAC must appoint one or more competent inspectors to conduct an investigation into the affairs of the company and make a report on such manner as the court directs.

At common law, the court has discretion as to when to make an appointment for investigation in the interest of the good management of the company and of the

shareholders. In *Otong vs. Mogal Nigeria Ltd*[10], it was alleged that the company since its incorporation in 1972 had never filed annual reports, had not been paying tax, had been run illegally, had not filed annual returns , had never held general meetings and kept no minute book of any meetings and no book of account. In that case, the court ordered for a thorough investigation of the affairs of the company by the Registrar of Companies (then equivalent of CAC). However, it must be pointed out that for an applicant to get the court to make such an order of investigation, such an applicant must specifically claim such a relief, as a court will not normally grant an order in respect of a relief not claimed.[11] It is our view that if such a case were to come up now, the members may not need to go to court, rather they would have explored the cheaper and faster route of making a complaint to CAC under Section 314 to appoint investigators to investigate the affairs of the company.

4.2.4. Investigation on the Commission's own Motion

The power of investigation granted to CAC by law is enormous and can be made effective, if properly utilized, even by CAC. In some circumstances, CAC is empowered to initiate investigations into company affairs, without the need to be prompted by members. Under Section 315 of the Act, the Commission may appoint an inspector or inspectors to investigate the affairs of a company where it appears to it that there are circumstances suggesting any of the following:

a. That 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 a manner which is unfairly prejudicial to some part of its members; or

[10](1978) FRCR 80.
[11]*Ekpenyong vs. Nyong (1975) 2 SC 71; Olorotimi vs. Ige (1993) 8 NWLR (Pt. 311) 257.*

b. That any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose; or
c. That persons concerned with the company's formation or the management of its affairs have, in connection with it, been guilty of fraud, misfeasance or other misconduct towards it or towards its members; or
d. That the company's members have not been given all the information with respect to its affairs which they might reasonably expect.

The members include the personal representative of a deceased member and any person to whom shares have been transferred or transmitted by operation of law.[12]

It is humbly suggested that the provisions of this Section 315 largely overlap with that of Section 314. For one, almost all the instances where the Commission may investigate a company on its own motion can constitute the evidence the applicant under Section 314 (3) is required to support his application with. Again, it may be very hard for the Commission to be aware of those circumstances under Section 315(2) of the Act, except the information is supplied to it by the applicant member of the company or the company itself or formal complaint by a creditor. The Commission does not go about interloping into the affairs of a company except there is a strong reason to do so. The reason to do so could be where there is a formal complaint to it by a creditor. Since a creditor is not a competent applicant to the Commission for investigation of the affairs of the company under the Act, it is suggested that the creditor nevertheless can petition the Commission that the company's affairs are being or have been conducted with intent to defraud him; and on the reception of such petition, the Commission can properly on its own motion

[12]Op. Cit. Section 315 (4).

investigate the affairs of the company to find out the veracity or otherwise of the complaint.

Finally, even Section 315(2)(c) which ordinarily appears to be information under the public domain may not be so easy except where the Commission is made a party to the suit. Otherwise, the information as to the finding of the guilt must be brought to its notice by somebody, either by petition or application. It is suggested that finding of guilt as used under the paragraph of the subsection must mean finding of guilt by a competent court of law. This is so because it is only a competent court under the Constitution[13] that can validly pronounce anybody guilty. Thus, the slightest insinuation of the Commission finding a person guilty is disabused, most especially since such finding involves criminal conviction. The highest the Commission can do is to indict a person and thus recommend him to the Attorney General for prosecution. But that is after the necessary investigation.

An inspector may be appointed to investigate the affairs of a company notwithstanding that the company is in the course of being voluntarily wound-up.[14]

4.3. Powers of Inspectors and Duty of Officers of the Company

For a successful investigation of the affairs of a company, there is need for collaboration between the inspectors and officers of the company. Section 316 of the CAMA provides for the powers of the inspectors during the investigation. Under this section the inspectors are empowered to investigate the affairs of a company as they think necessary for the purposes of the investigation, including the affairs of another corporate body, though which is not directly under investigation on its own, which is the company's subsidiary or holding or a subsidiary of its holding or a holding company of its subsidiary, he shall

[13]Section 36 (4) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).
[14]Op. Cit. Section 315 (3).

report on the affairs of the other body corporate so far as he thinks that the results of his investigation of its affairs are relevant to the investigation of the affairs of the company first mentioned.

From the foregoing, it is not everything about the other corporate body that can be investigated and reported but only to the extent that the affairs of the other corporate body are relevant to fully investigate the company primarily under investigation. This is so in the light of legal personality enjoyed under the Act by every company duly registered under the Act. The fact that a company is a subsidiary or a holding of another does not fuse it into that other. Thus, in the investigation of a company, it is suggested that the inspectors must of necessity respect the separate personality of the other corporate body and will investigate it only to the extent that will enable them achieve their purpose in the company primarily under investigation and nothing more. It is also suggested that the principle of relevance under the Evidence Act[15] can be made to bear in determining the extent the inspectors can go to investigate the subsidiaries or holding of the company under investigation.

The inspector may inform the Commission of the matters coming to his knowledge as a result of the investigation without the necessity of making an interim report.

It is the duty of every officer and agent (both past and present) of the company under investigation to give maximum cooperation to the inspector duly appointed under the Act. It is a criminal offence tantamount to contempt of court to obstruct the investigation of an inspector.

In his investigation, the inspector is empowered to inspect all books and documents of or relating to the company, or as the case may be, the other body corporate which are in their

[15] Section 9 Evidence Act 2011 (as amended).

custody or power; to require a person to attend before the inspector to testify or to obtain any other assistance from the officers of the company relevant to the investigation.

The inspector may examine on oath the officer or agent or such other persons in relation to the affairs of the company. Section 317 (4) provides that agent for the purpose of these provisions includes the banks, solicitors and auditors of the company. However, the privilege communication between a solicitor and his client is protected under Section 330 of the Act.

Under Section 318, the inspector may require a director to produce to him all documents in his possession, or under his control, relating to a bank account into or out of which the following has been paid:

a. The emoluments of the director's office, particulars of which have not been disclosed in the financial statements for the financial year;
b. Any money which has resulted from or been used in the financing of an undisclosed transaction, arrangement or agreement, in other words, particulars of which have not been disclosed in the financial statements of the company for the financial year; or
c. Any money which has been in any way connected with an act or omission, or series of acts or omissions, which on the part of that director constituted misconduct towards the company or its members.

4.4. Inspector's Report

Inspectors, after conclusion of their investigations into a company's affairs are supposed to submit a report of their findings to the Corporate Affairs Commission. By virtue of Section 320 (1) of the CAMA, the inspector may and if so directed by the Commission

must, make interim reports to the Commission, and on the conclusion of his investigation must make a final report to it. Any such report must be written or printed as the Commission may direct.

