THE JOURNAL OF

PRIVATE AND COMMERCIAL LAW

J.P.C.L. VOLUME 1, NO 1
JANUARY, 2001

Published by

DEPARTMENT OF PRIVATE AND COMMERCIAL LAW,
FACULTY OF LAW
OGUN STATE UNIVERSITY
AGO-IWOYE

THE JOURNAL OF

PRIVATE AND COMMERCIAL LAW

J.P.C.L VOLUME 1, NO 1

JANUARY, 2001

Published by: Department of Private and Commercial Law, Ogun State University, Ago-Iwoye

ISBN 978-31044-0-4

Typeset by J.T Business Centre (Division of Jil-Tingo Ltd., Ibadan)

CHAPTER FOUR

MINORITY PROTECTION AND CORPORATE LITIGATION*

The Company like all progressive present day Organisations upholds the democratic principle, that the majority's will must be the will of the Company. The majority controls the Company, majority embraces member(s) of a Company holding controlling shares in the Company and which is backed with equal voting right and powers. All decisions taken by Companies are either by simple majority or special majority as occasion warrants. It is an elementary learning in law that the court will not interfere in the internal affairs of the Company, and in fact has no jurisdiction to do so.

Further, and as corollary to the above, the court will not review any commercial policy or judgement of the Company[1]. Lord Eldon could not state the point more forcefully, when he said, "This court is not to be required on every occasion to take the management of every play house and Brewhouse in the Kingdom".[2]

A minority shareholder does not have any right whatsoever against the majority of the company (except for those secured by contract) he cannot use the name of the Company or sue for any wrong or irregularity that may arise in the management of the Company. The minority shareholders position can only be protected by law, even if he decides to sell his shares he may have to sell to the very people he is complaining about who may offer a nominal price for the share, circumstances abound where the majority deliberately sets out to oppress the minority in order to force them out or commits fraud on the Company and benefiting themselves at the expense of the Company and the minority shareholders.

The aim here is to examine the law in Nigeria on the protection of the minority shareholders, the different courses of action open to him, adequacy of the law in this regard, and suggestions for reform.

---

* K. Aina, Lecturer in Law, Faculty of Law, University of Ibadan, Ibadan

1. Lord Davey in Burland v. Earle (1902), Ac. 85
2. Carlen v. Drury (1812) IV & B 154 at 158

THE GENERAL RULE

The rule as laid down in the case of FOSS v HARBOTTLE[3] is that where a wrong has ben done to the Company it is only the company that can sue and no other person, further the court will not interfere with the with internal management of the Company acting within their powers and has no jurisdiction to do so[4] the rule was further elucidated in the case of EDWARD v HALLIWELL[5] where Jenkins L.J said[6]

> *"The rule in Foss v Harbottle, as I understood 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 the 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, no individual member of the Company is allowed to maintain an action in respect of that matter for simple reason that if a mere majority or association is in favour of what has been done then **cadit, quaesti** no wrong has been done to the company or association and there is nothing in respect of which anyone can sue."*

The will of the majority therefore represents that of the Company. From the above, the rule can be said to posses two aspects to it:

1) The proper plaintiff principle
2) The internal management principle[7]

The rule though has some recognised advantages.[8]

1) It discourages multiplicity of suits and this prevents the Company from being torn apart by miscellaneous suits from various members; or to avoid oppressive litigation.[9]

---

3. (1843) 2 HA 461, 67 E.R 189
4. Mozley v Alston, (1847) IPH 790
5. (1950) ALLER 1064
6. Ibid.
7. Street J. in Hawksbury Development Co., v Landmark Finance Property Ltd. (1970), 92 W.N. (N.S) 199
8. Grower, Principles of Modern Company Law 4th Edition, P. 642
9. Gray v Lewis (1873) L.R. 8. 1035

2) If the act complained of is one that could be ratified by the General meeting no purpose will be served in allowing the suit, except with the consent of the general meeting.[10] or in the words of Melish L.J.[11] " 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 illegal, which the majority of the Company are entitled to do legally, there can be no use in having 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".

The Latter is less of an advantage than a consequence of the rule and justifies the extension of the rule to internal irregularities in the Company. The rule took its source from two principles of law

1) From the already developed rule of corporate personality - that the Company is separate and distinct from its associated members,[12]
2) The other is a relic of partnership law that the court will not make it a practice to settle or interfere in the internal management of the partnership[13]

It is not part of the court's duty to settle all partnership squabbles, it expects from every partner certain amount of forbearance and good feelings towards his co- partner[14]

The two principles forms therefore the fundamental basis of the now famous rule in Foss v. Harbottle and Mozley v. Alston.

EXCEPTIONS TO THE RULE

Without exceptions to the rule definitely the hope of the minority shareholders would have been sealed totally. But in the case itself Wigram V.C. emphatically raised the issue when he said, "If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained except that of a suit by individual corporations in their private

---

10. Macdougal v. Gardiner (1875) 1 Ch. D. 13
11. Ibid., page 259
12. Even before the Trading Companies Act 1834 and Chartered companies act of 1837, it has been recognise that a company duly backed with a letter patent from the crown is a distinct and separate entity from that of the shareholders.
13. Lindley on Partnership, 4th Ed., P. 527.
14. Ibid., P 528.

character and asking in such character the protection of those rights which in their corporate character they were entitled, I cannot but thin that the claim of justice would be found superior to any difficulties arisin out of technical rules respecting the mode in which corporations are require to sue" (emphasis added).

