THE IMPORTANCE OF MINORITY SHAREHOLDERS PROTECTION IN PRIVATE COMPANIES: A COMPARATIVE ANALYSIS OF THE DERIVATIVE CLAIM IN ENGLAND AND WALES AND THE DERIVATIVE ACTION IN NIGERIA AND UNFAIR PREJUDICIAL PETITION UNDER BOTH JURISDICTIONS.

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ABSTRACT

The protection of minority shareholders within the realm of corporate governance constitutes an ongoing challenge facing modern company law. This thesis critically analyses the statutes in the protection of minority shareholders in England and Wales and Nigeria, the reason been both jurisdictions operate the common law system, and Nigeria been a former colony of the British empire despite the similarities in the different statutes in the protection of minority shareholders, the question which arises is it effective in the protection of minority shareholders, this is worthy of discuss. It is important to note that at the start of the research, the Companies and Allied Matters Act 2004 (CAMA) was in operation in Nigeria upon completion it was repealed and replaced by the CAMA 2020 which came into force on the 7th of August 2020, the relevant sections under focus are s.303 -308 under the CAMA 2004 now s.346-352 of the CAMA 2020 which highlights the procedure for commencing a derivative action and s.310-312 of the CAMA 2004 now s.353-357 of the CAMA 2020 which provides relief on the grounds of unfairly prejudicial and oppressive conduct. The CAMA 2020 has brought about key changes for instance, an improvement under s.346 of the CAMA 2020 enables an applicant to apply for leave to the courts to bring an action on behalf of a company or a subsidiary, this development is absent under the s.303 of the 2004 which allowed leave to bring an action on behalf of a company excluding its subsidiaries. This is a breakthrough in holding majority shareholders accountable for their actions. Considering this development, the relevance of the 2020 Act will come into focus in a comparative analysis of the CAMA 2004 and 2020 and the Companies Act 2006 in England and Wales in chapter 6 and 7.

Alternatively, the remedy of derivative claim and unfair prejudice petition have been codified under s.260 and s.994 of the Companies Act 2006 in England and Wales (CA 2006). In analyzing both jurisdictions, the Nigerian jurisdiction differs from England and Wales in several ways. For instance, while corporate ownership in the United Kingdom consists mainly of diffused ownership between widely dispersed public shareholders in public limited companies, and privately owned shares in private limited companies, in contrast ownership in Nigeria is concentrated predominantly in individuals, families and the government. Despite the differences, both countries share similarities in the substance

of their codes (the Nigeria Securities and Exchange Commission (SEC) Code 2011 and the United Kingdom 2016 Financial Reporting Code (FRC), and most importantly their reliance on efficient market-based governance mechanisms to enforce corporate governance by applying a system of disclosure of roles of non-executives to attain greater transparency between the company and its members.

The core question to be addressed in this thesis is: to what extent are minority shareholders' rights effectively protected against breach by majority shareholders? This comparative study focuses on the remedy of derivate claim/action and unfair prejudice petition in both jurisdictions in order to address this question; to demonstrate the current state of minority shareholder protection in England and Wales, and Nigeria, respectively; and to make suggestions as to the realistic achievement of greater protection, based on the findings of the comparative analysis.

Adopting a doctrinal comparative analysis of these claims/actions in the respective jurisdictions, this thesis argues that the statutory provisions in England and Wales are more progressive in the protection of minority shareholders than the Nigerian legal provisions. The key reason is the relative ease of instituting both remedies in a suit, in addition with the option of an exit strategy which is usually present in a shareholders' agreements. There is a greater chance of success for a minority shareholder to get justice which usually entails the majority purchasing his or her shares at a fair value. Whereas, in Nigeria, evidence reveals minority shareholders in most circumstances are at the mercy of the majority shareholders they are left with little or no remedy due to the literal interpretation of the majority rule in *Foss v Harbottle* by the courts, which set the precedent in any action in which a wrong is alleged to have been done to a company, the proper claimant is the company itself. This poor situation is further compounded by slow judicial processes and legal enforcement.

The thesis recognizes that despite the Nigerian jurisdiction has specific provisions for the protection of minority shareholders under CAMA 2004 now 2020, unfortunately it is not effective in its application. As a result, it is suggested legal reform is required by amending relevant sections under the CAMA Act 2004 now 2020. Alternatively, this may entail the adoption of a partial legal transplant of key provisions under the Companies Act 2006 in England and Wales to supplement existing statutes in Nigeria to bridge the gap in the protection and enforcement of minority shareholders rights when necessary.

However, it is recognized that the adoption of a partial legal transplant would not necessarily be without significant challenges as a result the advantages and disadvantages of this approach will be critically analyzed to ascertain if it is an appropriate mechanism for reforming and modernizing Nigerian corporate law, over 60 years after it attained independence.

In view of the foregoing observations, the thesis nevertheless concludes with a series of recommendations for change which acts as a blueprint for future revision of corporate law statutes in Nigeria by the Houses of Assembly in order to improve minority shareholder protection in Nigeria. As such this thesis is relevant to policy holders and legislators in this field, and could contribute to amending policy, legislation and practice in the future.

DECLARATIONS AND STATEMENTS

I declare that this research work has not previously been accepted in substance to any degree and is not being concurrently submitted in candidature for any degree.

I declare that the thesis is the result of my own investigations and other sources are acknowledged by footnotes giving explicit references and that a bibliography is appended.

The student gives consent for the thesis, if accepted to be made available online in the University's Open Access Repository and for inter-library loan, and for the title and summary to be made available to outside organizations.

In conducting this research, the University's ethical procedures have been followed and where appropriate, that ethical permission has been granted.

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ABBREVIATIONS

AC- Appeal Cases

All ER- All England Law Reports

BCC- British Company Law Cases/ British Company Cases

BCLC- Butterworths Company Law Cases

CA 2006 - Companies Act 2006

CAC- Corporate Affairs Commission

CAMA 2004 - Companies and Allied Matters Act 2004

CAMA 2020 – Companies and Allied Matters Act 2020

Can Bus LJ- Canada Business Law Journal

Ch- Law Reports, Chancery Division

C.L.J.- Cambridge Law Journal

E.R- English Reports

EWHC- The High Court of Justice and the Court of Appeal of England and Wales

ICLQ- International & Comparative Law Quarterly

Intl Ency Comp L- International Encyclopedia of Comparative Law

JBL- Journal of Business Law

K.B.- Law Reports, King's Bench Cases

L.R.- Law Reports

LTD- Private Limited Company

LLP- Limited Liability Partnership

PLC- Public Limited Company

WLR- Weekly Law Reports

NWLR- Nigerian Weekly Law Reports

UKHL- United Kingdom House of Lords

QB- Law Reports, Queens Bench

SGA- Sale of Goods Act 1893

SGL-Sale of Goods Law 1959

CHAPTER 1: INTRODUCTION

1.1 General Overview

This thesis examines in comparative terms, specific provisions of England and Wales and Nigeria's statutes. For the purpose of this research, the statue in operation in England and Wales is the Companies Act 2006 (CA 2006) which is applicable throughout the United Kingdom and in Nigeria the Companies and Allied Matters Act 2004 now 2020. Minority shareholder protection in Nigeria is deserving of attention despite the introduction of CAMA 2004 now CAMA 2020 which provides for the minority shareholders protection it raises the questions: whether minority shareholders are adequately protected, secondly what the extent of the protection are. It is worthy of note at the start of the research, the Companies and Allied Matters Act 2004 (CAMA) was in operation in Nigeria upon completion it was repealed and replaced by the CAMA 2020 which came into force on the 7th of August 2020, the relevant sections under focus are s.303-308 under the CAMA 2004 now s.346-352 of the CAMA 2020 which highlights the procedure for commencing a derivative action and s.310-312 of the CAMA 2004 now s.353-357 of the CAMA 2020 which provides relief on the grounds of unfairly prejudicial and oppressive conduct. Considering this development, the relevance of the 2020 Act will come into focus in a comparative analysis of the CAMA 2004 and 2020 and the Companies Act 2006 in England and Wales in chapter 6 and 7.

A cursory study of judicial precedents[1] in Nigeria point to the fact that whilst there are several cases addressing on the protection of the minority shareholder in a company, the sad reality is there is little or no judicial precedent in Nigeria[2] which has fully decided or enforced the right of the minority. This begs the question whether minority shareholder protection is a myth or reality. It is noteworthy that the

[1] *Vascumi Investment Nigeria Limited & Ors v Mukhtar Ladan* (2016) LPELR-40516(CA), in this case the issue on appeal was whether suit at the lower Court was properly commenced and whether the minority shareholder had the locus standi to institute the action. The Court had no opportunity to delve into the substantive issues as hearing of the issues had been truncated at the lower Court by notice of preliminary objections to the jurisdiction of the Court. The Court of Appeal held the matter should have been instituted by way of an originating summons and not a petition. Also, in the cases of *Onuekwusi v Registered Trustees of the Christ Methodist Zion Church* (2011) 6 NWLR (Pt.1243) paras 361-362 and *Okonkwo v National Universities Commission* (2013) 15 NWLR (Pt.1378) para 500, it was submitted that the court will not interfere in the internal affairs of the company if the irregularities complained of by the minority could be legally done or ratified by the majority.

[2] According to Kevin P McGuiness, Canadian Business Corporation Law, 2nd Edition (2007) empirical studies suggest that in the UK, 96.6% of cases where unfair prejudicial petition was being prayed involved private companies, 70.4 % of those cases were instituted by minority shareholders and 24% by 50% shareholders; 64.4% of such claims alleged exclusion from management, well ahead of the proportion for any other claim.

remedy of derivative claim and derivative action is available to minority shareholders in both jurisdictions with just a slight change in terminology.[3]

The remedy of derivative claim/action and unfair prejudice petition has a connection to the concept of corporate majority rule and minority protection from majority opportunism and oppression in private limited companies.[4] Nigerian corporate law (Companies and Allied Matter Act 'CAMA' 2004) considers the oppression remedy as comprehensive. It covers acts and omissions which would be regarded as oppressive to the rights and interests of a minority shareholder. However, relief from oppression is recognized only as one of the remedies available to minority shareholders.[5]

The arrangements between the management of a company and its other stakeholders is a delicate relationship based on trust. Minority shareholders opinions in company affairs are often limited by their role and the extent of their control in the company. Tensions may arise between majority and minority shareholders[6] of private companies because of the inability to offer or sell shares to the general public,[7] in the event of a breach of legally recognized shareholder membership rights by the majority.[8] The position is different with public companies (plc) which can issue shares by a rights issue, or permit the sale of shares to the general public), This means exiting a company in the event of a dispute or disagreement by the sale or transfer of shares is prescribed usually by the articles of association of a company. This limitation reinforces the need for minority shareholder protection, setting the stage for

[3] Derivative action is the term applicable in Nigeria while in England and Wales it is referred to as derivative claim. However, unfair prejudicial petition is the same term used in both jurisdictions.

[4] Companies Act 2006, s.59(1), Companies and Allied Matters Act 2004, s.22(1).

[5] Besides relief from oppression and derivative action, other minority shareholder remedies provided under s.314 and s.315 of the CAMA 2004 include: weighted shares which grants minority shareholders the statutory right to more than one vote in matters relating to variation of preference shares and winding up of the company. Secondly, appointment of inspectors for the purpose of investigation of affairs of a company where the court is of the opinion that the affairs are conducted with intent to defraud its creditors or creditors of any other person, in a manner which is unfairly prejudicial to some part of its members. The parties entitled to apply for this remedy are the Corporate Affairs Commission (CAC), the company and members holding not less than one-quarter of the class of issued shares of the company. Unfortunately, these sections have not been invoked by an applicant or granted in any court in Nigeria at the time of writing this thesis. I believe the reason for this lapse is awareness, not everyone is aware of this provision and if they are, what is the procedure to invoke such provision. Clearly there is no blueprint on the process.

[6] https://www.lexisnexis.co.uk/legal/guidance/protection-of-minority-shareholders-a-quick-guide accessed 9 /05/ 2021. An individual is regarded as a minority shareholder when he has less than 50% of shares in a company that has voting rights attached.

[7] Companies Act 2006, s.755, Companies and Allied Matters Act 2004, s.22(2).

[8] Companies Act 2006, s.756 and Companies and Allied Matters Act 2004, s.543, 545(1).

the comparative analysis of derivative claim in England and Wales and derivative action in Nigeria,[9] and unfair prejudice petition[10] in England and Wales and Nigeria to highlight the similarities and differences under the respective jurisdictions since these remedies are crucial in minority shareholder protection.

This thesis critically analyses derivative claim and action,[11] and unfair prejudicial petition,[12] in England and Wales and Nigeria. It is noted that alternative remedies exists such as: a claim for damages involving a breach of the terms of a shareholder's agreement, a claim for winding up on "just and equitable" grounds,[13] which enables the court to wind up a company if a particular function for which the company was set up has been achieved or can no longer be achieved, alternatively where there is a deadlock (i.e. a majority decision cannot be reached) or the relationship between the parties has broken down. However, for the purpose of keeping this thesis within manageable bounds (and within the word count) these alternative remedies will not be considered further. Rather derivative claim, and action and unfair prejudice petition will be the focus of the comparative analysis because these two remedies are far reaching in scope and covers both acts and omission which constitutes a breach of legally recognized rights the application of which has come to dominate corporate litigation[14]. In determining the different methods of protection of minority shareholders' interests, the importance of shareholders' agreements[15] cannot be over emphasized because they play a vital role by reducing future conflicts and when disputes between shareholders and directors do arise, they should be easily and quickly settled.

This thesis contributes to the spectrum of knowledge in company law specifically majority rule and minority protection) in Nigeria as to the current state of protection under the CAMA 2004 now 2020 in comparison to the position in England and Wales. The originality stems from the gap in the field of

[9] Companies Act 2006, s.260 and Companies and Allied Matters Act 2004, s.303.
[10] Companies Act 2006, s.994 and Companies and Allied Matters Act 2004, s.311.
[11] Companies Act 2006, s260 and CAMA 2004, s303.
[12] Companies Act 2006, s994 and CAMA 2004, s311.
[13] Insolvency Act 1986 and CAMA 2004, s408.
[14] According to Kevin P McGuiness, Canadian Business Corporation Law, 2nd Edition (2007) empirical studies suggest that in the UK, 96.6% of cases where unfair prejudicial petition was being prayed involved private companies, 70.4 % of those cases were instituted by minority shareholders and 24% by 50% shareholders; 64.4% of such claims alleged exclusion from management, well ahead of the proportion for any other claim.
[15] Companies Act 2006, s.154 and Companies and Allied Matters Act 2004, s.542.

corporate governance under the Nigerian jurisdiction with reference to the CAMA 2004 now 2020. The enactment of the 2020 Act has created a void in the literature on the current protection of minority shareholder if it is adequate or there is need for further reforms. This thesis bridges the gap by conducting a comparative analysis between the 2004 and 2020 act, the outcome enables the researcher makes recommendations to strengthen the protection of minority shareholders in comparison to the position in England and Wales.

This thesis has legal, economic and academic benefits to prospective investors, legal personnel, academic institutions and government agencies responsible for policy making in both jurisdictions, as it presents a clear picture of the effective remedies available to shareholders, particularly minority shareholders in a company. In addition, it reveals the attitudes of the courts in the respective jurisdictions in interpreting statutory provisions protecting the rights and interests of the minority shareholders. On the other hand, the absence of such protection, does not instill confidence in a minority shareholder as the statute is seen as a dead letter law which the majority can ignore without any accountability from the courts. Secondly it will affect Nigeria economically as potential investors will be skeptical to invest with the knowledge there is little or no protection for their rights in the event of a breach.

1.2 Research Questions

The core question addressed in this thesis is whether derivative claim and action, and/or unfair prejudicial petition provide effective protection of minority shareholders interest following a breach of duties by the majority. This will be explored through a comparative analysis of the remedies in two jurisdictions namely England and Wales and Nigeria. The outcome of this analysis will demonstrate and determine the extent of minority shareholder protection in the two jurisdictions. This approach creates a platform to consider whether there is a need to reform the existing legislation CAMA 2020 or consider a legal transplant into the Nigerian jurisdiction. Watson explains The role that legal transplantation plays when carrying comparative research [16] thus 'Comparative law is a study of legal borrowings that can and should be made, an investigation into the legal transplants that have occurred: how, when , why and from which systems have they been made , the new circumstances in which they have succeeded and failed and the impact on them of their new environment', in order to make a recommendation whether legal transplant is a viable option , the reason for transplant such as necessity, prestige, expected efficacy of the law, political, economic and reputational incentives would be discussed notwithstanding the obstacles that comes with the implementation in a developing country such as Nigeria. Orucu[17] draws attention to the concept 'local tuning' which affects the legal transplants that is the influence in the process of transplantation of each country's legal, cultural, accounting, technological, political and economic circumstances which results in a different transplant effect from the country of origin once the instrument has been incorporated by a country legal system. These reflections inform the recommendations made and their practical significance, in the concluding chapter of this thesis.

1.3 Rationale for undertaking a comparative analysis with England and Wales.

Nigeria operates a federal system of government with four distinct sources of law. They include the received English law (common law, equitable doctrines and statutes of general application that were in force in England on the 1st of January 1900), Nigerian legislations, customary and sharia (Islamic) law. As a former colony of the British empire, laws enacted in England before/om the 1st of January 1900 were to have force of law in Nigeria as a colony except repealed by our local legislation. An example is the Sales of Goods Act 1893 (SGA) which became operational in Nigeria under the statutes of general application. The SGA does not apply in the states of the western region, where it has been repealed and replaced by the Sale of Goods Law 1959. Nonetheless, most northern and eastern Nigerian states do

[16] Watson, A 'Legal transplant' Edinburgh Scottish Academic Press ltd 1974.
[17] Orucu E 'Mixed and mixing systems: A conceptual search studies in legal systems' 2002 P.432. for instance, the term leasing was transplanted from the United States of America to France through a decision by the judiciary dated 29 November 1973. The French changed the term leasing to credit bail as a result credit bail will describe only one type of leasing which is financial leasing which is different from leasing that includes both financial and operational leasing.

presently use the SGA 1893.Hence the adoption of the English law statutes has played a significant role in the development of the current law (including statutes in Nigeria)

This thesis seeks to determine the extent and effectiveness of minority shareholder protection under the two different jurisdictions i.e. England and Wales and Nigeria. Comparing these respective jurisdictions is crucial because it demonstrates the level of protection provided by the statutes currently in operation, this in turn is important because it creates a platform for debate over whether CAMA 2004 now (CAMA 2020), need to be amended, and if so how and in what ways (for example, in line with the model in England and Wales). The enactment of CAMA 2020 has given minority shareholders a reprieve from the action of majority shareholder. For instance, s.119 and s.791 provides for the full disclosure of members in charge of running the affairs of a company i.e., private, public and liability partnership, this is to promote transparency and discourage assets shielding. In addition, s.184 of the CAMA 2020 enables a member of a limited liability company to buy back his or her shares in a manner pursuant to a scheme of arrangement sanctioned by the courts in relation to an employee share scheme. However, despite the improvement made under the CAMA 2020 there remains issues that needs to be addressed for the improved protection of minority shareholders[18]

Derivative claim/action and unfair prejudicial petition are focused on the protection of minority shareholders, as a result it is imperative to undertake a comparative analysis of both remedies to determine if they effectively protect minority shareholders in their respective jurisdictions. Secondly, this analysis highlights the advantages of the legal process in England and Wales: for instance, the wide discretion exercised by the judges in adjudication of cases brought before them for determination more often provides the minority shareholders with an exit strategy option to protect their interests (e.g., purchase of shares at a fair value).[19] Despite the Nigerian judges have wide discretionary powers in cases brought before them for determination, they don't often exercise it, most times they adopt the strict interpretation of the statutes.

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[18] . https://pwcnigeria.typepad.com/files/cama-2020.pdf accessed 11th June 2022. For a comprehensive list of amendments in the 2020 act see https://www.mondaq.com/nigeria/shareholders/900874/a-review-of-the-companies-and-allied-matters-act-cama-2004-repeal-and-re-enactment-bill-2018 accessed 11th June 2022.

[19] Companies Act 2006, s.996(2)

This might conceivably provide an adequate option for adoption in the Nigerian jurisdiction.

The rationale for analyzing derivative action and unfair prejudicial petition stems from the connection between the two remedies. In England and Wales, by virtue of s.262 and 265 of the Companies Act 2006, a derivative claim may be instituted after a successful unfair prejudice petition has been brought. This is demonstrated in *Cooke v Cooke*[20] where the petitioner was granted leave to join an unfair prejudice petition to a derivative action because the petition was based on allegations of breach of duty on the part of the majority, as well as unfairness. By contrast, under the Nigerian jurisdiction the remedies are interpreted as separate and independent of each other; as a result, the failure to institute the proper action could jeopardize the chance of obtaining a remedy, as the Nigerian Courts will usually dismiss an application not instituted under the required mode set out in the Company Proceeding Rules.[21] For instance, in *Obasanjo v Yusuf* [22] the court refused to overlook the wrongful commencement mode and treat it as a mere irregularity, and dismissed the action. This research focuses on minority shareholder protection in private companies as private companies' directors are more likely to be the subject of petitions for derivative claim/action. The remedy of derivative claim/action and unfair prejudicial petition play a central role in this thesis.

1.4 General Overview of the relationship between directors and shareholders

The structure which a company[23]operates is equivalent to a web of contractual relationships between a range of factors that produces a combination of goods and services. It involves managers contracting with suppliers of goods and services to enable the company produce finished products, or bargain with lenders for finance for a project. In these instances, it becomes much clearer that there are competing interests in the corporation, which is characterized by the existence of divisible claims on the assets and cash flows of the organization which can be sold without permission of other contracting parties[24] An

[20] [1997] 2 BCLC 28.
[21] Rule 2(1)(2) of the Company Proceedings Rules 1992.
[22] [2004] 9 NWLR Pt. 877, Pg. 221.
[23] The word "company" is used interchangeably with the term 'corporation' Likewise 'shareholders' is used interchangeably with 'investor'
[24] Michael C Jensen and William H Meckling *"Theory of the firm: Managerial Behaviour, Agency Costs and Ownership Structure"* (1976) Vol 3, No 4, Journal of Financial Economics 305.

understanding of this translates to the dynamism of shareholders' interest in a company. A company is a separate legal entity.[25] In *Salomon v Salomon & Co Ltd*[26] the House of Lords held there was a separation of liability between a company and its shareholders, hence the shareholders of a company could not be sued for the failure or liability of its company except to the extent of their unpaid shares. Strictly speaking, the *Salomon* case indicates a company has a legal personality which is separate from its shareholders and as a result its shareholders or members are not liable for its debts.

In this case, Salomon ran a boot making business as a sole proprietor. As the business suffered due to bad economy, he incorporated a company and transferred all his sole proprietorship to the company for a sum of £39,000. Despite all Salomon efforts, the company went into liquidation. At this point the company was valued at £6,000. The creditors argued that Salomon and the company were the same person and as a result, Salomon was liable to pay the debt. The House of Lords held that if a company was duly and properly incorporated, it should be seen as.an independent person in the eyes of the law. This ruling meant that Mr Salomon was not personally liable to pay the debt of the company and established the corporate veil between the company and its shareholders. The House of Lords in establishing the corporate veil created a separation between the identity of the company and the identity of the owners/ shareholders. The ruling in the *Salomon* case has been upheld in the high-profile case of *Macaura v Northern Assurance Co Ltd*[27] here the court describes the corporation, as a legal person capable of acquiring rights and responsibilities which is fundamental to a claim or action instituted in the courts. This position was upheld under the Nigerian jurisdiction in the recent case of *Bulet Int'l Nig Ltd v Olaniyi &Another*[28] *per, kereke- ekun, JSC* espoused once more the status of a parent company and a subsidiary thus: "The concept of corporate personality was established a long time in the Salomon case to the effect that a company is a legal entity distinct from its members. It has a distinct legal personality and can sue or being sued in its corporate name. A company is a different person altogether

[25] *Battle v Irish Art Promotion Centre Limited* [1968] IR 25, the court held while an individual can represent himself in court, a legal person such as a company can only be represented by a solicitor or barrister.
[26] [1897] A.C. 22.
[27] [1925]AC 619.
[28] (2017) LPELR-42475(SC)

from the subscribers to the memorandum and is neither an agent nor a trustee for them, it also has the capacity to enter into any agreement in its corporate name.[29]

A company acts through two bodies of individuals, its shareholders and its board of directors. The board of directors oversee the management of the company's business. In carrying out this function, make strategic decisions for the company and ensure the company meets its statutory obligations. Directors are bound by a range of duties which include the duty of care, duty not to fetter discretion to act in a particular way and duty not to allow personal interest to conflict with the company[30]. The imposition of duties on directors is a mechanism for solving the agency problem resulting from the separation of ownership from control and centralized management. The objective is to ensure that directors remain focused and committed to promoting the goals of the company[31]. Shareholders of a company are effectively the company's financial supporters. They provide finance to a company by purchasing shares in the company as a result becoming shareholders and part of a company. Shareholders can also be directors of a company. Shareholders have certain rights and roles to perform set out in the statutes and the company's articles of association[32]. These includes making changes to the constitution of a company, declaring a dividend, approving the financial statement of a company. Decisions made by shareholders are made by resolutions at the annual general meetings include the adoption of the previous year's income statement and balance sheet, setting of dividends and its payment, and appointing members of the board of directors. Decisions taken in an extraordinary meeting include matters which cannot wait until the next annual general meeting. In the conduct of business, majority shareholders ratify the action of its directors which are either a breach of directors' duties or prejudicial to minority shareholders.

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[29] *Afolabi & Ors v Western Steel Works Ltd &Ors (2012) 17 NWLR (Pt.1329) 286.*

[30] Companies and Allied Matters Act 2004, s.279(3)-(6), 280. The corresponding section in the Companies Act 2006 is s.171-177.

[31] Mbeli V. Tebi and Gbakighir Terzungwe *"Corporate Governance Implications for Minority Shareholders in Nigeria"* 2017, Pg. 14.

[32] Minority shareholders have certain rights under the CA 2006 these includes the right to call a general meeting to make decisions, it depends on the % of shareholding. 25% or more can block special resolutions, 10% or more can demand a poll at a general meeting. Shareholders rights span from s.291 to s.423. under the Nigerian jurisdiction, s.81 of the CAMA 2004 states the rights of minority shareholder to include the right to attend meetings, receive dividends, inspect the register of members of the company to mention a few. The rights are provided for under s.42, 81 and 325 of the CAMA 2004.