Copies of the report are distributed as follows[16]:

a. The Commission may direct that a copy of the report be forwarded to the company at its registered or head office.
b. If the inspector is appointed pursuant to the order of the court, the Commission shall furnish the court with a copy of its report.
c. In other cases, the Commission may on its discretion –
    i. Furnish a copy on request and on payment of a prescribed fee to any member of the company, or any person whose conduct is referred to in the report, the auditors of the company, the applicants for the investigation and any other person whose financial interests appear to be affected by the matters dealt with in the report whether as creditor or otherwise; and
    ii. Cause the report to be printed and published.

The effect of the report, at most, is an indictment. The report does not apply as an order of the court. It is merely an expression of the findings and opinions of the inspector. It has without more any real legal effect. But if duly certified by the Commission, it can be received in evidence in any legal proceedings against any person that has been indicted by the report as the opinion of the inspector in relation to matters contained in the report – See Section 325(1) of CAMA.

However, the finding of the investigation may lead to civil or criminal proceedings against those found to be culpable under the report. If from the report it appears to the

[16] Op. Cit. Section 320 (2-4).

Commission that any civil proceedings ought in the public interest to be brought by the company or anybody corporate, the Commission may itself bring such proceedings in the name and on behalf of the company or the body corporate[17]. The Commission will indemnify the body corporate against any costs or expenses incurred in connection with the proceedings, and if such costs or expenses are not otherwise recoverable, they will be defrayed out of the Consolidated Revenue Fund.[18]

Furthermore, if from the report it appears to the Commission that proceedings ought, in the public interest, to be brought by any body corporate dealt with by the report for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation of that body corporate or the management of its affairs, or for the recovery of any property of the body corporate which has been misapplied or wrongfully retained, it may refer the case to the Attorney-General of the Federation for his opinion as to the bringing of the proceedings for that purpose in the name of the body corporate. If such proceedings are brought, all officers and agents of the company or other body corporate, as the case may be, (other than the defendant in the proceedings) must give the Attorney General all assistance in connection with the proceedings which they are reasonably able to give.[19] The expenses of such proceedings, if not otherwise defrayed, shall be defrayed out of the Consolidated Revenue Fund[20].

Also from the report, criminal proceedings may proceed against a person indicted in the report. If from the report it appears that any person has, in relation to the company or other body corporate whose affairs have been investigated, been guilty of any criminal

[17]Ibid. Section 321 (1).
[18]Ibid. Section 321 (2).
[19]Ibid. Section 322 (3).
[20]Ibid. Section 322 (4).

offence, the report must be referred to the Attorney General of the Federation.[21] Where the Attorney General considers that the case is one in which prosecution ought to be instituted, he will direct action accordingly. In that event, all officers and agents of the company or body corporate (other than the defendant in the proceedings) must give him all assistance in connection with the prosecution, which are reasonably capable of giving.[22]

From the report, winding up proceedings may issue if it appears to the Commission after considering report that it is expedient in the public interest that a corporate body liable to be wound up under the Act ought to be wound up. In that regard, the Commission may present a petition for it to be wound up if the court thinks it just and equitable to do so, in other words under Section 408 of CAMA[23].

The expenses incidental to an investigation by an inspector appointed by the Commission is defrayed in the first instance out of the Consolidated Revenue Fund, but the following persons will be liable to make repayment;

a. Any person who is convicted on a prosecution instituted by the Attorney General of the Federation as a result of the investigation, or who is ordered to pay damages or restore property may, in the same proceedings, be ordered to pay the expenses to the extent specified in the order;
b. A body corporate in whose name proceedings are brought will be liable to the extent of the amount or value of any sums or property recovered by it as a result of the proceedings and such amount shall be first charged on its sums or property;

[21]Ibid. Section 322 (1).
[22]Ibid.Section 322(2).
[23] Ibid. Section 323.

c. Unless as the result of the investigation a prosecution is instituted by the Attorney General, the applicant for the investigation pursuant to an application by the company or its member are liable to such extent (if any) as the Commission may direct[24].

4.5. Investigation of Company's Ownership

Apart from investigating the company or its management, the Commission is further empowered under the Act to also investigate the real owners behind the company in appropriate circumstances. This is akin to lifting the veil of incorporation to find out who the real owners of the company are and how the shares and debentures of the company have been managed or manipulated by them.

Section 326 (1) of the Act provides thus:

> Where it appears to the Commission that there is good reason so to do, it may appoint one or more competent inspectors to investigate and report on the membership of any company and otherwise with respect to the company, for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of the company or able to control or materially to influence the policy of the company.

The Commission can also appoint an inspector by the application of a member. Subsection (3) of the section provides that where an application for an investigation under this section with respect of particular shares or debentures of a company is made to the Commission by members of the company and the number of applicants or the amount of shares held by them is not less than that required for an application for the appointment of an inspector under paragraphs (a) and (b) of subsection (2) of section 314 of the Act, the

[24] Ibid. Section 324 (1).

Commission shall appoint an inspector to conduct the investigation unless it is satisfied that the application is vexatious.

In the appointment of the inspector, the Commission may define the scope of his investigation, whether as respects the matter or the period to which it is to extend or otherwise, or may limit investigation to matters connected with particular shares or debentures.

If it appears that there is good reasons to investigate the ownership of any shares or debentures of a company but that it is unnecessary to appoint an inspector, the Commission may require any person who has been interested in those shares or debentures or who has acted as a legal practitioner or agent, subject to protection of privileged communications, or someone in relation to such shares or debentures to give to the Commission any information which such persons have about them. Such information may include the present and past interests in the shares and debentures and the names and addresses of persons interested or their agents. Any person who fails to give the information required or deliberately makes a false statement is liable to a fine and/or imprisonment[25].

The Commission may, in appropriate situation, in writing directed to the company, impose restriction on shares under investigation[26]. Under 329(2) of the Act, where restriction is validly placed on any shares, the effects are:

a. Any transfer of those shares, or in case of unissued shares, any transfer of the right to be issued therewith and any issue thereof, shall be void;
b. No voting rights shall be exercisable in respect of those shares;

[25] Ibid. Section 328.
[26] Ibid. Section 328 (1).

c. No further shares shall be issued in right of those shares or in pursuance of any offer made to the holder thereof;
d. Except in liquidation, no payment shall be made of any sum due from the company on those shares, whether in respect of capital or otherwise.

Any person who is aggrieved by the direction to place restriction or refusal to give direction to place restriction on the shares by the Commission may apply to the court which may make such an order as it thinks fit[27].

Under subsection (5), any person who

a. Exercises or purports to exercise any right to dispose of any shares which to his knowledge, are for the time being subject to restrictions under this section ; or
b. Votes in respect of any such shares, whether as holder or proxy, or appoints a proxy to vote in respect thereof; or
c. Being the holder of any such shares, fails to notify that they are subject to the said restriction, shall be guilty of an offence and liable to a fine of N500 or imprisonment for a term of six months, or both.