The need therefore for exception to the rule has been recognised rig from the onset. The exceptions to the rule are grouped under four heads

1) Where the act complained of is ultra-vires or illegal
2) Where the matter is one which could validly be done or sanction only by some special majority of members
3) Where the personal and individual rights of the plaintiff as member has been invaded.
4) Where what has been done amounts to fraud on the majority and t wrong doers are in control.

Gower sums up the exception by starting that an individual shareholder c always sue notwithstanding the rule in Foss v. Harbottle when what complains of could not be validly effected or ratified by an ordina resolution,[16] while sealy[17] supports the view expressed by wedderbur that the fourth exception will actually be the only exception if the law expressed that all wrongs are directly against the company as a corpor body, some are actually devised for and may injure the minority shareholde exclusively e.g. invasion of personal right. In any case the case will h no application at all "for the individual members are suing, sue not in right of the company but in their own right to protect from invasion th individual rights as member".[19] Really, the first three exceptions above strictly not exceptions as such, but cases where the majority or the comp cannot act under the law, neither could the company ratify.

---

15. Jenkins L.J., in Edwards v Halliwell (1950)- 1064. Lord Wedderburn, shareholders Right the Rule in Foss v. Harbottle (1957) CAMB L.J. 194 at 203
16. Grower, Op.cit. 645
17. Cases and Material in Company Law, 3rd Edition, Page 451
18. Wedderburn, op.cit.
19. Per Jenkins, L.J. in Edwards v Halliwell above

A fifth exception was added by Gower[20] and has been dubbed a doubtful fifth,[21] the fifth exception is to the effect that any other case where the interest of justice require that the general rule requiring suit by the company, should be disregarded. He relied on certain judicial dicta, Wigram V.C.'s decision in Foss v. Harbottle, Jessel M.R , in Russel v. Wakefield Waterworks CO.,[22] Heyting v. Dupont[23] Goulding J.'s Statement in Hudson v. Nalgo,[24] Vinelot J.[25] agreed with him, if the learned author and judges examined the dicta of Wigram V.C. properly it will be seen that there is no such exception, Jenkins L.J. in the same vein states that those exceptions, especially the last one show that the rule is not an inflexible rule and it will be relaxed where necessary in the interest of justice.[26]

These dicta obviously does not make interest of justice an exception to the rule, but merely shows that the exceptions were introduced in the interest of justice. The cases of Akande v. Omisade[27] and Edokpolor and company Limited v. Sam Edo Wire Industries Limited and others[28] seems to support the existence of the interest of justice exception in Nigeria, Nnamani J.S.C. in the latter case said:

> ***A fifth exception appears to have developed from the cases. An individual minority shareholder can also sue where the interest of justice demands that he be so allowed.***[29]

However, the above is not supported by recent developments and interpretations of the dicta relied upon by Gower and the supreme court. In the case of Prudential Assurance Co. Ltd v. Newman Industries Ltd

---

20. Grower, op. cit., p. 645.
21. O.A. Osunbor; A crtical Appraise of the interest of justice. As An Exception to the rule in Foss v Harbottle (1987) 36, ICLQ page 1
22. (1872) L.R. 20 Eq 474 of 428
23. (1964) IWL. R. 843 at 851
24. (1972) IWL. R. 130 at 140
25. Prudential Assurance C. Ltd v Newman Industries Ltd.,
26. Edwards v Halliwell, op. cit
27. (1978) N.C.L.R. 363
28. (1984) 7.S.C. 119.
29. Ibid

(No 2) the court of Appeal in England was of the view that it was a practical test[30] even though it seems to have formed part of Vinelot J's ratio in the lower court while Megarry V.C. in the case of Eastman Co (Kilner House) Ltd v. Greater London Council concurred with the judgement in the Court of Appeal in the prudential Assurance Co. Ltd case, and destroyed the basis of the fifth exception when he said

> *"Although the concept of injustice is not the test, I think it is nevertheless a reason and an important reason for making exception from the rule yet the reasons for an exception should not be confused with the exception itself."*[31]

Could we conclude that the fifth exception still hold in Nigeria until the case of Edokpolo and Company Ltd. is overruled by the Supreme Court. I think not, The Law Reform Commission Report[32] as well as S300 of the Companies and Allied Matters Act 1990[33] did not include the interest of justice exception as a legal exception to the rule in Nigeria. We can assertively say therefore that the interest of justice exception is no exception at all.

Section 300(3)(e) and (f) are exceptions added by the Law in Nigeria,S 300 (e) states;

"Where as 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"

It should be noted from the onset that the two last exceptions above should not be read jointly by the use of the word 'and' the last exceptions are separate and separable and is therefore to be construed as a disjointive[34] and not conjuctive word[35].

---

30. Prudential Assurnace Co. Ltd v. Newman Industries Ltd. (No. 2) (1981) Ch. 257 above pa
31. (1982) I.W.L.R. 2
32. L.R.C. Reports vol. 1 p. 234
33. Companies and Allied Matters Act 1990.
34. Strauds Law Dictionary, 5th Edition
35. (1972) W.L.R 130

S. 300 (e) was introduced following the case of Hoggson v. National and Local Government officers Association by the Law Reform Commission.[36] The issue was first raised in the earlier case of Hogg v. Cramphorn Ltd.[37] where the court allowed a shareholder to bring an action on behalf of himself and all other shareholders of the Company complaining of irregularity in advancing certain loans to some trustee as constituting breach of fiduciary duty of the directors. Buckley J. stayed the action and gave the company the opportunity of ratifying the transaction.

