COMPARATIVE ANALYSIS OF MAJORITY RULE AND MINORITY PROTECTION IN CORPORATE LAW :UNITED KINGDOM AND NIGERIA.

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INTRODUCTION

The Board of Directors makes most decisions within companies management, almost any act of a company can be ratified by a resolution adopted by majority of its shareholders. Any such resolution would then be considered to be the decision of the whole company, and not merely a decision made by a specific group in the company. This is a fundamental principle known as the principle of majority rule. The rule is normally accepted by company members in their constitution and often prescribed by the company laws of most countries.[1] It is generally seen as advantageous to companies, the judiciary and the economy at large. For companies, it facilitates collective action,[2] allows management to focus on the daily running of the company business[3] and encourages corporate financing which is decisively important for corporations.

Minority holdings in thousands of close corporations throughout the United States have been made virtually worthless by the machinations of those in control of the corporations. Minority shareholders frequently are deprived of any income from the corporations, either in the form of dividends or salary; they are not allowed any effective voice in business decisions; and they are denied any information about corporate affairs. Often, they are eventually eliminated from the corporation at a fraction of the real value of their interests.

The case of **Foss v. Harbottle,**[4] represent the general principle that a minority group(shareholders) in a company cannot sue for any wrong done to the company or complain of any irregularities in the conduct of its internal affairs. The rule posits that the right of the majority to bar the minority action whenever they might lawfully ratify the alleged misconduct and the normally exclusive right of the company to sue upon a corporate cause of action.

English and Iranian corporation laws have noticed the conflict between majority and minority rights and have attempted to resolve it. While both regard the majority rule as a key principle, they have tried differently to resolve a possible conflict of the rule with minority

[1]Cooper v. Gordon, (1869), LR 8 Eq 249, Per Stuart V. C.; See Davies, P.L., "Gower's Principle of Modern Company Law", 6th Ed. (London: Sweet and Maxwell, 1997) 585-587.
[2]Hager Mark M., "Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory", University of Pittsburgh Law Review, (1989), Vol. 50, Pittsburgh. 633.
[3]Griffin Stephen, "Company law: Fundamental Principles", (1996), 2nd ed., London, Pitman, at 299-300; Farrar John H., "Company Law", (1991), London, Butterworth's, at 318-319; Cheffins Brian R., "'Company Law: Theory Structure And Operation", (1997), Oxford, Clarendon Press. 14-16.
[4](1843) 2 Hare 461.

shareholders' rights. As to the former, the law emphasizes on the rule of majority which is found in the famous Foss case and which has been supported by subsequent cases.[5] Meanwhile, it also acknowledges that minority shareholders must have some voice so as to prevent the former making abuse of rights. Consequently, it confers on minority shareholders strong protection to address the issue of abuse of rights by the majority[6] and in doing so it is not particularly concerned about directors' involvement in the wrongdoing. As to the latter, while the law supports governance of majority shareholders, which is stated in the Joint Stock.

This paper seeks to examine majority rule and minority protection under the English law, Nigerian law and the Ghanaian law.

MAJORITY RULE IN ENGLAND

Members in general meeting can only express their feeling or wishes by passing a resolution either in their favour or against it. The will of the majority members will usually prevails in a general meeting and the resolution so passed will binds all members of the company including those who voted against it. In a general meeting, members may decide to ratify or waive breach of fiduciary duty by a director who contract with the company.[7]

It must be noted that while directors owe fiduciary duties to the company, a shareholder do not owe any fiduciary duties to the company. When voting in a meeting, shareholders may vote in respect of his own interest.[8]

The right to vote by members has been subject to the doctrine of fraud on the minority so that the majority cannot waive a breach of a director's fiduciary duty by approving a misappropriation by him of the company's property which would be a fraud on the minority. That is what the majority tried to do in **Cook v. Deeks,**[9] where the shareholders in E Co. which was formed with the object of constructing a submarine telegraph, were H Co. with 3,000 shares, M with 2000 and 13 other persons with 325 between them. H Co. was to make and lay cables for

[5] MacDougall v. Gardiner (1875) 1 Ch.D 13; Burland v. Earle (1902) AC 83 PC. 93-94
[6] These protections include 'bona fide for the benefit of the company as a whole', derivative action, just and equitable winding up, and unfairly prejudicial remedy which will respectively be considered in Chapters three and five below.
[7] N.W Transportation (1987) 12 App. Cas. 589, PC.
[8] Estmanco (Kilner House) Ltd v. Great London Company [1982] 1 W.L.R 2 at 11
[9] [1919] 1 A.C 554

E Co. the directors of E Co., who were nominee of H Co. and H Co. decided not to pursue an action in which E Co. was claiming a concession to construct the telegraph, procured the passing of a resolution in general meeting to put E Co. into voluntary winding up and concealed the fact that they had agreed to end the agreement between E Co. and H Co. so that H Co. could sell the cable to their company. M brought an action on behalf of himself and the other shareholders, except those who were defendants, in which he joined E Co. as a defendant. He claimed inter alia, a declaration that H Co. was a trustee of the resulting profit fir M and other shareholders in E Co.. The court held the majority shareholder had obtained certain advantages by dealing with something which was the property of the whole company, the action of M thereby succeeded.