If it is the company that contravenes the said restrictions, the company and every officer of the company who is in default shall be guilty of an offence and liable to a fine of N500.

A prosecution shall not be instituted under this section except by or with the consent of the Attorney General of the Federation. It is submitted that this provision may be unrealizable where the Attorney General withholds his consent for any ulterior motive especially in a multi-party and multi-ethnic country like Nigeria, where subterranean issues known as ‘’Nigerian factor’’ are always at play.

[27]Ibid. Section 329 (3).

The court may however, remove the restrictions to enable a take-over to be completed while continuing to impose restrictions upon the proceeds of such transfer being withheld from the transferor.[28] The investigation of the company and its affairs may be advantageous to the minority shareholders in many ways:

1. It may enable him obtain further information on the affairs of the company. This is very important because some of the information may not get to him without such investigation by the Commission. The information obtained will enable him have enough evidence to pursue his rights or that of the company as the case may be in the court of law.
2. Investigation is not only a means but can serve as an end on its own. It may supplement other remedies accruable to a minority shareholder regarding the prejudicial and unfair conduct against his interest in the company.
3. The investigation may serve as a preventive measure to forestall an adverse conduct on the part of those in control of the company against the interest of the company or its members.
4. Through the investigation, the Commission may serve as voice to the voiceless members of the company who may be helpless in the face of capricious conducts of those in charge of the affairs of the company.
5. It is a potent means of exercising its supervisory role as empowered under the Act by the Commission over companies in Nigeria.

[28]See *Re Ashborne Investments (1978) 2 ALL ER 418.*

4.6 Winding up on the Just and Equitable Ground

Winding up on the just and equitable ground is one of the ways a company can be wound up under the CAMA[29]. It is a remedy available to contributories.

Where a contributory presents the petition under this head, and the court is of the opinion that he is entitled to the order, it must make the order except it appears to the court that another remedy is available to the petitioner and he is acting unreasonably in seeking the winding up instead of pursuing that other remedy. See *Georgius Cole vs. RC Irvin & Co Ltd*[30].

The contributory must allege and prove *inter alia* that there will be assets for distribution. See *Attorney General Lagos State vs. Nigerian Oxygen & Allied Gases Ltd*[31], otherwise, he will have no interest in the winding up. Where the petition on this ground is opposed by the majority members, the court will normally not grant it except the main object of the company has failed[32] or the conduct of the majority is such as to constitute oppression to the petitioning minority.[33]

Winding up on the just and equitable ground is an equitable remedy which is within the discretion of the court to grant or refuse. In exercising its equitable jurisdiction under this head, the court must exercise it judiciously and judicially,[34]so the petitioner must present enough material that will sway the court in his favour. Thus, the petitioner must present to the court such evidence to show that his interest will be highly prejudiced except the order is granted and that there is no other remedy available to him. A case of prejudicial

[29]Op. Cit. Section 408 (e).
[30]*(1971) 1 UILR 314*, See also *Ado Ibrahim & Co. Ltd.vs Bendel Cement Company Ltd. (2007) 15 NWLR (Pt. 1058) p. 538 at 561*; Ibid. Section 411 (2).
[31] *Suit No. FRC/L/M3/77 (Unreported) of 13/3/80*, cited by Orojo, Op. Cit, p. 456
[32]See *Re-German Date Coffee Co (1882) 20 Ch D 169*.
[33]See *Re Middlesborough Assembly Rooms Co (1880) 14 ChD 104.*
[34]*Momah vs. Vab Petroleum (2000) 1 SCNQR 348.*

and oppressive conducts against the petitioner may be appropriate reason to grant the petition in appropriate situation.

In the case of *Ebrahimi vs. Westbourne Galleries Ltd*[35], it was held that:

> The just and equitable provision does not … entitle one party to disregard the obligation he assumes by entering a company; nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations, that is, of personal character arising between one individual and another may make it unjust, or inequitable to insist on legal rights or to exercise them in a particular way.[36]

Some of the circumstances where the order may be made on the just and equitable ground are:[37]

1. If the whole substratum has disappeared a shareholder may petition.[38]
2. If the company is a small company in the nature of an incorporated partnership, the court may order a winding up on the same ground as would justify dissolution of a partnership on the just and equitable ground e.g deadlock – See *Re Yenidje Tobacco Co Ltd*[39]
3. Company formed for fraudulent or illegal purposes.[40]
4. Company which is a bubble – i.e a company which has no visible business or assets, it has had no proper foundation as a company[41].
5. If those in control conduct the affairs of the company so as to oppress or unfairly prejudice or discriminate against others thereby causing a justifiable lack of

[35] *(1972) 2 ALL ER 492 at 500.*
[36] See also *General & Aviation Services Ltd vs. Thahai (2000) 14 NWLR (Pt. 686) 108 at 118.*
[37] See generally, Orojo, Op. Cit. p. 457
[38] See *Re German Date Coffee Co.* (supra) p. 169.
[39] *(1916) 2 Ch. 426.*
[40] *Re International Securities Corporation (1908) 24 TLR 837; Re Thomas Edward Brinsmead & Sons (1897) 1 Ch. 406.*
[41] *Bakare vs. Bakado Line Ltd (1969) 1 All NLR 77; Re London & County Coal Co. (1866) LR 2 Eq. 1.*

confidence in the company's management.[42] The case of *Re Lundie Bros Ltd*[43]showed clearly that it is not only a minority that needs protection, as in this case, the oppressed members held 50% of the shares of the company and despite that, they still suffered oppression in the hands of the controllers of the company affairs.

4.7. **Meaning of a Contributory**

Section 403 of the Act defines it thus:

> The term "contributory" means every person liable to contribute to the assets of a company in the event of its being wound up and for the purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are to be deemed contributories, the expression shall include any person alleged to be a contributory.

This definition includes present and past members of a company.[44] It therefore means that a contributory is same as a member of a company. But the term is not limited to the current membership of the company but also to the past members provided that the member "is liable to contribute to the assets of the company in the event of being wound up". It is this liability for contribution that defines a contributory. Thus minority shareholders are qualified as contributories and have the right to present petition for winding up on just and equitable ground.

However, it is not just showing that a petitioner is a contributory that clothes him with the locus standi to present the petition. It must go further to show sufficient interest, in that if the company is wound up, as a member, he will receive some advantages or minimize

[42]*Loch vs. John Blackwood Ltd (1924) AC 783; Re Davies & Collett Ltd (1935) Ch. 693.*
[43]*(1965) 1 WLR 1051.*
[44]Op. Cit. Section 402.

some disadvantages which will accrue to him by virtue of his present or past membership of the company.[45]

To prevent indiscriminate petition by anyone who claims to be a contributory, section 410 (2) of the CAMA has to restrict the scope of the contributories that can present the petition; or situations in which it can be presented:

i. The number of members of the company has reduced below two; or
ii. The shares in respect of which he is contributory or some of them, were originally allotted to him or have been held by him and registered in his name, for at least six months during the 18 months before the commencement of the winding up, or have devolved on him through the death of a former holder.