In Bamford v. Bamford[38] where improper motive was alleged by a minority shareholder against directors exercise of their powers to issue shares, it was held by the Court of Appeal in England approving the decision reached by Plowman J. in the lower court so far as the Act complained of is capable of being effectively ratified and approved by an ordinary resolution, and since it has been so approved, then the action will be dismissed. In Hoggson v. NALGO, where the trade Union Executives has passed a resolution at its meeting, contrary to one passed at its conference and there was no time for the Unions conference to meet again, before the action will be taken, Goulding J. was of the view that the Court ought not to allow the rule in Foss v. Harbottle to become the possible instrument of an injustice to the majority that the majority could not possibly correct.[39] The court will therefore allow action in the name of a shareholder to prevent fraud being committed on the majority (or the Company).

From the case, it is clear that:

(1) this type of action can be instituted in the name of the shareholder or of the Company
(2) that it will only be allowed to protect the Company or majority
(3) the act or commission complained of is ratifiable by the company, but there is no time or opportunity for a meeting to be called for the purpose,

---

36. L.R.C. Report, Vol. 1, page 235
37. (1967) Ch. 254
38. (1979) Ch. 212.
39. (1967) Ch. 254 at 257.

(4) that the action will be stayed until the majority could ratify or confirm the action,

(5) and it will abate naturally when the Company approves the action.

It follows that where the company ratifies the action the cause of action is destroyed, where as, if the company does not ratify the action then the company takes over the suits, S.300 (e) will remain an exception to the rule in Foss v. Harbottle subject to the above, and in fact the court must adopt the procedure 1 aid down in Bamford v. Bamford[40] of staying proceeding until the company is afforded the opportunity of ratifying.

One may add that a minority shareholder is better protected under any of the other exceptions, and in fact the Hodgson v. NALGO decision was not based on minority protection, but that of the Company or majority. One does not see the usefulness this exception will serve in the Act. It is always open for the minority shareholder to commence action even to complain against those actions that are ratifiable by the majority, but it will be struck out if the court is satisfied that the action has been duly ratified, if not then the only cause open to the court is to give the Company the opportunity of doing so. S.300 (f) is based on the rule laid down in Daniels v. Daniels.[41] The court in that case distinguished the case of Pavilides v. Jenson[42] where it was held that a minority shareholder may not sue where the allegation is that of negligence. The court in Daniels v. Daniels faced with a situation where the directors had benefited from their negligence, has no hesitation in arriving at the conclusion that the minority shareholders can maintain an action in his name or that of the Company. Templeman J. stated the rationale clearly when he said "the principle which may be gleaned from Alexander v. Automatic Telephone Co.[43] (directors benefiting themselves) from Cook v. Deeks[44] (directors diverting business to their own favour) and from dicta in Pavlides v. Jensen (director appropriating assets of the Company) is that a minority shareholder who has no other remedy may sue where directors use their powers intentionally, or un-intenationally

---

40. Op. cit
41. (1978) 2 All E.R. 89
42. (1956) Ch. 565.
43. (1900) 2 Ch. 56
44. (1916) AC. 554

fraudulently or neligently, in a manner which benefits themselves at the expense of the company. [45] Vinelot J.[46] emphasised the position of the law by stating the criteria that a benefit must have occurred either to the Director directly, or his wife, or a Company in which he has a substantial shareholding. This exception is a corollary to and no extension of the fourth exception, because both are consequence of breach of duty. However, this exception will remain a very important one as it avoids the problem of pleading and proving of fraud.

CORPORATE LITIGATION

The directors and no one else are responsible for the management of the Company. As a corollary it is only the directors that are authorised to institute an action in the name of the Company to redress any wrong that may have been done or to prevent wrong from being done to the Company.[47] The General meeting cannot interfere in the management of the Company, and it cannot pass a resolution to discontinue action by the directors.[48] The General meeting cannot usurp the power of the directors, vested on them by articles.[49]

It should also be noted that the director as a shareholder cannot be controlled in the way he exercise his right of voting, he may actually vote to validate action that was voidable and could use his voting power to perpetuate himself in office,[50] and even use his voting power to prevent an action to be taken against him. Board of Directors is the sole organ that can control corporate litigation, in the management of Company business.[51] With the above in mind, we shall now examine the type of action that can be maintained by the minority shareholder and circumstances under which it could be done. There are three forms open to minority shareholders;

---

45. Daniels v Daniels, op cit., p.
46. Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) (1981), Ch. 257.
47. Automatic Self-cleansing Filter Syndicate Co. v. Cunighame (1906) (1981), 2 Ch. 34
48. Shaw and Sons (Salford) Ltd. v. Shaw (1935) 2 KB. 113, Scott v. Scott (1943) IALLER 582.
49. Scott v. Scott above.
50. North West Transporation Ltd. v. Beatty (1887) 12, App. Cas 589.
51. Except where there ius dedlock or where there are no directors can the General meeting.

i) Personal action[52]
ii) Representative action[53]
iii) Derivation action[54]

PERSONAL ACTION

A minority shareholder may maintain any action against the Company where the right to be protected is personal to the shareholder. Section 41,[55] states "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 contract represented by the memorandum and the articles of the company binds the company and the shareholders and represents rights and obligations owed to the shareholder[56] by the company. The shareholders can therefore sue where his rights has been infringed under the articles.[57] A member can sue the Company or the directors to enforce his right to vote at a meeting.[58] It seems that the court will readily allow a minority shareholder sue in his own name where proprietary right is involved, than where the irregularity is of a procedural nature[59] for instance, a shareholder can sue in his name to compel the company to pay dividends to him.[60] However, the articles does not constitute a contract between the company and someone who is not a member,[61] or outsider. It does not bind the member in any other capacity other than a member, e.g. a director who is also a member will not be covered and cannot sue under the contract represented by the article.