There are various functions which are delegated to the Directors of a company. The eventual power and control lies with the shareholders who can command the majority of the voting power.

In Foss v. Harbottle,[10] Two shareholders in a company incorporated by statue (Victoria Park Co.) sued the company's five directors and others, alleging that the property of the company had been misapplied and wasted and that certain mortgages were improperly given over the company's property. The plaintiffs sought an order for the defendants to render account and for the appointment of a receiver. The Court of Chancery declined to intervene in a matter that the company could settle for itself or regularize if an irregularity existed. It was the company itself which prima facie, had the sole right to sue for wrongs done to it. Wigram V-C reasoned that it would be an exercise in futility for the court to do what the company could easily and validly undo. He stated that: "How then can this court act in a suit constituted as this is, if it is to be assumed, for the purposes of argument, that the powers of the body of the proprietors are still in existence, and may lawfully be exercised for a purpose like that I have suggested? Whilst the court may be declaring the acts complained to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of the proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority is decisive to show that the frame of this suit cannot be sustained whilst that body retains its functions …"

[10] supra

The rule is to the effect that one, the proper plaintiff in an action to redress an alleged wrong to a company on the part of anyone whether director, member or outsider, or to recover money or damages alleged to be due to it, is prima facie the company and where the alleged wrong is an irregularity which might be made binding on the company by a simple majority of members, no individual member can bring an action in respect of it. To this end, the company is the proper plaintiff in a an action to recover loss or to enforce a duty owed to the company by directors. [11]

The Rule in **Foss v Harbottle**, according to Lord Wedderburn, encapsulates two notions based on the law relating to the company[12] and partnership principles.[13] In respect of the former, only the company may bring an action where an alleged wrong had been done to the company (the proper plaintiff principle).[14] In MacDougall v. Gardiner, the Chairman of Emma Silver Mining Co had adjourned a general meeting of the company without putting the question of adjournment to a vote as requested by a shareholder, MacDougall. The shareholder brought action seeking a declaration that the chairman's conduct was improper and also an injunction to prohibits the directors from taking further action. The Court of Appeal held that the issue was one of internal management for the majority members to decide. Mellish LJ stressed the futility of allowing an action to proceed where the conduct complained of is capable of ratification by the majority in general meeting. The Judge went on to note that:

> If the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing and there the minority are entitled to come before this court to maintain their rights; but if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have a right to set

[11] Smith & Keenan's, Company Law, 14th Ed. (Pearson Longman, 2009). 253
[12] Kenneth W. Wedderburn, 'Shareholder's Rights and the Rule in *Foss v. Harbottle*' (1957) Cambridge Law Journal 196. (Lord Wedderburn states that the law relating to the company is naturally discerned from the foundational principles of treating a company as a separate legal person from its members)
[13] ibid 196-7 (Lord Wedderburn explains how the partnership doctrine adopted by the courts – allowing members to deal with their own squabbles – sprouted to company law)
[14]Charl Herman, The Living Corporate Contract, Hypothetical Bargaining an Minority Shareholder Remedies under English and South African Law. Available at microsites.bournemouth.ac.uk/law-review/files/2018/11/Charl-Herman-article-FINAL-1-1 accessed on 8th August 2019

> that aside, or institute a suit in Chancery about it, except the company itself.[15]

The case of **Edwards v. Halliwell,**[16] served as exception to the rule of Foss v. Harbottle. Under the constitution of the defendant's trade union, contributions by members could only be altered by a two-thirds majority in a ballot of the membership. A general meeting of delegates passed a resolution increasing the contributions of members, without taking a ballot. The two plaintiffs, members of the union, successfully sued the union and members of the executive committee for a declaration that the resolution was invalid. Jenkins LJ identified four exceptions to the rule in Foss v. Harbottle thus

i. Where the act complained of was ultra vires;
ii. Where there was fraud on the minority and the wrongdoers were in control;
iii. Where the act complained of was a violation of a requirement in the articles for a special majority; and
iv. Where the act complained of was an invasion of members' personal rights as members.

Held the rule in Foss did not prevent a minority of a company. or as here, an association of persons, from suing because the matter about which they were suing was one which could only be done or validly sanctioned by a greater than simple majority. Applying the rule of **Foss v. Harbottle** in **Edwards v. Halliwell**,[17] where a wrong had been done to the company as a separate person and said that it had two elements: a) the proper claimant principle and the proper claimant aspect of the internal management principle and b) a principle that if a wrong done to a company is rectifiable by a simple majority of members, then a member cannot sue in respect of it because when it has been ratified it is no longer a wrong and if the members decide against ratification there is no valid reason why the company itself should not sue.