The company cannot by its articles restrict the rights of the contributory to bring a petition, for any such restriction will be void. Neither does the fact that the petitioner is a minority disqualify him[46].

4.8. Action by the Corporate Affairs Commission

The function of the Commission in relation to a company is set out in Section 7 of the CAMA. They are as follows:

a. To administer the Act, including the regulation and supervision of the formation, incorporation, registration, management and winding-up of companies under or pursuant to the Act;

[45] *General & Aviation Services Ltd vs. Thahai (supra) p. 108.*
[46] See *Obasi vs. Pureway Corporation of Nigeria Ltd, (unreported) Suit No: FRC /L/M10/78 of 18/9/78 cited by Orojo, Op. Cit. p. 460*.

b. To establish and maintain a company's registry, and offices in all the states of the Federation, suitable and adequately equipped to discharge its functions under the Act or any other law in respect of which it is charged with the responsibility;
c. To arrange or conduct an investigation into the affairs of any company where the interest of shareholders and public so demand;
d. To perform such other functions as may be specified by any Act or enactment; and
e. To undertake such other activities as are necessary or expedient for giving full effect to the provisions of the Act.

This section empowers the Commission to regulate and supervise the activities and management of a company from formation to winding up.

Basically, the most potent of these powers once a company has been duly registered are, first the power to regulate the management of a company and in appropriate situation, present petition for winding up of a company; then second, the power to investigate and supervise the affairs of a company.

Power to investigate the affairs of a company has proved to be the most potent corrective measure of all the powers of the Commission. It is often resorted to as an end on its own or a means to exercising other powers.

As we have seen, the Commission is empowered either on its own motion, by application of a member or an order of the court to appoint an inspector to investigate the affairs of a company[47].

The report of the inspector appointed by it will determine the course of other actions the Commission may take. In appropriate case, the Commission may refer the matter to the

[47]Op. Cit. Section 314.

Attorney General of the Federation either for civil or criminal prosecution of those indicted by the report.

The Commission, after considering the inspector's report, if it thinks it is expedient in the public interest that the company will be wound up, may present a petition for it to be wound up if the court thinks it is just and equitable to do so, i.e. under section 408 of the Act. It thus means that the Commission cannot sue or prosecute an erring director or officer of the company indicted directly on its own. The only time the Commission has power to approach the court on behalf or against a company is on winding up petition under Section 408 of the Act.

The Commission may with the approval of the AGF present a winding up petition in any of the following situations:

i. Where inspector's report submitted to it pursuant to Section 320 of the Act and the Commission is of the view that it is expedient in view of such report that civil proceeding ought in the public interest be brought or criminal prosecution ought to be brought.
ii. Where the court is of the opinion that it is just and equitable that the company should be wound up under Section 408 (e) of the Act.

From the foregoing therefore, the actions the Commission can take, especially in relation to the protection of the interest of the minority shareholders or the interest of the public are;

1. Appointing inspectors to investigate the affairs of the company;
2. Referring the inspectors' report to the AGF for appropriate actions against those found culpable in the report.

3. Presenting a winding up petition to the court in appropriate situations in accordance with the provisions of sections 323 and 410 (1) (d) of the Act.

In exercising its powers, the Commission must bear in mind the interests of the company, the members of the company, creditors and the general public.

4.9. Other Statutory Remedies/Protections

Apart from the remedies discussed above, which are predominantly provided for under the CAMA, there are other statutory provisions which seek to protect the minority shareholders from being swindled by those in charge of the affairs of a company. This protection may come in the form of statutory disclosures that must be made by the directors or the officers of a company to the prospective members of the company. Prominent among these statutes is the Investments and Securities Act 2007 (as amended), (hereinafter referred to as ''ISA''). The ISA makes copious provision for the regulation of the capital market. It should be noted that capital market is a market through which public companies can raise money from the public as a way of investment in those companies. It thus means that there must be sanity and transparency in the market to bolster confidence in the market. This is more so since the majority of the investors, aside the professional investors do not understand the working of the market. Thus, if left without any safeguards, they will easily be cheated. Thus the ISA seeks to forestall fraudulent dealings that can hamper the market, realizing the importance and significance of capital market in the well-being of any nation's economy. Some of these provisions, especially as they relate to the protections of minority shareholders will be treated briefly as follows. But before then, it should be noted that the institution charged with the responsibility of administering the provisions of the ISA is the Securities and Exchange Commission

(SEC). It is the duty of the SEC to see that the provisions of the ISA are complied with by all the operators in the capital market and other relevant bodies.

One weakness of the ISA as a statutory protection to minority shareholders is that its provisions are only applicable to public companies which intend to offer their shares to the public. Thus, its application is limited in scope and as such minority shareholders in private companies are still left in the cold.

Aside the general provisions of the ISA, other statutes may in addition regulate a particular industry. For example, the Banks and Other Financial Institutions Act, BOFIA[48], makes additional provisions to regulate the activities of banks and financial institutions in Nigeria. The said sections empower the Central Bank of Nigeria to carry out supervisory duties over banks and other financial institutions e.g. examine periodically books, accounts and affairs of banks and financial institutions in Nigeria.

One of the provisions of ISA relevant to our discussion is Section 78 which makes the disclosure of salient information that will one way or the other influence the decision of a prospective subscriber to the securities of a company compulsory through the issuance of prospectus. Section 78 of ISA provides thus:

(1) Notwithstanding the provisions of section 67 of this Act, no person shall make an invitation to the public to acquire or dispose any security:

a. Within six months prior to the making of the invitation, a prospectus relating to such securities and complying in all respects with the relevant provisions of sections 75, 76 and 79 of this Act has been delivered to the Commission and registered by it, in accordance with section 80 of the Act;

[48] Sections 31 and 61 of the Banks and Other Financial Institutions Act (Cap. B3) L.F.N. 2004.

b. Every person to whom the invitation is made is supplied with a true copy of such prospectus as filed with the Commission; and
c. Every copy of the prospectus states on its face that it has been registered with the Commission at the time when the invitation is first made and the date of registration is reflected thereon.