---

52. S. 301 (1) Companies and Allied Matters Act 1990
53. S. 301 (2)
54. S. 301 55 Companies and Allied Act 1990
56. Wood v. Odessa Waterrworks Co. (1889), 42 Ch. D. 636.
57. Hickman v. Kent or Romney March Sheapbreeders Association (1915), 1 Ch. 881
58. Pender v Lushington (1877), 6 Ch. D. 70
59. Griffith v Paget (1877), Ch D. 894
60. Wood v. Odessia Waterworks above
61. Eley v. Positive Government Life Assurance Co. (1876) 1 Ex. D 88

Wedderburn, has argued that the articles could actually be enforced by an outsider who is a member and enforcing right conferred on his as an outsider.[62] He relied on the case of Salmon v. Quin & Axtens Ltd,[63] if Wedderburns view is to be adopted it means that an outsider e.g. director can enforce a right due to him under the articles by merely framing his action in a way as to portray him as enforcing the due compliance with the articles by the Company. Whether this view is right or wrong will now be a matter of academic exercise in Nigeria as S.41 now State that the contract binds member and officer as such.[64] The law has therefore included outsiders, that is directors, promoters etc., as a class of persons who can maintain an action for or against the Company to enforce a right guaranteed by the articles. The Law in Nigeria will seem to have adopted Wedderburns argument.[65]

Hitherto the law has always been very clear, in the words of Astbury J.,[66] An outsider to whom the rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member cannot sue on those articles treating them as contracts between himself and the Company to enforce those rights, no right merely purporting to be given by an article to a person, whether a member or not in capacity other than that of a member, as for instance, as solicitor, promoter, director, can be enforced against the Company.

It will follow that all the old English decisions will no longer be good law in Nigeria. An outsider can now sue to enforce the contract under the articles of association of the Company. It should be noted that in adopting the Wedderburns position, the law in Nigeria has gone further, the outsider need not claim to enforce outsider right by virtue of the fact that he is a member and indirectly enforcing a right due to him he need not go in the round about way, the law now allows him to proceed and enforce his right in so far as they relate to the Officer as such.

---

62. Wedderburn. Op. cit.
63. (1909) A. C. 442.
64. See also Pulbrook v. Richmond Consolidated Mining Co. (1878) 9 Ch. D. 610 where it was held that a director may bring a personal action against his fellow directors to restrain them from board meetings. Quin and Axtens Ltd v. Salmon above, Ghana Company Code 1963, S. 21.
65. Wedderburn, op cit.
66. Hickman v. Kent etc., Supra, page 897 and 900.72. S. 41 (4).

The section also allows the member to maintain an action against an officer or any member if there is a breach of the article,[67] as the contract binds the members, inter se. The minority shareholders may therefore sue the director directly without he need of joining the Company. S. 41 (3) even goes further, when it states, 'where the memorandum and articles empower any person to appoint or remove any director or other officer of the Company, such power shall be enforceable by that person notwithstanding that he is not a member or officer of the Company'.

This provision has introduced an absurdity of sort into this area of the law. If the memorandum and articles are what constitutes a contract under seal,[68] between the members and officers of the Company, where the officer or the person is not a member of the Company, that is, he is an outsider in the absolute and real sense of the word he may still maintain an action to enforce contract (article) which he is not a party to.

The only likely situation that may arise are cases where the government is interested in some strategic companies but are not allowed to own shares therein, apart from this situation one cannot see where the articles will confer a right to appoint an officer of that company on a non-member of that company. It may be noted however, that S.41 (1) does not specifically state that the officer should be a member of the company so far as the articles confer some rights/benefits on him then he becomes a party to the contract. S.41(3) may therefore not be too difficult to understand in this light. The likely explanation will be a resort to the principle of contract that a third party to a contract who may benefit from the contract may sue to enforce the contract,[69] though, the House of Lords in England disapproved the law as stated above but Lord Denning who made the proposition in the Court of Appeal in England expressed the view that where a contract is made for the benefit of a third person, the third person may enforce it in the name of the contracting party or his executor or personal representative, or jointly with him or if he refuses by adding him as defendant.[70]

---

67. S. 41 (1) see Rayfield v. Hands (1958), 2 W.L.R. 851.
68. 41 (1) and actio to enforce contract (article) which he is not a party to.
69. Beswich v. Beswick (1966), A.C. 538.
70. Ibid age 554. See also G.H. Trietel, The Law of Contract, 7th Edition page 465.

The majority in the House of Lords did not agree with the position taken by Lord Denning above. The outsider sueing under S. 41 (3) therefore is advised to join the Company as a defendant, because in actual fact it is the company that owes him the duty and not the officers or directors.