In **Estimanco (Kilner House) Ltd v. Greater London Council,**[18] Megarry V.C accepted the general proposition that the shareholders do not owe any fiduciary duties but

[15] See also Lord Bingham in Johnson v. Gore Wood & Co. (2002) 2 AC 1.
[16] [1950] 2 All ER 1064, CA
[17] supra
[18] (1982) 1 All ER 437.

affirmed that in altering the articles they are subject to the doctrine of fraud on the minority, that is they must act in what they believe to be in the best interest of the company as a whole. In this case, the majority shareholder wished to deprive the company of a right of action under a contract and proposed and carried a resolution to that effect. A minority shareholder brought an action on behalf of the company to prevent this. The court held that though the general proposition is that shareholders do not owe an fiduciary duties to the company and that they must

In **Prudential Assurance Co Ltd v. Newman Industries Ltd**,[19] the court of Appeal said that Jenkins L J's judgment in **Edwards v. Halliwell** stated the classic definition of the rule in **Foss v. Harbottle** but pointed out that the rule also embraces the irregularity principle as a related principle. Australian courts on the other hand, still regard the judgment of the Privy Council in **Burland v. Earle** as containing the classic statement of the rule

There are four principles which served as the basis of the rule

1. THE RIGHT OF THE MAJORITY TO RULE: The court had stated that an action brought by a single shareholder cannot be entertained because of the feeling of the majority of the members of the company have not consented to such an action unless the majority of the shareholders agree to waive there right. The company can only sue if the directors pass a resolution to that effect where the power is delegated to them or where the company expresses desire to sue by an ordinary resolution in general meeting whether the power is delegated to the directors or not, since the power of the members to bring the company into court as a claimant is concurrent with that of the directors and if the members wish to bring the company into court and the directors do not, then the wish of the members by ordinary resolutions will prevail.
2. COMPANY IS A LEGAL PERSON: The court has also said from time to time that since a company is a person at law, the action is vested in it and can only be exercise by it and not a single shareholder instituting an action on its behalf.
3. THE PREVENTION OF A MULTIPLICITY OF ACTIONS: It is a fundamental principle of law that the unnecessary litigation should be avoided, and there should be an end to litigation. The rule of supremacy of majority seeks to ensure this principle, as

[19] [1982] Ch 204

every member is not allowed to bring an action. if each and every individual shareholder is permitted to bring an action against the person who has caused some loss to the company, there will be as many actions as there are shareholders and as a result there will be no end to litigation.[20]

4. THE COURTS ORDER MAY BE MADE INEFFECTIVE: The members by an ordinary resolution could subsequently overruled court order in a general meeting where such company is not ruled by the wrongdoer.[21]

EXCEPTION TO THE RULE OF FOSS v. HARBOTTLE

1. ACTS WHICH ARE ULTRA VIRES OR ILLEGAL: The Company Act 2006 provides that no simple majority of members can confirm or ratify an act which is illegal. Section 39[22] gives an individual member a statutory right to as the court for an injunction to restrain the directors from entering into ultra vires transactions but not if the members of the company have ratified a particular transaction by special resolution. In **Gray v Lewis,[23]** it was held that where the shareholder is seeking to recover a loss suffered by the company as a result of a transaction actually entered into, the action will fail if he does not satisfy the requirement of wrongdoer control. This is because the wrong is done to the company directly, and so the company is the proper claimant. Also in **Prudential Assurance Co Ltd v Newman Industries Ltd. (No 2)**,[24] the UK Court of Appeal explained that where the wrongful act in issue is ultra vires the company, the rule does not operate because the majority of members cannot ratify the transaction. A minority member can therefore only challenge an action which would be ultra vires the company, in circumstances where the agreement has not been concluded. See the case of **Smith v. Croft (No. 2)**[25] it was held that, an individual shareholder could bring a personal action to restrain the company from acting in a certain manner because it infringed his personal right as an investor to have the business conducted in accordance with the memorandum

[20] Gray v. Lewis (1873) 8 Ch App 1035 at p 1051
[21] MacDougall v. Gardiner (1875) 1 Ch D 13 at 25 "it was observed that if the thing complained of is a thing which in substance the majority of the company are entitled to, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be so called and then ultimately the majority gets its wishes."
[22] Company Act 2006
[23] (1873) LR 8 Ch App 1035.
[24] [1982] Ch 204.
[25] [1988] Ch 114.

and the articles of association. In **Lowe v. Fahey**,[26] where it is proved that the funds of the company were diverted to extraneous purposes, the guilty members and directors may be held liable for repayment of the same to the company. Moreover, the court can also pass an order of repayment to the company against the third persons who had knowingly received such money.

2. WHERE THE ACT COMPLAINED OF CAN ONLY BE CONFIRMED BY A SPECIAL OR EXTRAORDINARY RESOLUTION: The rule of Foss v. Harbottle is based on the principle of the majority, which is those who can obtain an ordinary resolution should decide whether or not a complaint relating to the company should be brought before the court.[27] Therefore, a simple majority of the members cannot be allowed to confirm a transaction requiring a greater majority.

3. WHERE A MEMBER'S PERSONAL RIGHTS HAVE BEEN INFRINGED: There are two hurdles to be overcome first the bar on enforcing so called 'outsider' rights conferred on a member by the article of association and secondly the difficulty in predicting when the court will hold that the breach of a provision in the company's constitution is a mere internal irregularity of procedure and therefore a wrong to the company, as opposed to a constitutional infringement for which a member can sue. In **MacDougall v. Gardiner**, the Court of Appeal reasoned that if every irregularity could be litigated by a member then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated. Also in **Pender v. Lushington**,[28] Jessell MR held that a member has a personal right to have his vote counted and could sue in the company's name and his own name to enforce that right. It is noteworthy that the Judge placed emphasis on the fact that at issue was a question of property right alleged act which has caused the invasion of the claimant's personal and individual rights in his capacity as a member.