The purpose of the prospectus is to ensure that all potential subscribers and purchasers of securities are fully informed of all facts material to their decision to subscribe or purchase the securities of the company. Therefore, the prospectus must contain full information on the company's capital, business, financial base, contracts, assets and liability of the company.[49]

Where a person issues or permits the issuance of a prospectus containing statements which turn out to be untrue, any person who acts upon such untrue statements and suffers loss or damage can hold the issuer or the person who permitted the issuance, liable for such loss or damage[50]. The person who suffered the loss or damage has his remedies both at common law[51] and under the ISA[52]. Also the misrepresentation can give rise to criminal liability.[53]

The relevance of this protection to the minority shareholders cannot be overemphasized. One, it helps to bridle companies' directors on what they concoct and sell to the public. It has been obvious that some directors use public offers to swindle the unsuspecting public

[49] See Part 1 of the Third Schedule of the Investments and Securities Act No. 29 2007 (hereinafter called ''ISA'').
[50] *Olawepo vs. S.E.C (2011) 16 NWLR (Pt. 1272) 122*.

[51] *New Brunswich and Canada Railway Co vs. Muggeridge (1860) 1 Drand Sun 365, Henderson vs. Lacon (1867) LR 5 Eq 249 at 252*.
[52] Op. Cit. Section 85.
[53] Op. Cit. Section 86 (1).

of their hard earned money in the pretence of making them invest in the securities of their companies; even when these companies are at the verge of collapsing.

Thus, the Act seeks to promote transparency both in investing in a company and the management of such a company for the mutual benefit of both the shareholders and the public. Thus, a minority shareholder who has been swindled by the directors of a company through false statement in the prospectus can bring an action to rescind the contract of his membership of the company and recover the money he invested as a result of the misleading prospectus. In addition, he can claim damages from the company and/or its directors.

Other rights of protection accorded the minority shareholders include, the right of compulsory acquisition of his shares in the company by another company trying to subsume his company in merger and acquisition or take over where he dissents on the resolution of his company approving the merger, acquisition or take over.[54] Thus, where a minority member dissents to such arrangement, he is not helpless.

The dissenting minority is not under compulsion to transfer his shares to the offeror company on the terms it acquired other shares in the company but may apply to court to determine the fair value of his shares.[55]

Apart from the above, minority shareholders who hold not less than five percent aggregate of the nominal shares of a company trying to reconvert from public company to private company are empowered under the CAMA to apply to the court to cancel a

[54] Ibid. Section 122(6) (e); Section 130; Section 146 (2).
[55] Ibid. See generally, Section 147.

purported special resolution duly passed which seeks to reconvert the company as aforesaid.[56]

All these provisions are attempts to provide adequate protections to the minority shareholders who are, as we have seen, always at the receiving end in the management of a company. If these safeguards are not put in place, unscrupulous and unconscionable directors of a company will always sacrifice their interest (minority shareholders) in order to feather their own nests (directors)

4.10. Codes of Corporate Governance

Many major and emerging securities markets in the common law jurisdiction have system of mandatory disclosure of securities information. The need for mandatory disclosure became imperative since the collapse of corporate giants, particularly, ENRON and WORLDCOM in the United States. It was suddenly realized that voluntary disclosure was not adequate and effective to prevent corporate fraud in the market operation or in the internal management of a company.

In the US, the crisis led to the enacting of the Sarbanes-Oxley Act. The Act is meant to enhance the accuracy and reliability of corporate disclosures and transparency in the internal management of a company among other things.

Nigeria is not left out in the effort to see that there is transparency in corporate governance and restore confidence in the capital market which the said failure of the corporate giants had engendered worldwide. This effort manifested itself in the Code of Best Practices on Corporate Governance in Nigeria, 2003. The code was a product of collaboration between the SEC, the CAC and other stakeholders through an industry wide committee. From the preamble to the code, it prescribes best practices for the public

[56]Op. Cit. Section 53 (3) (a) and (b) and (4) and (5).

companies in the area of their operation and supervision of executive actions, to ensure transparency and accountability in the governance of these companies within the regulatory framework and market. The main objective of the code is shown in the Preamble of the code which provides thus:

"A code to make provisions for the best practices to be followed by public quoted companies and for all other companies with multiple stakeholders registered in Nigeria in the exercise of the power over the direction of the enterprise, the supervision of executive actions, the transparency and accountability in governance of these companies within the regulatory framework and market; and for other purposes connected therewith".

One important thing to be noted about the code is that compliance with it is still voluntary, advisory and moralistic in Nigeria. This is against the current practices in many countries where such compliance is mandatory. However, while voluntary compliance is encouraged and permissible, it does not mean that SEC will take kindly to any deliberate breach of the provisions of the code.

Some of the salient provisions of the Code include Section 2 stipulating the requirement for the separation of the office of the Chairmen and CEO's of companies, to avoid undue concentration of power in one person and clearly defined responsibilities of top management. Section 6 provides for the requirement of full disclosure of directors' total emoluments and those of the chairmen and highest paid directors; while Section 7 deals with determination of emoluments and remuneration of the directors and executive directors by remuneration committee composed of non and independent directors. Another salient provision is Section 9 dealing with the requirement of shareholder protection and guaranteed participation in corporate governance, through regular meetings and detailed briefing on the true state and performance of the company.

Similarly, the provisions of Sections 11, 12 and 13on the requirement of establishment of Audit Committee in such a way as to ensure its independence from the board or any dominant personality on the board, but not to obstruct executive management, cannot be more apposite than now[57].

Furthermore, public companies are required to disclose their respective levels of compliance with international best practices.

Although it may be said that the provisions of the code are premature given a fragile and growing capital market as Nigeria's, however, it has been argued that the 'codes are proactive measures to ensure Nigeria does not have its own Worldcom and Enron soon in a fast growing capital market'[58]

But going by what has happened in the capital market, especially in the banking industry, one may ask, how effective has this code been able to forestall corporate fraud and malpractices? Often, we hear some companies posting impressive balance sheet only to come back the next day to hear that they have been distressed. The accusation of insider trading is common and more often than not, some members of the public are deceived into buying shares in these 'shell' companies. These shortcomings make it now imperative that there must have to be element of statutory coercion for noncompliance with the code, if the code must achieve its desired purposes.

Today, aside the code, some of these pitfalls mentioned above can be met with adequate criminal sanctions. The matter could be reported to the Economic and Financial Crimes Commission (EFCC) or the police for proper investigation and possible prosecution. For

[57]Egwonwu, R. *Pattern of Corporate Governance,* Strides Associates, Lagos, p.59.

[58] See Ndanusa Suleyman, former DG, SEC reported by Osei-Brown, A. *Ndanusa Offers Carrots on Corporate Governance* in Business Day, Vol. 3, No. 283, August, 6, 2004, p.32 cited by Ali, L. (2008) *Corporate Criminal Liability In Nigeria*, Malthouse Press Ltd, Lagos, p 268.

example, the Managing Directors of some of the distressed banks have been properly prosecuted and even convicted.[59]

However, the problem with the code is that it is meant only for quoted companies; and given the ownership structure in private companies, application of corporate governance is lacking and can lead to dire consequences for minority protection. Hence, Agom is of the view that:

> The ownership structure of an enterprise does also impact on its governance. In a private company, ownership is usually concentrated on few persons who are most often also directly involved in its day-to-day management. Control is thus strongly exercised by the owners. In such companies, it is usual for a majority equity holder to double as chairman and chief executive officer. By implication therefore, the same person or persons own, govern and manage the company. This fusion could have adverse consequences on accountability[60].