The majority shareholders may decide not to pursue a particular cause of action to remedy a wrong done to the company, instead they may choose to ratify a wrong done to the corporation irrespective of the interest affected by their action or may simply choose not to take any action. This is the principle laid down in the *locus classicus* of *Foss v Harbottle,*[33] which emerged as a result of the courts' reluctance to interfere in the internal management or disputes of a company except with a view to its dissolution.[34] This was as a result of the inferred sanctity of the bond that tied members to a company and secondly, the recognition that a corporation is a separate personality from the individuals that constitute it.[35] Therefore, the company having an independent legal personality must resolve its disputes or sue for remedy, where a wrong has been done to it, in accordance with the procedures laid out in the articles of association.[36]

The need to protect minority shareholders who have legitimate reasons to institute a suit for any wrong done to the corporation led to the introduction of exceptions to diminish the consequences of the unrestrained application of this principle. These measures were developed at common law to grant standing to minority shareholders to bring personal actions. These conditions include[37] acts which constitute a fraud on the minority,[38] acts considered illegal,[39] actions by the majority which affects the minority's personal rights and acts that require the approval by the votes of a special majority. When any of the exceptions is present in a case, the court will grant leave to a shareholder to institute a personal suit to remedy the wrong, regardless of whether the will of the majority shareholders takes the contrary

[33] [1843] 2KB 461, 67 ER 189.
[34] The case of *Carlen v Drury* (1812) V&B 154 laid the foundation for the rule in *Foss v Harbottle*, the chancellor in the Carlen case declined to interfere with the internal management of the company, although the extent of the majority's power to ratify has not yet been explored, the majority were already conceded a right to jurisdiction over any internal dispute this principle was applied in the Nigerian case of *Abubakar v Smith* (1973) 6EC 31.
[35] *Roundabout Ltd v Byrne* [1959] IR 423.
[36] Companies Act 2006, s.33 provides that 'every member of a company is contractually bound by the articles and memorandum of the company as well as the company's other shareholders.
[37] The case of *Edwards v Halliwell* [1950] 2 ALL ER 1064, is an authority for the exceptions to the majority rule. In *Ephraim Faloughi v Haniel Williams and Others* (1978) 4 FRCR, the court held where a plaintiff is unable to institute his action within any of the exceptions, the majority rule will apply.
[38] *Estmanco (Kilner house) ltd v Greater London Council* [1982] 1 ALL ER 437
[39] *Prudential Assurance Co Ltd v Newman Industries Ltd* (No 2) [1982] Ch 204.

approach. The exceptions to *Foss v Harbottle* are provided for by statute in England and Wales[40] and Nigeria.[41]

The application of the rule in *Foss v Harbottle*,[42] is governed by s.299 of the Companies and Allied Matters Act 2004 which provides that *"Subject to the provisions of this act, where irregularity has been committed in the course of a company's affairs or 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"*. In Nigeria, the rule in *Foss v Harbottle*[43] plays an important role in majority rule.[44] The two key principles enunciated in this case are: first, in any action in which a wrong is alleged to be done to a company, the proper claimant is the company itself.[45] Secondly, only a bare majority of the members can bring a claim on behalf of the company.[46] The implication of this rule on the interest of the minority raises corporate governance concerns. First, it encourages abuse of majority powers.[47] Secondly, it favors the marginalization and eventual oppression of the minority. Even though this rule was intended to prevent the harassment of the minority in settings which deliberation in meetings occurs, it ensures that parties that lose to a majority have an interest to remain part of the group's process, because the decision can be overturned by another majority. Unfortunately the interpretation by the courts in Nigeria has done more harm by promoting corporate malpractice and placing the minority at the mercy of the majority who run the company with impunity.[48] There exists the need to protect the minority shareholder's interests from the actions of the majority putting aside the factor whether the minority shareholder is native or foreign.[49] The Court made a general statement of the need to protect minority shareholder

[40] Companies Act 2006., s260.
[41] Companies and Allied Matters Act 2004, s299 and 300.
[42] (1843) 67 ER 189.
[43] (1843) 2 Hare 461, 67 ER 189.
[44] Companies and Allied Matters Act 2004, s 299(1).
[45] *Prudential Assurance Co. Ltd v Newman's Industries Ltd* [1982] Ch 204, this case reaffirms the rule in *Foss v Harbottle*
[46] *Macdougall v Gardiner* [1875-76] Ch D 13.
[47] Companies and Allied Matters act, s.300(d), *Nsirim v Onuma Construction Co. (Nig) Ltd (2001) NWLR (Pt.44) 405.*
[48] *Wallersteiner v Moir* (No.2) {1975} QB 373 at 395.
[49] *Oil Fields Supply Ltd v Joseph Lloyd Johnson [1987] 2 NWLR, Pt 58, Pg.625.*

irrespective of their background in instances where they are foreign investors in the company holding little or considerable amount of shares.

In England and Wales, s.260 to s.269 of the Companies Act 2006 have not entirely replaced the common law rules together with the principle in *Foss v Harbottle* as they apply to companies and its subsidiaries[50]. The rule has now been partly codified[51] by the Companies Act 2006, by virtue of s.260-263, which set out the requirements for a derivative claim, and Part 11 which governs the principles and processes of derivative claims. S260 of the CA 2006 defines derivative claims as proceedings brought by several companies in respect of a cause of action vested in the company and seeking relief on behalf of the company. S260(3) of the CA 2006 provides that a shareholder can pursue a derivative claim in respect of an actual or proposed act or omission involving negligence, default, breach of duty or trust by a director of a company. This provision is important because claims against directors for breach of duties owed to the company falls within its scope.

1.5 Shareholders' Agreements (SHA)

The importance of shareholders' agreements cannot be overemphasized. A shareholder agreement is a voluntary contractual arrangement between members of a company that describes how their relationship as shareholders will be maintained.[52] It not only whittles down disagreements between the shareholders but also protects the rights of shareholders by the grant of nomination rights[53]. A nominee shareholder or beneficial holder is an individual or company who holds shares in a company on behalf of someone else (the beneficial owner). The beneficial owner may choose to appoint a nominee because it does not

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[50] *Boston Trust Company Limited and another v Szerelmey Limited and another (No.2) 2020 EWHC 1352 (Ch)* in this case the court granted conditional permission to bring a derivative claim to claimants who lacked standing provided there is a sufficiently robust and proximate prospect of the claimant acquiring standing in due course. Here the court granted leave to bring a derivative claim to an intermediary company (tellisford company) despite the company was not a direct shareholder in the group of companies eligible to bring the claim.
[51] In the recent case of *Homes for England Holdings Ltd v Nick Sellman* [2020] EWHC 936, the High Court held in instituting derivative claim the common law test was applicable to companies as well as its subsidiaries and limited liability partnership (LLP).

[52] Companies Act 2006, s.33 provides every member of a company is contractually bound by the articles and memorandum to the company as well as the company's other shareholders.
[53] Companies Act 2006, s.145 Part 9 provides for shareholders agreement in England and Wales. It is also provided for under the Companies and Allied Matters Act 2004, s.542(1) under the Nigerian jurisdiction.

wish to have shares registered in its own name, or it may be required to appoint a nominee. A nominee shareholder is a great way to keep shareholders information away from public records.

The inclusion of shareholders agreement in corporate transactions seeks to maintain the confidentiality between the parties and enables shareholders choose freely the jurisdiction for arbitration or litigation of disputes arising from the agreement.[54] Most importantly, it is a vital method of securing minority shareholders interest in a company. This can be achieved by ensuring the terms of the agreement not only comply with the rules of contract and statutes applicable to business transaction, but it is detailed enough to cover all transactions of shareholders' interest.[55] The case of *Dinglis v Dinglis*[56] portrays the importance of shareholders' agreements. In this case, shareholders involved in a family business brought an action claiming the business was a quasi-partnership offering them the entitlement to be involved in the management of the company. The court held there was no evidence of agreement or understanding that they were involved in the management of the business, hence there was no quasi-partnership, and as a result the action failed. This outcome could have been different if the petitioners sought a shareholder's agreement at the first instance to protect their status: for an individual who is a minority shareholder and having a shareholder's agreement that includes all the requirement for all shareholders to approve certain decisions ensures that he or she have a say in the important decisions that affect the company. This can be beneficial to both minority and majority shareholders.

In the Nigerian context, the shareholders' agreement (commonly referred to as a SHA) is as the name implies an agreement between shareholders. The practice in Nigeria[57] is for the agreement to be entered into as a pre-incorporation or a post-incorporation contract. As a result, every time two or more individuals agree to incorporate a company, a 'SHA' is born, albeit orally. As obvious as its relevance appears to be, many shareholders proceed to incorporate companies with their colleagues without

[54] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.
[55] Phillip Newman *'Shares and Shareholders'* 2018.
[56] [2019] EWHC 1664 (CH).
[57] https://legalnaija.com/the-shareholders-agreement-eberechi-okoh/02900951941647681314/ accessed 24/08/2021.

reducing terms into writing nor a ‘SHA’. They based their belief on the assumption the memorandum and articles of association sufficiently protects their interests. Shareholders proceed to execute more complex documents with third parties, even while the company has no code guiding the shareholders business relations. A common cause of action in the courts is the breach of oral pre-incorporation contracts among shareholders. Unfortunately for many, with nothing more than a memorandum and articles of association they are forced to compensate their fellow shareholders who may have contributed nothing beyond their signature at the time of the company’s registration.[58]

The practice of lawyers in the past was to formulate several clauses into the memorandum and articles of association[59] the essence of this approach was to address the incident limiting shareholders’ protection. The articles of association of the company sometimes do not offer adequate protection as a result, there is the risk that a minority shareholder in a private company would be shut out of decision-making process.

However, in Nigeria until recently the Corporate Affairs Commission (CAC) stopped receiving bulky memorandum and articles of association for registration. The reason is to effectively address issues affecting shareholders rights and interests in a company, relationship between members and third party. The introduction of the ‘SHA’ has become a veritable tool to protect shareholder’s business interest within the company and regulate the company’s dealings with third parties. Most especially it amplifies the information contained in the memorandum and articles of association. Clearly, the ‘SHA’ is particularly useful to small, unquoted companies, companies set up as special purpose vehicles and companies whose shareholders generally revolve round a definite circle. It is therefore pertinent that every shareholder protects its business interest today by executing a shareholders’ agreement.

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[58] *Kelner v Baxter* (1866) LR 2 CP 174 promoters agreed on behalf of the company that had not been formed to purchase wine for a new hotel business. Subsequently the company was formed, took delivery and sold stock, but failed to pay for it. The court held the company was not liable because it could not ratify a pre-incorporation contract that was created before the company existed. The promoters were personally liable.
[59] https://www.researchgate.net/publication/348630713_AN_EXAMINATION_OF_THE_UTILITY_OF_SHAREHOLDER_AGREMMENTIN_NIGERIA_THE_IMPERATIVE_TO_GIVE_IT_A_STATUTORY_LEVERAGE accessed 24/08/2021.

1.6 Methodology

According to Brown,[60] "Methodology is the philosophical framework within which the research is conducted or the foundation upon which the research is based". Research methodology can be defined as "an activity that involves finding out, in a more or less systematic way, things you did not know". [61] It may be understood as the study of how research is conducted scientifically.[62] It is the aim of the research and the research question that will determine which methods could be useful.[63] Moreover, different methods may be combined, as they are complementary and not mutually exclusive. The comparative legal methods adopted to answer the research question in this thesis include the: structural, analytical, common-core, historical and the law in context approaches. Whether derivative claim and action and/or unfair prejudicial petition is effective in the protection of minority shareholders against a breach of duties by the majority, the outcome of this question will demonstrate and determine the extent of minority shareholder protection in the two jurisdictions. Comparing legal system has been described as the most common mode of comparison[64], with further explanation or concrete guidelines.[65]

The first question is why compare? The reason is comparative law is seen is an instrument for improving domestic law and legal doctrine[66] especially the harmonization of different legislation under analysis[67] Patrick Glenn[68] asserts comparative law is an instrument of learning and knowledge (information of the

[60] Brown R.B, Doing your Dissertation in Business Management: The Reality of Research and Writing 2006, p.14.
[61] Walliman, N.S and Walliman N 'Research methods: the basics' 2011, p.7.
[62] Kothari, C.R.: *Research Methodology*, *Methods & Techniques* 2nd revised Edition 2004.
[63] M. Adams and J. Griffiths, '*Against "Comparative method": Explaining Similarities and Differences'*, in: M. Adams and J. Bomhoff, *Practice and Theory in Comparative Law*, Cambridge: Cambridge University Press 2012, p.279-301.
[64] M.Van Hoecke, '*Do Legal Systems'* Exist? *The Concept of Law and Comparative Law'*, in: S. Donlan and L. Heckendorn Urscheler (eds.), *Concepts of Law*, Dartmouth: Ashgate 2014, ch.3, p.43-57.
[65] M.Van Hoecke *"Methodology of Comparative Legal Research"* 2015, p.4.
[66] R. Saleilles, 'Droit civil et droit compare', *Revue inter. Enseigment* 1911, p.22.

[67] Patrick Glenn answered the question of the aims of comparative law. See the Elgar Encyclopaedia of Comparative Law (Glenn 2006), *Compare the purposes of comparative law research* as listed by Esin Orucu (2007, p.53-56), see also *"Comparative Law & Legal Definitions"*, online: http://www.definitions.uslegal.com alternatively H.Patrick Glen, Aims of comparative law, in J.M Smits(ed) Elgar Encyclopaedia of Comparative law 2nd ed (2014). see also U. Kischel Comparative Law (translated by A. Hammel) (2019) OUP with reference to chapter 2 which discusses the aims of comparative law.

[68] P. Glenn '*Encyclopaedia of comparative law'* 2006.

law elsewhere and a better understanding thereof), contributing to one's own legal system (understanding it better, including the resistance of its traditions, improving it, using it as a means of interpreting the constitution).

The adoption of comparative analysis in this thesis seeks to establish the extent to which the remedies of derivative action and unfair prejudicial petition protect minority shareholders in Nigeria *vis-a-vis* England and Wales jurisdiction.[69] In addition it addresses the issues raised by the potential adoption of laws in England and Wales to Nigeria.[70]

The next question is what must be compared? According to Pound[71] the expert on comparative legislation combines the information afforded by the legislation of the world on any point and pull out the 'one right rule later, attention was paid to judicial decisions and the way legal problems were solved in practice'[72]

The focus of this research is to compare key provisions of derivative claim /action and unfair prejudicial petition of the statutes in England and Wales and Nigeria as it relates to minority shareholder protection. The importance of considering the socio-economic and historical context of the law when carrying out comparative legal research cannot be overlooked because it provides a blueprint of how the statutes were enacted and the rationale behind them. Also, it gives sufficient information on its current application in practice, and most importantly if it performs the functions for which it was created. Another important factor for consideration is how does one compare? The rationale for adopting England &Wales as a backdrop for comparison with the Nigerian jurisdiction is the similarities that exist between the nations. First, both operate a common law system which combines the passing of

[69] M. Antokolskaja '*Comparative Family Law: Moving with the Times?'*, also in E. Orucu and D. Nelken (eds.), *Comparative Law.* A Handbook, Oxford: Hart Publishing 2007, p.241-262.
[70] The improvements indicated for the Nigerian jurisdiction include the existence of exit strategy sale of shares at a fair value), exercise of wide discretionary powers by the courts. The likely difficulties faced in implementation is corruption in the judicial system which stems from government interference in judicial decisions.
[71] R. Pound '*What may we expect from comparative law'* American Bar Association journal 1936-22, p.56-60.
[72] E. Lambeth 'Une reforme necessaire des etudes de droit civil', Revue inter. enseigne-ment 1900, p.242,237.

legislation but also the creation of precedents through case law. There are four (4) distinct legal systems in Nigeria, which include English law, common law, customary law and sharia law. English law is derived from the colonial Nigeria where law and legal principles that have roots or origin in England but were adopted into the Nigerian legal system to form part of nigeran laws, while common law is a development from its post-colonial independence, as a result English law has a tremendous influence on the Nigerian legal system and English law forms a substantial part of Nigerian law [73] automatically the comparative analysis is relevant between both jurisdiction to determine the extent of minority shareholder protection.

Comparative law has been criticized for not following any method when carrying out comparative research, as it is descriptive with the lack of a more general framework used, sometimes 'comparing' is a method in its own right and called the 'comparative method' without further explanation or concrete guidelines.[74] Contrary to this view, comparative law functions as a discipline because its goal is to attain a deeper understanding of the legal system in effect in carrying this analysis it seeks to confront the plurality of constitutional rules and to highlight similarities and differences in order to perfect the legal system. Possibly to contribute to the unification of legal systems either on a small or large scale. Comparative law is an effective method of comparing various legal systems as there exist different legal framework around the world. Comparative law has a wide range of utility to the legislator and reformers alike.it has great value n international relationships, community at large, in practice it provides a framework to a legal practitioner for handling egal problems involving foreign law.

[73] Obilade O.A,' The Nigerian Legal System: Ibadan: Spectrum books Ltd 1979, p10.
[74] L. Pierre, 'Beyond Method: Comparative Law as Perspective'. American Journal of Comparative Law 36 (1988): 788, at 789.

1.6.1 Types of Comparative Law

There are different models of comparisons which may be distinguished in various ways, comparing law from different perspectives. The levels on which the law is made and practised geographically for instance: international, European, state and sub-state will as such also influence the possible, or at least most evident, the levels of comparisons.[75] The most classical is the distinction between macro and micro levels, comparing legal systems as distinguished from comparing more concrete rules and legal solutions to societal problems in different legal systems. Macro Comparative Law assesses the spirit of different legal system, techniques of legislation, methods of thoughts and procedures.[76] Micro Comparative Law compares objects within each system (corporate minority rights protection) rather than comparing the different legal systems.[77] This involves analysing the sections of the statutes under focus for instance s.260 (derivative claim) and s.994 (unfair prejudicial petition) of the Companies Act 2006 in England and Wales and s.303 (derivative action) and s.311(unfair prejudicial petition) of the Companies and Allied Matters Act 2004 in Nigeria.

Two comparative law approaches will be applied in this research. First, the normative approach is used to identify and compare laws on their effectiveness and suitability to a given problem. This approach attempts to identify and select policy goals through analysis and provide a prescriptive statement as to what the law should be.[78] Perhaps the best way to understand the normative approach to comparison applied in this thesis is to examine those remedies prescribed by the corporate laws of England and Wales and Nigeria for the protection of minority shareholders in both jurisdictions. Areas of similarities between the normative remedies include derivative action, and unfair prejudicial petition. Secondly, the functional approach focuses on the way practical problems of solving conflicts of interests are dealt with in different societies. Consequently, this makes it possible to compare laws and legal institutions,

[75] W. Twinning, 'Globalisation and Comparative Law', in: E Orucu and D. Nelken, Comparative Law: *A Handbook,* Oxford: Hart Publishing 2007, p.69-89.

[76] Ibid 80.

[77] Geoffrey Samuel, "*Comparative Law and its Methodologies" in Research Methods in Law*, Dawn Watkins and Mandy Burton ed (New York: Routledge, 2013) at 103.

[78] L.Pierre, *Methods of Comparative Law* (Cheltenham, UK: Edward Elgar Publishing Limited, 2012) at 307-308.

even if they display different doctrinal structures, if they fulfil the same function, they are 'functional equivalent'

In carrying out a comparative analysis of the derivative claim and action and unfair prejudicial petition in England and Wales and Nigeria, one factor which is usually overlooked is whether the law in the statutes corresponds with the judgment of the courts (the law in the books vs law in action). The courts in England and Wales have flexibility in the exercise of wide discretionary powers by the judges in cases brought before them for determination, as opposed to the Nigerian jurisdiction where the courts adhere to strict interpretation of the statutes with little or no flexibility.[79]

However, in any substantive comparative research, both legislation and case law will have to be studied as in all legal systems, common law and civil law alike, they are both of decisive importance for knowing and understanding the law.[80] This may show how diverging rules and doctrinal constructions may lead to similar decisions or how similar rules and /or doctrinal constructions may lead to diverging practical solutions. Comparison of these normative prescription for minority shareholders forms the crux of Chapters 6 and 7, exploring the similarities of the remedies and its functions make this comparative research important and relevant.[81]

1.6.2 Methods of Comparative Law

According to Samuel, there are six methods of comparative research[82]: the functional method, the structural method, the analytical method, the law-in context method, the historical method and the common-core method. In this thesis four methods out of the six recognised methods of comparative law analysis were applied: namely the functional, historical, the law in context, and the common-core

[79] *Supra* 328, Pg79.
[80] R. Pound "Law in Books and Law in Action" 1910, p.86, Roscoe Pound in his book he commented approving and sometimes disapproving on the way judges, public prosecutors and the police deliberately did not follow the written law. He considered it the work of lawyers 'to make law in the books such that the law in action can confirm to it'
[81] M.Van Hoecke '*Deep Level Comparative Law in Epistemology and Methodology of Comparative Law*, Oxford: Hart publishing 2004, p.165-195.
[82] G. Samuel, 'An Introduction to Comparative Law Theory and Method', Oxford: Hart Publishing 2014, p.281-282.

approach. The names of the methods point to the specific feature of each approach but does not preclude its combination with another comparative method.

The Functional method: Zweigert and Kotz[83] believed the method of comparative law is the functional method, a view optimistically supported by the conclusion that rules and concepts may be different as a result of geographical location, customs and tradition. Legal systems will solve legal problems in a different way from others based on individual circumstance. However, Ralf Michaels[84] has criticized the functional method as a triple misnomer. First, there is not one functional method but many. Second, not all allegedly functional methods are functional. Finally, some projects claiming adherence to it do not even follow any recognizable method. Indeed, functionalism is used in quite divergent meanings rather serving different goals: understanding the law, comparing, focusing on similarities, unifying the law and critical appraisal of the legal orders. The main idea behind functionalism is to look at the way practical problems of solving disputes are dealt with in different societies according to different legal systems. This allows us to perceive those problems independently from the doctrinal framework of each of the compared legal systems.[85]

The functional approach observes the rules, legal institutions (courts) and how the rules operate within that institution.[86] Applying this method to this research the focus is to examine the remedies of derivative action and unfair prejudicial petition in the protection of minority shareholders in England and Wales and Nigeria. Although the term 'functional method' is the same in both jurisdictions, its function might be different. The functional method was employed to examine the process of solving problems within different societies according to the different legal system, in this scenario, England and Wales and Nigeria. In other words, the functional approach adopts a methodology that examines the socio-legal function of rules within legal systems. Under the functional approach, the researcher

[83] K. Zweigert & H Kotz, Introduction to Comparative Law, Oxford: Clarendon Press 1998, P.35.
[84] Ralf Michaels, 'The functional method of Comparative Law', in: M Reimann & R. Zimmerman (eds.), Oxford handbook of Comparative Law 2006, ch.10, p.340-382.
[85] J. Husa, 'Comparative Law, Legal Linguistics and Methodology of legal doctrine' in: M. Van Hoecke, ed. Methodologies of legal Research. Which kind of Method for what kind of Discipline? Oxford: Hart 2011, p.209-228.
[86] J. Husa, 'Functional Method in Comparative Law – Much Ado About Nothing?', Eur.Rev. Priv.Law 2013, p. 4-21.

strives to discover the norms, which are functionally comparable to other rules or principles that have been taken into comparison from the other systems: what socio-legal purpose does the norm under study fulfil in its own societal context?[87]

To determine the extent of minority protection under the different jurisdiction it is important to identify specific problems related to minority shareholding in private corporations. For instance, majority opportunism or fraud on the minority under England and Wales and Nigerian jurisdiction, to overcome this obstacle a critical observation on how the English legal system has been able to solve this problem through the instrumentality of the exercise of wide discretion by the courts and the availability of an exit strategy which entails the purchase of shares at a fair value.

The Structural method: According to Geoffrey Samuel[88] in a structural method the observer focuses on the phenomenon being observed, these structures can be loose in the way they interrelate, or they can be a collection of elements that form a system. This latter notion being characterised by the creative interaction of the elements within a totality that can be identified as having frontiers and thus independent. Structural analyses can be made in different ways based on a large variety of distinctions and criteria. At the basic level all legal systems have a common core: in England and Wales the Houses of Commons and the House of Lords, and in Nigeria which is a federation there is the National Assembly[89] which consists of the Houses of Senate and Representatives, which are responsible for the creation of primary rules of behaviour and in addition to secondary rules that govern the coming into being and the application of those primary rules.[90]

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[87] J. 2Husa, "*About the Methodology of Comparative Law* – Some Comments Concerning the Wonderland..." Maastricht Faculty of Law Working Paper Series, 2007 available on the SSRN at: <http://www.ssrn.com/abstract>

[88] G. Samuel, *An Introduction to Comparative Law Theory and Method*, Oxford: Hart Publishing 2014, p.81-82.
[89] The National assembly is provided for under s.47, Chapter 4 of the 1999 constitution. The National Assembly is a bi-cameral legislature it consists of a senate with 109 members and a 360 member houses of representatives. The houses are conferred with law making powers on these two components of the National Assembly.
[90] H.L.A Hart, *The Concept of Law*, Oxford University Press1961, p.77-96.

Joseph Raz[91] has argued that at the level of secondary rules, there is some minimum content which is common to all legal system which determines the necessary internal relations existing in every legal system, that is the internal structure which is necessarily common to all legal systems. As a result, it should be easy to identify the rules in every legal system and compare them as to the competence of law making or for legal adjudication. The statutes under analysis are the Companies Act 2006 in operation in England and Wales and the Companies and Allied Matters Act 2004 applicable in Nigeria at the period of this research, the legislation currently in operation is the Companies and allied Matters Act 2020. Hence, the degree of development of the various statutes and the separation between law making and the adjudication of the law will offer a comparative criterion for classifying legal systems at the level of their respective rules.

<u>The Analytical method:</u> In his analysis of the concept of 'right' in the Anglo-Saxon legal world Wesley Newcomb Hohfeld[92] propounded that right has different meanings. It may mean a claim, power, liberty, or immunity and privilege. This refinement of the concept of right was an important in analysing the deep structure of the concept of right and in clarifying the actual meaning of the word, as used in several different contexts. Brouwer and Hage[93] are of the opinion that by using the Hohfeldian analysis, the private law of different European countries can be reconstructed in terms of a limited set of the basic concepts. According to them, such a set of basic concepts should allow for correct representation of the contents of private law and render it comprehensive and non-redundant. Only at a deeper 'Hohfeldian' level, can adequate comparison between different legal concepts and systems become possible.

The analytical method was described by Leopold Pospisil as the most ambitious attempt to determine the 'legal grammar' in view of analytical and structural comparison. Leopold Pospisil[94], as an anthropologist of law tried to work out a model that could be used for cross-cultural comparison valid

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[91] J. Raz, *The Concept of a Legal System,* Oxford: Clarendon Press1980, p.141.
[92] W.N. Hohfeld, '*Fundamental Legal Conceptions, as Applied in Judicial Reasoning,* New Haven: Yale University Press 1919, p.36.
[93] P.W. Brouwer & J. Hage, 'Basic Concept of European Private', *European Review of Private Law 2007, p.36.*
[94] L. Pospisil *'Anthropology of Law: A Comparative Theory,* New York: Harper & Row 1971 p.295-346.

for both primitive societies and developed modern legal systems. Being fully aware of the importance of the role of ideology in law, which is most visible in cross-comparison, he emphasized the need for a comparative analysis of basic “jural postulates” derived from the culture and institutions in general, on one hand and the legal values, as implied in legal decisions on the other. At a second stage he worked out an analysis in terms of ‘legal correlates’ which should present the subdivisions of a legal concept or field in a logical, systematic, succinct and complete way. The aim is to get a better understanding of the similarities and differences between legal concepts and regulations. The above opinion points to the conclusion that it is not possible to disconnect concepts from the rules of the legal system o which they belong. The content of a legal concept is defined by the actual rules governing the field covered by the concept, within a particular legal system at a specific moment in time.

Applying this method to the research involves analysing the statutes of England and Wales and Nigeria to determine if there is level of convergence or divergence will determine if a legal transplant will be possible as a result of difference in cultures. In applying this approach, one may doubt whether such a method may be worked out for comparing legal systems in quite different contexts but combined with the methods highlighted, it is appropriate for understanding the different legal relations and conceptual framework in other cultures and for determining the most adequate level for comparing different legal system.

<u>The Common-Core method:</u> This is largely based on the functional method, to some extent combined with the law-in-context method. What is specific to the common-core method is that one looks for a common core in view of the possible harmonization of a certain part of the law. The common-core method looks for commonalities and differences between legal systems in view of the question to what extent harmonization on certain points would be possible among compared legal systems or the question[95] how a European rule, for instance, could be interpreted in such a way that it best fits the different national traditions. The application of this method to this body of research will uncover the similarities and differences of the statutes in England and Wales and Nigeria. it will be helpful in

[95] A. Lyall, ‘Early German Legal Anthropology: Albert Hermann Post and His Questionnaire’, *Journal of African Law 2008, p.114-138.*

identifying the differences between the different jurisdiction in the protection of minority shareholders and the problems faced in enforcement and the possibility of harmonisation of the different laws.

The Historical method: In carrying out a comparative analysis information and sources on legal history are generally more available than for other forms of law in context approaches. In traditional doctrines many books will include some historical materials or at least historical references to the origin of some legal concepts, legal rules, legal construction. A historical study uses sociological, economic and psychological data. Historical comparisons may not only explain the origins and rationale for the law as it is affects society, in some cases it may reveal similar rules or approaches one legal system have in common with another. Differences may appear in the development of legal system or differences as to the outcome of ongoing tensions between two opposite views one view taking priority in one society, at least for some time, whereas the other view has become dominant in another legal system.
The historical method may reveal other similarities and/or differences at a deeper level, compared to what transpires from an analysis at the surface level. A specific feature of this historical approach is that its use cannot be avoided in any comparative research. Fully understanding the law as it functions today in some society, is only possible when one knows where it comes from and why it is as it is today.[96] Application of this method to the research will give an insight into the origin of the remedies, including its application in past and present cases.[97]

The Law-in-Context method: Comparative research cannot be limited to pure black letter comparison of legal rules, concepts or systems, even domestic legal systems will consider the way the world works in practice, as far as it transpires judgement made by the court in matters brought before them for determination. On the other hand, the law in context as a method cannot be isolated from the other methods. They are complementary and interdependent for an adequate understanding of the law. There exist a range of possible law-in-context methods of research. One may just point to some generally

[96] Mark Van Hoecke *'Methodology of Comparative Legal Research'* 2004, Pg.81.
[97] N.H.D. Foster, '*Comparative commercial Law*' in: E Orucu and D. Nelken, Comparative Law: *A Handbook*, Oxford: Hart Publishing 2007, p.263-285.

known elements such as data from historical, sociological, anthropological, psychological sources. Much will depend on the focus of the research and on the available knowledge involved in the researcher's time and financial means when choosing the type and size of the law-in-context approach. Rodolfo Sacco[98] was explicit when describing this method as the 'legal formants' on what has made the law as it is. In this approach, it is notably the legal context which seems to be the most important: constitutional and legislative rules, case laws and legal doctrines, but also implied patterns and other hidden elements such as world views, influencing the way the law is interpreted and handled, which he calls 'cryptotypes'. Some cryptotypes are more specific, others more general. The more general they are, the harder they are to identify. In extreme cases they may form the conceptual framework for the whole system. According to Van Hoecke & Warrington[99] the law-in-context approach plays a decisive role in the way the law is perceived, interpreted and applied. Putting law in context aims at understanding the law as a foreigner to the legal system, and hence explaining why the law is as it is. In addition, the institutional contexts in the compared countries or societies play an important role in explaining apparent differences in the law and legal practice. Applying this method to this thesis seeks to justify the rationale behind the current law in its application in England and Wales and Nigeria in the enforcement of minority shareholders protection. The Law-in-context critically analysis the rule in *Foss v Harbottle,* its application in England &Wales under the Companies Act 2006 and the Companies and Allied Matters Act 2004 now 2020 in the Nigerian jurisdiction influencing the way the law is interpreted, applied and enforced.