4. WHERE THERE IS A FRAUD ON THE MINORITY: The rule in **Foss v. Harbottle** will create a greater injustice if the majority member were allow to commit wrong against the company and also benefited from those wrong at the expense of the minority simply because no claim could be brought in respect of the wrong committed. In **Menier v**

[26] (1996) 1 BCLC 262 Ch.D
[27]Edward v. Halliwell [1950] 2 All ER 1064.
[28] (1877) 6 Ch D 70.

Hooper's Telegraph Works,[29] Menier a minority shareholder complained that there were self-interested transactions between a majority member and the company, the court held that a minority shareholder's action was properly bought in these circumstances. Also in **Burland v. Earle,**[30] the court stated that an example of fraud is 'where a majority are endeavoring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company. See also the case **Estmanco (Kilner House) Ltd v Greater London Council**,[31] where Templeman J stated that under this exception, a minority can bring a claim even in the absence of a complaint of fraud and that in the absence of any remedy, an individual member may bring a claim where the powers are used intentionally or unintentionally, fraudulently or negligently, by the directors in a way which proves beneficial to them and disadvantageous to the individuals. Thus, the court held that stultification of the purpose for which the company was formed, against the wishes of the minority shareholders, may constitute 'fraud on minority.'

MINORITY PROTECTION UNDER COMPANIES ACT 2006 OF UK

The Companies Act 2006 had made improvement on the protection of minority Shareholder from the Rule in **Foss v. Harbottle**. Sections 260-269 of the Companies Act 2006 which have now replaced the common law rules associated with the general principle laid down in Foss v Harbottle as far as they apply to derivative claims.

Section 260,[32] defines a dreviative claim as" proceedings by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company." The new rules contain an *exclusive* list of grounds under Section 260(3), which further states that only where a cause of action arises from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company, can a derivative claim be made and that it is not material as to whether or not the person bringing the claim became a member before or after the cause of action arose. Its noteworthy that negligence is specifically allowed as a ground for bringing proceedings for bringing statutory derivative

[29] (1874) L. R. 9 Ch. App 350
[30] [1902] AC 83
[31] (1982) 1 All ER 437.
[32] Companies Act 2006

claims and that the claim is only allowed to be brought in respect of wrongs perpetrated by the company's directors. Section 261 puts forward the requirement that in order to bring a derivative claim, an application for permission to do so must be made to the court. Once the application is made, the court then decides whether to allow it, dismiss it or adjourn it and give appropriate directions.

Similarly, under Section 262 where a company has brought a claim and wished to continue it as a derivative claim, then a member of such a company must make an application to the court to seek permission to do so, on the basis that the method by which the company is continuing the claim is an abuse of the courts process, the company has not prosecuted the claim diligently and it is more suitable to continue the claim as a derivative claim. The Court again has the above three options once such an application has been put forward. Section 263 sets out the factors that the court must consider in determining whether to grant permission to pursue claims as derivative claims under Sections 261, 262 and 264 is a similar provision in that it allows an application to court to continue a derivative claim brought by another member and the court may allow it on the same grounds as a company claim which a court allows a member as a derivative claim above.

As to the rights of minority shareholders to an indemnity in a derivative action, under the common law in **Wallersteiner v Moir No.2**,[33] the Court of Appeal recognised that a minority shareholder who brings a derivative claim may have the right to an indemnity in respect of his costs against the company. This right will only be available where the minority shareholder has acted in good faith in bringing the claim. It was also stated in this case that where a shareholder brings a derivative claim, no legal aid will be available for him. It must be noted that such an indemnity order application must be made and seen along with the application for permission to continue claim as a derivative claim. However, this case was interpreted rather restrictively in **Smith v Croft**,[34] where it was stated that where an indemnity order application is made, there must be evidence that it is honestly needed and that a certain amount of the cost must be left for the claimant too. Thus, at seems that under common law a minority shareholder has the right to get an indemnity. However, where a minority shareholder claims for a remedy against the

[33] [1975]QB 373
[34] [1988] Ch 114

company under the common law rules, then the Company Act 2006 rules applicable to derivative claims will not apply, for the simple reason that sections 260-264 do not make any provision with regard to a minority shareholders right to an indemnity in a derivative claim. instead a shareholder in such circumstances may sue in a representative form (where he brings a claim together with other shareholders); or he may bring a claim in his own name and seek an injunction or an action for a declaration.[35]

Unfairly Prejudicial Conduct under s. 994 of UK Companies Act 2006

In respect of "unfairly prejudicial conduct", a member can bring an action under CA 2006 s. 994 (1). The requirement under this section that the conduct is not only prejudicial to the rights of shareholders but also that it is unfairly prejudicial, is important as anyone who losses a vote could claim that their interests have been prejudiced, but there is clearly nothing wrong with losing a vote (Taylor, 2009: p. 92). Neil LJ stated in Re Saul D Harrison and Sons Plc[14] that, the words "unfairly prejudicial are general words and should be applied flexibly to meet the circumstances of the particular case". The most common remedy sought is an order that the majority purchase the minority's shares at a price that reflects their proportion of the company's value (Sealy & Worthington, 2013: p. 710)