So it means in the case of private companies, it is still business as usual.

4.11. **Intervention of Regulatory Institutions**

As we have stated above, there are many other regulatory agencies that tend to regulate transparency of business transaction in Nigeria. It should be noted that any regulation which seeks to enforce transparency in corporate activities will invariably benefit the minority shareholders.

More commonly, most of these institutional interventions are in the realm of criminal aspect of noncompliance with the relevant rules of corporate governance.

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[59] For example, Mrs Cecilia Ibru, former MD of Oceanic Bank Plc, some of the cases of the other deposed MDs of the distressed banks are still on-going.

[60] Agom, A. R. (2000) *Shareholders Activism in Corporate Governance*, Modern Practice Journal of Finance & Investment Law, Vol. 4 No. 4 p. 255-256.

Apart from the two principal statutes[61] which primarily centre on the regulations of companies, some other Acts may not be specifically directed to the regulation of companies but their functions can cover in appropriate situations the activities of companies.

Some of these agencies and institutions include the Ministry of Justice, through the office of AG of the Federation, the Police, the Economic and Financial Crimes Commission (EFCC), the Independent Corrupt Practices and Other Related Offences Commission (ICPC), the Central Bank of Nigeria (CBN) (especially for financial institutions). All these institutions administer one statute or the other and their relevance to our discussion is that in appropriate cases, their powers can be activated to sanction a director or majorities who have engaged in fraudulent acts against the company and the minorities.

The effort of the EFCC in combating financial crimes in a society that is full of many fraudulent people in public and private life is strategic. Thus, it is not only corrupt politicians that the agency is after, but also corrupt corporate executives.[62] The CBN on its own is monitoring the movement of money through the banks in Nigeria. The apex bank is empowered under the BOFIA to freeze any bank account in Nigeria which is suspected of being used for financial crime, like money laundry.

Section 322 of CAMA empowers the CAC to refer the report of the investigation which it appointed an inspector to conduct in a company to the AG of the Federation to prosecute any person who has been found culpable in the report.

All these institutions are working together to ensure there is transparency in the public life of the nation, including corporate aspect thereof.

[61] Companies and Allied Matters Act; and Investments and Securities Act.
[62] For example, Mrs Cecilia Ibru, former MD of Oceanic Bank Plc, the cases of the other deposed MDs of the distressed banks are still on-going.

4.12. One Man Meetings

A meeting, in normal English Language usage, is an occasion when two or more persons come together directly or indirectly or any type of interaction between them to discuss or decide something. A meeting has also been defined as an assembly of two or more persons properly convened and constituted to discuss or decide matters.[63] Generally, there must be two or more persons interacting, for a meeting to hold; as a person cannot normally meet alone or by himself. This view received judicial approval in the case of *Sharp vs. Dawes*[64] where a company meeting was convened but was only attended by the Secretary, Mr Sharp and Mr Silversides, a shareholder. Nevertheless, the meeting proceeded to business with Mr Silversides as the Chairman. The meeting agreed that a call be made on all unpaid shares, and Mr Dawes received one of such calls but refused to pay, on the ground that there was no valid meeting authorizing such calls. The Court held that no valid meeting was convened as Mr Silversides being the only shareholder present could not by himself constitute a meeting which is a shareholders' meeting. In arriving at this decision, the Court based it on the fact that according to ordinary English language, a meeting could not be constituted by only one shareholder.

However, there is an exception to this general rule, such that in *Re London Flats Ltd*[65] it was held that as a general rule, one shareholder could not constitute a meeting except where it could be shown that the word ''meeting'' had a special meaning and could include a single shareholder. However, it would appear that under the common law, one man meeting had been recognized by the English Courts way back in 1911 in the case of

[63] Akume, A. A.,(2008-2009) *The Legality of One Man Meetings in Nigerian Company Law*, Ahmadu Bello University Journal of Commercial Law (ABUJCL), Vol. 4 No. 1 p. 204.
[64] *(1876) 2 QB.D 26.*
[65] *(1969) 2 All E.R. 744*.

East vs. Bennett Bros Ltd[66]where it was held that one member who held all the shares of a particular class of shareholders could by himself constitute a meeting of that class of shareholders. It was successfully argued in this case that being the holder of all the preference shares of the company, no other person was affected by the preference shareholder's action and accordingly there was no basis for defeating the validity of his one man meeting.

In the same vein, Akume[67] is of the view that where the quorum for a given company meeting is fixed by percentage of shareholding, then the holder of that percentage of shareholding could by himself alone constitute the quorum for the meeting to take place. He argues that the reasoning in *East vs. Bennett Bros Ltd*. could apply where for example quorum for a given meeting is fixed at say holders of 60% of shares of the company, and if only one member holds the required 60% shares, he constitutes the required quorum to hold the meeting by himself.

It would appear that under CAMA, one man meetings are permissible and are designed to enhance minority protection. The following provisions of CAMA seem to have the effect of sanctioning the legality of one man company meetings.

4.12.1. One Man Meeting By Court Order

(a) Section 213 (2) CAMA provides that where there is default in holding Annual General Meeting (AGM) within 15 months (as required by CAMA) of a previous AGM, any member of the company may apply to the Corporate Affairs Commission (CAC) for ancillary or consequential directions. And these directions shall include a direction that one member of the company present in person or by

[66] *(1911) 1 Ch. 163*.
[67] Akume, A. A. Op. Cit. p. 205.

proxy may apply to the Court for an order to take a decision which shall bind all the members.

(b) Where for any reason it becomes impracticable to call a meeting of the company or that of the board of directors, any shareholder or director may apply to the court for an order to call and hold a meeting. In such circumstance, the Court can make an order that one member (in case of company meeting) and one director (in case of board meeting) may convene and hold the meeting either in person or by proxy, and same shall be binding on all the members or the directors.[68]

(c) Also, if there is quorum at the beginning of a meeting, but no quorum later to continue the meeting as required by CAMA due to deliberate act of some members withdrawing from the meeting to reduce already constituted quorum until one member is remaining, such a member can apply to Court to seek direction to take a decision.[69]

(d) Similarly, under Section 239 (4) CAMA where a meeting is convened upon requisition of members and quorum is lacking, the meeting stands adjourned. And if at the adjourned meeting, only one member is present, he may seek the direction of the Court to take a decision.