The concept of legal transplant of key provisions of the Companies Act 2006 in England and Wales is brought to debate, the rationale is to determine whether it would be a practical solution under the Nigeria jurisdiction in the quest to achieve greater protection for minority shareholders. Transplantation is a technical concept which might not be fully adopted in a different legal system the

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[98] R. Sacco, '*Legal Formants. A Dynamic Approach to Comparative Law'*, *American Journal of Comparative Law* 1991, p. 1-34 (part I) and p. 343-401 (part II).

[99] M. Van Hoecke & M. Warrington, 'Legal Cultures, Legal Paradigms, and Legal Doctrines: Towards a New Model for Comparative Law ', *The International and Comparative Law Quarterly 1998,* p.495-536.

likely problems encountered during the process in Nigeria include: the rampant corruption in the judicial system, which is a major obstacle hindering the fight for an independent judiciary in the country,[100] which will be discussed in chapter 8.

1.7 Thesis Structure

Chapter 2 traces the development of derivative claim in England and Wales, the process of instituting such claims, it analyses the function of the remedy during the period (pre-2006 act) and the limitation in pursuing such remedy. Most importantly, the law in context method is applied to highlight how the law is interpreted and enforced.

Chapter 3 analyses the development of unfair prejudicial petition known as the oppression remedy, the statutory elements of oppression, proper parties to sue and the reasonable expectation test in England and Wales. The common core method plays a central role here as it focuses on the harmonization of the elements that constitutes oppression (pre-2006 act) and unfair prejudice and the adoption of the doctrine of reasonable expectation by judges in cases brought before them for determination.

Chapter 4 examines the historical development of derivative action under the Nigerian jurisdiction. It further analyses the differences between the CA 2006 and CAMA 2004. Most importantly the function of derivative action in the old and current law is put into context. This aids an individual who is not familiar with the legal system to understand why the law is the way it is.

Chapter 5 focuses on the advancement of unfair prejudicial petition in Nigeria as a veritable remedy in the protection of minority shareholders. The requirements for instituting such petition, most importantly its limitations in the protection of minority shareholders rights are critically analysed. It sets the tone for the function of unfair prejudicial petition and how the remedy operates in Nigeria in the protection of minority shareholders.

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[100] H. Abdulrauf Salisu and H. Gholami '*Corruption in the Nigeria Judicial System*: An Overview Journal of Financial Crime Vol 25, issue 3 2018.

Chapter 6 and 7 are comparative analysis chapters highlighting the differences between the two jurisdictions and presenting the findings which suggests England and Wales has a preferable framework for the protection of minority shareholders as it acts as a check and balances on the actions of the majority, which the Nigerian jurisdiction can learn from and subsequently adopt to fill the void in its current statutes.

Chapter 8 concludes the thesis by summarising the findings relating to minority shareholder protection in England and Wales and Nigeria. It re-affirms the deficiencies inherent in the current state of the statutes on minority shareholder protection in Nigeria and makes recommendation for better protection for minority shareholders. The researcher suggests a legal reform by amending relevant sections under the CAMA 2004 now 2020 which is currently in operation in line with changes that have occurred as a result of the introduction of the new act. Another option is the adoption of a partial legal transplant of key provisions under the Companies Act 2006 to supplement existing statutes in Nigeria to bridge the gap in the protection and enforcement of minority shareholders rights. However, the transplantation in question is not automatic neither is it smooth sailing as it will be fraught with obstacles. Finally, the Chapter advocates for further research on the subject by building on the premise laid by this thesis.

<u>CHAPTER 2:</u> DERIVATIVE CLAIM IN ENGLAND AND WALES.

<u>2.0 Introduction</u>

In England and Wales, shareholders' remedies developed as a result of the need to protect their rights and interests especially in situations where mismanagement of a company's affairs is alleged. It is important because it addresses management inefficiencies, breach of director's duties and in the long run protects the interests of companies and shareholders alike.[101] Minority shareholders protection is an important area of company law, especially corporate governance. This is because the corporate sector has witnessed a boom of corporate activities and the growth of corporate management powers with little or no protection for minority interests. The agitation by the minority for greater protection although is largely by public limited companies we cannot deny that minority shareholders in private companies need protection which has prompted more discuss on shareholders activism into the spotlight[102].

Shareholders' remedies were examined by the Law Commission[103] in 1996, and by the Department of Trade and Industry[104] in 1999. The deficiencies of derivative action at common law coupled with "lengthy and costly" proceedings under the Companies Act 1985 prompted the agitation for recommendations for further reforms. Following a series of consultations, a statutory derivative claim was finally introduced under the Companies Act 2006, to replace the uncertain[105] derivative actions at common law. The development and limitations of derivative claims under common law will be analysed. The historical method of comparative methodology[106] is applied in this chapter as it traces the historical development of the remedy of the derivative action and subsequent claim in England and

[101] Fang, M. Shareholders Remedies in England and China: Are they comparable? International Company and Commercial Law Review 2013, pg. 2.
[102] Bourne, N. *'Bourne on Company Law'* 6th Edn, 2012 Routledge Pg.233.
[103] Law Commission, Shareholders Remedies (Law Com. Consultation paper No. 142, 1996); Law Commission, Shareholders Remedies (Law Com Report No.246, 1997), Cm.3769.
[104] DTI, Modern Company Law for a Competitive Economy: The Strategies Framework, Urn 99/654 (February 1999); Developing the Framework, URN 00/656 (March 2000); and Completing the Structure, URN 00/1335 (November 2000).
[105] The problems which plagued derivative action can be briefly stated: it had the possibility of leaving the company worse off, because there was the danger that a company will be burdened with an action that it does not want (multiplicity of suits). Also, it created a risk of strategic behaviour by minorities (i.e., gold-digging claims) against the company, which do not reflect the value of the company's right and is not in the best interest of the company.
[106] Supra No.85,86.

Wales. It aims at providing insights into the origin of the derivative claim, its application in past and present cases and to critically evaluates the protection it affords to minority shareholders.

To achieve this task, the first step is to trace the development of majority rule;[107] in the case of *Foss v Harbottle.*[108] Secondly, the possible benefits and limitation of derivative action will be explored to justify its subsequent reform into statutory derivative claim under s.260 of the Companies Act 2006. The chapter goes further to examine the function of the derivative claim in its present applications i.e., whether its objective is primarily to deter misconduct or simply to compensate the company for wrongdoing through the instrument of the adoption of the functional method.[109] Tracing its historical antecedent is pivotal for a proper understanding of the past (derivative action) and the present state of derivative claim as a remedy for minority shareholders protection in England and Wales.[110] In England, the Companies Act of 2006[111] replaced the Companies Act 1985 with the goal of maintaining a balance between the protection of shareholder's interests and the day-to-day management of the company.

2.1 Minority Shareholders Protection in England and Wales

Corporate governance is focused on the relationship between the managers of a company and those who have a stake in the running of its affairs.[112] The level of protection a corporate governance system offers to minority shareholders, presents a credible topic for debate. The reason is that as trade barriers

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[107] The decision whether a company should litigate is a commercial one which involves the balancing of risks and expenses and is usually left for the board of directors to decide. It should be noted that a consequence of corporate personality is majority rule. For a discussion on the principle, see Davies, P.L '*Directors fiduciary duties and Individual Shareholders'* in McKenzie, E. "*Commercial Aspects of trusts and fiduciary* Obligations (Oxford, Clarendon Press 1992) Pg.86-87, 90-91. Mayson, French & Ryan on Company Law (31st edition) OUP Oxford 2014-2015 Pg. 548.
[108] (1843) 67 ER 189, (1843) 2 Hare 461.
[109] Supra No.75.
[110] Supra No. 87, The law-in context methodology was applied to how the statutes was perceived, interpreted and applied.
[111] The 2006 Act received Royal Assent on November 8th, 2006.
[112] Prentice, D.D "*Some Aspects of the Corporate Governance Debate in*" and Holland, P.R.J "*Contemporary Issues in Corporate Governance* (Oxford, Clarendon Press 1991) pg.2. See also Fleckner, M.A & Klaus, J. "*Comparative Corporate Governance*" A functional and international analysis 2013, Pg. 915.

fall and markets expands, it has become progressively easier for investors from one country to invest in companies in another country[113] which has an efficient structure that serve shareholders' interests.[114]

Thus, a crucial element in the appeal of a particular territory will be its system of corporate governance.[115]As a result, a significant amount of research has resulted from the controversial topic of minority shareholders' protection.[116]In my opinion, the reason is that it fosters a debate on latent issues affecting minority shareholders (i.e., whether the remedies provided for under the Companies Act 2006 are adequate for the protection of minority shareholders or there arises a need for a reform).

It is indisputable that minority shareholders are stakeholders in a company.[117] The infringement of the rights of minority shareholders emerges from the self-interest of majority shareholders, who may or may not also have the role of a director who are in control of the company, and their motive is carried out or given effect to by the board of directors. In England and Wales, the unitary board model is in operation where there exists a single board of directors composed of both executive and non-executive directors.[118] The unified board carries out its management and supervisory functions subject to a direct action by the board by way of a special resolution in general meeting in accordance with Article 4 of the models' articles. However, the unified board is under the obligation to fulfil two incompatible corporate functions (it is both the supreme executive body and the supervisory organ). This structure raises concerns of abuse of executive power by the management, and doubts about the accountability of directors despite a disclosure system introduced to improve the lack of accountability as a result of the unitary board with dual function.[119] Decisions taken by the majority may exist in the following

[113] Lowry, J 'Eliminating obstacles to freedom of Establishment: The Competitive Edge of UK Company Law' (2004) 63 *Cambridge Law Journal* 331.See also Gordon, J.N. and Roe, M.J. "Convergence and Persistence in Corporate Governance (Cambridge University Press 2004) Pg.128.
[114] Monks, R.A.G. and Minow, N 'Corporate Governance' Cambridge, MA, Blackwell (1995) Pg.270-271.
[115] Berglof, E '*Reforming Corporate Governance*': Redirecting the European Agenda' 24 Economic Policy (1997) Pg.93.
[116] Cheffins, B.R 'Minority Shareholders and Corporate Governance' 21 Company Lawyer (2000) pg.41. See Denis, D.K. and McConnell "International Corporate Governance" ECGI Finance working papers No.5/2003(January 2003): and La Porta, R. "Investor Protection and Corporate Governance" June 1999
[117] Deakin. S, Ferran. E and Nolan. R 'Shareholders Rights and Remedies': An Overview, 2 Company Financial and Insolvency Law Review (1997) P.162 at Pg.163.
[118] Smerdon, J. '*A Practical Guide to Corporate Governance*', 2nd edn (London: Sweet & Maxwell, 2004), pg.360.
[119] Michael, S. '*Unitary board or Two-tiered board for the new South Africa?*' International Review of Business Research Papers Vol.1, No.2, 2005, Pg. 84-99.

forms[120]: (A) where the management in a different capacity (i.e., the shareholders who are also directors) holds the majority of the shares, they commit a wrongful act then vote at the general meeting to prevent the company from suing the directors to redress the wrong committed.[121] (B) in a private company where there is no available market to sell shares for a fair price, minority shareholders could be barred from realising their capital investments by the inclination of the majority.[122]

Shareholder litigation (i.e., personal action in court) is neither the initial nor the primary protection for shareholders against managerial misconduct. Other forms of redress exist one of which is the derivative action now the statutory derivative claim under the Companies Act 2006. Several factors need to be taken into consideration before instituting a claim for example: the professional standards of managers, oversight by independent directors and the disciplinary power of the market or shareholder's voting. These factors effectively align the interest of managers and shareholders, thus decreasing the need to resort to costly litigation as a means of protecting shareholder's interests.[123]

Considering whether or not to initiate action raises the question whether the statutory derivative claim is the appropriate remedy for the protection of minority shareholders in England and Wales taking into consideration the statute (Companies Act of 2006) and the United Kingdom Corporate Governance Code applicable to companies. As defined earlier a company is a collective association where the interests of different shareholders must be balanced and subject to the common interest in accordance with the constitution. The managerial duties of the directors are owed to the company. These duties are

[120] Sealy, L. and S. Worthington, (2013) *Sealy & Worthington's Cases and Materials in Company law*, (Oxford: Oxford University Press), pg.638.
[121] In *Brown v British Abrasive Wheel Co* [1919] 1 Ch 29*0*, the company required more capital, majority shareholders held 98% of the shares, they were willing to provide capital only if they could buy up the remaining 2 percent. The minority refused and the majority sought to alter the articles, though the alteration was accepted by the majority. The courts held the alteration of the article be restrained since it was not for the benefit of the company.
[122] *Clemens v Clemens Bros* [1976] 2 All ER 268, a minority shareholder in a family-owned company instituted an action against the company with respect to an increase in share capital which would drastically reduce her shareholding to under 25 percent. The court held the action of the majority was unfair, oppressive and could not be exercised in whichever way they pleased.
[123] Deakin, Ferran and Nolan (n.6) Pg.167.

enforceable on its behalf by those with power under the constitution to do so, rather than shareholders acting separately.[124]

2.2 The Development of Derivative Action (pre-2006 Act)

Derivative action was a form of pleadings originally introduced on the ground of necessity in order to prevent a wrong committed without redress.[125] In the event of a wrong, the question of who is entitled to bring an action to remedy the wrong comes to light. This is important, as it reduces the number of vexatious claims that would otherwise be instituted by an individual who believes he or she has a legal right to protect.[126] This was the dilemma the English legal jurisdiction faced before the enactment of the Companies Act 2006. The attitude of the United Kingdom is derived from the case of *Foss v Harbottle,*[127] where the court held the company and not the shareholders should sue to remedy the wrong done to the company. Also, members cannot sue to rectify mere irregularity if the act is within the powers of the company and the majority supports the intra vires act.[128] These respects and reflects the separate corporate personality of a company.[129] Derivative actions could only be brought in relation to a breach which affected the company and benefitted the directors personally and so the directors were reluctant to authorise action against themselves. Also the breach must have been fraudulent in nature (i.e., fraud on the minority) which was the first requirement.[130] It was extremely difficult to prove fraud

[124] Company Law Review Steering Group 'Modern Company Law for a Competitive Economy': Developing the Framework", Consultation Document (London, DTI March 2000) pg.105.
[125] *Smith v Croft (*No. 2) [1988] Ch 114,185.
[126] This view is buttressed by the findings of James LJ in *Gray v Lewis* (1873) 8 Ch App 1035 at 1051. He justified the principle that "anybody corporate" is the proper plaintiff in proceedings to recover its property by pointing to the danger of multiplicity of shareholders suits in the absence of the rule in *Foss v Harbottle.* The effect will be the ability to institute and discontinue an action at will. Most importantly, the situation will be aggravated where the suit is dismissed with costs against the plaintiff shareholders who are unable to meet the costs. In contrast, the courts of equity, reiterated its powers to stay and consolidate action under the Civil Procedure Rules 1998, Part 3 'The Court's Case Management Powers'
[127] (1843) 2 Hare 461; 67 ER 189.
[128] McKendrick, E "Commercial Aspects of Trusts and Fiduciary Obligations (Oxford, Clarendon Press 1992) pg. 86-87 and Sealy, L.S. "Company Law – Power of The General Meeting to Intervene" *Cambridge Law Journal* (1989) P.26 at Pg. 27. See also the case of *Macdougall v Gardiner* (1875) 1 ChD 13 at 25, which is of the effect that a mere irregularity in the decision-making process will not be enough for an action to succeed.
[129] *Salomon v Salomon* [1895] 2 Ch 323, 329, the rule is a company is in law a separate person, which shareholders have agreed should be managed by its directors.
[130] *Burland v Earle* [1902] AC 83.

committed on the company by those in control of it, which meant that the trial was complex requiring rigorous investigations, which were detrimental to smaller companies that struggle to keep up with the high costs of litigation.[131] In *Re Elgindata*, the court took forty-three days to adjudicate on the matter before it. The hearing cost from the proceedings was eight times more than the original price of the shares.[132]

The second requirement,[133] was that the directors who were in breach of their duty must be in *de facto*[134] or *de jure*[135] control of the company at the general meeting. The nature of derivative action at this stage was to provide minority shareholders with redress for their rights and uphold the founding principles of company law that safeguards this balance.[136] Also, the presence of the "loser pays" principle exacerbated the situation as the plaintiff had to pay the legal fees in the event the suit was unsuccessful. In the judgment of Foss *v Harbottle*, *Wigram VC* adopted the decision in previously decided cases.[137] on unincorporated companies by insisting that the minority must demonstrate they had exhausted any possibility of redress within the company. He was of the view that the courts will not intervene where majority shareholders may lawfully ratify an irregular conduct.[138] In its entirety, it was established that the *Foss v Harbottle* rule barred a minority action whenever the alleged misconduct was in law capable of ratification whether or not an independent majority would ever be given a real opportunity to consider

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[131] Law Commission cited in Dignam, A. (2011), Hicks & Goo's Cases &Materials on Company Law (Oxford: University Press), pg.467.

[132] [1991] BCLC 959.

[133] *Edwards v Halliwell* [1950] 2 All ER 1064.

[134] *De facto* control focuses on influence, rather than legal power. This type of control exists when a person or group of persons has any direct or indirect influence which if exercised would result in the control of the company. For E.g., where a person holds less than 50 percent of the voting control of a company but hold "other influence" so that they can force the company to act in accordance with his or her wishes.

[135] *De jure* controls exist by reason of the ability to elect most of the directors of the company, by reason of legal control of the corporation.

[136] Chief Justice Holt in *Ashby v White* [1703] 1 E.R.417 cited in Joffe QC, V, D. Drake, G. Richardson, D. Lightman, and T. Collingwood, (2011) Minority Shareholders: Law, Practice, and Procedure (4th ed) (Oxford University Press: Oxford, UK).

[137] *Moseley v Alston* (1847) 1 Ph 790 *and Bailey v Birkenhead Railway* (1850) 12 Beau 433 at 441.

[138] *Re Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ, 227. Lord Wilberforce opined "Those who invest in companies must accept the majority rule, and in order to establish oppression, a petitioner must show that there has been a visible departure from the standards of fair dealing that a shareholder is entitled to expect". This case also recognises the court has unfettered discretion to give relief and safeguard the rights of minority that has been trampled upon.

the matter.[139] *Wigram VC's* judgement is also notable for the creation of an entirely new principle to support the majority rule.[140]

This rule ensured that companies are run smoothly without undue interference from individual shareholders who had different perspectives about the management of their companies.[141] In the corporate character of a company Wigram VC found another reason for restricting minority actions, namely that since an incorporated company was the "proper plaintiff" in any action concerning its rights or its constitution, it would be in very exceptional cases of grave abuse that a minority shareholder might be allowed to sue in their own name by joining the company as a defendant. The principle, that the company itself was the proper plaintiff in proceedings concerning its rights was closely linked with the discretion exercised by the courts of equity over the use of the representative form of action. It was to have a considerable influence upon the late Victorian era judges in adopting an increasingly restrictive attitude to minority actions for breach of articles or duty by directors.[142] Going from the decision in *Foss v Harbottle*, set the tone for majority rule over minority protection as a cornerstone of the whole edifice of corporate governance. The effect of this in my opinion made the rule unfavourable, rigid, and the law in this field complex. It deterred minority shareholders from legitimately instituting an action. Hence, derivative action was an inadequate remedy for protecting the interests of minority shareholders.

While the courts were reluctant to interfere in the internal affairs of a company, there existed certain situations arising which appeared to be so inequitable that they could not be tolerated.[143] Ultimately the

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139 *Macdougall v Gardiner* (1875) 1 ChD 13 at 25.

140 *Cooper v Gordon* (1869) L.R.8 EQ 249, the majority rule is of the effect that acts and decisions of a company which are for the general meeting should be decided by it in accordance with the constitution and should not normally be subject to intervention by a shareholders' or group of them. If this approach were not qualified, there would be a gap in the protection of shareholders' interests, in cases where it would not be just for their individual interests to be submerged in the wider interest. See also Shareholders Remedies Law Commission Consultation Papers No.142 (1996) para.1.6.

141 Wedderburn, K.W. "Shareholders rights and the rule in Foss v Harbottle" 1957 C.L.J. Pg.194.

142 *Prudential Assurance Co Ltd v Newman Industries Ltd* (No.2) [1982] Ch 204, the Court of Appeal referred to the rule of in *Foss v Harbottle* as embracing the proper plaintiff rule that an individual shareholder cannot bring an action in the courts to complain of an irregularity, if the irregularity is one that can be cured by a vote of the company in general meeting. See also Boyle, A.J., Minority Shareholders Remedies: Cambridge Studies in Corporate Law 2010.

143 Tang, J. (2012) "Shareholders Remedies: "*Demise of the Derivative Claim*", UCL Journal of Law and Jurisprudence, 1(2), Pg.179-180.

question that must be answered in order to determine whether the rule in *Foss v Harbottle* applied to prevent a minority shareholder from seeking relief as a plaintiff for the benefit of the company, was whether the plaintiff was improperly prevented from bringing an action? The answer depended on the facts and circumstances surrounding the case, i.e., if it could be established that it was the company (through its directors) preventing the plaintiff from instituting the action then the answer to the question was in the negative. The common law derivative action as already stated sets the tone that in the absence of an independent general meeting there was no corporate body acting truly independently in the corporate interest in relation to litigation against directors. In such circumstances an exception to the rule was made, namely that the company is not the only accepted plaintiff, therefore enabling an independent shareholder to bring an action, but this does not entirely mean the action was brought in the interest of the company. As *Lawson LJ* observed in *Nurcombe v Nurcombe*[144] "*w*hoever comes forward to start the proceedings must do so for the benefit of the company and not for some other purpose, it follows that the court has to satisfy itself that the person coming forward is the proper person to do so". Acting in corporate interest can be looked at subjectively that is whether the person thought he was bringing the action on behalf of the company[145] and objectively, according to a benchmark determined by reference to a hypothetical actor like a director if the action was in the corporate interest. As *Warren J* in *Airey v Cordell*[146] "the correct test for allowing the action to continue is to ask whether the decision is one which a reasonable board will take".

A third approach in determining corporate interest was to rely upon the views of independent members of the corporate organ in *Smith v Croft (No 2).*[147] Cases were treated differently because of the circumstances surrounding them. "Acting in the corporate interest" was thus lawfully having the legal right to institute an action on behalf of a company for acts or omissions which were detrimental to its corporate interest. It translated to the notion that the courts must be satisfied that the intent for instituting the action is for the benefit of the company not for personal interest or gains. Finally, the reasonable

[144] [1985] 1 ALL ER 65.
[145] *Barrett v Duckett and Others* [1995] 1 B.C.L.C. the action was not allowed, because the shareholder was motivated by a personal grudge against the directors, who was the ex-husband of the shareholders daughter.
[146] [2006] EWHC 2728, Pg.10
[147] [1987] 3 ALL ER 909,957.

test i.e., whether a reasonable board would institute an action in the present circumstance should be applied only in cases of uncertainty if the applicant's demeanour did not demonstrate he intended to bring the action on behalf of the company. I subscribe to the perspective of *Lawson LJ* in *Nurcombe v Nurcombe*[148] and *Warren J* in *Airey v Cordell*[149]. Despite the different views from the various judges there existed a common factor which is to protect the interest of the company. The view of Lawson J suggests a personal approach, here an applicant must have had the *locus standi* to institute the proceedings and the suit must have been in the best interests of the company, which was the underlying reason for the suit as opposed to personal gain(s). This requirement ensured the suit was genuine and not selfishly motivated. It aimed to eliminate frivolous and vexatious proceedings from any individual from the outset. On the other hand, Warren J subscribed to an objective stance by analysing whether a member of a company or third party put in the position of the applicant would institute the suit in the interest of the company.

2.3 Exceptions to the rule in *Foss v Harbottle* 'Majority Rule'

The exceptions to the rule developed during the latter half of the nineteenth century. The exceptions permitted a derivative action if the company was not able to take a decision on enforcement of its corporate rights, because the wrongdoers were in effective control. Exceptional cases exist where a shareholder becomes a representative of the "corporate interest".[150]According to *Romer J* in *Cotter v National Union of Seamen*[151] he was of the opinion that *"the main purport of the exceptions is to allow minority shareholders institute an action on behalf of themselves and others and if they are denied that right, their grievance would never reach the court because the wrongdoers themselves being in control, would not allow the company sue"*. However, the rule will be relaxed where necessary in the interest

148 Ibid
149 Ibid
150 *Cinematic Finance Ltd v Ryder* [2010] EWHC 3387.
151 [1929] 2 Ch 58.

of justice. The following are exceptions to the rule that protect basic minority rights, regardless of the majority rule under the CA 2006.[152]

Decisions made unfairly, illegally and not in the interest of the company

In situations involving decisions made unfairly,[153] illegally[154] and not in the interest of the company, a shareholder can bring an action against the directors or shareholding majority. In the *Hutton case*[155], the shareholders at a general meeting resolved to spend part of the purchase money after the sale of the company in compensating employees and part as remuneration for past services of directors. According to law a company wound up had no power to make such payments and the court held the purported action was unlawful. Also, in *Cockburn v Newbridge Sanitary Steam Laundry Company Limited.*[156] the managing director of the company paid bribes to secure contracts with the consent of the majority shareholders. The court held the act illegal.

Actions which require the authorisation by a special majority

Certain actions require a special majority like passing of a special resolution (i.e., at least 25 percent majority) at a general meeting of shareholders. In such a scenario, if the majority purports to perform an act by merely passing an ordinary resolution and do not follow the proper procedure, the majority cannot enforce their decisions on the company and any member may bring an action restraining the majority. The reasoning behind this is if such act is permitted, the statutory requirement of 25 percent majority is defeated.[157]

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[152] Companies Act 2006, S.39.

[153] *Hutton v West Cork Railway Co* (1883) 23 Ch D 654.

[154] If a company suffers loss by reasons of an illegal act, the directors in default would be liable to the company in damages. The Supreme Court has confirmed in the case of *Peter Buchanan Limited v Mcvey (1954) IR 89* Shareholders acting unanimously cannot ratify conduct of directors for fraud or dishonesty. In this case, the transaction was a fraud on the revenue commissioners.

[155] Supra N153 Pg.47

[156] (1915) 1 IR 237.

[157] *Edwards v Halliwell* [1950] 2 All ER 1064, the court granted the application of minority members of the National Union of Vehicle Builders who sued the executive committee for increasing fees by a delegate meeting instead of a two third approval by ballot vote as required by the union constitution.

Acts or omissions that affect the applicant's right as a member

The courts have recognised situations, where an act or omissions affects the applicant's rights as a member, as an exception to the rule in *Foss v Harbottle*. This is illustrated in *Pender v Lushington.*[158] This is a leading case in company law, which affirms that a member of a company's right to vote should not be interfered with, because it is a right of property. Furthermore, any interference leads to a personal right of a member to sue in his or her own name to enforce his or her right.

Fraud committed on either the company or the minority shareholders

For the purpose of instituting derivative action, "fraud" in this context means abuse of power, whereby the directors or majority, who are in control of the company, secure a benefit at the expense of the company. In *Cook v Deeks*[159], the directors diverted a contract to themselves which should have gone to the company and later purported to ratify their act in the general meeting. The court allowed the action brought against the directors. In contrast, in *Greenhalgh v Ardene Cinemas Ltd (No 2)*[160], the court was of the opinion that none of the majority voted for a private gain, the alteration of the articles was legitimate as it followed due process and it was reasonably foreseeable that the articles could be altered at any time. Hence the claimant is not entitled to assume the articles will always remain in a particular form, and from the action of the majority it did not discriminate against the minority to give the former an advantage of which the latter was deprived.