The rule in Foss v Harbottle does not apply under S 41, personal actions should be restricted to protection of personal rights only, though it may be employed to restrain the company, from proceeding on an ultra-vires or illegal action, or doing by ordinary resolution that which the articles or law states be done by special resolution.

REPRESENTATIVE ACTION

Where a number of people having the same interest or rights[71] which have been infringed may sue in a representative capacity. ORDER 13 rule 14 of the High Court of Lagos State Civil Procedure rules States, "Where there are numerous persons having the same interests in one cause or matter, one or more of such persons may with the leave of the court or Judge in Chambers defend any such cause or matter, on behalf of all persons so interested".

The minority shareholders may employ this form of action more often than personal action, where the grievances is of a personal and common nature the company will be made a defendant, the directors may also be joined as defendant where the order being sought is to be directed at the directors personally.

A representative action is allowed to enforce the articles where the grievance is common,[72] section 41 (4) states, "in any action by any member or officer to enforce any obligation owed under the memorandum or articles to him and any other member or officer, such member or officer may, if any other member or officer is affected, by the alleged breach of such obligation, with his consent, sue in a representative capacity on behalf of himself and all other members or officers who may be affected other than any who are defendants and the provisions of Party XI of this Decree shall apply".

---

71. He may join the directors pesonally to enable the court compel them directly to comply with the courts order.
72. S. 301 (4)

The member either sueing in a personal or representative form is not entitled to damages,[73] except the court may award cost in favour of a member whether he wins or lose[74] as they may have done a great service to the company.[75]

The personal and representative action cannot be brought to enforce the rights of the shareholder for anything done before he became a member. Under the rules of court the representative must first seek leave of court before institution of the action. In most cases leave will be sought ex-parte, except where the court is of the view that the other party be notified.

DERIVATIVE ACTION

In cases where fraud has been or is being committed against the minority or the company because the wrong is against the company its only proper that the company is the plaintiff, but where the wrong doers are in control of the company, then obviously they will not institute an action against themselves. The wrong or fraud will go un-remedied unless a solution can be found under the law.

The solution formerly was to frame an action in such a way as appear in as a representative action against the wrong doing directors, e.g. AB sueing on behalf of himself (a minority shareholders) and all other shareholders of the company X against the wrong doing directors of the company.[76]

The Law Reform Commission, while examining the issue was of the view that this is circuitors and uneccessary,[77] and suggested a reform in the Law, S.303 of the Companies and Allied Matters Act 1990 now allows a minority shareholders to bring an action in his own name on behalf of he company, or in the name of the company against the wrongdoing directors subject to conditions specified in the section.[78]

---

73. S. 301 (2)
74. S. 301 (3) See also Marx v. Estates & General Ltd (1976), I.W.L.R
75. Per Lord Denning M.R. in Wallersteinet v. Moir (No. 2) (1975), Q.B. 373 at 390.
76. Ibid.
77. Law Reform Commission Report Vol 1, p. 237
78. S. 3030 (1) state "subject to the provisions of subsection (2) of this section an applicant may apply to the court for leave to bring an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company."

The true nature of the action referred[79] to as Derivative action which originated and is more developed in the United States of America, is that the minority shareholder sues on behalf of the company to enforce rights derived from it.[80]

In the case of EastDu point Lead Mining Co v. Merry-weather[81] where a minority shareholder sues the wrongdoing director for recession of a contract of sale of certain mines property of the Company. The majority object to the use of the Company name on the basis of the rule in Foss v. Harbottle, the objection was sustained and the suit was struck out. The Plaintiff, then commenced another action in his own name in Attwool v. Merry-weather[82] which was allowed. The court struck out the earlier action because it was not satisfied that the Plaintiffs were authorised to call themselves the Company or use the corporate seal.[83] However, the later case was allowed because in the words of Page-wood, V.C., "If I were to hold that no bill could be filled by shareholders to get rid of the transaction on the ground of the doctrine of Foss v. Harbottle, it would be simply impossible, to set aside a fraud committed by a director under such circumstance[84]"

The right to sue rightly belong to the company, but in the situation where a fraud has been committed by the directors or persons in control of the company, then the minority shareholder can maintain an action in his name in order to protect the company itself. It is a matter of procedure in order to give a remedy for a wrong which would otherwise escape redress.[85] It should be noted clearly that the plaintiff cannot complain of the acts which will be valid if done with the approval of the majority. Also the case in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or

79. Grower op. cit page 647
80. A.J. Boyle: The Minority Shareholder In The Nineteenth Century. A study in Anglo-American Legal History (1965), 28 MLR 317.
81. (1864) 24 & M 254
82. (1867) L.R.s. Eq 464n.
83. Ibid
84. Ibid.
85. Per Lord Davey in Burland v. Earle (1902) A.C. 83

beyond the powers of the Company, neither is the plaintiff entitled to reliefs or right larger than the company itself would be entitled.