Just and Equitable Winding up under Section 122 of UK Insolvency Act 1986

Section 994 of Company Act, 2006 allows applicants to plead section 122 (1) (g) in the alternative in conjunction with section 459. The principles developed by the courts with regard to the meaning of "just and equitable" have been extended to apply to section 459 and by extension to its identical successor, section 994 of Company Act, 2006. The final statutory exception to the rule in **Foss v Harbottle** in the UK, is an application for the "just and equitable winding up" of the company under s. 122 of the Insolvency Act 1986 (IA 1986), as an option of last resort. Obviously, this is a very serious course of action as it means that an otherwise successful

[35] All Answers ltd, 'Majority Rule Shareholders' (Lawteacher.net, September 2019) <https://www.lawteacher.net/free-law-essays/company-law/majority-rule-shareholders.php?vref=1> accessed 14 September 2019

company may be forced to cease trading. For this reason, the court will only make such an order in exceptional circumstances.

In **Re Bleriot Manufacturing Aircraft Co Ltd.,**[36] Neville J stated that, the words "just and equitable, are words of the widest significance, and do not limit the jurisdiction of the court to any case. It is a question of fact, and each case must depend on its own circumstances".

A contributory petitioning under IA 1986, s. 122 (1) (g) may rely "upon any circumstances of justice or equity which affect him in his relation with the company, or ... with the other shareholders", per Lord Wilberforce in **Ebrahimi v Westbourne Galleries Ltd**.[37]

Unless the articles of association of a company provide otherwise, a member cannot make it wind up voluntarily other than by obtaining a three-quarters majority at a general meeting. A person must accept, on joining a company that leaving the company is subject to this fundamental restriction. A contributory presenting a just and equitable petition is claiming that it is just and equitable to waive this restriction. The essential question on a contributory's petition, "is whether members who do not desire to stay in a company should be entitled to be released", per Harman J in **Re A company No 00370 1987**.[38] In **Ebrahimi v. Westbourne Galleries Ltd,**[39] Lord Wilberforce was of the view that the circumstances under which it would be just and equitable to wind up a company can be extremely wide indeed. This is because its occurrence is not only limited to where there is a breach of rights or obligations as defined in the Companies Act and the articles of association, but also where there is breach of equitable rights, obligations and legitimate expectations. This is significant in a company which was formed or continued on the basis of personal relationships involving mutual confidence. It is evident that although the courts have the jurisdiction to make a winding up order, this provision makes the winding up of a company on "just and equitable" grounds a remedy of last resort.

MAJORITY RULE AND MINORITY PROTECTION IN NIGERIA

[36] (1916) 32 TLR 253.
[37] [1973] AC 360.
[38] [1987] 1 WLR 1068.
[39] supra

The administration and control of a company is vested in the shareholders majority vote duly exercised in accordance with the memorandum and articles of association of the company.[40] Decisions affecting the company, members or outsiders are taken by majority vote of members. Where a wrong is done, even to the company, it is the majority of members that would decide whether it should be treated as wrong which would be redressed or whether it would be overlooked and the majority can validly decide not to redress such wrong as was laid down in **Foss v. Harbottle**.[41] Section 299 of CAMA now incorporate the rule in Foss v. Harbottle and states that "where an 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." The ramifications of this rule as contained in Foss v. Harbottle are two fold (i) the company will ultimately be the plaintiff to sue in respect of wrong done to the company and (ii) the Court will not intervene in the management of company, where the irregularity being complained about is within the scope of powers of the majority shareholders to remedy or ratify by means of an ordinary resolution. The rule has further been held not to apply only to incorporated company but also to unincorporated bodies. The Nigerian Supreme Court has held in *Agip (Nig.) Ltd. v. Agip Petroli International*,[42]

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

The rule had been applied in **Cotter v. National Union of Seamen**,[43] **Mbene v. Ofili**[44] and **Abubakri v. Smith**,[45] on the ground that it was a body possessing a constitution or a set of rules and regulations entitling it to sue and be sued as a legal entity.

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[40] Hon. Dr. Olakunle Orojo, Company Law and Practice in Nigeria, 5th Edn. LexisNexis. 208.
[41] The rule had been apply in Sparks Electrics (Nigeria) ltd v. Ponmile(1986) 2 NWLR (Pt. 23) 516.
[42] (2010) 5 NWLR (Pt. 1187) p. 348 at p. 392; Onuekwusi v. Registered Trustees of the Christ Methodist Zion Church (2011) 6 NWLR (Pt. 1243) p. 341 at 361-362; Okonkwo v. National Universities Commission (2013) 15 NWLR (Pt. 1378) 482 at 500
[43] (1929) 2 Ch 58.
[44] (1968) NCLR 293.