4.12.2. One Man Extra Ordinary General Meeting

Whenever a company's board of directors receive notice of requisition of an extra-ordinary general meeting by a member or members of the company, the board must within 21 days convene such a meeting. Where they default, the requisitionists or any one or more of them representing more than one half of the total voting rights of all of them

[68] Op. Cit. Section 223 (1) and (2).
[69] Ibid. Section 232 (5).

may themselves convene the meeting.[70] From the provision, it is very obvious that even if only one requisitionist holds voting rights which represents more than one half of the total voting rights of all of them, he alone can convene the extra-ordinary general meeting.

4.12.3 One Man Meeting By Proxies

Section 227 (1) CAMA provides that every member has a right to attend any general meeting of the company. Section 230 (1) CAMA further provides that any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of him. We share Akume's view[71] that a shareholder who receives proxy attends the meeting for himself and as representative of other shareholders whose proxies he holds and can act in several capacities at the meeting. Accordingly, such a single shareholder could validly convene a meeting and act therein as if all the other shareholders he represents also physically attended the meeting.

4.12.4 One Man Meeting In Wholly-Owned Subsidiaries

Company A is said to be a wholly-owned subsidiary of Company B where all the shares in Company A are owned by its parent or holding company i.e. Company B and the parent/holding company's other subsidiary, Company C, which is a nominee of Company B.[72] In a situation where the wholly owned subsidiary calls a meeting attended by only a representative of the parent company, who is also appointed as a proxy by the other subsidiary of the parent company, then a one man meeting could hold. We cannot agree

[70] Ibid. Section 215 (1)-(4).
[71] Akume, A. A. Op. Cit. 207
[72] Op. Cit. Section 338 (5) & (6).

more with Akume that a one man meeting can be used as a minority protection mechanism where the majority use their number to oppress a numerical minority.[73]

[73] Akume, A. A. Op. Cit. 208.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

We have in this work tried to examine the legal protection that are available to the minority shareholders in the company laws of Nigeria. This has led us to examine some relevant laws; laws that are primarily company law legislations, e.g., Companies and Allied Matters Act, and Investments and Securities Act. We have also touched in passing some other laws especially the provisions that affect the administration of companies in Nigeria, such as Banks and Other Financial Institutions Act, Economic and Financial Crimes Commission Act (Cap. E1) L.F.N. 2004 etc.

The question is why the need for special protection for the minority shareholders in the company? It has been noted that in every organization as in every society, the minorities are always a vulnerable group. This is more prominent in any political or economic arrangement that is based on democratic principle. Simply, in its ideal form, democracy is nothing but the rule of the majority or on behalf of the majority. Thus, where the right of the minority is at stake and the majority is unconcerned or insensitive to their plight, the minority may cry but a muted cry. This has made it necessary to offer a special protection to the minority. Thus the principle nowadays is, while the majority will have their way, the minority must have their voices heard. It means that in the majority rule, that the rights of the minority should not be trampled with impunity. After all, democracy is said to be the rule for all.

It is this democratic principle to offer protection to all members concerned that has found its way to the company law regime. This is because the modern company law is

predicated on the democratic principles. It thus means that the company must be run for the benefit of all the shareholders whether or not the shareholder can influence the incidents of the activities of the company.

As we have shown in this work, a company duly registered is accorded the status of legal personality. This status makes a company a separate personality from its members with its independent rights such as right to own property, enter into a contract, maintain its businesses, sue and be sued. No member of the company can appropriate to himself the company.

However, it has also been identified that though it is a legal personality but a company at most is artificial personality which will rely on the instrumentality of the human members to run its affairs. This is the management organs of a company. Basically, under the Act, they are members in the general meeting and the board of directors. The third organ, the managing director is a derivative one, deriving its powers from the powers of the board of directors or the general meeting. It is any of the organs that can without more legally bind the company with their acts. Thus, they are supposed to act in the best interest of the company. Where any wrong is done to the company, it is any of these organs that can bring a suit on behalf of the company for redress.

However, we have seen that more often than not it is those who are in charge of the affairs of a company that turn themselves as a scourge on the company.

We have waded through the relevant laws to find out the remedies available to the minority shareholders of a company in such an ugly situation. Quite interestingly, there are many safe guards that are provided in the laws to protect the interest of the minorities. The protections can be divided into three:

1. Enforcement of his private rights under the constitution of the company and provisions of CAMA[1]
2. Exceptions to the rules in *Foss vs. Harbottle*[2]
3. Institutional intervention to protect the interest of the company, investors and the public against unconscionable acts of its management[3].

We have shown the instances, procedures and conditions to be fulfilled before resorting to any of the mode of enforcement of the rights of the minority. It should also be noted that some of these instances may overlap; in such situation, the minority's choice of mode of enforcement of his right will depend on what he intends to achieve. If for example he intends to by injunction stop the impending or continuing illegal or ultra vires action embarked by the directors and purportedly ratified by the majority, he may apply to court under section 300 of the Act. He may also apply under section 311 of the Act if he is alleging that such conducts of the directors are prejudicial and unfairly oppressive to him; he may even apply to the Commission (CAC) for investigation into the affairs of the company which may eventually result to prosecution of those indicted by the report of inspectors appointed by the Commission.

Finally, before rounding off, it is pertinent to briefly point out the immense role of the courts in Nigeria as it regards giving effect to the rights of the minority shareholders under the Nigerian company laws. In plethora of cases, the court has come down strongly in favour of protecting the rights of minority shareholders of a company, but not sacrificing, however, the legal status of a company as a juristic personality. Few of such cases are summarized below:

[1]Op. Cit. Section 41; *Pender vs. Lushington (1877) 6 Ch.D.70; A-G Lagos State vs Eko Hotels Ltd. (2006) 18 NWLR (Pt. 1011) p. 378.*
[2] Ibid. Sections 300 -313; *Tanimola vs Surveys and Mapping Geodata Ltd. (1995) 6 NWLR (Pt. 403) .617*.
[3] Ibid. Section 314; Section 13 ISA; other institutions that can intervene in appropriate situations are: the CAC, SEC, CBN, the EFCC, the AGF and even the Court.

1. *Omisade vs. Akande*[4], the Supreme Court upheld the right of a minority shareholder to maintain derivative action on behalf of a company against a director who defrauded the company. The court in that case established conditions the minority shareholder has to fulfill before he could maintain the action.
2. In *Oilfield Supply Centre vs. Johnson*[5], the Court of Appeal gave effect to the statutory power of a member of a company to present a petition for winding up of a company on the just and equitable ground. The court held that the motive of the petitioner is irrelevant provided that the petitioner satisfies the court that it is just and equitable to wind up the company.
3. In *Okomu Oil Palm Co. vs. Iserhienrhien*[6], in upholding the legal entity of incorporated company, the Supreme Court held that having a controlling number of shares in a company is not synonymous with its ownership once it is incorporated as an entity of its own and having its own separate legal entity. This case clearly establishes that no matter the number of shares a member has in a company, he cannot run the company like his private empire without due regards to the interests of other shareholders of the company.
4. In *Okoya vs. Santilli*[7], the court showed its readiness to protect the interests of shareholders in a company. The court held that it has the power to intervene in the internal management of the company by injunction or by appointment of a receiver or manager of the undertaking and assets of a company, where there is internal wrangling in the management of a company, until the dispute is resolved.