I concur with the view of *Romer J* expressed in *Cotter v National Union of Seamen*[161] as the justification of the above exceptions.*:* the reason being that the exceptions represent acts and omissions by the majority which are contrary to the interest of its members, especially the purpose for which the company was established. In addition, the exceptions act to ensure that a company is not improperly

[158] (1877) 6 Ch D 70.
[159] (1916) 1 AC 554 PC.
[160] [1946] 1 ALL ER 512.
[161] Supra N151 Pg.46

prevented from averting or remedying a wrong done by a self-interested board or by majority shareholders acting unlawfully. These exceptions are the last line of defence to minority shareholders who are faced with the infringement of personal rights or violation of corporate interests.

Merits and Demerits of Derivative Action

In order to justify the transition from derivative action to statutory derivative claims, a distinction must be made between the merits and demerits (limitations) of derivative action. The objective is to determine if derivative action was an effective remedy, which obviated the need for a reform or if it fell short of its purpose to justify the transition to statutory derivative claim.

The limitations of a derivative action are as follows; the company may suffer collateral harm which outweighs the gain from litigation. Such harm includes non-monetary harm for example, it may produce unwarranted publicity which in turn may affect the long-term reputation of the company, deter future investments and the action may not be worth the expense.[162]Also, derivative action generates agency costs;[163] for instance, it increases expenses that companies incur in order to recruit managers. In theory, a manager's net return must be proportionate to some "reservation" level for him to be willing to work for the company. Hence if the manager faces a risk of action, the company must either supply them with adequate liability insurance or raise their salary.[164] The ability to institute a derivative action by an applicant encouraged frivolous and vexatious litigation and therefore this action needed to be rigorously controlled.[165] Also, it ran the risk of strategic behaviour by minority shareholders , for instance the possibility of "gold-digging" claims against the company, which was settled on terms advantageous to the plaintiff which did not necessarily reflect the value of the company's right and were not in the interest of the company.[166] This is why an order for indemnity in respect to costs that may be have been awarded to a shareholder to assist him maintain to a derivative action also required

[162]Cheffins, B.R *'Reforming the Derivative Action'*: The canadian experience and british Prospects' 2 Company Law *financial and insolvency Law* Review (1997) p.227 at Pg.230.
[163] Agency costs in the more general sense arise whenever the welfare of the principal depends on actions taken by the agent. The problem lies in motivating the agent to act in the principal's interest rather than in the agent's own interest.
[164] Kraakman.R, Park.H, Shavell.S *'When are shareholders suits in shareholders' interests?* 82 *Georgetown Law Journal* (1994) p.1733 at Pg.1738.
[165] Payne, J *'Shareholders remedies Reassessed'* 67 Modern Law Review (2004) p.500 Pg.504.
[166] In order to reduce the possibilities of 'gold-digging' settlements are controlled by the court.

the plaintiff to refer back to the court for approval of any offer to settle the action.[167] This in turn reduced the possibilities for 'gold-digging' claims against the company. Finally, it deterred legitimate risk-taking on the part of the managers, imposing liability discouraged entrepreneurial risk taking and adversely affected profit maximisation, and fear of liability makes directors more risk-averse[168].

On the other hand, derivative action played a fundamental role in aligning the interests of managers and shareholders as the threat of personal liability provides the directors with an incentive to comply with applicable standards of conduct. The corollary objective of derivative action is to ensure that directors pay heed to their legal duties. Although director's duties are owed formally to the company and not individual shareholders, it is essentially shareholders interest that are protected by the imposition of these duties. The main fiduciary duty owed by directors is the duty to act in the interest of the company and these interests have time and again been equated with the interest of the shareholder as elucidated in *Allen v Gold Reefs of West Africa Ltd.*[169] However, the imposition, of duties sets bounds to the director's exercise of corporate power and attempts to control the exercise of managerial discretion and self-interested behaviour. By virtue of s.174 of the Companies Act 2006, a director must act with care, skill, diligence and in the interest of the company, must not put himself in a position where his personal interest conflict with the company. However, the performance of such duties is subject to the overriding duty provided under s.172 of the Companies Act 2006 which provides a director "must act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole." This is very similar to the common law duty to act in the 'best interest' of the company. This section (s.172 CA 2006) sets out a list of non-exhaustive factors which a director must consider while evaluating what would be likely to 'promote the success of the company' which include: the need to act fairly between members, the interest of the company's employees, the need to foster the company's business relationship with suppliers, customers

[167] This is also the position under the Companies Act 2006, with respect to derivative claims. In *Steiner v Lee and Others* [2010] EWHC 1539, [2011] BCC 134, the High Court granted an indemnity for the applicant's costs when granting permission to proceed with the derivative claim but limited this by placing a financial cap on the amount of costs covered by it. This is known as the "filter stage" as it ensures only genuine claims continue.
[168] Banta, P. '*The New Indiana Business Corporation Law*': "Reckless" Statute or New standard', Columbia Business Law Review (1987) p.233 at Pg. 236.
[169] (1900) 1Ch 671.

and others, just to mention a few. This is one of the controversial aspects of the Companies Act 2006 as it was feared that the new overriding duty and the 'enlightened shareholder value' concept it introduced would contribute significantly to the red tape company directors were subject to. However, the Companies Act 2006 has by detailing duties more specifically, arguably changed the scope of directors' duties.

As cases were brought before the courts for their determination, the interpretation and proper application of fiduciary duties becomes clearer. All companies benefit from a judicial decision clarifying the scope of permissible conduct. The benefit of clarification is not simply deterrence of future managerial conduct but rather gives a contractual setting where the parties namely the directors and shareholders may contract.[170]

There was a serious limitation to the gap filling role. In my opinion, the intent of derivative action as a remedy from its merit is simply to resolve disputes, compensate the injured and to deter misconduct. In a corporate setting, derivative actions were usually perceived as addressing purely private matters e.g., fraud and control.[171] Thus, the public role of derivative action was absent by portraying its objective as simply doing justice to those harmed by the defendant's misconduct.[172] From the analysis, the limitations of derivative action outweigh the merits. The continuous application of the rules was deemed to be complex, incoherent and restrictive. The Law Commission was requested to make recommendations with the following principles in mind; "the consideration of a new derivative procedure with more modern, flexible and accessible criteria for determining whether a shareholder can pursue an action" emphasizing that any modern position should retain a balance of regulation in favour of the company's management by insisting that any derivative action should be "exceptional" based on the state of the law and its applicability[173]. The statement and its rationale reflect the passion and desire

[170]Romano, R.R 'The shareholders suit: Litigation without foundation' 7 Journal of Law, Economics and Organization (1991) p.55 at Pg. 85.
[171] In the sense that their existence can only be construed on the facts of each case.
[172] This was stated as one of the objectives of derivative action by Browne-Wilkinson LJ in *Nurcombe v Nurcombe* [1985] 1 WLR 370, 378.
[173] http://www.lawcom.gov.uk/ accessed on 9/12/19. Law Commission, Shareholders Remedies: s.3(1)(e) of the Law Commission Act 1965 (Law Com No.246, 1997) Para 1.4.

behind the reform debate that took place in the United Kingdom resulting in the statutory derivative claim being introduced in the Companies Act 2006. The Law Commission realised it was necessary to establish a framework where minority shareholders were accorded protection from continuous abuse. The effect of this was a tighter judicial control of all stages preceding the initiation of the action making the derivative claim exceptional. This position in my opinion was the main reason why the Law Commission report[174] was accepted and implemented.

The recommendation held out the possibility of greater levels of enforcement of directors' duties especially breach of director's duty of care. However, whether this potential is realised was dependent on how the courts discharged the discretion entrusted to them. The Law Commission approval of the policies which underlined the present restrictive standing rules for individual shareholders[175] and if the courts were to refer those policies from common law to their interpretation of the discretion conferred upon them then the changes brought by the reform will be limited. The reforms[176]were enacted in Part 11 of the Companies Act of 2006. The final report of the Company Law Review Steering Group (CLRSG) indicated the recommendations in respect of derivative claims would be "an important mechanism by which shareholders could hold directors to account for the proper exercise of their duties in pursuit of the company's short and long-term interests.[177]

[174] Law Commission, Shareholders Remedies: A Consultation Paper (Law Commission Consultation Paper No.142, stationery office, 1996) Para 1.5. Part 17.
[175] Para.6.13 of the Commission proposal states that: 'We do not accept that the proposals will make significant changes to the availability of the action. In some respects, the availability may be slightly wider, in others it may be slightly narrower. But in all cases the new procedure will be subject to tight judicial control'. This may have a chilling effect on minority shareholders the reason been there would be in-depth scrutiny by the courts on the individual who brings an action on behalf of the company. Hence it is not enough that the action was brought to protect the interest of the company, factors such as was the action brought in good faith, will the applicant stand to benefit if the action is granted, and judgement is ruled in favour of the company. Tight judicial control in my opinion suggests the courts unfettered discretion to determine who can institute such action and the outcome of such proceedings based on the facts presented as no two facts are the same depending on the circumstances.
[176] Law Commission, Shareholders Remedies (Law Commission Report No. 246, Cm 3769, Stationery Office, 1997).
[177] Law Commission cited in Reisberg, A., (2008) "*Derivative claims under the Companies Act 2006*: Much Ado about Nothing?" pg.6-7.

2.4. Derivative Claim under the Companies Act 2006

A member of a company instituting proceedings to enforce a right of the company is said to be deriving a right of action from the company. Accordingly, such proceedings are known as derivative claims.[178] Following the Law Commission report, the reform introduced by the Companies Act 2006 in relation to derivative claims was based on the Law Commission's perspective of the limitations associated with common law. The Companies Act 2006 implemented the Law Commission's recommendation to replace the 'fraud on the minority' exception and establish a modern, flexible and attainable basis for leave to institute a derivative claim.[179] Part 11 of the Companies Act 2006 is a significant breakthrough associated with the introduction of a new statutory derivative claim. The Act[180]provides that derivative claims can only be brought in accordance with the provisions of the Act and that "a claim may be brought in relation to any breach of duty, negligence, default or breach of trust by the director"[181] as prescribed by s260(3) of the Act.

The principle that directors owe a duty of care in the exercise of their duties in running the company has been considered in *Sharp & Others v Blank and Others.*[182] In this case, the court held that a director owes fiduciary duties to the company rather than directly to the shareholders[183], when providing information to shareholders about a transaction. It recognised that broader fiduciary duties can arise in exceptional circumstances where on the facts of a particular case there is a "special relationship" between the director and shareholder. However, that special relationship must be over and above the usual relationship that any director of a company has with its shareholders. It is not enough that a director has greater knowledge of the company affairs or that the director's actions have the potential

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[178] *Schiowitz v IOS Ltd* (1971) 23 DLR (3d) 102 at Pg.121, *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1WLR 2 at Pg.10

[179] Cabrelli, D. '*Statutory Derivative Proceedings*: *'The view from the inner house'* (2010) 14 the Edinburgh Law Review 116. See also Law Commission, *Shareholder Remedies: Report on a Reference Under Section 3(1)(e) of the Law Commissions Act 1965* (Law Com No. 246, 1997) Para 6.15.

[180] Companies Act 2006, s260(2).

[181] In *Lesini v Westrip Holdings Ltd [2009] EWHC 2526 (Ch),* the judge emphasised the importance for derivative claim to be based on an act or omission involving negligence, default or breach of duty by a director. The directors in the company followed the advice of eminent professionals in the conduct of their duties, the court held they had not been negligent or breached their duties.

[182] [2015] EWHC 3220 (Ch).

[183] Companies Act 2006, s.170.

to affect the shareholders. The judgment underlines the difficulty of establishing a direct fiduciary duty to shareholders in the context of a large company with large numbers of shareholders. As the decision recognizes, it is no accident that the cases in which such a duty has been held to exist mostly concern small, closely knit companies where there is often a family or other personal relationship between the parties. This does not however connote that the directors of large, listed companies do not owe any duties to shareholders in providing information about a transaction, which the defendants accepted in *Sharp v Blank.*[184]As directors do owe a duty to provide shareholders with sufficient information to enable them to make an informed decision on how to vote at a shareholder meeting, as well as a duty to take reasonable care in making certain statements or recommendations. From the judgment, it had opened a channel where directors at the helm of affairs in a company take decisions without consulting the minority shareholders and hide under the guise of the excuse that "no special relationship" existed between them. The beneficiaries of this action will be the majority since they appoint the directors to the board, as a result their interests are protected. Consequently, the majority may seize the opportunity to exploit the minority.

Despite the change in judicial precedent, the position of minority shareholders remains uncertain, the reason being that minority shareholders are constantly denied their rights as shareholders. Alternatively, when majority shareholders act in a way that favours the majority or unfairly prejudices the minority, for instance, when a minority shareholder cannot find a buyer for his or her shares, the investment is trapped as a result the minority cannot control the investment's direction by influencing management and the funds from sale of shares cannot be invested in a profitable venture. In some cases, a minority shareholder may receive no dividends or other return for the investment made.

Under the Companies Act 2006 the 'fraud on the minority' condition was abolished. This is a change from what was in practice under common law, whereby the existence of fraud was a condition for instituting a derivative action. The Companies Act 2006 sets a criterion which determines the court's decision when exercising discretion whether the claim should be heard.[185] The derivative claim

[184] [2017] EWHC 3390 (Ch).
[185] Companies Act 2006, s263(2).

structure can be highlighted as: APPLICATION→PERMISSION→JUDGMENT. In order to determine if the derivative claim is a modern, flexible and accessible criteria for a shareholder to pursue, it is important to analyse the process of instituting such remedy.

The first step is the institution of a derivative claim by the applicant, followed by the court consideration whether a *prima facie* case exists, if it exists then the court may require evidence from the company. If no case exists, the court will dismiss the case under s261(2) Companies Act 2006.[186] The first stage was not recommended by the Law Commission based on the view that including an express test on the merits could easily result in a time consuming and expensive mini trial. In my opinion, this stage acts as an adequate safeguard to prevent the floodgates of claims from individuals who believe they have a right to institute an action and an interest to protect. Hence, it aimed at preventing the multiplicity of suits.

The second stage involves the court considering the ground(s) for application to determine if it falls within the accepted criteria for instance whether the claim would promote the company success[187] whether there was or could be a ratification of the act complained of [188] the views of disinterested members,[189] good faith of the derivative claimant [190]and whether the company decided not to pursue the claim.[191] Where the court is satisfied that a person acting to promote the success of the company[192] would not seek to institute the claim in the first instance. If the company refuses to pursue the claim, the court will consider what an individual under the duty to promote the success of the company would have done.[193] The court will discontinue a claim when the shareholders have ratified and authorised the breach which represents an extension of common law position. This action by the courts may encourage companies to put ratification resolutions clauses in the articles and memorandum of association more frequently than they would have done otherwise, which could be administratively burdensome.

[187] Companies Act 2006, s263(2)(a) and 3(b).
[188] Companies Act 2006, s263(2)(b)(c) and 3(c)(d).
[189] Companies Act 2006, s263(4).
[190] Companies Act 2006, s263(3)(a).
[191] Companies Act 2006, s263(3).
[192] In *Kleanthos v Paphilis and Ors* [2011] ALLER 33, the court considered the possibility of success of the derivative claim by the claimant, the claim was dismissed on the basis that a director acting in accordance with s.172 to promote the success of the company would not continue with such claim.
[193] Companies Act 2006, s172.

Regarding the view of disinterested members his requirement is contentious, and it should not qualify as a criterion because it imports the common law principle under the rule in *Foss v Harbottle* that a minority shareholder should not be able to bring a claim against the majority.

Section 263(2) CA 2006 is of a mandatory nature, while s263(3) CA 2006 is discretionary and open-ended since it was devised by the Law Commission to be non-exhaustive. In my observation I noticed that although the Companies Act 2006 lists specific criteria for the courts to consider when deciding whether to give permission for a derivative claim to proceed, no guideline is present as to the weight that should be attributed to the above criteria. Their limitless nature renders them inherently uncertain and expandable by the courts[194]. The primary test for an applicant to pass is to establish that he has a *prima facie* case[195] regardless of whether the judges impose a standard of proof, it is the applicant's supporting evidence that is crucial to the case. Gibbs[196] suggests that satisfying the *prima facie* case criteria requires establishing more than a zero percent chance of success which is the basis for the grant of permission by the courts

However, I fail to see how Gibbs established the point regarding the zero chance of success issue, as if even a case has more than a zero percent success rate this does not translate into the court granting permission to proceed. Some commentators have remarked that the judiciary's approach to the *prima facie* case criteria might be to allow the claim to go through to the second stage should there be sufficient evidence in the claim[197] since it would still be possible to stop proceedings at that stage.[198] The effect of this approach makes the *prima facie* case criteria redundant and unnecessary. Significant time and resources would be exhausted on the first stage since the rationale underlying its existence (i.e., a

[194]Law Commission No.246 (n73) Para 6.73. The Law Commission responded to the concerns about the ambiguity of these non-exhaustive by stating that an additional specific list of factors together with developing case law will assist practitioner in advising their clients. No doubt it would be of great assistance but there remains a lacuna of the body of case laws in the interpretation of cases before the courts.

[195] Andrew, K and Joan, L 'Something Old, Something New, Something Borrowed: An Analysis of the new Derivative Action under the Companies Act 2006' (2008) 124 *Law Quarterly Review* 469,480.

[196] Gibbs, D 'Has the Statutory Derivative Fulfilled its Objectives? A prima facie case and the Mandatory Bar: Part 1 (2011) 32 Company Lawyer 41,42.

[197] Simon, J 'The Curse of Uncertain Times' (2007) 8 *Journal of International Banking and Financial Law* 447,448.

[198] Hannigan, B and Prentice D*: Hannigan and Prentice*: The Companies Act 2006- A Commentary (2007) Para 4.46.

screening mechanism could as easily be achieved in the second stage.) In *Lesini v Westrip Holdings Ltd.*[199]*Lewison J* remarked that the judge at first instance has considered there was a *prima facie* case on paper and with that moved on to the second stage. No evidence was required from the defendant or the company so that the *prima facie* case criteria would lead to a mini trial. Likewise, in *Stimpson v Southern Private Landlords Association.*[200] Pelling QC reiterated there was no consideration of the first stage because it was unduly elaborate in the circumstances.

In determining the existence of a *prima facie* case by the courts, it is my observation that the first stage has been made unnecessary. It increases the number of cases brought before the courts for determination which would have been dispensed with at the first stage. This decreases the court process and inevitably leads to unsatisfactory results. On the positive side, this approach can save applicants from incurring unnecessary costs in crossing the first stage.[201] If the Law Commission's aim was to create a 'modern, flexible and accessible criterion,' sadly this has not been achieved as the trend is to either bypass the *prima facie* case proceedings directly to the second stage or bundle the two-stage proceedings into a single hearing.[202] Despite this, the government still stands firm in its position that the two-stage procedure for obtaining court's permission to continue a claim, particularly the requirement for the shareholder bringing the claim to make a *prima facie* case together with the requirements to be considered by the courts will allow the courts to dismiss "fishing" litigation.[203] This exhibits that the government is oblivious to whether the two-stage procedure causes hardship to minority shareholders instituting a genuine derivative claim.

The complexities of pursuing a statutory derivative claim are illustrated *in Mission Capital Plc v Sinclair and Another*[204] and *Franbar Holdings Ltd v Patel & others.*[205]In both cases the court found

[199] [2009] EWHC 2526 (Ch), [2010] BCC 420.
[200] [2009] EWHC 2072 (Ch), [2010] BCC 387.
[201] Tang, J 'Shareholders Remedies': Demise of the Derivative claim? (2015) Pg. 178-210.
[202] *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch), [2008] BCC 885, the two-stage process was effectively telescoped into one. The counsel for the defendants accepted that 'it would be appropriate to deal with the entirety of the application for permission to continue at a single hearing'.
[203] Slaughter and May Companies Act 2006: Director's duties, Derivative actions and other miscellaneous provisions (2007) Pg. 11.
[204] *Ibid (n 97).*
[205] *Ibid (n 95).*

that no prima facie case could be derived from the facts. It therefore went on to consider the discretionary factors, and the factor which proved decisive was whether a person acting in accordance with a director's duty to promote the success of the company would continue the claim (i.e., whether an objective hypothetical director think it would promote the success of the company to pursue the complaint raised by the shareholder). In each case, the court found that such a person would not attach much importance to continuing the claim. In *Franbar's* case, this was because of the chances of success of the claim, the costs involved and the likelihood of recovery of any damages awarded. In Mission Capital the court thought the more likely course would be to replace the former directors rather than bring a claim against those whose acts caused the removal. Also, the court found that in each case the applicants had alternative means of recourse. Franbar had already brought an unfair prejudice claim under s.994 of the Companies Act 2006 as well as a claim for breach of its shareholders agreement with casualty plus. Although members of the Sinclair family had not brought a s.994 claim, the court thought that the relief they were seeking could be pursued under s994 CA 2006 and therefore denied permission.

The requirement of the "proper plaintiff" rule and its corollary the "wrong-doer control" as a precondition to institute a derivative claim is absent under the companies Act 2006. This has brought about divergent views on whether the proper plaintiff rule or the wrong-doer control mechanisms have relevance in today's application for derivative claim. Davies[206] opines the rule of *Foss v Harbottle* is 'consigned to the dustbin', Arad Reisberg shares the same opinion when he observes that the 'previous rules in the Foss case and other cases will not be directly relevant' and that 'the claimant does not need to show wrongdoer control[207] In *Wishart v Castlecroft Securities Ltd*[208]and *Bamford v Harvey*[209] following the decision in the *Wishart* case Roth J observed that 'wrongdoer control is not an absolute condition for a derivative claim'. In the case of *Stimpson v Southern Private Landlords Association,*[210] the court considered the status of the wrongdoer control mechanism. *Pelling QC* in response to the

[206] Gower and Davies (8th edn) 2008 615.
[207] Reisberg, A. '*Derivative Claims under the Companies Act 2006*: '*Much Ado about Nothing*' in J. Armour & J. Payne (eds) *Rationality in Company Law: Essays in Honour of D.D. Prentice* (Hart Publishing 2009) at 224.
[208][2009] CSIH 65.
[209][2012] EWHC 2858 (Ch).
[210][2009] EWHC 2072 [46].

submission that the wrong-doer mechanism was no longer relevant indicated that it would be a relevant consideration as the doctrine is an additional requirement considered by the court by virtue of the non-exclusive nature of s.263(3) CA 2006.

The conflicting positions opens the debate on the correct interpretation and application of s.263(2) CA 2006 to determine if it is correct to interpret the Act as simply providing a clearer and more accessible procedure for the application of the common law rules, including an absolute requirement to show wrong-doer control or other corporate incapability; and if not, in what way is it possible to effectively and coherently take account of the proper plaintiff rule through Part 11. In my opinion, the Law Commission never intended the common law "proper plaintiff" and "wrong-doer control" mechanisms to be applied to the new Act, because of its restrictive nature in aiding a minority shareholder institute an action. Moreover, continuous application of the said mechanisms will defeat the purpose of ensuring actions instituted are dispensed within a reasonable time. At the end of the day, the courts are left with the discretion as to whether the common law mechanisms will be applicable to a particular case from the circumstances surrounding the facts before granting permission to proceed with the claim.[211]

At present, derivative claims have still been instituted in the courts. In the case of *Cullen Investment Ltd v Brown*[212], the claim was brought by a minority shareholder alleging that a director has diverted profitable corporate opportunity for his own benefit. In considering whether to grant permission the court had to evaluate a couple of potential obstacles to the pursuit of a derivative claim. First, it took the view that the alleged breach had not been authorised. Secondly, it rejected the contention that no director acting in pursuance of his duty under s.172 of the Companies' Act would have supported the claim. Although the potential fruits of the claims were modest, that was no bar. An important consideration was that the minority shareholder had assumed all the risks of the litigation, so there was no danger of the company being faced with an adverse costs order. Considering all these circumstances,

[211] In *Abouraya v Sigmund* [2014] EWHC 277(Ch), the court believed that for a derivative claim to succeed the claimant must show that a "prima facie" case exists. In this case the claimant failed to sufficiently show that the actions of the majority led to his financial loss, hence the claim failed.
[212][2015] EWHC 473 (Ch).

permission to proceed was granted. By contrast in *Bridge v Daley* [213]where a derivative claim was blocked by the judge, HH Hodges QC, the claimant had shares in a public company, though he had limited backing from other shareholders the overwhelming majority gave no support for his claim. The judge felt that the complaint made would be more appropriate to have been tested in the context of s.994 CA 2006 petition rather than a derivative claim and costs was awarded against the claimant. It should be highlighted that Part 11 of the 2006 Act does not apply to "multiple derivative claims." These remain governed by common law and the Civil Procedure Rules 1998 (Rule19.9) which regulates the permission to proceed with an application. A multiple derivative claim is instituted in a situation where a member of the parent company sues on behalf of the subsidiary.[214] There must exist a *prima facie* case, that is being pursued in good faith. In *Bhullar v Bhullar.*[215] permission was granted to a minority shareholder to continue a double derivative claim on behalf of two companies alleging dishonest payments and a transfer by a director. A pre-emptive cost order for an indemnity out of the company's assets was not ordered as it would have given the minority shareholder a considerable advantage. As a result, my view suggests the retention of the multiple derivative claims under common law by the Companies Act 2006 causes uncertainty to the remedy of derivative claims.

From the above analysis, the codification of derivative claims under the 2006 Act by the Law Commission places the statutory derivative claims alongside an obscure, complicated and unwieldy common law regime. In the above circumstance it will be appropriate if a minority shareholder is permitted to institute a derivative claim and pursue an unfair prejudice petition simultaneously. This will save time as the courts will determine within a reasonable time which action will succeed. In matters pertaining to costs, the benefit of unfair prejudice petition accrues to the claimant likewise in a derivative claim, the court may order the company to indemnify the claimant for liability in respect of costs, whether the claim is successful or not.[216]

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[213][2015] EWHC 2121 (Ch).

[214] *Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] EWHC 348 (Ch), [2013] Ch 551), it was held that the common law did indeed provide for the possibility of a double or multiple derivative claims and the court's jurisdiction in that respect had not been taken away by s260-264 of the Companies Act 2006.

[215][2015] EWHC 1943.

[216] Civil Procedure rules 1998, r.19.9E, see also the case of *Mumbray v* Lapper [2005] EWHC 1152 (Ch), [2005] BCC 990.

Considering the recent cases involving derivative claims, the attitude of the courts in respect of the derivative claims is somewhat sympathetic to the plight of minority shareholders. Rather than initiating a claim, it will be better for a member to petition the court for relief under Part 30 CA 2006[217] If the initial derivative claim fails to meet the necessary grounds under s.263(2) to s.263(4) and s.172 CA 2006, there is the possibility that the court will grant leave to the claimant to switch to unfair prejudice under s.994-999 CA 2006.[218] This is favourable because the requirement of going through preliminary applications which entails court's approval for continuance of the derivative claim[219] is absent and the exorbitant cost applicable to the claim is virtually non-existent[220] under s.994. Most importantly, the benefit resulting from a successful derivative claim accrues to the company, since the company is seen as the proper plaintiff in the suit and has the right of recovery,[221] meaning that a successful litigant would not be better off than fellow shareholders who made no effort to support the proceedings.

The next Chapter (3) commences by tracing the historical development of unfair prejudicial petition in England and Wales. To accomplish this task, the historical method of comparative methodology was adopted to unravel the legal problems rooted in the past. In addition, signposts were adopted to illustrate how the statutes developed and evolved over the years to its currently application. Notwithstanding, the functional method was applied to decipher the function of the remedy and finally the law-in-context method to clarify if the current legislation adequately protects minority shareholders in its application.[222]

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[217] Part 30 (s994 to 999) provides the court with a wide-ranging jurisdiction to remedy conduct of a company's affairs 'that is unfairly prejudicial to the interests of its members generally or of some part of its members'.
[218] In *Clark v Cutland* [2003] EWCA CIV 810, [2004] 1 WLR 783 also in *Gamlestaden Fastigheter AB V Baltic Partners Ltd* [2007] UKPC 26, [2007] BUS LR 1521. These cases highlight the ability of the courts concessionary attitude in granting corporate reliefs in unfair prejudice petition.
[219] Civil Procedure (Amendment) Rules 2000, Rule 19.9(3) [Derivative action]
[220] Reisberg, A. 'Funding Derivative Actions: A re-examination of costs and fees as incentives to commence litigation' (2004) 4 Journal of Corporate Law Studies 345.
[221] *Wallersteiner v Moir* [1975] QB 373 in a derivative action it was observed that an individual shareholder does not enforce a right which belongs to him, but which is vested in and derived from the company.
[222] Ibid No.70, Pg. 22.

CHAPTER 3: UNFAIR PREJUDICIAL PETITION IN ENGLAND AND WALES.