The conditions for bringing a derivative actions are as follows:

1. As stated above, the act complained must be such that involves fraud or one that the majority cannot approve of. Professor Gower has itemised the three area thus:[86]

   a) Expropriation of the property of the Company or in some circumstance that of the majority.[87]
   b) Breach of the directors duties of subjective good faith.[88]
   c) Voting for Company resolution not bonafide in the interest of the Company as a whole.[89]

A minority shareholder cannot maintain an action therefore when the claim is based solely on negligence without more[90] as the majority can easily ratify the action of the director.[91] However, what happens, where the director benefits from the negligent act? The answer was given in the decision reached in Daniels v. Daniels[92] that such negligence will amount to fraud on the minority. The court will impute Fraud as it recognised the difficulty in pleading and proving fraud in the circumstances. The position of the law was summarised by Templeman J. as follows: "If minority shareholder can sue if there is a fraud, I see no reason why they cannot sue where the action of the majority and the directors though without fraud, confers some benefit on those directors and majority shareholders themselves at the expense of the Company.[93]

Megarry V.C. was of the view that fraud comprise if not only fraud at common law but also fraud in the wider sense of that term, as in the equitable concept of fraud on a power.[94] The case seems to discount the necessity

---

86. Op. cit. page 648
87. Menier v. Hooper Telegraph Works (1874) L.R. 9. Ch. App. 350
88. Regal Hastings Ltd v. Gulliver (1942) 1 ALER 378
89. Brown v. British Abrassive Wheel Co (1919) 1 Ch. 290., Lifan Tinplate
90. Pavlides V Jensen (1956) Ch. 565. Heyting v. Dupont (1964) W. LR. 543
91. (1978) Ch. 406
92. Daniels v. Daniels above page 416
93. East Manco (kilner House Ltd V Greater London Council (1922) I.W.L.R. 2.
94. Ibid

of proving fraud as such if the plaintiff can show material benefit to the directors arising out of an action by them, then derivative action may be used.

2. The applicant must satisfy the court that the wrong doers are in control and will not take necessary action. [95] In America this condition is termed the requirement of demand, explained thus, there must be a demand, first upon the board of shareholders to take proceedings on behalf of the corporation, followed by another similar demand addressed to the general body of shareholders in each case the minority shareholders must aver in his pleadings either that he has made these requests, one or both of which have been wrongfully refused, or alternatively, that it would be futile in the circumstances to make one or both of these demand and that the law therefore excuses him. If he cannot establish these averments at the outset of the trial his action is barred,[96] the position is not entirely different from the one taken by the Anglo-Nigeria law on the matter, [97] the best way to prove that the wrongdoers are in control is to show that they have been called upon to take action, or call a general meeting with a view to sanction an action being taken, if the director use their voting power to stop the action there is a clear evidence that they are in control and will not take necessary action. However, it may not be necessary to demand that an action be taken where from the facts it is obvious that no useful purpose will be achieved if the directors were asked to act, they are actually in control, or they are to be made defendants in the suit.

Where the meeting is convened and the majority ratifies the action, the minority shareholder may still sue alleging that directors voted for company resolution not in the interest of the company as a whole, but where the majority of the shareholders, independent of those implicated in the fraud, supporting the bill....,[98] then the minority will obviously have no action, and it is just as well.

---

95. S 303 (2) CAMA 1990
96. Sixth Decinnial Digest, Corporation Key Nos. 202 - 206 -
97. Boyle, op. cit.
98. Per pagewood V.C. in Attwool v Merry weather (1867) L.R.S. Eq 464m.

3. Section 303 (2) (b) of the companies and Allied Matters Act 199 goes further when it states: The applicant has given reasonable notic to the directors of the company of his intention to apply to the cou under subsection 1 of this section if the directors of the company d not bring, diligently prosecute or defend or discontinue the action:. The problem with this subsection is that apart from the fact tha reasonable notice is indefinite as to allow different interpretations t suit different circumstances, it is not a demand to act one way or th other. The use of notice of intention to sue is not very clear, if th directors subsequent to the notice call a meeting and the majorit (excluding the wrongdoers approves the action complained about, coul the minority shareholder still maintain an action? I think not in an case, either if the directors do not bring an action against th wrongdoers or convene a meeting to ratify, if the action is ratifiable could the minority shareholder maintain a derivative action.

4. The company must be a party to the action. This is necessary in orde that any money recovered will rightly be paid to the company, the rea plaintiff (in the first place). This will also act as res judicata agains subsequent derivative actions on the same issue.[100]

5. The applicant must act in good faith, as an equitable remedy devise by law to prevent fraud, the applicant must come with clean hands, h must not have his hands soiled in any way or he must not be faulted i any way or manner e.g. he must not have benefited from the fraud He must be a member of the company at the time of suing,[101] thoug he may sue for wrong done to the company before he became member as the right is that of the Company and not personal.

6. The applicant must apply for leave of court o bring the action,[102] thoug the law does not state whether such application should be exparte o on notice, it is submitted that it will be left totally at the discretion o the court. However, it will be enough if the affidavit evidence befor the court satisfy the conditions stated in the section, these are:

---

99. S. 303 (2) (b).
100. Grower, op. cit., 651
101. Birch V Sullivan (1957) 1.W.L.R 1247
102. S.303 (2)

a) The wrongdoers are the directors who are in the 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 the subsection (1) of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action.

c) The application is in good faith and

d) It appears in the best interest of the company that the action be brought, prosecuted, defended or discontinued. The law did not actually make the plaintiff **dominus litis** and the court may give directions for the conduct of the action.[103] The court must be satisfied that it is justified and in the best interest of the company before any compromise or settlement could be sanctioned as to warrant a discontinuance of the action.[104]