[4] *(1987) 2 NWLR (PT.55) 158.*
[5] *(1986) 2 NWLR (PT. 25) 681.*
[6] *5 NSCQR 802 at 806.*
[7] *(1990) 2 NWLR (PT.131) 172 at 180.*

5. Finally, in Yalaju-Amaye vs. A.R.E.C Ltd[8], the Supreme Court copiously expounded on the exception to the rule in *Foss vs. Harbottle*. The court also gave confirmation to the statutory provision that vests the management of a company on the board of directors; and showed also the special position of a managing director in the scheme of affairs of a company.

5.2 Findings

i. Lack of award of damages for personal action or representative action as provided in Section 301 of CAMA can discourage aggrieved minorities to pursue remedies. The provision that an applicant is only entitled to declaration or injunction to restrain the company and/or directors, seem unbeneficial to an applicant who may have suffered financial losses as a result of the wrongful act of the directors, who may be in the majority.

ii. Section 300 (d) CAMA, the expression committing ‘’fraud’’ is strong and connotes commission of crime; so by law of evidence, it requires a higher standard of proof, that is, beyond reasonable doubt.[9] This will certainly pose serious challenge to a minority shareholder who is interested in restraining the company from committing fraud but may not have access to all the facts to prove the matter beyond reasonable doubt.

iii. Section 301 (4) CAMA that requires the provision for security for cost by the court unnecessarily raises the standard of requirement for enforcement of rights or enjoyment of protection afforded a minority by that provision. An indigent minority shareholder will find utilization of the provision unattractive.

[8] *(1990) 4 NWLR (Pt.I45) 422.*
[9] Section 135 (1) Evidence Act 2011 (as amended); *Nwobodo vs. Onoh (1984) 1 SCNLR 1.*

iv. Punishment is not adequately meted out to those directors and officers of a company who have been found guilty of defrauding the company. A situation where a person found guilty is given a light sentence in the name of plea bargaining or to pay small amount of money as fine (which is incomparable to the amount looted) is to say the least, deplorable. If one knows that if he is caught he will escape adequate punishment in the name of plea bargaining, there is nothing that will inhibit him from looting his company as far as his fancies can stretch.

5.3 Recommendations

i. The denial of award of damages to an applicant for personal action or representative action under Section 301 CAMA is wrong. If there is a breach of duty, then there should be a remedy for any person who may have suffered losses as a result of the breach. Usually a claim for damages could only arise if there is a breach of any legal duty to the claimant.[10] It is therefore recommended that there is need to include the award of damages as one of the remedies available to an applicant under Section 301 CAMA especially where he can prove any financial loss suffered as a consequence of any breach by the company or director.

ii. It is also suggested that in order to lower the standard of prove required under Section 300 (d) CAMA, the ‘’fraud’’ in the phrase ‘’committing fraud’’ should be amended to ‘’committing any wrong’’ on either the company or the minority shareholders…. This will remove any criminality in an allegation, and reduce the difficult task of proving the issue beyond reasonable doubt; thereby lowering the standard of proof to balance of probability especially where the applicant lacks

[10] *Ativie vs. Kabel Metal Nig. Ltd. (2008) 5-6 S.C. (Pt. II) 47.*

access to all the necessary facts being that the directors are in control of the company.

iii. We have seen that security for cost in Section 301 (4) CAMA will act serious impediment against indigent minority shareholders who may ordinarily would have wanted to bring an action to enforce their rights. Accordingly, it is recommended that the requirement for security for cost should be removed as provided in Section 307 CAMA which stipulates that an applicant shall not be required to give security for costs in any application made or action brought or intervened in under Section 303 of CAMA.

iv. It should be borne in mind that almost all the people involved in criminal activities of defrauding their companies are well informed people who are rational enough to weigh the consequences of their wrongful actions before they embark on them. In this regard, the punishment does not even need to be proportionate; corporate fraud is an economic sabotage and should be greatly discouraged. Thus, plea bargain should be completely removed from the realm of corporate or financial crime. What is required is to provide stiffer penalties in the law and for our courts to be courageous to apply the sanctions with full weight, without prejudice to the status of the offender. This will serve as a deterrent.

In conclusion, in all these cases, the courts have shown their readiness to give effect to the protection of the rights of minority shareholders. But in doing this, the courts have not turned blind eyes to the principle of legal personality of a company and the consequential majority rule. Thus, the rule in *Foss vs. Harbottle* is as still as relevant as ever and Nigerian courts have always upheld that. However, the courts have always resisted the temptation of turning the principle to instrument of oppression and fraud.

In fact, from careful analysis of the exceptions to the rule in *Foss vs. Harbottle* and other relevant remedies accorded the minority members of a company under the relevant company laws[11] in Nigeria, the common underlying principle can be deciphered; namely, attempt to protect the minority members against fraud and oppression by those in charge of the affairs of a company. Thus where the conducts of the directors or the majority are oppressive and/or fraudulent, the court will not hesitate that the matter is outside the *Foss vs. Harbottle* rule. In other words, while the principle of majority rule as enunciated in *Foss vs. Harbottle* is often respected, there is nothing sacrosanct about the rule and in appropriate circumstances, the court will be ready to depart from it in order to attain the justice of the matter.

Also, the court has shown its readiness to attribute any act done on behalf of a company, whether legally or illegally to the company provided the illegality was committed in furtherance of the business of the company.[12] It has also been shown that for a director to be criminally liable for acts done on behalf of the company, it must be shown that the act is necessarily ultra vires or that he has been fraudulent against the company, as well he intends to appropriate the benefit of the illegal act to his personal coffers; or where a statute makes such director or officers of the company who authorized the act jointly and severally criminally liable.

However, the court has the jurisdiction to examine the alteration of the constitution or ratification as the case may be in appropriate cases to see if there is element of fraud or attempt to overreach the minority shareholders, and in appropriate cases still upholds the right of the minority shareholders to maintain the action despite such alteration and ratification. This commonly happens where the alteration or ratification is sequel to the

[11]CAMA; ISA, Op. Cit.
[12]*Adeniji vs. State (supra) p. 248.*

action of the majority and is seen as an attempt to frustrate the action of the minority members in the court.

From the fore going, it seems that the doctrine of majority rule and minority protection is not much of a reality under the Nigerian company law. Adequate protections have not been guaranteed the minority shareholders under the company law in Nigeria; and in the light of the decided cases, it shows that the so called protection is simply a façade and not practically realizable. The courts have not given severe sanctions despite the availability of some statutory protections and that accounts for why we still have so much rots and fraud in corporate governance in Nigeria.

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