3.0 Introduction

Shareholders often enter into agreements independent of the statutory contract contained in the articles of association of a company with the intent of achieving the objectives which is usually to protect the interests of members[223]and to safeguard minority shareholders by reserving certain decisions such as the issuance of shares, which can only be made by the unanimous consent of all shareholders. The agreement may contain 'tag along provisions' which seek to protect minority shareholder in a share sale situation where the majority attempts to sell only their shares rather than seeking to find a buyer for all the shareholders. Conversely, it offers protection to majority shareholders with the option of 'drag long' provision which usually operate where an offer is received to buy all the shares in a company and the majority wishes to accept the offer. The clause in the agreement might allow the majority to force the holders of the remaining shares to accept the offer on the same terms so that they will not withdraw from the deal.[224]

Despite the existence of carefully laid out terms and conditions in an agreement, with the inclusion of exit provisions expectations may not be met. In the event a shareholder fails to carry out his duties or act in a manner which is contrary to, it constitutes a breach recognised by law. The primary route to relief for a minority shareholder is damages, a common law remedy for instances of breach of contract. Other than awarding damages, the common remedy for resolving breach of contract is via an injunction issued by a court. However, this can be a slow process and may incur additional fees. These injunctions can mandate that shareholders take the required voting action to carry out the terms stipulated by the court, or an even force a shareholder guilty of wrongdoing to transfer their shares. However, for the purpose of this research unfair prejudice petition will be the focus.[225] Unfairness is an essential

[223] It should be noted that agreements between shareholders differ. It may include agreements relating to the sale and transfer of shares, share of profits and dividends depending on the type of company.
[224] https://www.ashtonslegal.co.uk/insights/legal-news/10-reasons-why-your-company-should-have-a-shareholders-agreement/ accessed on 6/06/2021.
[225] In *Re Raven Heart Service (Holdings) Ltd* [2004] 2 BCLC 376 an unfair prejudice petition was defined as a statutory remedy available to shareholders of a company. It is the primary procedure available to a minority shareholder who is a victim of 'unfairly prejudicial conduct'. The basis of the claim is that the affairs of the company have been, are being or will be conducted in a manner that is unfairly prejudicial to its shareholders or some of them (and at least the petitioner).

ingredient in minority shareholder petitions. Prejudice is not enough. This remedy permits a member of a company to petition the courts for relief on the ground that the company affairs are being or have been conducted in a manner that causes unfair prejudice to the interests of members generally or of some parts members (including him/herself).[226]

This chapter focuses on the statutory relief of unfair prejudice petition available to shareholders[227] of a company. It is provided under s.994 of the Companies Act 2006, [228]formerly s.459 of Companies Act 1985 also referred to as 'section 459 Petition'. After the statutory changes aimed at the removal of the restrictions in instituting a petition under s.459, the current attitudes of the courts are in favour of providing reliefs to minority shareholders through the unfair prejudice petition, which is considered as a major source of protection for minority shareholders.[229] This chapter traces the historical background of an unfair prejudice petition and its objective in safeguarding minority shareholders rights from 1948 to date. The discussion will focus on the analysis and interpretation of the provisions of sections 994 to 999 of the Companies Act 2006 with particular emphasis on how these provisions have been applied by the English and Welsh courts in recent cases. In addition, the remedies available under s.996 of the Companies Act 2006 will be examined, with particular emphasis on buyout.[230] Finally, the chapter will conclude by making an informed opinion whether unfair prejudice petition is an effective cause of action for minority shareholders protection in England and Wales.

[226] *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171, CA. See also Hannigan, B Company Law (2nd edition, Oxford University Press 2009) Pg. 415.
[227] The term "shareholder" in this context generally refers to minority shareholders in a company affected by the act or omission of the majority.
[228] The statutory remedy of unfair prejudice petition is provided for under Part 30: protection of members against unfair prejudice, S.994-999 of the Companies Act 2006.
[229]http://www.mslawyers.eu/images/publication_documents/Minority_Shareholders-_Applicability_of_Unfair_Prejudice.pdf accessed 8/12/22
[230] The buyout remedy is one of the many orders which a court can grant. It has proved to be a veritable remedy as it gives the petitioner the option to have his shares bought by the respondent for a fair value. In certain circumstances the court may order the respondent be bought out of the company. This as a result makes this remedy attractive.

3.1 Historical Background of Unfair Prejudicial Petition

The remedy of unfair prejudice petition dates to 1948, when the 'oppression remedy' was introduced as a requirement to establish unfair prejudice in England and Wales.[231] The oppression remedy required the presence of oppressive behaviour, a term narrowly interpreted by the courts in order to subdue vexatious claimants. Prior to the introduction of s.210 of the Companies Act 1948, a minority shareholder was often unable to obtain any redress from the courts to prevent the majority shareholders from acting in an oppressive manner.[232] In *Scottish Co-operative Wholesale Society v Meyer*[233]Lord Simmons reiterated that the term 'oppression' meant burdensome, harsh and wrongful. In this case, a shareholder complained that the company's business contracts were diverted to another company in which the petitioning shareholder had no interest. The petition instituted by the petitioner was successful. Also, in *Re HR Harmer Ltd*.[234] the petition was presented by the son of the respondent, who contended that the respondent ran the company's business as his own personal venture, his actions were dictatorial: for instance, he took decisions without convening meetings without the consent from members of the company, and most importantly defied board resolutions. The petition was successful.

The courts had a restrictive approach in the interpretation of this remedy, which meant that relief could only be granted in respect of continuous act by the majority, which was improper. Further, it was necessary to show that the circumstances of the company were such that it was just and equitable that the company be wound up. Unfortunately, it was difficult to obtain a just and equitable winding up order by the court.[235] These restrictions meant that only a handful of petitions succeeded. However, the term 'oppressive behaviour' proved too conservative and the Company Law Review Committee in 1945 recommended that a reformed version have a wide interpretation to permit more claims.[236] The result

[231] Mathew, B 'Unfair Prejudice': Who has it right, economically speaking? Journal of the Australasian Law Teachers Association Pg.55.
[232] Law Commission, 'Shareholder Remedies': A Consultation Paper. Law Commission No 142 (1997) Para 7.5 Pg. 56. However, on rare occasions the courts applied the winding up order on just and equitable grounds.
[233] [1959] AC 324.
[234] [1959] 1WLR 62.
[235] Orenstein, D (Radcliffe Chambers) 'Minority Shareholders & Unfair Prejudice' (2011) Pg.1.
[236] Dignam, A&Lowry, J Company Law (Oxford: University Publishers) 2012, Pg. 226.

was the introduction of s.210 of the 1948 Act. The section provided that where the company affairs were conducted in a manner which was oppressive to some part of its members and the circumstances were such that a just and equitable winding up would be available but was inappropriate to grant it, the court could instead grant such other remedy as it thinks fit.[237] Interpreting the wording of this section, it gave the courts the unfettered discretion to determine the appropriate remedy to apply, if granting the winding up order will be unjust based on the circumstances of the case before it. This wide discretion set the tone that previous case law is not as weighty in precedent as in other areas of law since each case will be decided on its merit. The impact of this section brought the full force of litigants and judges' attention to bear on what the term 'oppression' means, the scope of which would determine the rigour of the standard by which the majority conduct was reviewed.

Unfortunately, s.210 had various drawbacks,[238]which were highlighted by the Jenkins Committee in 1962.[239] One notable drawback was that an order could only be made if the facts could be the basis for a winding up order on the just and equitable ground, which meant the section was closely aligned to the rules relating to winding up. Secondly, a single act was insufficient to justify the institution of a petition the petitioner had to show the conduct was a repetitive and oppressive. In addition, a petition could not be based on omissions or on proposed future conduct. Finally, it was thought that the section would not cover personal representatives. However, Plowman J in *Re Jermyn Street Turkish Baths Ltd*[240]opined that personal representatives could petition. I agree with the position of *Plowman J* to the extent that a personal representative manages the affairs on behalf of another who is unable to do so. In the event of the death of a shareholder, a personal representative is generally required to settle the deceased's affairs. Where a will exists, which identifies a personal representative (i.e., an executor), the court will accept and recognise the personal representative as acting on behalf of the deceased and give effect to any express instructions set out in the will on the action to take. The court will allow such action to proceed

[237] Davies, P 'Introduction to Company law' 2nd Edition Oxford University Press 2010, Pg.233.
[238] *Ibid* para 9.1.
[239] https://www.yumpu.com/en/document/read/15548237/report-of-the-company-law-committee-1962-jenkins-committee accessed 7/06/2021.
[240] [1971] 1WLR 1042.

as if it was brought by the shareholder. This view also applies when the shareholder is alive and appoints a representative to act on his behalf.[241]

In 1962, the Jenkins Committee suggested several reforms to the oppression remedy, one of which was the expansion of the provisions to accommodate complaints of unfairly prejudicial conduct.[242] . This change was enacted into s.75 of the Companies Act 1980, which in its effort to overcome the restrictions of s.210 replaced the term 'oppressive' with 'unfair prejudicial'. S.75(10) of the 1980 Act, provided 'Any member of a company may apply to the court by petition under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including himself)'[243]. Also, the express link to the consideration of winding up as a remedy disappeared[244] but the wide remedial flexibility of the section was retained. The requirement of unfairly prejudicial conduct established in s.75 of the 1980 Act was embodied in s.459 to 461 of the Companies Act 1985. Hence the unfair prejudice remedy was introduced as an implicit instruction to the courts to liberalise and broaden the law to allow for more petitions by minority shareholders,[245]. Section 459 provided the courts with unfettered discretion to grant relief where, upon a member petitioning, it is established that the company's affairs have been conducted in a manner which is unfairly prejudicial to him alone, a group of members or all the members[246]. At present, the provision that regulate unfair prejudice remedy is s.994 of the Companies Act 2006.

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[241] Hayton, D & Mitchell, C "Cases and Commentary on Trusts and Equitable Remedies" 12th Edition: Sweet &Maxwell, 2005.
[242] Paterson, P 'A criticism of the contractual approach to unfair prejudice' (2006) 27 Comp Law 204.
[243] McMullen, J 'Minority Protection and Section 75 of the Companies Act 1980' the Cambridge Law Journal Vol 42, No 2 (November 1983) Pg. 204-206.
[244] According to Lord Hoffman in O'Neill v Phillips [1999] 1 WLR 1092 Pg. 1099-1100, he believed in order to succeed with a petition for the relief of unfairly prejudicial conduct of a company's affairs. It is not necessary to show that the circumstances justify winding up the company.
[245] Coffee, J.C 'The mandatory enabling balance in Corporate Law: An Essay on the Judicial role' (1989) 89 Columbia Law Review 1618, 1688-9.
[246] Goddard, R 'Enforcing the Hypothetical bargain: Section 459- 461 of the Companies Act 1985' (1999) 20 Comp Law 66.

3.2 Problems and Proposals for Reforms of Unfair Prejudicial Petition (pre-2006 Act)

The major obstacle that plagued unfair prejudice petition before the enactment of s.994 of the Companies Act 2006 was the costs of proceedings encountered by litigants. According to *Harman J* in *Re Unisoft Group Ltd (No 30) "unfair prejudice petitions have become notorious to the judges of this court and also to the bar for their length, their unpredictability of management, and the enormous and appalling costs which are incurred upon them particularly by reason of the volume of documents liable to be produced*". [247]

The case of *Re Elgindata Ltd.*[248] is indicative of this point. In this case, costs totalling £320,000 were incurred litigating over shares worth £24,600. Unfortunately, this amount did not include the cost of the appeal. Likewise, in *Re A Company (No 00836 of 1995)*[249] the petition was struck out because a reasonable offer to buy the petitioner's shares had been made. The judge however noted the striking out might also be justified if it appeared that the proceedings were conducted in pursuit of family feud (personal) rather than for commercial reasons. Most importantly, the opposing parties in the case had already incurred costs of £1million. Going from the judgment of the court, in my opinion, the fact that a claimant instituted a petition despite the financial burden reflects the depth of personal animosity involved between the parties than a mere desire for compensation for loss, coupled with the growing perception that unfair prejudice petition is an effective remedy to pursue than derivative claim,[250] makes it an attractive substitute.[251]

[247] [1994] 1 BCLC 609, Pg. 611.
[248] [1991] BCLC 959.
[249] [1996] 2 BCLC 959.
[250]As earlier pointed out, what makes the remedy of unfair prejudice petition more favourable to minority shareholders than derivative claim is the absence of preliminary application which requires court approval for continuation. Most importantly, the benefit from a derivative claim accrues to the company since the company is seen as the proper plaintiff. As opposed to unfair prejudice petition, the petitioner benefits from the court order. See Reisberg, A. 'Funding Derivative Actions: A Re-examination of costs and fees as incentives to commence litigation' (2004) 4 Journal of Corporate Law Studies 345.
[251] This is contrary to the position of Prentice, D.D 'Minority shareholders oppression: Section 459-461 of the Companies Act 1985' (1988) 8 OJLS 55, Pg. 65. Also, Milman, D 'Avenues for shareholders redress in the 21st century' (2011) 295 COLN 1 at 3, he opined "unfair prejudice petition aims at protecting shareholders right, it is a costly and lengthy procedure. This as a result makes shareholders sceptical in instituting a petition"

The legal system in England and Wales failed to provide a framework for regulating unfair prejudice petitions. This perspective is shared by Sealy.[252] Counsel presenting a case on behalf of their clients in unfair prejudice in a company often had to present evidence depicting acts or omissions of majority shareholders, to build up an overall picture of prejudice. This is countered by equally extensive evidence and cross-examination from the other side. The result can easily be that costs exceed the value of the assets being fought over. The reason been the fees of legal representation over a period plus the seeking of adjournment of cases by the counsel to perfect their briefs.

The Company Law Review Committee[253] decided it would not update the unfair prejudice provisions for the Companies Act 2006. A salient feature of s.994 is the sheer volume of cases brought with long complicated histories as shareholders dig into the past to discover evidence of “unfair prejudice” The Law Commission in its report[254] considered ways of reforming unfair prejudice provisions for the Companies Act 2006. The proposals made by the Law Commission included: imposing a time limit for instituting claims, prohibiting advertisement of unfair proceedings without the leave of the court, promoting shareholder exit articles in constitutions so that a remedy for a shareholder to leave a company where the relationships have broken down are incorporated into the company’s own regulation, including the winding up remedy among the already existing remedies provided by the courts by virtue of s.996 and finally instituting a statutory buyout remedy.

The Company Law Review Committee rejected the last two ideas,[255]one of which was adding a winding up remedy to the existing remedies. The reason for this was the existence of a winding up remedy under s.122 (1) (g) of the Insolvency Act 1986. I agree with the exclusion on the ground that the remedy will lead to duplicity causing confusion on the appropriate Act to apply. The courts do not grant unfair prejudice petition but winding up order where is “just and equitable to do so” and it therefore became

[252] Sealy, L ‘No relief for the Minority Shareholders’ (1995) 16 Co Law 178.
[253] Developing the framework Para 4. 100-111, completing the structure, Para 5.78-81 and final report 1, Para 7, 41-45.
[254] Shareholders Remedies Law Com No 246, Cm 3769 (London: Stationery Office 1997).
[255] Robert Goddard ‘The Modern Law Review’ Vol 66, No.3 (May 2003), pp.40-424.

a habit for the petitioner to ask for a winding up of the company. Secondly, with regards to a statutory buyout remedy, the Company Law Review was of the view that since majority of resulting order by the courts are ‘buy outs’ putting such a remedy on a statutory footing, where a private company member has at least 10% of the shares and has been excluded from management. There would be a presumption that exclusion from management would be unfairly prejudicial. I disagree with the position in rejecting a statutory buy out remedy. It is a potent remedy available to minority shareholders in event of unfair prejudicial conduct by the majority. The existence of a statutory buyout remedy gives credence to the protection of minority shareholders since it is backed by law. It ensures the existence and enforcement of minority rights.

The principal recommendation was that the problem of excessive length and costs[256] encountered by litigants should be solved by active case management by the courts. The courts further indicated that the powers of case management which is present under the Civil Procedure Rules 1998 would be used to control proceedings on unfair prejudice petitions.[257] An aspect of the overriding objectives of the Civil Procedure Rules which is relevant to cases like *Re Elgindata Ltd*[258] is that the courts should deal with each case proportionate to the amount in dispute. In my opinion, this approach will lead to unnecessary segmentation of cases, on the basis that the cost of proceedings in a particular case failed to attain the required financial threshold. This leads to a situation where genuine cases of unfairly prejudicial conduct are overlooked. In *Allmark v Burnham,*[259] after the court-directed mediation failed the court sought direction of joint experts on accountancy and land valuation. This produced a valuation of the petitioner’s shares at £30,500 and established liability for repayment of a debt of £65,000. The Law Commission[260] recommended a time limit within which proceedings may be instituted, which would start to run from the date when the petitioner ought to have known the relevant facts. The reason

[256] Cheung, R ‘The statutory minority remedies of unfair prejudice and equitable winding up: The English Law Commission’s recommendation as models for reforms in Hong Kong’ (2008) 19 ICCLR 156 at 157.
[257] *North Holdings Ltd v Southern Tropics Ltd* [1999] 2BCLC 625. See also *Re Rotadata Ltd* [2000] 1 BCLC 122.
[258] [1991] BCLC 959.
[259] [2005] EWHC 2117(Ch), [2006] 2 BCLC 437.
[260] Shareholders Remedies Law Com No 246, Cm 3769 (London: Stationery Office 1997) also Keay, A ‘Company directors behaving poorly’: Disciplinary option for shareholders (2007) JBL 656 at 678.

for the time limitation is to ensure petitions are instituted and dispensed with within a reasonable time, to prevent multiplicity of suits and most importantly to determine if the petitioner has the right to institute the petition. The effect of the recommendation was also felt in *Re Grand Actual Ltd.*[261] The court held that it had the discretion whether to grant relief, however no court of competent jurisdiction will grant reliefs for events which transpired nine years ago (statute of limitation) which the petitioner partook in. The Company Law Review Committee steering group referred to an arbitration scheme to deal with disputes which might be otherwise be taken to court.[262] Despite the recommendations made by the Law Commission, in *Hawkes v Cuddy,*[263] shares worth £97,000 were in contention at various stages in the proceedings, amounting to a lengthy and expensive proceeding. However, the attitude of the court in some situation is to stay an unfair prejudice petition where a shareholder's agreement provided for disputes to be arbitrated.[264]

3.3 Unfair Prejudicial Petition under the Companies Act 2006

An action instituted before the courts usually seeks a specific remedy. This, however, depends entirely on the remedy sought. For instance, in a derivative claim, the minority shareholder may seek a court order that will render the actions of the majority invalid, because the act amounts to negligence, default, breach of duty or trust by the directors with a view to increasing the value of the assets ultimately available for distribution to the shareholders as shown in *Lesini v Westrip Holdings Ltd.*[265] In addition, a claimant may also seek an order that the company indemnify him against costs of the claim, because the claim is entirely for the company's benefit. This approach was demonstrated in *Mumbray v Lapper.*[266]

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[261] [2005] EWHC 1415(Ch), [2006] BCC 73.

[262] Corbett, J and Rosalind, N 'Mediation and Section 459 petitions' (2002) 23 Com Law 274. Arbitration clauses are usually inserted into shareholder's agreement as a precaution in the event of disputes arising. One major advantage of arbitration over litigation is that it saves time and cost, issues arising are dispensed within a reasonable time. Also, arbitral awards are binding on all parties. It can be enforced as a judgement in the court by virtue of s.66 of the Arbitration act 1996. See the case of *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855; [2012] Ch.333.

[263][2007] EWHC 2999(Ch).

[264] *Ibid (N30).*

[265] [2009] EWHC 2526(Ch).

[266] [2005] EWHC 1152(Ch).

In an unfair prejudice petition, the claimant mostly seeks an order that the majority purchase his shares at a fair price to be determined by the court as depicted in *Sethi v Patel.*[267] It was observed in the case of *Birdi v Specsavers Optical Group Ltd &Ors*[268] which portrayed the impact of wrongdoing on fair valuation of shares. The court ordered the price payable for the petitioner shares could include "a sum to make good the prejudice that was suffered". This judgement lays a foundation for a floodgate of unfair prejudicial petition specifically for the cost of the prejudice suffered. Alternatively, this has an impact on the judicial system. It leads to incessant investigation conducted by the courts to determine if there was indeed prejudice on the part of the respondent to justify the award of the costs sought for. This is time consuming and an abuse of judicial process. Upon a successful petition, the court has power to 'make such order as it thinks fit for granting relief in respect of the matters complained of' by virtue of s996(1).

Section 996(2) contains a non-exhaustive list of orders the court may make.[269] A judge must consider every possible remedy and apply the appropriate option likely to remedy the unfair prejudice. The petitioner's preference is an important consideration, but not the only one,[270]. For the purpose of minority shareholder protection in England and Wales it is imperative to address the buy-out remedy by the courts [271] The reason is its general acceptance and application as a judgement given by the courts to redress the wrong committed by the majority[272] Coupled with the fact that in most cases, the

[267] [2010] EWHC 1830.
[268] [2015] EWHC 2870.
[269] The most potent remedy given by the court is for the petitioner's shares to be purchased by other shareholders or by the company. The remedy may also include a form of injunctive reliefs. In Attwood v Maidment [2013] EWCA Civ 119, the Court of Appeal highlighted factors to be taken into consideration when dealing with the valuation of shares. The most important of these factors is the basis on which the valuation must be carried out and the exact date of the valuation. Unfortunately, the Companies Act 2006 does not contain any provision relating to valuation of shares and as a result it is up to the courts to decide the fair value.
[270] *Irvine v Irvine* (No 1) [2007] 1 BCLC 349, the court was of the view that the payment of excessive remuneration by the majority shareholder was an unfair prejudicial conduct. The breakdown in trust between the parties had gone too far to be rectified by requiring the majority shareholders to repay the excessive amount and fixing the level of his remuneration as to the future. It was held that a buy-out was the most suitable for the situation.
[271] Companies Act 2006, *S.996(2)(e)* provides "the court's order may provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly".
[272] *Simon Radcliffe v Guy Radcliffe, Home and Office Fire Extinguishers Limited* [2012] EWHC 917(Ch) Two brothers (Simon and Guy) set up a company to sell and service fire extinguishers. The company soon went into financial difficulty and Guy reduced his and Simon's salaries. Simon assaulted Guy as a result of the decision and each brother petitioned the court under s994 for an order that the other sell his shares to each other. The court held

predominant remedy will require the respondent to buy-out the petitioning shareholder at a price to be fixed by the court[273].

This is normally the appropriate remedy to issue in intra-company disputes involving small private companies. In *Grace v Biagioli*[274] a buyout was described as the usual order a court makes in the event of an unfair prejudicial petition. Buy-outs have several benefits over the alternative remedies the court may order under s.996(2) of the Act. The benefits include the possibility that conflict arising between shareholders is eliminated and, in the process, enabling minority shareholders to obtain the value of their shares from the company. Also, the company business is preserved for the benefit of other shareholders and finally the company is free from the claims of the petitioner in the event of the buy-out.

Unfair Prejudice Petition under s.994 allows petitions to be initiated based on a much wider range of circumstances with remedies awarded to petitioners at a far higher rate than under the previous section, as a result, most petitioners now choose to seek relief pursuant to s.994-996 of the CA 2006 than prior to 1980.[275] A member of a company may petition under s.994 of the Companies Act 2006 for relief from "unfairly prejudicial" conduct. This cause of action covers a broad spectrum of conduct,[276] and provides a wide range of remedies[277].

Simon's assault on Guy constituted unfair prejudicial conduct which made it impossible for them to continue their association as directors and shareholders and ordered Simon to sell his shares to Guy at a *pro rata* price.

[273] *Thomas v Dawson* [2015] EWCA Civ 706.

[274] *Supra. N 63.*

[275] Mclaughlin, S "Unlocking Company Law" 3rd edition (London and New York: Routledge 2013 Pg.391.

[276] Typical examples of unfairly prejudice petition include common shareholder complaints as exclusion from management, misappropriation of assets, and failure to pay dividends. It is not limited to these three categories. Joffe in his book *'Minority Shareholders: Law, Practice and Procedure'* 4th edition OUP Oxford Para 7.12, (2011) highlights a list of unfair prejudicial conduct. upon careful examination it would be observed that the category is neither mutually exclusive nor closed, new category of conduct can still arise based on new existing facts of a case.

[277] In *Grace v Biagioli* [2006] 2BCLC 70 (CA*)*, the judge reiterated the courts may make "such orders as it thinks fit" under *s.996* where unfair prejudice is found. This will often be an order that the petitioner shares be purchased by the majority shareholders or the company. The order may also include a form of injunctive relief or may regulate the company's affairs in the future.

Section 994 is not restricted to private companies, however it is particularly important to small companies with a limited number of shareholders, where personal disagreement can quickly escalate. Also, it is observed that unfair prejudice petition has extended its application to partnership[278]and quasi partnership[279] entered by shareholders. According to Lord Hoffmann[280] *"The rights of minority shareholders is an important and rapidly developing branch of law''*. It raises difficult questions of principle, the conflict between the letter and spirit of the company's constitution, the sanctity of the bargain, between shareholders agreements embodied in the articles and the prevention of unfair treatment, between giving a remedy which is effective and being an instrument of abuse, between the attainment of fairness and the amount of money which the parties can afford to spend on litigation. *Paterson*[281] was of the view the protection of minority shareholders has been introduced with the aim that the approach towards them will be fair since they lack control over the company. *Chiu*[282] shares similar views affirming the importance of minority shareholders protection in respecting freedom of contract and efficiency in private dealing between shareholders. In my opinion, the point Lord Hoffmann wanted to convey was that despite minority shareholder protection been a rapidly developing area of law, there exist obstacles limiting its effective application. This includes the conflict arising between shareholders from the interpretation of the company's constitution as to the proper party to institute a petition in the event of a breach of legally recognised rights. The courts are not exempted as they are under pressure to maintain a balance between issuing an effective remedy in the determination of a case brought before them and the prevention of frivolous cases.

[278] *Blunt v Jackson* [2013] EWHC 2090 (Ch) In this case, the petitioner and the respondent entered a partnership. It was agreed that each would hold a 50-50 shareholding. After a year, the petitioner was dismissed as a director and excluded from taking active part in the management of the company. Subsequently, his shares were transferred to another party (2nd respondent). The court held on the basis which the company was incorporated, the exclusion of the petitioner was unfair and prejudicial to his position as a shareholder.

[279] *Re BC & G Care Homes Ltd, Subnom Crawley .v. Bessell and Ors* [2015] ALL ER 115 demonstrates the impact of a quasi- partnership on the available relief. It was held that the removal of the petitioner right to be involved in the management of the company was unfair in the absence of a fair agreement to acquire his shares.

[280] Lord Hoffman in Paterson, P 'A criticism of the contractual approach to unfair prejudice' (2006) 27 Comp Law 204.

[281] *Ibid.*

[282] Chiu, I H 'Contextualising shareholders disputes': A way to reconceptualise minority shareholder remedies (2006) JBL Pg. 312.

At present, under the Companies Act 2006, the remedy of unfair prejudice petition is in operation by virtue of s.994,[283]. This section[284] provides *"a member of a company may apply to the court by petition for an order on the ground that "the company's affairs are being or have been conducted in a manner which is prejudicial to the interests of members generally or of some part of its members (including at least himself), or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial"*. The inclusion of the words 'including at least himself' means that a member cannot petition unless his interests have been adversely affected by the unfairly prejudicial conduct. This provision demonstrates that there are two grounds for instituting an unfair prejudice petition. First the conduct of the affairs of a company must be undertaken in an unfair prejudicial manner. Secondly, the corporate act or omission which is or would be unfairly prejudicial is sufficient as a ground for a petition. Also proposed acts and omission are covered by s.994, however mere fears and suspicion about how a company's affairs may be conducted would not be sufficient and a petition on such a basis would likely be premature.[285] The failure of majority shareholders to act by exercising the powers vested in them in accordance with the articles may constitute unfair conduct in the affairs of a company.[286] Majority shareholders are not excluded from bringing a petition in the event of any prejudice arising, such prejudice could be remedied using the power they possess by virtue of their controlling position. However, in a situation where a majority shareholder is prevented from exercising his or her rights by the minority, presents an opportunity to institute a petition to remedy the breach.[287]

[283]The procedure for petitions is governed mainly by the Companies (Unfair Prejudice Applications) Proceedings Rules 2009 (SI 2009/2469), also by the Civil Procedure Rules and the practice of the High Court, where not inconsistent with the 2009 Rules.

[284] It should be noted that this provision repeats rather than reforms s459 of the Companies Act 1985.

[285] *Re Astec (BSR) Plc* [1998] 2 BCLC 556.

[286] *Whillock v Henderson* [2009] BCC 314. See also the recent case of *Graham v Every* [2014] EWCA Civ 191, Where the petitioner instituted a petition under s994 for the non-compliance with a pre-emption provision in the shareholders agreement. The agreement was to the effect that directors were to be rewarded through dividends not salary, this was not adhered to. *Lord Mccombe* held that failure to observe the requirement of the pre-emption provision was an essential feature of the overall picture of unfair prejudice petition alleged in the petition. Hence the action succeeded.