In **Tika Tore Press Ltd. v. Abina**,[46] upon the death of the majority shareholder, the directors allotted to themselves shares which enable them to gain control over the company by becoming its majority shareholders. The deceased shareholders administrators sought a declaration that the allotment was ultra vires void and of no effect. The Supreme Court held that they were not void but where at worst voidable and that the plaintiff's action which sought a declaration that the allotments were void is misconceived.

Thus in **Ephraim Faloughi v. Haniel Williams & Ors**,*[47]* 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.[48] In **Okoya v. Santilli,**[49] the Supreme Court held that for the rule in Foss v. Harbottle to apply, the action must relate to a wrong done to the company which would otherwise escape redress, and in such action the complainants cannot have a larger right to relief than the company itself would have if it were the plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders' votes or are capable of being confirmed by the majority votes except that the minority can maintain such an action where the acts complained of are, inter alia a fraudulent character or beyond the powers of the company. The Supreme Court in the case of **Associated Registered Engineering Limited v. Yalaju-Amaye,**[50] where it held that, that in going on a withdrawal spree from the bank account, and forging minutes of meetings to cover lack of a resolution to change the signatories to cheques, the majority had committed fraud on the company.

There are however exceptions to the aforementioned rule under Section 300 of CAMA in instances where it is essential that the company is prohibited from committing certain act namely:

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[45] (1973) 5 SC 31.
[46](1973) 1 All. NLR 401
[47] (*1978) 4 F.R.C.R. 32*
[48] Ehi-Oshi, 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. 386 - 403
[49] (1990) 2 NWLR (Pt. 131) 172 at 203
[50] (1990) 4 N.W.L.R. (Pt. 145) 422

- Entering into a transaction which is illegal or ultra vires;
- Purporting to do by ordinary resolution any act which by its constitution or by CAMA is required to be done by special resolution;
- Any act or omission affecting a shareholder's personal rights as a member;
- Committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;
- Impracticable to call a company meeting in time to redress the wrong done to the company or to the minority shareholders; and
- Where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of a fiduciary duty.

In addition to the exception provided under Section 300 of Companies and Allied Matters Act, there other provisions for redress such as by petition for winding-up under the just and equitable rule,[51] by the use of the provisions for relief on the grounds of illegal or unfairly prejudicial and oppressive conduct[52] and by inspection and investigation of the company.[53]

MINORITY SHAREHOLDER PROTECTION IN NIGERIA

Since the general rule is that where irregularity has been committed in the course of the management of the affairs of the company or a wrong has been done to the company, it is only the company that can ratify the irregular conduct or sue to remedy the wrong.[54]

The minority may now be protected by members' action or outside bodies. This could be done through;

1. Members' Direct Action (for injunction and declaration): A member may by injunction or a declaration restrain the company from the following.

a) Entering into any transaction which is illegal or ultra vires.[55] Such as where the shareholders at general meeting resolved to spend part of the purchase money after sale

[51] Section 408 (e) CAMA
[52] Section 310
[53] Sections 314 - 329
[54] Section 299 CAMA, Foss v. Harbottle (supra), Yalaju-Amaye v. Associated Registered Engineering Contractors Ltd. [1990] 4 NWLR PT 145, 422.

of the company in compensating employees and part as remuneration for past services of directors when a company being wound-up has no power to make such a payment.

b) Purporting to do by ordinary resolution any act which its constitution or the Act requires to be done by special resolution.[56]

c) Any act or omission affecting the applicant's individual right as a member.[57]

d) Committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done to the company.[58] In Daniels v. Daniels,[59] the minority shareholders brought an action against the company and two of its directors alleging that the company had on the instructions of the directors sold land to one of the directors on under value of $4250. The land was sold four years later for $120,000 the court held that the minority could bring action for fraud.

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 shareholder.[60]

f) Where the directors are likely to have profited or benefited from their negligence or from their breach of duty.[61]

In all the above a member may institute an action to redress any wrong done to him as an individual member of the company. A right of action which is personal to the individual member. The remedies available to him would be either an order of injunction restraining the company from any act or omission affecting the applicant's rights as member or for a declaration. It is worthy of note that where a member institutes a personal action to enforce such a right, he will not be entitled to any damages but to a declaration for doing a particular act.[62] Instituting an action either in personal capacity or representative capacity under Sections 300 and

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[55] Section 300 (a) CAMA, Parke v. Daily News [1962] All ER 929, Hogg v. Cramphorn [1967] Ch. 254; NIB Investment W/Av. Omisore (2006) 4 NWLR (Pt. 969) 172 @198
[56]Section 300 (b) CAMA, Edwards v. Halliwell [1950] 2 All ER 1064.
[57] Section 300 (c) CAMA, Pender v. Lushington (1877) Ch.D 670
[58] Section 300 (d) CAMA, Cook v. Deeks [1916] AC 554
[59] (1978) 2 All ER 89
[60] Section 300 (e) CAMA
[61] Section 300 (f) CAMA
[62] Section 301 (1) CAMA

301, members includes the personal representative of a deceased member and any person to whom shares have been transferred or transmitted by operation of law.[63]

2. Derivative Action: An application may be made to court for eave to bring an action in the name or on behalf of the 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.[64]

   However, this derivative action is available only against directors who are in control of the company. In essence, it cannot be brought against former directors, shadow directors or even a third party. It is of the opinion that derivative action shod be a claim against both former, current and shadow directors even a third party should be permitted in certain circumstances.[65]

3. Relief on Grounds of unfairly prejudicial and oppressive conduct: A member who alleges that the affairs of the company are being conducted in a manner oppressive or unfairly prejudicial to a member or members may apply to court for relief by petition.[66]

   The members of the company share this right of action with;

   a) A director or officer or former director or officer of the company;

   b) A Creditor;

   c) The Commission;

   d) Any other person permitted by the court in its discretion.