WINDING UP UNDER THE JUST AND EQUITABLE GROUND

The act makes provisions for situation where the company minority shareholders interest is better protected if the company is wound-up and its assets shared where the court upon the evidence adduced find it just and equitable to do so, S.408 (e) states "A company may be wound up by the court if - (e) the court is of the opinion that it is just and equitable that the company should be wound up.[105]

The phase itself is nebulous and it is aimed at giving the court enough room for direction and to enable it achieve substantial justice in the circumstance of each case. In many cases, the court has to consider series of oppressive conduct which on their own will not amount to an oppressive conduct against the minority but taken together, it may be enough to wind up the company in order to adequately protect the minority shareholder.[106] The courts have emphatically stated that categorisation of the grounds should be made.[107]

---

103 S. 304 (b)

104. S. 306.

105. See also S. 209 (f) Companies Decree 1968, see also S. 25 Partneship Act 1892 where the same words are used.

106. Lock v John Blackwood Ltd 91924) A.C. 783.

107. Lord Wilderferece in Re Westbourne Galleries (1972) 2 WLR 1289 108 Re Bleriot Manufacturing Air craft Co. Ltd. (1916) 32 TLR 253.

The courts has found it oppressive, just and equitable to wind up a company in the following circumstance: where the substratum of the company is gone, where the company was set up for a particular purposes and is not able to carry out that purpose the court will be ready to hold that its substratum is gone.[108]

Also, where either court find that he company is a bubble or that it has no assets or was set up for a fraudulent purpose unable to apply its debt, and named directors who had paid nothing for themselves it will be wound up under the section.[109]

A very common situation is where there is deadlock or dissention amongst the member especially where the shares are evenly divided e.g. in a partnership,[110] where a member normally has control of the company business was ousted from control in order to force him out, the company will be wound up under the section on the application of the oppressed member. In the leading case of Ebrahimi v Westbourn Galleries,[111] the House of Lords in England after examining the leading cases reversed the decision reached in the lower court and adopted the partnership principle in order to assist the shareholder in the company because "A company however small, however domestic, is a company not a partnership or even a quasi-partnership, it is through the just and equitable clause that obligations, common to partnership relations may come in".[112]

And upon this the court laid down the rule thus:

"The just the 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 right o equitable considerations, considerations that is of a personal character arising between one individual and another which make it unjust, or equitable to insist on legal rights, or to exercise in a particular way".[113]

---

108. Re Bleriot Manufacturing Air craft Co. Ltd. (1916) 32 TLR 253.
109. Re London & Country Coal Co. (1866) L.R. 3 Eq 350.
110. Re Yenidje Tobacco Co. Ltd. (1916) 2 Ch. 426, Re Steve During (Nig.) Ltd. (1962) LLR 164.
111. (1972) 2. W.L.R 1298.
112. Ibid., per Lord Wilberforce, page 1207.
113. Op.cit per Lord Wiberforce, page 1297.

The application will be granted where:

(a) The company was formed on the basis of personal relationship such as where partnership was converted into a limited liability company.

(b) There was an agreement or understanding that the complaining director shall participate in the management of the company.

(c) And there is restriction on transfer of interest in the company so that if confidence is lost or the director is removed he cannot take out his stake and go elsewhere.

In all cases, a winding up order will not be granted;

(i) Where the petitioners cannot show that he has tangible interest in the winding up, in the words of Beckley J,[114] "it remains the rule that before a contributory can petition successfully for the winding-up of a company, he must show either that there will be surplus of assets available for distribution amongst shareholders or that the affairs of the company require investigation in respect which are likely to pursue such a surplus".

(ii) The petition was filed for purely an ulterior motive or the principle of majority rule will thereby be threatened,[115] similarly if the order is to undermine the power of board of directors.[116]

(iii) The order will not be available if the allegation is that the Company is losing money or was not making any profit. Bennet J. was emphatic when he stated the rule that," it is clear from what was said by James L.J. in Re Langlam Skating Rink Co.,[117] that the mere wish of majority of the shareholders, not being a three-forth majority to be repaid the money which has been advanced by them to the company is no ground whatever for making a winding up order on the footing that it is just and equitable so to do.[118]

---

114. Re Othery Construction Ltd (1966) 1 ALLER 45 at 149, see also Re Expanded Plug Ltd (1966) IER 877.
115. Cole v Irving & Company Ltd (1971) 1.U.I.L.R 314 Re Bellador Silk Ltd. (1965) ALLER 667.
116. Charles forte Investment Ltd v Amanda (1963) 3 W.L.R. 662
117. (1877) 5 Ch. 669
118. Re Anglo-Continental Produce Co (1939) 1 AllER 99 at 102

The effects of the winding-up order is dramatic - it brings to end or terminate the life of the company. It may not necessarily be the most appropriate remedy in all cases of oppression, and obviously undesirable where the minority shareholder not being a partnership could be compensated in other ways e.g. by ordering the directors to comply with the articles of the company, or stop the oppressive act, it is submitted that the order should be restricted only to cases where the court can find elements of partnership in the relationship. The Cohen committee recommended, the alternative remedy which we will only examine, it is submitted, is much more useful not only to stop oppressive and prejudicial acts, but also to enable the court investigate the affairs of the company with a view to reordering its affairs.