[287] *Parkinson v Euro finance Group Ltd* [2001] 1 B.C.L.C, a majority shareholder removed from the board was prevented from using his shareholding to obtain redress with respect to sale of company's assets by the directors to a company controlled by them. The courts permitted the unfair prejudice petition to succeed.

Unfair prejudice petitions arise where there is breach of recognised right by law, breach of duty by directors in running the affairs of the company and conflict arising from shareholders agreements.[288]. I concur with the argument of the learned authors *Paterson*[289] and *Chiu*[290]on the need to protect minority shareholders from the act of the majority. However, the categories that constitute unfair or prejudicial conduct are not exhaustive as the boundaries keeps expanding. Hence there is no exhaustive definition on what constitutes unfair prejudice conduct, and it is left to the discretion of the courts to decide.[291]

What constitutes unfair prejudicial conduct has evolved over the years as recognition for minority shareholder rights increases due to the growth of shareholder's activism. This potentially puts the majority at risk because any act in the performance of their duties which tilts in favour of their interests has the potential to be declared unfair to the interest of the minority. The case of *Re Annacott Holdings Ltd*[292] below is typical example. When interpreting s994, four questions arise: who has the right to petition? what is meant by the term company's affairs? what is considered as being the interests of the members? and finally, what does unfairly prejudicial conduct depict? These questions will be answered by analysing instances where they have been applied.

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[288] Davies P.L and Worthington S, Gower and Davies: Principles of Modern Company Law 9th Edition, Sweet & Maxwell 2012 Pg.719.
[289] Supra N280 Pg 72.
[290] Supra N282 Pg 73.
[291] In *Re Annacott Holdings Ltd* [2012] EWCA 998, the defendant succeeded at first instance in arguing that remuneration paid to himself as the sole director and majority shareholder although excessive had been disclosed in the company's account and unchallenged over the years, could not form the basis of unfair conduct. On appeal, the court refused to accept this position as amounting to a "new restriction" and allowed the appeal by the petitioner to succeed.
[292] [2012] EWCA Civ 998.

3.4 Factors to Consider When Interpreting S.994

3.4.1 Who has the Right to petition?

By virtue of s.994, only members of a company have the right to institute an action.[293] A member is defined as a subscriber to the memorandum and any other person who agrees to become a member of the company and whose name is entered in the register of members.[294] This includes nominee shareholders,[295] an individual with beneficial interest in a share but who is not a registered member cannot institute a petition. However, the interests of a beneficial owner may be protected under s.994 if the nominee shareholder decides either voluntarily or by instruction to bring a petition. The concept of membership under s.994 has been enlarged into two contexts. Firstly, membership is extended to those to whom shares have been transferred but whose names have not been entered into the register of members.[296] Secondly to individuals where the shares have been transmitted by operation of law,[297] a petition for relief under the section, will extend to personal representatives and trustees in bankruptcy.[298] From the above ground 'who has the right to petition' it can be observed that s.994(1) expands the category of persons that can institute a petition, on the basis that the act of the majority is unfairly prejudicial to their interests or the interest of the person in whom they represent.

This section is flexible as demonstrated in the recent case of *Harris v Jones.*[299] Here, a percentage of share was transferred by a shareholder to another to be held on trust. The shareholder trustee executed an undated share transfer form back in favour of the original transferor which made the original transferor a transferee for the purposes of s.994(2) and therefore was entitled to petition under s.994(1).

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[293] *Re a Company* [1986] BCLC 213, it was held that exclusion of a member of a company, from being part of the board of directors amounted to unfair prejudice. See also *Companies Act 2006, s.112.*

[294] *Companies Act 2006, s117*. In *Tay Book Shoon v Tahansan* [1987] 1 WLR 413 PC, it was held that a non-executive chairman did have an interest remaining in position to protect the capital he has contributed to the company by way of loans.

[295] *Atlasview Ltd v Bright view Ltd* [2004] BCC 542, it was held that a nominee shareholder could be considered a legitimate petitioner. The court refused to strike out the petition holding it was arguable the interests of a nominee shareholder could include the economic and contractual interests of the beneficial owners of the shares. See also Hannigan B. *Company law* 2nd edition, Oxford University Press 2009 Pg.4.

[296] This applies when shares are held in a paper form and a proper instrument of transfer has been executed and delivered to the transferee or company. See the case of *Re Company A* (No.003160 of 1986) BCLC 391.

[297] Companies Act, 2006, *s 994(2)*

[298] *Re McCarthy Surfacing Ltd, Hecquet v McCarthy* [2006] EWHC 832.

[299] [2011] EWHC 1518 at 36, 149.

This provision can be subject to abuse (multiplicity of suits), in situations where individuals who believe they have an interest to protect, repeatedly institute petitions in the courts incurring unnecessary cost and slowing down the court's process. Equitable considerations such as the requirement that petitioner must come to court with 'clean hands' is not an essential pre-requisite in this circumstance. However, there is a High Court authority that a court might "in justice and fairness" recognise a mere equity in the exercise of its s994 jurisdiction when shareholders have acted unconscionably.[300] The conduct of the petitioner may, depending on the seriousness of the matter and degree of its relevance, lead the court to refuse relief, even if the conditions for the exercise of discretion in his favour are otherwise satisfied.[301] This highlights the unfettered discretion the courts possess when adjudicating on matters brought before them for determination. Also, if the conduct of the respondent is neither sufficiently serious nor sufficiently closely related to an unfairly prejudicial conduct, the court may refuse its discretion to grant relief.[302] Also, a member can agree to waiver or vary the right to petition.[303]

3.4.2 The Conduct must Prejudice the Petitioner's Interest as a Shareholder.

It has been established that when a shareholder seeks a petition for unfairly prejudicial conduct, the action must be directly related to the interest of the petitioner as a member of the company and not as an individual.[304] As the petitioner must be a shareholder[305], beneficial owners of shares held by nominees may not petition. Similarly, a petitioner cannot use this remedy to protect his right as a director save for where there is a quasi-partnership or a creditor. The main source of a shareholder's interest in a company is embedded in the company's memorandum and articles of association.[306] For

[300] *Dilip Kaneria v Prakash Keshavlal Kaneria and Ors (30 July 2015, unreported)*
[301] *Richardson v Blackmore* [2006] BCC 276.
[302] *Ibid*
[303] *Fulham Football Club Ltd (1987) v Richards* [2010] EWHC 3111 (Ch), [2011] Ch. 208 in this case members of the company varied their rights to institute an action in court but resorted to arbitration in the event of dispute arising.
[304] *Re a Company* (No 004475 of 1982) [1983] 2 All ER 36 at 44.
[305] *RE J E Cade& Sons Ltd* [1992] BCLC 213 is to the effect no petition will succeed when it is irrelevant to the interests of the member of the company. The petition failed because the shareholder tried to defend his interest as a freeholder of a farm instead of protecting his interest as a member of the company.
[306] *Arbuthnott v Bonnyman &Ors* [2015] EWCA Civ 536 demonstrates the use of the unfair prejudice remedy unsuccessfully to challenge the exercise of rights under the articles by the majority shareholders. In this case the petitioner a retired partner claimed unfair prejudice regarding the acquisition of his shares by the remaining

the interest of a petitioner to be prejudiced as a shareholder, it requires damage to the financial position, and damage to the value of his shareholding.

Unfortunately, there is no definition of the term ‘member’s interest’. The reason is the term depicts the rights exercisable by a member as a creditor or a director of the company. It is observed that the courts adopt a fair and broad approach in considering the members interest as creditors and not just as members of the company before reaching a judgement. This was illustrated in *R &H Electrical Ltd v Haden Bill Electrical Ltd,*[307] where the shareholder petitioned for relief under s.994 when the relationship between him and other shareholders broke down regarding loan taken by the company. Majority of the shareholders voted for his removal from management. The shareholder asserted the conduct complained of was irrelevant to his membership of the company and his interest as a member. *Robert Walker LJ* believed that the activities which the petitioner was engaged in was closely related to his interests as a member of the company. However, his removal from the company was unfair and prejudicial since he had an essential role to the management, and he petitioned successfully for relief under s.994. In *Gamlestaden Fastigheter AB v Baltic Partners Ltd,*[308] (whose facts were similar to *R&H Electrical Ltd,* the shareholder) was offering loans to the company from his working capital. The court was of the view that the proper approach was to place the interests of the petitioner as a creditor into consideration before the court decides on whether to allow the petition and grant the petitioner relief. Lord Scott emphasized that “*the fact that there were arrangements as to the funds between the petitioner and his fellow shareholders is highly important and influential to the court’s decision”*[309]. Moreover, no shareholder can be removed from the management of the company on grounds of non-conformity or conflicts of beliefs regarding the accounting and funding arrangements. This would constitute an unfairly prejudicial conduct and the minority shareholder will have the right to petition and would be

partners. He alleged the amendment to the company articles facilitated the expropriation of his shares at a gross undervalue rather than for any genuine corporate purpose. The claim failed on the basis that the amendment amounted to a “tidying up” exercise of existing provisions. There was no evidence of bad faith or improper motive on the part of the respondent.

[307] [1995] 2 BCLC 280.

[308][2007] 4 All ER 164.

[309] [2007] 4 All ER 164 Paras 39-49.

entitled to relief under s.994(1)(A) of the Companies Act 2006. Going from the above decision, it is safe to conclude that a shareholder affected by the actions of the majority, or the resulting performance of the company has an interest to enforce. Thus, it is argued that the meaning of member's interest should be examined carefully by the court and should adopt a wide approach of what it may refer to.

3.4.3 The Conduct must be Unfairly Prejudicial.

The conduct must be unfairly prejudicial before a shareholder can institute an action. Unfairness arises where there is breach of the memorandum or articles of association, agreements or legitimate expectations between shareholders. A company's conduct will be unfair where the directors have acted in bad faith for an illegitimate or ulterior purpose. As stated earlier, there is no requirement that the petitioner must come to court with clean hands. However, the petitioner's conduct might reveal no harm was suffered, hence the relief should be restricted.[310] The test of whether the prejudice was unfair is an objective one.[311] To determine what constitutes "fairness "or 'unfairness' in applying the objective test is whether a reasonable man in a company either as a shareholder or director observing the consequences of the majority conduct, would regard it as having unfairly prejudiced the petitioner's interest. From the judicial aspect, it presents the courts with the challenge of developing a case-by-case criteria through which the concept of 'fairness' can be given operational content coupled with the wide discretionary power it possesses. The question that arises is whether the harm suffered by the petitioner is one which he is entitled to be protected against. The prejudice must be 'real, rather than merely technical or trivial,[312] and the petitioner need not prove that the persons who control the company have acted purposely in bad faith or with a conscious intent to treat him unfairly.[313] The conduct complained of must be capable of causing harm to the interest of a particular member. Also, once the petitioner

[310]*Grace v Biagioli* [2006] 2 B.C.L.C. 70, CA *the* petitioner was removed from his position as director contrary to an agreement between him and three other persons involved when the company was set up. This amounted to unfair prejudice, however the petitioner had put himself in a position of conflict by seeking to purchase a competing company which justified his removal in breach of the agreement. The court held that the prejudice to the petitioner was unfair.
[311] *Nourse J* in *RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273 reiterated that the courts will apply an objective test to determine whether the conduct has unfairly prejudiced the petitioning shareholder's interest. See also Hicks, A & Goo, S.H, Cases and Materials on company Law 6th Edition, Oxford University Press 2008. Pg.450.
[312] *Re Saul D Harrison &Sons Plc* [1994] BCC 475 at 489.
[313] *Re R A Noble & Sons (Clothing) Ltd* [1983] BCLC 273 at 290

shows that the conduct complained of is prejudicial, then he or she would have the task to show that it was unfair. It is not sufficient if the conduct satisfies only one of these tests[314],therefore both unfairness and prejudice must be established but unfortunately none of the terms are defined.[315]

In the case of *Re Saul D Harrison & Sons Plc*[316] a few guidelines were set out in identifying when a conduct is unfairly prejudicial. These guidelines were confirmed by Lord Hoffmann LJ in *O'Neill v Phillips.*[317] He asserted that *"a member will not ordinarily be entitled to complain of unfairness unless there has been, (a) some breach of the terms on which the member agreed that the affairs of the company should be conducted or (b) some use of the rules in a manner which equity would regard as contrary to good faith such as cases where equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers''.*

Lord Hoffmann LJ's interpretation of the meaning of equitable considerations is an approach not to allow vague notions of unfairness to be used to fuel litigation and create uncertainty for the business community.[318] His refusal to rely on legitimate expectations to base a petition under s.994 CA 2006 spans from prior case laws with petitions being instituted on the fact that a petitioner was aggrieved that his legitimate expectation in relation to the conduct of the company's affairs had not been met. The term legitimate expectations in my opinion is clear to the extent that members in a company have the expectation that the company will be managed in a lawful manner and protect their interests in accordance with the articles of association.

This led Hoffmann LJ to affirm that the phrase legitimate expectation "should not be allowed to lead a life of its own". He preferred to use the phrase 'equitable considerations' to describe the circumstances when the courts should grant relief to petitioners.[319] Equitable considerations were to anchor on the

314 *Ibid (N.77)*
315 Goddard R.J 'The unfair prejudice remedy' Edinburgh Law Review (2008) Pg. 12(1), 93, 94.
316 [1995] 1 BCLC 14.
317 [1999] 2 BCLC 1.
318 Milman, D "The rise of the objective concept of unfairness" in United Kingdom Sweet and Maxwell Company Law Newsletter (2010) Pg 1-4.
319 https://radcliffechambers.com/wpcontent/uploads/2019/11/Minority_Shareholders_and_Unfair_Prejudice_Lecture-DO.pdf Pg.5 accessed 28/07/2022.

courts assessment of what might constitute unfair conduct in the face of the formal and informal bargain struck by the shareholders of the company.

3.4.4 The Conduct Complained About Must be Conduct of the Company's Affairs.

The term 'company affairs' is broad. By referring to the conduct of the company's affairs, the conduct must be the consequence of acts or omissions by the company or by those who have the authority to act on behalf of that company and not merely the actions or inactions of an individual acting in a personal capacity.[320] According to Harman J 'the acts of the company must be kept separate from the acts of an individual acting in his personal capacity since the latter cannot get relief under s.994 of the Companies Act 2006. This point of view was illustrated in *Re Legal Costs Negotiators Ltd,*[321] where it was held the complaint about the defendant's retention of shares could not be substantiated the reason been it was a personal matter as opposed to events that affect company affairs.

Matters involving a parent and a subsidiary company can be viewed as impacting the company's affairs.[322] It captures both acts and omissions. Also, in *Arrow Nominees Inc. v Blackledge,*[323] most of the shareholders were lenders and suppliers of the company, which was irrelevant to the company's affairs. The Court of Appeal underlined that no petition could be allowed since the allegations made concerned the terms of the loan and supply contracts granted, which did not bear any significance to the company's conduct. The petition will be substantiated only if the majority shareholders were fully engaged in unfairly prejudicial conduct by exploiting their position to constrain the company in accepting the terms of their own contact at the expense of more favourable rates offered by others. it can be concluded that a conduct is unfairly prejudicial if it has a recurring negative effect on the company affairs.

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320 *Re Unisoft Group Ltd* (No 3) 1994 1 BCLC 609 it was held the conduct of shareholders regarding disputes between themselves cannot be complained of and a shareholder cannot seek a petition.
321 [1999] 1 BCLC 171. See also *Re Leeds United Holdings Plc* [1996]2 BCLC 545.
322 See the case of *Nicholas v Sound Craft Electronics Ltd* [1993] B.C.L.C. 360 on the conduct of the parent as conduct of the subsidiary. It must be noted that it is not confined to companies engaged in the same business. *Rackind v Gross* [2005] 1 W.L.R 3505 it was decided that the affairs of the subsidiary comprise the conduct of the holding company and vice versa. In effect unfair prejudice order can arise by the conduct of the subsidiaries of the company, particularly when they are entirely owned or controlled by majority of directors. In that way, shareholders of the parent company can petition for relief in relation to the subsidiary conduct. See Hannigan B *Company Law* 2nd Edition, Oxford University Press 2009 Pg.420.
323 *[*2000] 2 BCLC 167.

Section 994 protects expectation not only rights. The courts prefer the phrase "equitable consideration".[324]The category of equitable consideration arises out of a fundamental understanding between the shareholders which formed the basis of their agreement not put in contractual form. What this principle recognises is that the totality of the agreement or arrangement among the members of the company may not be captured in the articles of association. Hence there exists the need to adopt a set of rules dealing with every aspect of the company's present and likely future method of operation, since the future is unpredictable. The starting point for analysis by the courts will be the articles of association and evidence will be required to dissuade the court from the view that "it can safely be said that the basis of the association is adequately and exhaustively laid down in the articles"[325] If that factual demonstration cannot be made, the petitioner's case will fail. It follows from this that the category of protected expectations is almost wholly confined to a small number of members. In a large corporate establishment, it becomes increasingly difficult to demonstrate that all members of the company were parties to the informal agreement and if they were not, the court is unlikely to favour enforcement instead the members would rely on the registered constitution of the company,[326].This approach adopted by the courts was confirmed in the House of Lords decision in *O'Neill v Phillips.*[327] Here the respondent who incorporated the company handed over the business to the petitioner, allowing him to acquire a quarter of the shares in the company. Later, the petitioner became the managing director of the company, receiving half of its profits. There were conversations about the petitioner acquiring one-half of the share capital. The emergence of an economic downturn led the respondent to take over the company and paid the petitioner only a salary and the dividends due on his 25 percent. The treatment of the petitioner who resigned was held not to be unfairly prejudicial because there was no agreement between the parties, although the petitioner should be entitled to receive half the profits as far as he

[324]At first legitimate expectation was the phrase adopted by the Court of Appeal in *Saul D Harrison & Sons Plc* [1995] 1 B.C.L.C. *14 at 19 Per Hoffman L.J.* led the House of Lords to adopt the phrase "Equitable Considerations" for fear that the former phrase carried connotations which were too wide. Equitable considerations were to anchor on the courts assessment of what might constitute unfair conduct in the face of the formal and informal bargain struck by the shareholders of the company.
[325] *Ebrahimi v Westbourne Galleries Ltd and others (on appeal from in Re Westbourne Ltd):* HL 3 May 1972.
[326] *Re Astec (BSR)* [1998] 2 B.C.L.C. 556.
[327] [1999] 2 B.C.L.C. 1, HL.

acted as the managing director and be entitled to increase his shareholding to one-half, contrary to the judgement of the Court.

The judge in my opinion, should have determined whether there were equitable considerations which required the strict legal rights of the majority derived from the articles of association to be subject to equitable considerations which channel or restrict the discretion which the majority would otherwise have, where it can be shown that the members came together on the basis that those legal rights should not be freely exercisable.

On the other hand, *Ebrahimi v Westbourne Galleries Ltd*[328] emphasised that equitable considerations do not flow simply from the nature of the company as a quasi-partnership but requires “something more” in the form of proof of the existence of an informal agreement say the participation by the minority in the management of the company. From this affirmation in the *O’Neill* case there was an informal agreement between the petitioner and respondent, likewise the petitioner actively participated in the management of the company; hence the petition should have succeeded.

Although the *Ebrahimi* case involved winding up of the company, similar considerations were applicable which have strongly influenced the growth of this category of unfair prejudice. In *Re Guide Zone Ltd,*[329], Jonathan Parker J took the equitable analogy a step further by requiring that non-contractual understandings can be relied upon by the minority before they could form the basis of an unfair prejudice petition. In other words, implied agreements between members of a company can be the basis of a petition. This requirement has been fully absorbed into the unfair prejudice petition.

A company’s constitution is the ‘starting point’ for judicial analysis because ‘keeping promises and honouring agreements is probably the most important element in commercial fairness’[330]. The four

[328][1973] A.C.379.
[329][2000]2 B.C.L.C. 321 at 356.
[330] The words of Per Hoffman L.J *in Re Saul D Harrison & Sons Plc* [1995] 1B.C.L.C. 14, 19.

factors discussed above must be strictly adhered to by the courts when interpreting s.994 because it sets the tone in determining whether a petition will succeed.

3.5 Relationship Between Unfair Prejudicial Petition and Derivative Claim

In the context of increasing shareholder activism in England and Wales, it is interesting to reflect upon the apprehension that greeted the introduction of the statutory regime of derivative claims in the Companies Act 2006. I believe there were concerns that the development, alongside the wide discretion afforded to the courts in assessing the existence of unfair prejudicial conduct, might herald a wave of new shareholder litigation. Before the reform of the derivative action now statutory derivative claim, some courts were concerned to draw the boundary between the derivative claim and the unfair prejudice petition.[331] The Jenkins Committee[332]recommended the introduction of the unfair prejudice remedy envisaging it would have a role to play in relation to wrongs[333] done to the company. However, this generated an ambiguity in interpreting the intentions of the Jenkins Committee. The question for determination is: in the event of a wrong done to the company which inflicts harm on a minority shareholder, can s.994 be invoked to redress the wrong? The answer can be obtained from the attitude of the courts from several reported cases,[334] where the unfair prejudice petition has been entertained by the courts, where the wrongdoers conduct consisted wholly or partly of wrongs done to the company. The courts went further to refuse to accept that the actual availability of a derivative action constitutes

[331] Reisberg, A: European Business Law Review (2005) 1065. In the case of *Re Charnley Davies Ltd* (No.2) [1990] B.C.L.C 760, *Millet J* was quick to point out the relationship between a petition based on unfair prejudice and the derivative action (now derivative claim). The learned judge was of the view that an allegation that the directors had breached their duties to the company was not sufficient to institute a petition. To rightly institute a petition what needed to be shown was there was also conduct on the part of the controller which was unfairly prejudicial to the minority. This suggests the answer to the difficult questions of which complaint the petitioner is seeking to make and if the petition is the appropriate action based on the nature of the remedy sought.
[332] Report of the Company Law Committee, Cmnd. 1749 (1962), Para.206.
[333] Such wrongs include direct wrongs which is harm inflicted directly on the minority and not the diminution in the value of their stake in the company. Also, indirect wrongs committed on the company by the majority and actions taken to redress the wrongs are prevented. In such a case the minority is indirectly wronged.
[334] From *Cooks v Deeks* [1916] 1 A.C.553 to *Re Cumana* Ltd [1986] B.C.L.C. 622 all involving various forms of diversions of the company's business to rival companies in which the majority have interest. Also, the case of *McCarthy Surfacing Ltd* [2009] B.C.L.C. 622 involving exercise of director's power for an improper purpose, the court found that certain bonus payments, and the non-declaration of dividends, amounted to an unfair prejudice. So long as the "Independent Illegality" theory held sway proving breach of director's duties was a way of bringing the controllers conduct within the unfair prejudice provisions.

a bar to an unfair prejudice petition.[335] This position was reinforced by *Lord Hoffman L.J* (as he then was) who noted that "enabling the court in an appropriate case to outflank the rule in *Foss v Harbottle* was one of the purposes of the section (s.994).[336] The case of *Clark v Cutland* [337] makes s.994 attractive for minority shareholders as it expanded the circumstances in which minority shareholders can make use of the statutory oppression remedy. According to *Payne*,[338] he believed the case of *Clark v Cutland*[339] may lead to s.994 entirely superseding the derivative action". Going from the decision in *Re Charnley*[340] it can be deduced that an unfair prejudice petition might arise out of breach of duty owed by directors which is unfairly prejudicial to the minority. Unfair prejudice to the petitioner was the ground for any relief granted and the relief that might be claimed in a petition was confined to personal remedies and might not include corporate reliefs.[341]

This application blurs the distinction between this remedy and derivative action now derivative claim. Most of the conduct presently regulated by s.994 might have fallen within the scope of derivative actions before the introduction of s.994 CA 2006.[342] Based on this ambiguity, the question arises as to whether derivative claim should be entirely replaced by the unfair prejudice remedy, or whether it should remain a separate remedy. From the analysis of derivative claim in the Chapter 2 and unfair prejudice petition in this present chapter, the overlap of functions between both statutes is a concern and the mere fact that the conduct of a majority shareholder would merit a derivative claim is not a reason to strike out a petition under s.994. The courts are careful to ensure in a situation where the only substantive relief sought on the petition is a claim brought on the part of the company against a third

[335] *Lowe v Fahey* [1996] 1 B.C.L.C. 262.
[336] This statement was made in the *Saul D Harrison &Sons Plc* case. The literal meaning entails discarding the remedy of derivative action as a one stop remedy in the event of wrongs done to an individual shareholder or the company. Also, it can be interpreted that the petition seeks to overcome the excessively strict limitations on the derivative action (now derivative claim) imposed by common law.
[337] [2004] 1 WLR 783.
[338] Payne, J *'Sections 459-461 Companies Act 1985 in Flux: 'The Future of Shareholders Protection'* (2005) 64 CLJ 647 at 645.
[339] *Ibid.*
[340] Supra, N322.
[341] This position is buttressed by the case of *Kung v Kou* (2004) 7 HKCFAR 579 which has the most extensive discussion in this area of contention. However, it must be noted the judgement of the court only has a persuasive effect on cases brought before the courts for determination.
[342] Xiaoning, L 'A Comparative study of shareholders' derivative actions (Kluer 2007) Pg.40

party, that they will not let the claimant to proceed by petition instead of bringing a derivative claim, and where the derivative claim and petition raise substantially the same issues, the court may require the proceedings be consolidated in the petition.[343] Both remedies have their peculiarities and advantages over each other.[344] The fact that derivative claim is available under Part 11 of the Companies Act 2006 is evident that it is an independent remedy. It should give rise to more clear lines between the two remedies.

The statutory derivative claim rules set out a criterion which must be fulfilled before the claimant can proceed against the directors. This is the recognition that it is not always in the interest of the company to enforce its legal rights. Part 11 of the Companies Act 2006 makes it clear that derivative claims can be instituted only under its provisions or "in pursuance of an order of the court in proceedings under section 994" [345] However this is not a general permission for derivative claim to be initiated by way of petition under s.994. The reference to "an order of the court" is to one of the court's remedial orders. When an unfair prejudice petition is instituted by an individual, the courts have the to "authorise civil proceedings to be brought in the name and on behalf of the company by such persons and on such terms as the court may direct". This wording emphasises the difference between a petition under s994 and a derivative claim because it eliminates the need for a subsequent derivative claim to be authorised by the court after the petition has succeeded. It will not be attractive for a shareholder to bring a petition to obtain permission to commence a second piece of litigation as opposed to seeking permission directly under Part 11 to commence derivative claim.

343 Hannigan B "Company Law (2nd Edition, Oxford University Press 2009) Pg. 442

344 Accordingly, under the derivative claim, the claimant must obtain consent from the court in order to carry on with the claim, which is a protracted procedure. Whereas in a petition under s994 the obstacles are non-existent. A petition provides a personal remedy to the petitioner this the derivative claim lacks. However, in situations where a shareholder is not willingly to sell his shares but rather seeking a remedy for misconduct and the recovery of assets which belongs to the company, aiming to take advantage of the indemnity for costs which is available with respect to a derivative action. These remedies rightfully complement each other. it covers the lapse of the other.

345 See *s260(2) of the* Companies Act 2006.

Despite the idea that in the event of an assertion of a conduct to be unfair, the appropriate remedy is the unfair prejudice petition and with respect to corporate injury, the derivative claim is the attractive choice for the petitioner. There exist some instances where the court permits a particular action to succeed contrary to the generic idea we have come to know. Hence, there is no hard or fast rule to a set of remedies a court may apply based on the facts of a particular case. Since judges possess a wide discretionary power at their disposal, exerting such discretion depends on the circumstances surrounding a particular case. In *Anderson v Hogg,*[346] the court granted a corporate remedy in an unfair prejudice petition. The petition was based on an unlawful payment of remuneration by the respondent director to himself. The director was ordered to return the funds to the company.

The court came close to rejecting Millett J's proposition in *Re Charnley Davies* that proof of illegality on the part of the director as against the company is not by itself enough to demonstrate unfair prejudice to the petitioning shareholder. The above case involved a two-man company which was in the process of solvent liquidation. In addition, the case of *Bhullar v Bhullar*[347] involved a two-man company owned by a family. The court took similar route in granting corporate remedies upon instituting unfair prejudice petition stating that directors must avoid any possibility of a conflict of interest, particularly relating to corporate activities. Hence, it would be a waste of time and resources to institute a subsequent action, and so corporate relief will be granted based on the initial petition brought. The court however denied the compulsory purchase of shares sought by the petitioner but ordered corporate relief by declaring the property in question be held in trust for the company. From the above cases, a pattern can be discovered that corporate reliefs are granted in the event of breach of duties by directors or an individual at the helm of affairs in small companies by instituting unfair prejudice petition. Despite this trend, this is not a principle because cases differ based on facts and circumstances surrounding them.