   Section 311 (2) (a) of CAMA provides that a member of a company may apply to the court by petition for an order on the ground (i) that the company's affairs are 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

[63] Section 302 CAMA
[64] Section 303 – 309 CAMA
[65] Aduma and Ibekwe. Protection of minority shareholders under Nigerian company law, www.ajol.info/index.pgp/naujij/article/viewfie/156744/146351.pdf accessed 11 August 2019
[66]Section 310 (1) and 311 CAMA, Ijale Properties Ltd. V. Omololu-Mulele [2000] FWLR (Pt. 5) 709.

members as a whole; or (ii) that an act or omission or a proposed act or omission, by or on behalf of the company or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial or unfairly discriminatory against a member or members or was or would be in a manner which is in disregard of the interests of a member or the members as a whole. As such, the restrictive term of 'oppression' referred in section 201 of the repealed Companies Act 1968 has been replaced by the more widely interpreted terminology of 'unfair prejudice'. However, it is not yet clear what the term 'unfair prejudice' means since there is not a definition provided for that term in CAMA. Furthermore, problems with the section 201 of the repealed Companies Act oppression remedy was the inclusion of the need to establish that the oppressive conduct must be a continuous nature right up to the time of the petition and that the conduct affected the petitioning member, *qua* member and not in some outside capacity. Therefore, the addition of the term unfairly prejudicial conduct, made by section 311 of CAMA, was a successful movement from a restrictive approach to a broader one, which provides flexibility to the courts to interpret the term in such a way as to provide protection to minority shareholders.

Moreover, if the court is satisfied that the petition under section 311 is well founded, then section 312 of CAMA provides the court with a power to grant relief. Such reliefs may be to wind up the company or regulate the conduct of the company's affairs in the future or direct an investigation to be made by the commission or requiring a person to do a specific act or thing or appointing a receiver or a receiver and manager of the property of the company or restraining a person from engaging in specific conduct or from doing a specific act or thing. Also, an order may authorise civil proceedings to be brought in the name and on behalf of the company, or varying or setting aside a transaction or contract to which the company is a party and finally, the court may order the purchase of shares. The most commonly used remedy is the purchase order meaning that, the minority shareholder's shares are to be purchased at a fair value by those who control the company or the company itself.

The wordings of section 312 of CAMA, the minority shareholder does not have a 'right' to specific remedy. The power of discretion to order for instance either winding up or

purchase of shares belongs solely to the court. Accordingly, this may either create hold-up problems on the minority side or, conversely, decrease the majority's incentives to respect the minority shareholder's interests. This uncertainty may operate as a disincentive for the minority shareholder to use his right, which eventually decreases the incentives on the majority to respect minority rights. Hence, a legislative reform is necessary in this respect. It is also important to note that Section 310 of CAMA had expanded the categories of persons who can petition under Section 311. This was an improvement of what was obtainable under the repealed 1968 Companies Act where only a member can apply for relief under Section 201.

4. Investigation of the Company by the Commission: The Commission may appoint inspectors to investigate the affairs of the company if;

   i. On the application of members.[67]

   ii. On the application of the company.

   iii. On the orders of the court.[68] And

   iv. Of its own motion.[69]

   This constitutes extra-judicial remedy to minority shareholders by way of application to the Corporate Affairs Commission to appoint inspectors to investigate the affairs of the company. It is one of the new and unique innovations provided by CAMA to protect the rights of the minority shareholders and generally to ensure proper administration and management of the company.[70] The background for the appointment of inspectors was well entrenched in the case of **Norwst Holst v. Secretary for Trade.**[71] Lord Denning, also in **Wallersteiner v. Moir,**[72] restated the need for inspection of companies. His lordship was of the view that 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

[67] Section 314 CAMA
[68]Section 315 (1) CAMA.
[69] Section 315 (2) CAMA, Spectra Ltd. v. Stabiini Visionini Ltd. (1996) 6 NWLR (Pt. 44) 239
[70] U E Azu, 'Examination of Recent Trends in Corporate governance as it Affects the Majority Rule and
[71] (1978) 3 ALL ER. 280.
[72] (1974) 3 ALL ER 217, 292.

to appoint inspectors to investigate the affairs of the company. Gower, on his own part opined thus:

> It is now widely recognized in all countries that the only way of preventing impropriety in the management of corporate enterprise is to ensure effective supervision by some government agency. The idea that shareholders can be relied upon to supervise management and take effective steps to protect themselves is an anachronism… even if shareholders have the determination and the financial means they will often lack the inside knowledge of the facts which is needed before any legal action can be commenced. Accordingly, the tendency in all countries is to provide wide powers of investigation and inspection.[73]