ALTERNATIVE REMEDY TO WINDING UP

Under S. 201 of the Companies Act 1968, a member of a company who complain that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) may petition the court for relief, and if the court is satisfied, coupled with the fact that the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound-up the courts may make any order it thinks fit to remedy the matter complained of and may in particular regulate the future conduct of the company affairs, order that the share of any member of the company be purchased by other members of the company.

WHO MAY PETITION

The position of the law stated by Karibi-Whyte J. (as he then was as follows:[19]

> *"It is to be observed first that the person permitted to apply to the court under S. 210 is any member of (the) company and he must show that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself). This indicates that the oppression complained of must be by a member of the company and must be oppression of some part of the members (including himself in their or his*

---

19. Ormsby v Mobil Shipping W. A. Ltd (1976) 2 F.R.C.L. 101

capacity as member or member of the company as such"

The Law Reform Commission was of the view that this is a narrow limitation on the class of people who may petition, S. 310 of the Companies and Allied Matter Act 1990 now list categories of persons who may petition:

a) A member of the company
b) a director or officer or former director or officer of the company;
c) a creditor; or
d) The Commission; or
e) Any other person who in the discretion of the court is the proper person to make as application under S. 311 of this Decree.

OPPRESSIVE CONDUCT

Oppressive conduct has been described as any conduct that is burdensome, harsh and wrongful by Viscount Simmonds,[120] and the court found oppression proved when it was shown that because of their loyalty to the majority shareholder the directors deliberately managed the affairs of the holding company as to depress the business of the subsidiary by subordinating the interest of the subsidiary to those of the parent they conducted the affairs of the company in a manner oppressive to the other shareholder. Karibi-Whyte,[121] in the same vein states "The oppression or fraudulent conduct of the majority must be harsh, burdensome and wrongful, and must represent a consistent pattern of conduct intentionally directed at the oppressed minority over a period of time. Thus negligence in conducting the affairs of the company, or lack of business ability or inefficiency will not be sufficient.

Oppression and oppressive conduct has been examined in some cases.[122] However, it is submitted that the use of the term oppressive conduct is too restrictive and this led the Jenkins committee to recommend a more flexible phrase, "unfairly prejudicial conduct" in the report of the Waring party on the Harmonization of Company Law in the Caribbean Community.[123] The issue was raised and analysed thus:-

---

120. Adopting the dictionary meaning in the case of Scottish - Cooperative whosale Society Ltd. v Meyer (1959) A.C. 324 at 324.
121. Ogunade v. Mobile Films (W.A.) Ltd., op. cit
122. Ibid page 134
123. Law Reform Commission report Vol. 1 Page 245.

a) The definition of oppressive conduct given in the decided cases had not decided the question of what degree of capability was required to satisfy the element of wrong fullness as factor of oppressive conducts.

b) Section 210 (now S.311) as originally framed was meant to answer complaints not only that the affairs of the company were conducted in a manner oppressive (in the narrow sense) to the members concerned but also that those affairs were conducted in a manner unfairly prejudical to the interests of those members.

c) The section was meant to cover complaints of single instance of oppressive conduct as well as complaints against courses of conduct having that effect.

The Law Reform Commission in adopting a more flexible definition along the lines above states that by expanding oppressive conduct to include conduct which is prejudicially or in disregard of the interest of any member a wider variety of conduct would be adequately covered, not only conduct of a continuing nature but also isolated acts.[124]

In adopting the flexible definition, the law under section 311 (2) (a) (i) now allows an application by any member who alleges that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to or unfairly discriminatory against him or in a manner that is in disregard of the interest of a member or of the members as a whole. The Act now allows the aggrieved member to petition even for acts that is oppressive, or unfairly prejudicial to or discriminatory against or which is in a manner in disregard of the interest of that person[125]

It may also be noted that the conditions in the Companies Act 1968 provisions[126] that, the act complained of must also justify a winding up order under the just and equitable ground has been deleted of course. This is a welcome development as the alternative active remedy is supposed to be a stop gap provision between winding up and the oppression on the minority, the condition for making an order under the section should therefore not be made unnecessarily strict.

---

124. Ibid
125. Section 311 (b) (ii)
126. S. 201

The order that could be made by the court under the section is much were flexible and order of winding up of the company[127] to an order requiring a person to do a specific act or thing which it is submitted will enable the court to apply its equitable jurisdiction in resolving any issue that may arise under the section with a view at reaching the most equitable and just decision as to protect all the parties concerned and the company as a whole.

SUGGESTION FOR REFORM

Minority protection cannot be divorced from corporate litigation, as it is clear only the court can effectively prevent the majority from oppressing and discriminating against the minority members of the company. The test for all exceptions to the rule in Fóss v. Harbottle still remains all those acts which cannot be validly carried out or ratified by an ordinary resolution,[128] though the courts have consistently refrained from laying down a general test as such. The law we think, should go a step further and introduce legislation that will make it impossible for the company to act immediately a minority shareholder raises as objection under any of the exception to an action being taken by the company or to be taken by the company either by filing an action in court or generally protesting in writing to the directors, in this way the minority shareholders rights is further guaranteed.

S. 41 (3) should be repealed or amended to make it impossible for the outsider to enforce any right, that may be conferred upon him by the Article of Association unless he is a member thereof.

It is hereby finally suggested that the courts be much more liberal and sympathetic to the plea of the minority alleging oppressive conduct against the majority. In this way, the rights of the minority will be better protected.

---

127. S. 312 (2) (a)
128. Gower, op.cit., 644