[346] 2002 S.L.T. 354.
[347] [2004] 2 B.C.L.C. 241.

A common feature of derivative claims and unfair prejudice petitions is that the extent of any misconduct will be an important consideration when judicial discretion is being exercised. When instituting a derivative claim there is no firm threshold regarding establishing misconduct. Instead, the court will take account the six non-exclusive factors under s.263(3) CA 2006 combined with the overall strength of the case. *In Lesini v Westrip Holdings Ltd*[348]and *Kleanthous v Paphitis*[349] the petitioner a shareholder brought an action alleging the directors committed serious and fraudulent breach of their fiduciary duties by acquiring another company. During the trial, several matters listed under s.263 were of significance. In particular, very strong weight was accorded to the fact that an independent committee established by the company had specifically chosen not to pursue the claim and the claim accordingly failed.

Similarly, in unfair prejudice petitions, any alleged mismanagement must be sufficiently serious to amount to unfair prejudicial conduct. In *Martin Boughtwood v Oak Investment Partners XII*[350] where the claimant and defendant entered a quasi-partnership both parties agreed that the other was culpable of unfair prejudice. It was found that the defendant's attempted coup was unconstitutional and his destructive interference in management was sufficient to amount to unfairly prejudicial conduct, whereas the claimant's breaches of its disclosure obligation as a quasi-partner was not. I disagree with this position, for the fact that disclosure is a very important element in quasi-partnership. Failure to disclose is a breach of duty owed by a partner to another. It goes to the root of the partnership and can amount to an action for unfair prejudice.

Finally, the controversy plaguing unfair prejudice petition under s.994 of the Act is the position in *Mckillen v Misland (Cyprus) Investments Ltd.*[351] Here the Court of Appeal confirmed that the breach

[348][2009] EWHC 2526(Ch) The judge emphasized the importance of derivative claim being based on an act or omission involving negligence, default or breach of duty by a director. Going from the facts of the case the directors sought advice of eminent professionals. The court held the directors were not negligent or breached their duties. The claim against the board was weak, such that no director acting in accordance with s172 of the Companies Act 2006 would pursue the claim.
[349] [2011] ALL ER (D) 33.
[350] [2010] EWCA Civ 23.
[351] [2013] ECWA Civ 781.

of a pre-emption clause in a shareholder's agreement or articles is unlikely to result in an action under s.994 of the Act, because the breach relates to a dispute amongst shareholders rather than the conduct of the company affairs. I do not subscribe to that line of reasoning. s994 CA 2006 is a wide concept, it has a far-reaching scope on the types of conducts that are unfairly prejudicial. Restricting s.994 to company affairs in my opinion was not the main intention of its enactment. In *Graham v Every,*[352] this position was reconsidered by the courts, it concluded that a breach of a pre-emption provision was an essential feature in a shareholder's agreement, a petition under s.994 CA 2006 has a good chance of succeeding. Recently, the judgment was affirmed by the Court of Appeal in *Arbuthnot v Bonnyman & others*[353] which subscribes to the line of reasoning that prejudice is a wide concept and unfairness is flexible. The courts possess wide discretionary powers and determining the act that falls under s994 will be a tricky hurdle to overcome.

The question which needs to be answered is whether unfair prejudicial petition is an effective remedy in the protection of minority shareholders rights? It can be argued that the broad meaning of s994 has to a great extent provided flexibility regarding the interpretation of its principles. It can be credited for providing an adequate protection to minority shareholders. One of the most positive aspects of the unfair prejudice petition is the fact that the petitioner can have his shares purchased at a fair value and exit the company. Despite this attractive feature, there is a downside, in that the term "unfair prejudice" remains unclear and needs clarification since there is no definition provided, though there exist some guidelines that have been derived from case law indicating situations a conduct can be considered as being unfairly prejudicial. This unfortunately cannot be a yardstick as each case has its peculiarities and particular circumstances surrounding it. Any understanding of unfairness must also depend upon the justice of the company's decision to instigate the conduct in question. As already highlighted the major problem of s.994 is the cost, length and complexity of the proceedings. Despite the troubles plaguing s994, it is popular among minority shareholders because of its flexibility and adaptability to different situations which are likely to fall under its scope, with the coverage of the legal approaches in England and Wales

[352] [2014] EWCA Civ 191.
[353] [2015] EWCA Civ 536.

complete Chapter 4 focuses on the Nigerian jurisdiction. It traces the historical development of derivative action, its function in protection of minority shareholders under the CAMA 2004 (now 2020), and to achieve this task as outlined in the introductory chapter; the historical, functional and law in context methods of comparative law have been adopted.[354]

[354] *Supra*, N.70, Pg.22.

<u>CHAPTER 4:</u> DERIVATIVE ACTION IN NIGERIA.

4.0 Introduction

Developing countries in Africa are usually characterised as having weak institutions.[355] The result of this is a comparative gap in the literature relating to minority shareholder protection, which is the situation in Nigeria.[356] Companies in Nigeria have been portrayed as having majority shareholders who frequently retain control on boards and are responsible for making decisions which affect the company.[357] This chapter reviews the historical background of derivative action in order to ascertain how effective the corporate governance structure is in the protection of minority shareholder's rights. This will enable the reader to understand the development of corporate governance from the adoption of the Received English law as a source of law in Nigeria which comprises of the common law, doctrine of equity and the statutes of general application[358] which have were in force in England on January 1st 1900 to the enactment of the Companies and Allied Matters Act 2004 now CAMA 2020.and finally, to the enforcement of the Nigerian code of Corporate Governance 2018.[359]Attention will be focused on the statutory derivative action,[360]2under the Companies and Allied Matters Act 2004, now CAMA 2020 which is the primary legislation that regulates most corporate activities in Nigeria.[361]

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[355] Tsamenyi T and Uddin S, Corporate Governance in Less Developed and Emerging Economies" (2008) Research in Accounting in Emerging Economies, Emerald Books Pp 1-13. See also Garner, B. A: Black's Law Dictionary 8th Dictionary West Publishing Company U.S.A 2004 states the term also refers to less developed countries, third world countries that are not as economically or politically advanced as the main industrial powers for e.g., the United Kingdom. The Nigerian economy is characterised by capital market decline, economic stagnation, capital outflow and currency depreciation. This view is further buttressed by Demakis, G.O "Debt Management and Economic Recovery in Nigeria" international journal for engineering science invention Vol 2, issue 2 2013, Pg. 9-14, is illustrative of the Nigerian situation.

[356] Adegbite, E. & Nakajima, C. "Institutional Determinants of Good Corporate Governance: The case of Nigeria 2011. Nigeria has the largest economy in Africa according to a survey conducted by the economist in 2014. It also presents a moderate representation of the corporate governance structure in Sub-Saharan Africa.

[357] Adegbite, E "Corporate Governance regulation in Nigeria" 2012 Pg. 257-276.

[358] Interpretation Act Cap 123, s.32 Laws of the Federation of Nigeria 2004 provides *"the Common law of England, Doctrine of equity and Statute of general application which were in force in England on the 1st of January 1900 are applicable to Nigeria, in so far as local jurisdiction and circumstances may permit".*

[359] <u>https://nambnigeria.org/Nig_Code_of_Corp._Governance_2018.pdf</u> 13/06/ 2021, It is important to note the revised 2018 code takes effect in 2020, known as the Nigerian Corporate Governance Code 2020. Under the Code, ethics and sustainability will be critical areas for companies to give priority. Insights on the code can be found on <u>https://www.proshareng.com/news/Business-Regulations,-Law---Practice/Nigeria-Corporate-Governance-Code-2020--/48635</u> accessed 16 /06/2021.

[360] The Principal Legislation on Company Law in Nigeria is the Companies and Allied Matters Act 2004 Cap. C 26, LFN 2004 also known as "CAMA" which provides for the remedy of Derivative action under S.303, now S.346 under CAMA 2020.

[361] It is worthy to note that at the time of this research the CAMA 2004 was the principal legislation based on my research, recent update suggests that CAMA 2020 has been signed into law and repealed the CAMA 2004 the act came into force on the 7th of August 2020 when President Muhammadu Buhari gave his assent to the CAMA

This is important as it provides a deep insight into the corporate environment,[362] where corporate enforcement is either ineffective or practically non-existent,[363] owing to the absence of efficient enforcement agencies. To achieve the task, the historical, functional and law in context method of comparative law will be applied. This will create a platform for subsequent debate on whether derivative action is effective in the Nigerian jurisdiction despite the setbacks already highlighted. Recent and on-going developments in Nigeria,[364] are centred on the policies, procedures, practices and implementation of effective corporate governance mechanisms. Whilst the different corporate governance codes[365] over the years have shaped the policy on corporate governance particularly minority shareholder protection, factors such as corruption[366], government interference in policies, institutional challenges such as administrative bottleneck have impeded the effective implementation of the codes. According to Adegbite[367] "the Nigerian weak institutional context makes corporate law enforcement and self-regulatory initiative remain in idealism" this is compounded by the multiplicity of codes on corporate governance which makes enforcement virtually impossible.[368]

The Nigerian Code of Corporate Governance 2018 seeks to institutionalise corporate governance best practices in Nigerian companies. The Code also sets out to promote public awareness of essential corporate values and ethical practices that will enhance the integrity of the business environment.

2020. The salient changes made to the act does not affect the area of my research. For more information on the new act https://www.lexology.com/library/detail.aspx?g=cc3be00f-c1df-47b0-a14c-eb609e9df15c accessed 13 /06/2021.

[362] Adewakun, A "Poor Corporate Governance, Bane of Nigerian Banks": Nigeria Tribune September 29, 2010, Pg.15: Corruption has traditionally been at the centre of corporate governance in Nigeria. The country's financial and corporate sector experienced major setbacks which led to its collapse as a result of corrupt practices involving directors and managers at the helm of affairs.

[363] Preye Edwards, E.A. & David, G.W. "Corporate in Infancy and Growth – An Interview Based Study of the Development of Governance and Corporate Regulation in Nigeria 2008, Vol.8 Pg. 359-407.

[364] The Recent Regulatory reforms in Nigeria include the 2003 Code of Corporate Governance in Nigeria now 2011, the 2006 CBN Code, the 2007 Code of Conduct for Shareholders Association in Nigeria and the Draft National Code of Corporate Governance. Unfortunately, its passage into law has been impeded by a court injunction on May 19th, 2015, pending further consideration of the draft code.

[365] From a proposal of a unified national corporate governance code in 2016 to the enactment of the Nigerian corporate governance code in 2018, to the recent code of 2020.

[366] M. Ogbonna, Corporate Governance Challenges in Nigeria: The way forward. https://guardian.ng/features/law/corporate-governance-challenges-in-nigeria-the-way-forward/ accessed 13/06/2021.

[367] *Adegbite, E "Good Corporate Governance in Nigeria: Antecedents, Propositions, and peculiarities'' (2015) International Business Review 319 at 319.*

[368] Osemeke, L and Adegbite, E (2016), 'Regulatory multiplicity and Conflict: Towards a Combined Code on Corporate Governance in Nigeria" Journal of Business Ethics, Vol .133(3), pp.431-451.

The peculiarities of Nigeria's turbulent history of public and corporate corruption provide an extensive perspective on how minority shareholders' rights can be protected amidst weak institutional parameters.

4.1 Development of Corporate Governance in Nigeria

Corporate governance in Nigeria is governed by the twin theory of stewardship and agency.[369] The theory of stewardship suggests that directors are ordinarily trustworthy and are therefore capable of acting bona fide in the interest of the public and shareholders. The basic root of this theory is found in their fiduciary relationship with the company which is constituted by the company's shareholders. Agency theory on the other hand, presumes that directors cannot really be trusted to act in the public good in general and in the interest of shareholders.[370]The idea of corporate governance is not a new concept in Nigeria and cannot be separated from company law in general. The emergence of corporate governance can be traced to the Companies and Allied Matters Act (1990), which replaced the Companies Act 1968. Over the years, corporate governance has evolved, as a result it is crucial to discuss the evolution of corporate governance in Nigeria. The reason been it represents a shift from the reception and application of the common law in England and Wales in Nigeria to the enactment of local statutes to reflect the cultural peculiarities in the country. This transition to the current Corporate Governance Code of 2018 helped shaped the current corporate framework, most especially in the area of multiplicity of codes which contributes to the confusion. Nigeria is a former colony of the United Kingdom, and as a result much of the law (i.e., common law), doctrines of equity applicable in England and Wales were/are applicable in Nigeria by virtue of the Statute of General Application in force in 1900.[371] The adoption of common law post-independence in the field of company law appears to be due to the absence of local laws and statutes to regulate corporate activities.

[369] Kolade, C, 'Board Performance Analysis' Distinguished Management Lecture Weekend Concord Newspaper (Lagos, November 1998) 6.
[370] Ibid
[371] Andrew Edward Wilson, P "Sources of Nigerian Law" Issue 6 of Law in Africa, African Universities Press 1963. An example of a Law received in Nigeria as a Statute of General Application from England is the Sale of Goods Act of 1893, it is still applicable in Nigeria except in the western region of the country. Also, the Infants Relief Act of 1874 is a Statute of General Application in Nigeria, though it applies to a particular class of person.

In the year 1960 when Nigeria attained its independence, the Companies Ordinance of 1922 was repealed and replaced by the companies act of 1948. The 1948 Act became the principal legislation regulating companies in Nigeria[372] it contained comprehensive provisions concerning the running of the affairs of companies particularly in relation to the roles of the board of directors and that of members in general meetings. However, the Companies Act of 1968, failed to appreciate the economic realities and settings of Nigeria. In 1972, the federal government promulgated the Nigerian Enterprises Decree. However, this decree has been repealed. The CAMA 1990 repealed the and replaced the Companies Act of 1968 as the primary law regulating companies in Nigeria. It made provisions which were fundamental to corporate governance in Nigeria, which included required accounting and auditing standards, equity ownership and disclosure, minority shareholders rights. Another feature of the Act was the codification of directors' duties.

However, under the Corporate Governance Code 2003, it specifically recommended the disclosure of director's emolument together with that of the chairman and highest paid director in the annual report. However, if there was no compliance it was regarded such disclosure was confidential. It is from this response that the learned author Adegbite[373] argued that the legal corporate regulatory framework in Nigeria will be hampered in the short run given the corporate corruption that runs deep in the country's corporate governance structure. In its report, the Greenbury Committee emphasized the need for a remuneration committee made up of non-executive directors, its main responsibility is to determine appropriate policy for executive directors[374] The Hampel Committee set up in 1997 came up with the report that the primary duty of directors is to manage the company in the best interest of its members and other stakeholders.[375] The adoption of the recommendation of the Cadbury, Greenbury and Hampel Committees exhibited examples of good corporate governance, which were lacking in the Nigerian corporate structure. These recommendations have been codified in the "Code of Best Practice" in

[372] Emiola, A: *Nigerian Company Law* (Emiola Publishers, Ogbomosho) 2007.
[373] Adegbite in 'Corporate Governance Regulation in Nigeria'. Corporate Governance, (2012) Pg.257–276.
[374] http://www.ecgi.org/codes/documents/greenbury.pdf accessed on 26/10/2019.
[375] http://www.ecgi.org/codes/documents/hampel.pdf accessed on 26/10/2019, Alternatively the Companies and Allied Matters Act 2004, s.279 provides for the duties of directors, subsection (3) is of the effect that "a director shall act at all times in what he believes to be the best interest of the company as a whole".

Nigeria.[376] which was implemented by the Securities and Exchange Commission in 2003 and amended in 2011 to reflect the peculiarities of the corporate governance regime in Nigeria. It can be argued that the presence of the recommendations in the CAMA 2004 is owed to the different Committees. Adherence to the code is voluntary and is designed to entrench good business practices and standards for managing directors and CEO's.[377]

In response to the need for the recognition of a corporate governance structure and the existence of adequate provisions for effective practice and procedures,[378] the Nigerian Securities and Exchange Commission ("SEC") in 2003 issued the first corporate governance code in the country in its regulatory capacity which applied to all public listed companies in the country. This Code was amended in 2011 to bring it in line with international best practices. Other regulatory bodies that enacted regulatory codes since 2003 to address peculiar industry issues not addressed by the "SEC" include: The Central Bank of Nigeria (CBN Code 2006), the code of corporate governance for licensed pensions operators (PENCOM Code 2008), the code of corporate governance for the insurance industry (NAICOM Code 2009) to mention a few.[379] These codes seek to regulate corporate organisation within their spheres of operation. Demaki[380] believed disparities in the provisions of the key element of firm governance arising from the proliferation of Codes of corporate governance in Nigeria, namely SEC Code 2003 now 2011, CBN Code 2006, PENCOM Code of 2008 and NAICOM Code 2009 respectively impact negatively on the economy.

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376 Ujunwa, A 'Rethinking Corporate Governance in Nigeria' *Corporate Ownership & Control*, Volume 9, issue 1, 2011. Pg. 517, see also Adewale, A, An evaluation of the limitations of the corporate governance codes in preventing corporate collapses in Nigeria. IOSR Journal of Business and Management (2013) 7(2) 110.
377 Abubakar, M.D & Syamarlah, R "Corporate Governance and Disclosure in Nigeria: An Empirical Study, International Conference on Accounting Studies 2014, and ICAS 2014 Pg.161-171.
378 Alfaki, M "Global Trend in Corporate Governance and Social Responsibility" A paper presented at the conference of institute of Chartered Secretaries and Administrators of Nigeria (ICSAN) 2007, reiterated the purpose of introducing corporate governance code. Which is to help sustain investors' confidence, monitor and implement corporate policies. Poor corporate governance was identified as one of the major factors of financial institution distress in Nigeria.
379 Okpara, J "Perspective on Corporate Governance Challenges in Sub-Saharan African Economy" Journal of Business & Policy Research Vol.5, 1 July 2010 Pg.110-122.
380 Demaki, G.O "Proliferation of Codes of Corporate Governance in Nigeria and Economic Development

According to Demaki, the multiplicity of Codes leads to a situation where companies listed in the Nigerian stock exchange and operating in different sectors are regulated by different Codes. For instance, Stanbic Bank is governed by the CBN Code which regulates banks and other financial institutions, and by the SEC Code in respect of sale and transfer of shares. This presents an opportunity for managers and directors the option to choose the code which will be applicable, since compliance is not compulsory.[381]

From the limitation arising from the multiplicity of codes, it can be inferred that a well implemented corporate governance regime has tremendous benefit to all stakeholders. It seems that an effective corporate governance mechanism, backed with an adequate monitoring and enforcement regime would build investors' confidence, eliminate financial scandals and curb corporate failures. The Nigerian situation is far from this result. This is acknowledged by Orojo, who points out in this connection that "*it is trite corporate administration cannot be achieved without effective checks and it is the shareholders of a company, the enactment of adequate enforcement statutes and regulatory agencies that can effectively check the excesses of the board of directors in the area of governance".*[382] Unfortunately, there is no adequate provision under the Securities and Exchange Commission Code 2011 to enforce compliance, and without enforcement it adversely impacts on the realisation of the benefits'[383] (i.e., promoting efficacy in the use of corporate governance assets, assist corporate bodies in attracting low-cost capital, ensure overall positive corporate performance and the ability to assist societal expectations) from corporate governance code implementation.

Despite the fact that the Securities and Exchange Commission Code is far-reaching, covering more corporate activities than any other Code in the country, its compliance is not felt, because observance

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[381] Clause 1.3.G of the SEC Code 2011 states *"where there is a conflict between this code and the provisions of any other code in relation to a company covered by the two codes, the code that makes a stricter provision shall apply".*
[382] Orojo, J.O "Company Law and Practice in Nigeria" 3rd Edition 1992 Pg.17.
[383] Opara, L.C and Alade, A.J "The Legal Regime of Corporate Governance in Nigeria: A Critical Analysis. Journal of Law, Policy and Globalization, Vol.26, 2014 Pg.40.

of the Code is not mandatory except the CBN Code 2006[384] Thus for instance after a four-year financial statement review, it was discovered that the Nigerian Stock Exchange (NSE) had defied corporate governance principles and took advantage of the SEC Code due to its non-mandatory nature. The report indicated the NSE declared surplus bonus to its council members which was contrary to s.26 (3) of CAMA 2004 and s.6 of the Memorandum and Articles of Association of the NSE. In summary the illegally shared funds were due to the lack of harmonization of the plethora of Nigerian Codes coupled with the non-obligatory character of the SEC Code. The outcome was the relieving of duty of the Nigerian Stock Exchange director-general and the dissolution of its Council.[385]

The enactment of the Financial Reporting Council (FRC) Act 2011,[386] vested the Corporate Governance Directorate of the FRC with the authority to co-ordinate all matters relating to corporate governance in the country, develop principles and practices of corporate governance, promote the highest standard of corporate governance, promote awareness, issue guidelines and develop a mechanism for the assessment of the Code among other functions. The FRC had the task of enacting a unified National Corporate Governance Code for the country by January 2014.[387] Unfortunately, the draft Code released on the 15th of April 2015 was hampered by a court injunction on the 19th of May 2015 restraining the National Assembly from passing the Bill into law pending further consideration of the draft Code. Updates regarding the Bill indicates it has been passed into law.[388] The Code is divided into three sectors: private, public and not for profit. They are collectively combined to form "National Code of Corporate Governance 2016". An official report from FRC disclosed the Code for the private sector is mandatory, while that of the not-for-profit entities will be operated on the "comply or justify non-compliance" basis in a manner like the United Kingdom's Code. It goes further to highlight the Code for the public sector will not be applicable immediately till an executive directive is secured from

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[384] Clause 1.7 of the CBN Code 2006 states *"compliance with the provisions of this code is mandatory"*.
[385] Egwatu, P. (2010). "Bonus Sharing: How NSE May have Defied Corporate Governance". Financial Vanguard. Vol.25. No. 6166, www.vanguardngr.com
[386] Part 1, S.8 (1) of the Act stipulates the functions of the Financial Reporting Council.
[387] http://www.financialreportingcouncil.gov.ng/corporate-governance/revised-draft-of-the-national-code-of-corporate-governance-january-23-2016/ Accessed on 29/09/2018.
[388] Federal Reporting Council (FRC) of Nigeria Act 2011, s.50

the Federal Government. This moratorium for the public sector is attributed to the fact that the enabling law that sets up most government establishments already have diverse governance structures in place, which needs to be harmonised by a common legislation. Further details on the code application can be accessed on the FRC website.[389]

According to Iskander and Chamlou[390] “slow economic growth remains a major cause of poverty in many low-income countries, but the records also shows that a focus on growth alone is not enough”, and they blame the poverty rate on uneven distribution of resources and poor corporate governance. Nigeria is faced with the problem of corruption and ineffective public and corporate governance.

The history of company law in Nigeria shows that the political class emasculated the Nigerian Corporate Governance ethos through obnoxious laws that were enacted to promote self instead of good governance. In most cases, company laws in Nigeria draws their inspiration from British company law and fails to address institutional peculiarities of the Nigerian Corporate environment. For instance, the Code of best practices on Corporate Governance 2003 was said to be meant for guidance only and did not stop a company from adopting its own terms in accordance with the provisions of CAMA 2004. This shows that the Code lacks legal authority since there is no enforcement mechanism and its observance is entirely voluntary. The Financial Reporting Council of Nigeria released the Nigerian Code of Corporate Governance (‘the Code’) on January 15th, 2019. The Code highlights key principles that seek to institutionalise corporate governance best practices in Nigerian companies.[391] The best practices include accountability, transparency and fairness for corporate entities in order to attain the aim of corporate governance. As with many organizational structures in Nigeria, corporate governance has faced challenges which range from institutional challenges, corrupt practices, multiplicity of Codes of corporate governance and other factors. However, despite these challenges, Nigeria ranks among the

[389] http://www.financialreportingcouncil.gov.ng/news-center/frc-releases-draft-national-code-of-corporate-governance/ Accessed on the 26/10/2019.
[390] Iskander, M and Chamlou, N Corporate Governance: A framework for Implementation, Washington DC.; World Bank Group 2000.
[391] https://assets.kpmg/content/dam/kpmg/ng/pdf/advisory/2018-Nigerian-Code-of-Corporate-Governance.pdf accessed 16 /06/21.

top five countries in Africa for compliance with the Organization for Economic Cooperation and Development principles of Corporate Governance (OECG)[392] the practice in Nigeria has improved over the years thereby making corporate practice a more respectable area in Nigeria.

4.2 Minority Shareholder Protection in Nigeria

The membership of a company and the shareholding of an individual confer rights on such persons. An example of such rights includes the right to attend general meetings of the company,[393] , the right to vote and pass any resolution meeting[394],and the right to be informed of any resolution appointing or approving the appointment of a director,[395]Olatawura JSC in *Globe Fishing Industries Ltd v Coker* opined that *"The dividing line between personal and corporate right is very hard to draw, and perhaps the most that can be said is that the courts will incline to treat a provision in the memorandum or article as conferring a personal right on a member only if he has an interest in its observance distinct from the general interest which every member has in the company adhering to the terms of its constitution".* [396]

The distinction between a personal and corporate right according to the author can be determined by a review of the Companies and Allied Matters Act 2004 now CAMA 2020. There would be no difficulty in determining if a personal right has been infringed or corporate right breached from the articles of association, and circumstances of the case before it. The exercise of an existing right depends on whether the rights are individual or corporate.[397] Individual rights are attached personally to the status of the membership. It is recognised and protected by law.[398] The company or any group of members

[392] https://assets.kpmg/content/dam/kpmg/mu/pdf/balancing-rules-and-flexibility-for-growth-abridged.pdf accessed 3/08/2022.
[393]Companies and Allied Matters Act 2004, s.81 subject to s.228 of the act which provides *"every person who is entitled to receive notice of a general meeting of a company provided under s227 of this act shall be entitled to attend such a meeting".*
[394] *Ibid*
[395] Companies and Allied Matters Act 2004, s.256
[396] (1990) 7 NWLR Pt. 162, 265 at Pg.280.
[397] Orojo, O.J "Company Law and Practice in Nigeria" 5th Edition 2010 Pg. 205-207
[398] Individual or personal rights are provided for under S.300(c) of the Companies and Allied Matters Act 2004. In the case of *Edokpolor and Co Ltd v Sem-Edo Wire Industries Ltd* (1986) 3 N.W.L.R Pt.31, Pg. 653 the court held that a shareholder's right to vote cannot be impeded, because it is a right of property. Where such personal right has been infringed upon, the rule does not apply, and the minority shareholder can sue in his own name to enforce his right.

cannot lawfully deprive a shareholder of his rights.[399] These rights are entrenched by statutes, the memorandum and articles of association, it includes: the right to vote,[400], the right to refuse consent to an increase in shareholding, and the right to exercise various statutory rights. In *Pan Atlantic and Forwarding Agencies Ltd v Aleyi,*[401] the Court of Appeal held the right to have a proper notice of meeting with a prescribed quorum to take valid decisions is a right of the individual and not of a corporate nature. A member can sue in his personal capacity if the wrong is done to him in his personal capacity. He does not require the consent or approval of any other member to sue.[402]

On the other hand, corporate rights are exercised by a group of people acting together by a resolution. A member is bound by the decision of the majority at general meeting, he can take part in the decision-making process in accordance with the rights attached to his shares, but he cannot have his way in the face of stiff opposition from the majority or controlling shareholders. The Annual General Meeting[403] is an important body, and it is constituted by shareholders in the company. The AGM has the power to appoint, remove directors and most importantly institute legal proceedings in the event of breach of a corporate interest. The AGM affords an opportunity for shareholders to supervise the management of the company. Dorothy Nelson[404]conceives that in Nigeria most AGMs are fraught with dishonesty, the reason being that they are prearranged in such a way that leaders of shareholder's association are induced by the majority shareholders rather than by looking closely into the accounts presented by the directors.

The AGM affords an opportunity for shareholders to supervise the management of the company, since the articles of association regulates the management of a company and the power to alter this article of

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[399] *Edwards v Halliwell* (1950) 2 All ER 1064 at 1067*, per Jenkin, LJ.*
[400] By virtue of *S.16 of the Companies and Allied Matters Act 2004* all shares in a company in Nigeria carry the right to vote when the occasion to do so arises. The act has abolished the issuance of non-voting shares by any company.
[401] *Suit No. CA/L/106/84 of 15th January 1985 (Unreported).*
[402] *Pender v Lushington* (1877) 6 ChD 70 at 80.
[403] *S.213 of the Companies and Allied Matters Act 2004.*
[404] Dorothy, N The Dilemma of the Shareholders under the Nigerian Company Law: Journal of Law, Policy and Globalization, Vol 37, 2015.

association lies in the shareholders, the shareholders can alter the articles for their own protection[405] and can also prevent the director's perpetuating fraud. Every member is bound by the decisions of the board of directors, who are the majority, and this implies that while the majority shareholders will always have their say, the directors will always have their way.[406]

This approach has led to the establishment of several associations for the protection of interests of minority shareholders,[407] and to raise awareness of their plight. From the emergence of these associations, it is evident that Nigerian investors are no longer solely interested in the economic value of their shares but also in the fact that share ownership gives them the ability to influence corporate strategy and management.