5. Winding up on the just and equitable ground: Another protection afforded minority shareholders by CAMA is the right to petition the court on just and equitable ground.10 The winding up order is the most drastic form of shareholder relief. CAMA sets out a number of circumstances under which a court may order a winding up of the company.[74] This also include where an oppression remedy claim has been met12 and, perhaps most importantly, where it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up.[75] The courts have, in the exercise of their powers under the 'just and equitable' doctrine, made it abundantly clear that each case must be determined on its own facts. However, Courts certainly have tended to be against making such an order when a company is clearly solvent except where the company cannot conduct its affairs.[76]

The just and equitable provision has usually been used to provide a remedy in the situation of deadlocks within the company which have arisen without any fault on the

[73] Quoted in KD Fraser, 'Administrative powers of Investigation into Companies', (1971) 34 *MLR* 260.
[74] Section 408 CAMA
[75]Section 408 (e) CAMA.
[76] A Keay, 'Company directors behaving poorly: disciplinary option for shareholders' (2007) JBL 656 -678.

part of those involved15, where the Substratum or Main Object of the company has Failed16and also where the minority shareholder or company has been defrauded.17 Exclusion from Office.18 Finally, where the court makes an order that the company be wound up, then the relevant provisions of the CAMA relating to the winding up of companies will apply with such adaptation as are necessary, as if the order had been given upon an application filed in the court by the company. And under Section 313, it is an offence punishable by fine or imprisonment for any person to contravene or fails to comply with any order made by the court relating to winding up.

COMPARISON BETWEEN UNITED KINGDOM AND NIGERIA

The United Kingdom parliament in 2006[77], passed into law one of the longest legislations in British parliamentary history[78]. Known as 'Companies Act, 2006' forming the now primary source of United Kingdom Company Law. Territorially covering England, Wales and Scotland and extends to Northern Ireland. It received Royal assent in 8th day of November, 2006. This Act replaced the Companies Act of 1985, and part 9 of Enterprise Act, 2002. The Act also tries to incorporate most of judicial decision (case laws) to cover a wild range of areas which is the biggest criticism that the Act has amongst legal practitioners who are reluctant to apply the law.[79] The new Act provided for the protection of the Rights of minority shareholders of a company (here mostly joint stock companies) is made possible where the cause of action is vested on the company, allowing an individual member of the company to bring an action on behalf of the company to seek for relieves therein.[80]

Under this Act the action is called DERIVATIVE CLAIM[81] unlike in Nigeria where it is referred to as DERIVATIVE SECTION. The action can only be brought through a court order in respect to matters covering protection of members against unfair prejudice.[82] The UK Act made a further in road extended the action which the member is entitled to bring on behalf of the

[77]Companies Act 2006, C46.
[78] https://enwikipedia.org/wiki/companies_Act_2006. (visited 20th March, 2016)
[79]Companies Act 2006 Explanatory note, page 1. (Ukpgaen_20060046_en.pdf)
[80] David Ejesu, Majority rule and Minority Protection, https://www.academia.edu › Majority_Rule_and_Minority_Protection accessed 8 August 2019
[81] Section 260-64 Companies Act 2006, C46, UK
[82] Section 994 Ibid

company to include act of negligence by the directors as well as breach of duty or trust[83]. It also made the right of the minority shareholder wide to the extent that even if the action had arisen before the shareholder became a member of the company, as it is immaterial. This I think is giving too much to the member or minority shareholder as this could have a spiraling effect of hampering or grounding business of the company. As it means an individual who knows little or nothing about an act or omission of a director, which may have impacted negatively on the company, not being a member as at the time the act or omission was done, could still bring an action against such director on behalf of the company. The position is different in both Nigeria and United Kingdom as there are no such clear provisions in this respect. These laws also seem to depart from the concept of the wrong doer since the action also covers anticipatory act[84]. Here too, a person who though not a member, but whose shares has been transferred to also falls within the purview of member under this Act[85]. Also where a company has brought a claim by itself, and a member of the company feels that the company is not applying due diligence in prosecuting or the manner the matter is being conducted amounts to abuse of court process, a member could seek the leave of the court to continue the action as a derivative claim in Northern Ireland[86]. But there was no express provision as to how that would be applied in England.

CONCLUSION

It is clear that though a company is the proper plaintiff in action involving it with a third party, or where there is a wrong done to it, however to protect the rights of other members of the company who may have little or no voting right at the General meetings of the company from the oppression of the majority, the law has evolved as equitable remedies and legislative enactments have come to ameliorate this oppressive hardship of majority rule and minority oppression by the majority. The recent codified laws of different sovereign states have enhanced the protection of the minority and have even to it to a high point as seen from the little discuss on the extant United Kingdom legislation on Company law. It is my opinion that society evolves on regular basis and laws should also evolve with the evolving and dynamism of societal development. The

[83] Section260(3) ibid
[84] The Companies Act 2006 (3) Ibid, states that the action can be brought '..only in respect of cause of action arising from an actual or propose act or omission…'
[85] Section 260(5)(c) Ibid.
[86]Section 262 (2) Ibid.

Nigerian company law has to catch up with what the contemporary business world and ideals represent.