Okike[408] suggests the attitude of majority shareholders towards the minority have led to a rise in the establishment of shareholder's association in Nigeria. According to her "after analysing recent newspaper reports on shareholder association in the country, contrary to the beliefs that minority shareholders in Nigeria are ignorant, they take actions to challenge the directives of the management they believe were not taken in their best interests". From the assertion whether the association perform its function it was established at the outset for the protection of minority shareholders is a question still yet to be answered.

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405 Onuoha, R, 'The need for investors vigilance in corporate governance' available at http://www.proshareng.com/ardticles/singleNews.php?id=63 accessed on 17 /06/21.

406 Dada, J '*Principles of Nigerian Company Law*', 2nd edition (Wusen Publishers: Calabar, Nigeria 2008) 261.

407 Okike, E.N.M. (2007) 'Corporate governance in Nigeria: The Status Quo' Corporate Governance: An International Review, 15 (2):173-193. The Independent Shareholder Association of Nigeria (ISAN), The Nigerian Shareholders Solidarity Association (NSSA), Association for the Advancement of the rights of shareholders of Nigeria are among other shareholder's association made up of individuals that share common interests and are presumably united to give minority shareholders a voice.

408 Okike, E.N.M "Corporate Governance in Nigeria: the status quo" Corporate Governance: An International Review, (2007) 15(2): Pg.173-193.

4.3 The Rule in *Foss v Harbottle* in Nigeria

Decisions which affect a company, its members or an individual who has an interest in the company are generally taken by the majority shareholders at the AGM. The decision made is binding on all.[409] Where a wrong is committed against the corporate interest of the company, the appropriate party to institute an action is the company. The majority can decide whether to redress the wrong. The will of the majority prevails this is the principle laid down in the case of *Foss v Harbottle,*[410]. In *Abubakri & Ors v Smith,*[411] the Court held the rule in *Foss v Harbottle* applied to unincorporated associations such as a religious body (Jannat-ul-Muslim of Lagos) possessing a written constitution or a set of rules and regulations entitling it to sue and be sued as a legal entity. Judging from the application of the rule, it is safe to say that the rule applied to virtually all sphere of corporate activity regardless the type of organisation during this period.

The rule in *Foss v Harbottle* was codified under s.299 of the Companies and Allied Matters Act 2004, and now can be found in s.346 CAMA 2020 which provides that: "Subject to the provisions of this Act, 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".

It is worthy of note that the rule in *Foss v Harbottle* also incorporates the judicial policy that the courts will not adjudicate intra-corporate disputes if the majority shareholders decide the matter will not be heard. This approach was confirmed in *Tika Tore Press Ltd v Abina,*[412] where the Court held that where a wrong is committed by the director's action, it was open to the shareholders in AGM to ratify their wrong doings. The case of *Ejikeme v Amaechi,*[413] clearly explains the majority rule doctrine in the Nigerian context. It was held that the Court will not take over the management of a body corporate and

[409] *Shell Petroleum Development Company v Nwawka* (2001) FWLR 1223-1425 Pt. 48, 1363. *See also* Supra N30, Pg.7.
[410] (1843) 2 KB 461.
[411] (1973) 6 S.C. 242, *Elufioye v Haliu* [1993] 6 NWLR570 at590, Pg. 597-598.
[412] [1973] 1 ALL NLR 400.
[413] (1998) 3 NWLR Pt.542, 456.

run its affairs. When a shareholder brings an action on behalf of the company, any judgment obtained by him inures not for the benefit of the shareholders personally, but for the benefit of the company.

The need to protect minority shareholders and retreat from the principle of the majority rule was displayed in the Supreme Court's decision in *Edokpolor & Company Ltd v Sem-Edo Wire Industries Ltd,*[414] which introduced a new exception that the rule will not apply where *"in the interest of justice requires it not to be applicable"*. One of the Justices *Bello JSC*[415], averred that the rule in *Foss v Harbottle* is to the effect that only a company can sue for redress for a wrong done to it was inapplicable and that the alleged wrong in the case in hand was done to the appellant, a minority shareholder who has the right to sue for redress. The rule is not intended to do injustice to a minority shareholder and for that reason, his right to sue for redress for a wrong done to him by majority shareholders is one of the exceptions to the rule. Going from the facts of the case the plaintiff did not base his claim on a pre-incorporation agreement but on the terms of an agreement reached by the company in its general meetings and meetings of its board of directors after it had become incorporated. The events which eventually led to the 2nd and 3rd respondent in collusion with the German company taking over the interest of the appellant which he single-handedly has brought into being made it a clear case of injustice in the eye of the Court.

Unfortunately, the application of the interest of justice exception is at the discretion of the Courts based on the facts of a particular case absent under the statutes. From the foregoing, its absence under the CAMA 2004 severely impacts on the right of minority shareholders to bring an action under this heading, as the term "interest of justice" refers generally to the cause of unfairness or equity. It is subjective and interpretation will vary based on the facts and parties involved.

It is trite that equity will not suffer a wrong to be without a remedy. The majority rule under the Nigerian jurisdiction seems to undermine equitable principles especially where there is an increasing need for

[414] (1984) 7 SC 119.
[415] https://lawcarenigeria.com/edokpolo-company-limited-v-sem-edo-wire-ind-ltd-ors-1984/ accessed 18/06/21.

absolute control of the majority. Despite companies upholding the democratic principle that the majority will is the will of the company, the vitality of corporate governance lies in the recognition of minority rights and equitable settlement of corporate disputes. One of the rationales of the rule which is the proper plaintiff rule is that the court should not interfere in company activities where a wrong complained by the minority is intra-vires which can be ratified by the majority. The rule seeks to prevent multiplicity of actions by the shareholders and prevents the company from being torn to pieces.

The rule despite its unfavourable nature to the minority shareholders is a safeguard for the interest of all concerned in the company. Application of the rule in *Foss v Harbottle* under the Nigerian jurisdiction created practical and legal problems[416] First, unless the company decides to sue, its right may never be enforced, with the result that the minority will suffer. Secondly, in practice the decision to sue or not is the decision of the board of directors where the discretion is not restricted by the articles of association, and it is normal for the board to be unwillingly to sue where they are the wrong doers. Thirdly, the interpretation of the term "majority" translates to an individual who has voting shares as a result can influence decision making in meetings which disenfranchise minority shareholders,[417] though it is accepted by the shareholders when acquiring their shareholding position those shares tend to be cheaper than voting shares. These factors restricted the scope of shareholder's action like the position in England, with respect to cost of litigation under the Nigerian jurisdiction in my opinion, was an obstacle to bringing an action, this was the same situation in England where instituting an action was prohibitively costly because of the complicated procedures involved.[418]

However, the doubts that existed as to the right of the applicant to recover costs are now resolved by the provisions of s.304(2)(d), 307 and 308 under the CAMA 2004. Under these sections the court has express powers to order payment of reasonable legal fees, incurred by the applicant in connection with

[416] Aderibigbe, O.I. "Corporate Litigation and the Majority Rule: Retreating from the Precipice. International Journal of Advanced Legal Studies and Governance, Vol.3, No.3 Dec 2012. Pg.35

[417] ibid

[418] Kaplan, Williams Q.C. & Elwood, Bruce "The Derivative Action: A Shareholder's Bleak House?" 36U.B.C.L. Rev 443, 2003.

the proceedings.[419] Also, an applicant is not required to give security for costs in any application made or action brought in respect of a derivative action,[420] but the court may at any time order the company to pay to the applicant interim costs before the final disposition of the applicant or action.[421]

4.4 Exceptions to the Rule in *Foss v Harbottle*

The overall impression of the rule in *Foss v Harbottle* from the discussion is that minority shareholders are in a dire position, as they do not possess any right to institute an action to correct any irregularity in the management of the affairs of the company. However, the courts have laid down exceptions to this rule over the years. The exceptions are codified under s.300(a)-(f) CAMA 2004, [422] and are now found in s.343(a)-(g) CAMA 2020 which states: without prejudice to the rights of members, the court on the application of any member; may by injunction or declaration restrain the company from the following:

(a) Where the majority in a general meeting resolve to do something, which is either illegal or *ultravires.*[423]

(b) When the company purports to do by an ordinary resolution an act which could be effectively done or is required to be done by special resolution,[424]

(c) Where it is alleged that the personal right of the minority shareholder has been infringed,[425]

(d) Where there is fraud on the minority,[426]

(e) Where the company meeting cannot be beneficially held,[427] and finally

(f) Where the directors derive benefits from their breach of duty,[428]

A major change under the CAMA 2020 Act is the inclusion of another exception to the rule under s.343(g) which include any other act or omission, where the interest of justice so demands.

The Common law exceptions are:

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[419] *S.304(2) of the Companies and Allied Matters Act 2004.*
[420] *Companies and Allied Matters Act 2004, s.307.*
[421] *Companies and Allied Matters Act 2004, s.308.*
[422] Ademola, O & Adedoyin, S "Corporate Governance in Nigeria" Paper delivered in a Conference on Corporate Governance, Accra, Ghana 29th- 30th January 2001.
[423] S.300(a) of the Companies and Allied Matters Act 2004, now s.343(a) of the CAMA 2020.
[424] *Ibid, s.300(b).*
[425] *Ibid, s.300(c).*
[426] *Ibid, s.300(d).*
[427] *Ibid, s.300(e).*
[428] *Ibid, s.300(f).*

(a) Decision taken wrongly and not in the interest of the company,

(b) Actions which require special resolution,

(c) Acts which affect the applicant rights and finally,

(d) Commission of fraud.

One of the major differences is in England and Wales a person who is not a member could bring an action, however there must have been the transfer of shares to the individual. Further, the English court may make such orders it sees fit to and other statutory protection such as derivative claims and proceedings under insolvency legislation is also available to such minority member.

The exceptions to the rule in *Foss v Harbottle* highlighted above is discussed to paint a clear picture when the rule is inapplicable.

4.4.1 Entering Into Any Transaction Which is illegal or *Ultra vires* to the Company

Where the act complained of is illegal, a shareholder is permitted to bring an action. The rule will not apply as an illegal transaction cannot be ratified. In *Associated Registered Engineering Co. Ltd and Others v Yalaju-Amaye,*[429] where the purported appointment of new directors, by the board was held to be ultravires since there was no such power in the articles of association to make such declaration, the minority shareholder was allowed to sue. Likewise, the fact that a shareholder present at a meeting voted for a resolution does not preclude him from questioning its validity on the ground that it was not authorised by its constitution, or it was illegal. In *Benson Oduduro & Another v National Union of Hotels and Personal Services Workers and Others,*[430] a resolution passed was contrary to the trade union constitution, it was held the plaintiffs were entitled to sue despite the fact they participated in the meeting where the resolution was initially passed. The Nigerian jurisdiction still retain the use of the term *ultra vires* under the Companies and Allied Matters Act 2004 contrary to the position in England

[429] (1986) 3 N.W.L.R Pt.31, Pg. 653.
[430] Unreported Suit No. FCA/L/226/83.

and Wales after the enactment of the Companies Act 2006.[431] The leading case of *ultra vires* in Nigeria is *Continental Chemists v Ifeakandu,*[432] where the object of a company was the buying, selling, importation, exportation and manufacturing of drugs, and anything that would be profitable, or incidental or conducive to the main objects. The Court held that the object of the company did not include the training of doctors, and that the object allowing the company to do anything profitable was indefinite and useless to be of assistance to the company and therefore the transaction was *ultra vires.*

4.4.2 Acts Passed by Ordinary Resolution whereas the Constitution requires it to be done by Special Resolution

Where a company's constitution clearly states that an act or decision can only be approved by a special majority, to allow the company to do otherwise is to go contrary to its own constitution. In *Edwards v Halliwell,*[433] two members of a trade union succeeded in preventing an attempt by the delegates in the meeting to increase a member's contribution without obtaining the two-thirds majority required under their rules. This exception also covers breach of a particular procedure laid down in the articles of an organization. In the case of *Nigerian Stores Workers Union v Uzor and Others,*[434] ratification by a simple majority by members at general meeting of a transaction entered with the consent of one managing director instead of the consent of two as required by the articles was held to be void as being an attempt to alter the terms of the contract in the articles by an ordinary rather than by a special resolution.

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[431] Olong, M.A, Idubor R and Asada D. 'Trends in the Concept of Ultravires: The Nigerian Rethink: Global Journal of Politics and Law Research Vol.3, No.3, pp.121-128, June 2015.
[432] (1966) ALL NLR, Pg1.
[433] (1950) 2 All E.R. 1064.
[434] 1974 1 NMLR 174.

4.4.3 Where the Member's Personal Rights Have Been Infringed

Where it is the personal right of the shareholder that is breached the majority rule does not apply,[435]. It follows where the articles have so provided for rights accruing to the shareholder, it is mandatory that the company observes and performs the covenant in the articles failure of which the members can enforce their personal rights,[436]. The shareholder has the duty to prove the rights been enforced is strictly that of a member. Where such rights fall outside the scope, it will remain unenforceable,[437]. Section 41 of the Companies and Allied Matters Act 2004 permits officers and directors of a company to sue directly to enforce their rights enshrined in the articles and memorandum. It enables an individual whose right has been infringed by the majority to bring an action speedily without the courts determining if such right infringed is personal or corporate therefore delaying court process. This also serves as a deterrent to majority shareholders in cases where the rights of members of a company are clearly laid out in the articles of association.

4.4.4 Committing Fraud on the Company or the Minority Shareholders, Where the Directors Fail to take Appropriate Action to Redress the Wrong Done

It has been long settled that one true exception to the rule in *Foss v Harbottle* is where fraud has been perpetrated against the company by those who owns majority shares in the company and will not allow an action to be brought in the name of the company.[438] Before, the introduction of the Statutory Derivative Action in 2004, minority shareholders could institute a representative action against the directors at fault to enforce the rights belonging to the company. In the event of fraud, only the company can bring an action, where the real wrongdoers are in control and will not institute an action, the law

[435] *CBN v Kotoye (1994)* 3 NWLR Pt. 330, Pg.66, the court held the rule in *Foss v Harbottle* is a Common Law rule derived from decisions of courts over the years. It cannot override clear statutory provisions to the contrary or affect the courts rights and obligations conferred by the constitution. Similarly, the rule will not apply to an action instituted to protect an individual shareholder to whom harm is done.

[436] Also, in *Nigerian Stores Workers Union v Uzor &Others Supra N52, Pg. 11* the court discovered that the contribution of members of the trade union was altered contrary to the rules of the union, it was held it was an invasion of personal rights of the members in the union for which they could sue.

[437] Wedderburn, K.W., "Shareholders right and the rule in Foss v Harbottle" *Cambridge Law Journal* Vol. 194 1957 Pg. 209.

[438] In the words of *Harman L.J* in *Bamford v Bamford* (1980) Ch. 212.

permits the minority shareholders to maintain an action to redress the wrong. The courts have not set a precise definition of the term Fraud but acknowledge that it is wider than common law fraud.[439] The Supreme Court case of *Associated Registered Engineering Limited v Yalaju-Amaye,*[440] held that by going on a withdrawal spree from the company bank account and forging minutes of meeting to cover the absence of a resolution to change the signatories to cheques, the majority had committed fraud on the company. The court defined 'Fraud' in s.300(d) in an equitable sense as an abuse or misuse of power on the part of the majority or the directors and indeed breach of duty by directors. Consequently, no actual fraud needs to be proved, it may simply be presumed, also it is inclusive of omissions. This is like the position in England and Wales under s.260(3) of the Companies Act 2006, which laid down the foundation for bringing a derivative claim. It allows a claim to be brought in respect of a course of action arising from actual or proposed act or omission involving negligence, default, breach of duty or trust by the director of the company. From this section, it is evident in England and Wales there is no requirement to prove fraud, even if the directors have acted in good faith and has not personally gained from the wrong committed, the claim can be instituted. Unfortunately, not having a precise definition of the fraud will complicate issues when a case is brought before the court for determination.

The Nigerian jurisdiction adopts the position of *Templeton J in Daniels v Daniels,*[441] and applied the principle in the case of *Associated Registered Engineering Limited v. Yalaju-Amaye*,[442] which is to the effect that the exception would permit a minority to sue even in the absence of fraud where the directors have abused their power, intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company. *Templeton J* concluded that where the directors had benefitted from their negligent act, then the minority can institute an action.

In Nigeria, the Law Reform Commission introduced the commission of fraud as a statutory exception under S.300 (f) of the CAMA 2004, and now a similar provision is provided for under s.343(d) of the CAMA 2020. This is welcomed considering the Nigerian corporate environment, which is plagued with

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[439] Dignam, A "Company Law, London Oxford University Press, 2009, Pg. 184.
[440] *Supra N49, Pg.10.*
[441] (1978) Ch.406.
[442] [1990] 4 NWLR Pt. 145, Pg.145.

corruption.[443] In the World Bank data on CPIA transparency, accountability and corruption in the public sector[444] 2019 Nigeria ranked 146 out of 180 countries and has a score of 26 out of 100, which is low translating to the in-depth corruption ingrained in the country. The data shows that no considerable effort has been made to combat corruption. The inclusion of fraud on a statutory footing seeks to prevent fraud directly or indirectly by the directors at the helm of affairs to the detriment of the minority. The next hurdle for a claimant is to satisfy the court that the wrongdoers are in control and will not bring an action against themselves. The Nigerian statutes have departed from the common law by affirming in s.300(d) of the Companies and Allied Matters Act 2004 "that any member may by injunction or declaration restrain the company from committing fraud on either the company or the minority shareholder where the director fail to take appropriate action to redress the wrong done". From the wordings of the above sub-section, the Act has discarded the condition that the directors must only have committed fraud on the company, or the majority must be in control.

However, s.303(2)(a) in highlighting the requirements that must be achieved by the claimant commencing a derivative action, stipulates that the court must be satisfied that (a) the wrongdoers are the directors who are in control and will not take the necessary action. The correct position will be to read the two provisions together, if this is done then the control aspect of the exception is still law in Nigeria. The absence of any of the laid down criteria has the consequence of invalidating the action brought. As a result, what constitutes fraud in my opinion depends on the facts and circumstances of each case. It involves any act, which amounts to an abuse of fair dealing or abuse of confidence in the management of a company, which constitutes deceit that takes the conduct outside the rule in *Foss v Harbottle*.

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[443] The Transparency International Index 2019 reveals Nigeria has a ranked 146 out of 180 corrupt nations, with a percentile rank of 16%. https://www.transparency.org/country/#NGA accessed on 4/8/2020. On the other hand, the United Kingdom fares much better, it has a rank of 12 out of 180, with a percentile rank of 77%. https://www.transparency.org/country/#GBR_DataResearch accessed on 4/8//2016. There is a huge disparity between the two nations, the United Kingdom has put considerable effort in the fight against corruption. It is a signatory to the OECD Anti-bribery convention 2011, surprisingly Nigeria is not.

[444] http://data.worldbank.org/indicator/IQ.CPA.TRAN.XQ accessed on 4/8/2020.

4.4.5 Where a Company Meeting Cannot be called in Time to be of Practical Use in Redressing a Wrong Done to the Company or to the Minority Shareholders

This exception enacts the principle in the decision in *Hodgson v National and Local Government Officer Association.*[445] It was held where a company meeting cannot be called in time to be of practical effect to redress a wrong done to the company, a shareholder can sue. In this case, the trade union executive council had passed a resolution which purported to mandate the union's delegate to vote in a manner contrary to an earlier resolution of the union conference. The court ordered the withdrawal of the executive's directive and mandated the delegates vote in accordance with the union conference earlier resolution.

4.4.6 Where the Directors are Likely to Derive a Profit or Benefit or have Profited or Benefitted from the Negligence or from their Breach of Duty

This exception validates the principle in *Daniels v Daniels,*[446] which is to the effect that where directors benefit from their breach of duty, a minority shareholder will be allowed to bring an action. It is an extension of s.300(d). In this case, a married couple were the directors and majority shareholders of a company. The company sold land to the couple at an under value, later they sold it for a profit. There was no proof of any intention to defraud the minority shareholders. However, the court held there was a misappropriation of company's land in respect of which an action would lie at the instance of the minority. This requirement is not easily met by a minority shareholder, and even when it is met the action can still be frustrated if the wrong complained of by the minority shareholder is ratified by the majority.[447] On the last two exceptions i.e., s.300(e) and (f) there is no case law under the Nigerian jurisdiction, in respect of the jurisdiction in England and Wales if such cases were decided by the highest court in English judicial hierarchy of court is only of persuasive authority within the Nigerian judicial system.

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[445] (1972) 1W.L.R 130.
[446] Supra N58, Pg.13
[447] Nelson D "The Dilemma of the Shareholders under the Nigerian Company Law" Journal of Law, Policy and Globalization Vol.37 2015, Pg. 96.

Although, the provisions of the Act about minority protection can be said to be comprehensive to an extent, the flexibility with which the court will interpret them would go a long way to justify the arduous task undertaken in furtherance of the clear intention of the legislature to reform the law on the subject.

4.5 Statutory Derivative Action

The Nigerian Law Reform Commission[448] proposed an amendment to the common law position, with the aim of giving the minority more opportunities to enforce their rights. This led to the enactment of s.300-303 of the Companies and Allied Matters Act 2004[449] which for the first time introduced "*Statutory Derivative Action*". In England and Wales, it is known as *"statutory derivative claim"*. This is an action brought by a shareholder of a company in the name or on behalf of a company, or to intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.[450] The right of action belongs to the company, the reason being it is the company rather than the shareholder that is wronged, since it is only the company that can complain, the company can maintain an action and not an individual shareholder. However, the decision to maintain the action is the responsibility of the directors.[451] Accordingly, Section 303(1) provides that: "An applicant may apply to the court for leave to bring an action in the name or on behalf of a company or to intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company"

Choo Peale Koh Ming,[452] is of the opinion that statutory derivative action has primarily a deterrent objective, that by empowering the shareholders, it serves to deter managerial misconduct by imposing the threat of liability. Kunle Aina shares the same view that statutory derivative action as an exception

[448] Nigerian Law Reform Commission Report on Reform of Nigerian Company Law, Vol. 1, 2 and 3.
[449] Now CAP C26, Laws of the Federation of Nigeria 2004. (CAMA)
[450] Companies and Allied Matters Act 2004, s.303.
[451] Under normal circumstances, the general meeting may maintain an action in the name of the company where the directors are unable to act under s.63 of CAMA.
[452]Choo, P.K.M "The Statutory Derivative Action in Singapore- A Critical Examination" Bond Law Review Vol.13 No 1 2001 Pg. 64

to the majority rule ensure,[453] that fraudsters who are in control of the company's machinery for filing action in the name of the company do not use the opportunity to enrich themselves to the detriment of the company.

My assessment of the above contentions is that statutory derivative action was introduced to provide a lifeline for minority shareholder in the event of mismanagement by the majority at the helm of affairs in the company. However, whether it is an effective remedy for minority shareholders is debatable. Under the CAMA 2004,[454] no action may be brought, and no such intervention may be made unless the court is satisfied as to the following

(a) The wrongdoers are the directors in control and will not take necessary action.

(b) The applicant has given reasonable notice to the directors of the company of his intention to apply to the court if the directors do not bring or diligently prosecute or defend or discontinue the action.

(c) The applicant is acting in good faith and

(d) It appears to be in the best interest of the company that the action be brought, prosecuted, defended, or discontinued. These factors will be discussed to determine if they are relevant to warrant instituting a derivative action, this will determine if the present remedy is appropriate for the protection of minority shareholders in Nigeria. It flows therefore that the applicant must bring an application for leave of court in order to bring an action under s.303 CAMA 2004.

The CAMA 2004,[455] provides a list of persons who can apply to the court for a derivative action as an applicant these include- (a) a registered holder or a beneficial owner and a former registered holder or beneficial owner of a security of a company (b) a director or an officer, or a former director or officer of a company (c) the Corporate Affairs Commissioner (d) any other person who is in the discretion of the court, is a proper person to make an application for that purpose. A shareholder cannot bring the action if his conduct is such as to disqualify him, where in a situation he was a party to the wrong which he complains of. The applicant usually brings the action on behalf of himself and other members of the

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[453] Aina K "Current Developments in the Law on Derivative Action in Nigeria Company Law, Babcock University Socio-Legal Journal (2014) Vol.1No.4 Pg.49.

[454] Companies and Allied Matters Act 2004, s.103.

[455] Companies and Allied Matters Act 2004, s.309.

company except the defendants who in most cases are the directors and/or controlling shareholders and the company will be joined.[456]

This ensures that the company, defendants, and other shareholders are bound by the judgement of the court. The Companies Act 2006 in operation in England and Wales permits only a member to bring a statutory derivative claim. This seems very restrictive as it foreclosed other interested parties especially where there is a just cause for action and especially when no member is interested in bringing the action. In the case of *Chief Akintola Williams & Ors v Edu,*[457] the Court of Appeal held the view that a non-member of a company cannot institute a derivative action under the section despite the provisions that allows anyone to apply at the discretion of the court. The courts had refused to allow former shareholders,[458] and former directors,[459] because they lack sufficient interest in the outcome of derivative action, when in fact the CAMA 2004 expressly permits such persons to bring the application. It is surprising that the court charged with the responsibility of interpreting the law will go contrary to the intentions of the legislature, invalidating the provisions of the CAMA 2004. The judgment of the court is not in sync with the CAMA 2004, this approach gives the impression that the judiciary is oblivious to the literal interpretation of the statute. Unfortunately, s.309 is a dead letter law.

The CAMA 2004 intends to protect the interest of minority shareholders' however this is not achieved by the misinterpretation of the letters of the CAMA 2004 by the courts. The court ought not to bring extraneous matters to inhibit the legislature's intention in permitting a wide category of persons to seek redress on behalf of the company. In order to prevent undue technicalities arising from future cases, it presents the need for a reform of the CAMA 2004 to bring it in conformity with practices and procedures applicable in England and Wales, in determining who can successfully institute a derivative action Brayton J in *Jacob's* case affirmed it was not the intention of the legislature to allow every former director to bring an application for derivative action. This opinion establishes two lines of reasoning,

[456] A Statutory derivative action by a minority shareholder may be joined with a direct personal claim by the minority shareholder where the claim arises out of the same transaction. Likewise, a representative claim may be joined with a derivative claim and this in effect will be only one truly representative claim.
[457] (2002) 3 NWLR Pt.754 Pg.400.
[458] *Jacobs Farms Ltd v Jacobs* (1992) OJ No 813
[459] *Schafer v International Capital Corporation* (1997) 4 WWR 99.

first placing a restriction on the category of persons that can institute an action act as a bar to the recognition and enforcement of minority shareholder's rights. Secondly, permitting an individual having little or no interest in the company to bring an action provides an avenue for multiplicity of suits and is an abuse of court process.

The application of the sufficient interest rule was explained by Belgore JSC in the Supreme Court case of *Adenuga v Odumeru,* [460] *"A party must in his statement of claim aver enough facts to indicate what his interests are in the matter and how those interests stand threatened if the action was not brought. It is not enough to state that he has an interest, there must be an averment that his interest is threatened".* From an application of this rule to the facts of *Chief Akintola William's case,*[461] a former shareholder or director would have sufficient interest to institute an action, if he or she still has shares in the company, even though they take no active part in administration. In like manner if the courts interpreted s.309 strictly a former director or shareholder would be entitled to bring an action, hence the judgement of the court would have been different.

4.6 Factors to be Considered When Instituting a Derivative Action.

There exist various obstacles that hinder a minority shareholder's ability to enforce the company's rights. Before a derivative action is successful, the minority shareholder must satisfy the provision of *s.303 of the* Companies and Allied Matters Act 2004, which imposes the following requirements:

4.6.1. Pre-Action Notice- *Section 303(2)(b) of the Act* requires that *"an applicant for leave to bring a derivative action must give reasonable notice to the directors of the company of his intention to apply to the court under subsection one of the sections and after giving the reasonable notice, if the directors do not bring, diligently prosecute or defend or discontinue the action, the applicant is allowed to file a derivative action".* Serving of such pre-action notice is compulsory. The advantage of this notice is that it is possible that the directors had not thought of this course of action and since the right of action is

[460] (2002) 8NWLR Pt.821 Pg.163.
[461] *Supra.N61, Pg.18.*

that of the company, it should be given first opportunity to seek redress for itself. It is only if this is not done after a reasonable notice that the applicant may file the application. The issue with this provision is it fails to specify the duration that will constitute reasonable notice, in addition the provision is silent on the contents of the notice and whether the notice contain details to enable the directors know the specific actions to remedy. However, where the directors take immediate action on behalf of the company, a derivative action will not be necessary.

An important observation is that the Act does not provide for an exception to pre-action notice. This will bestow on the courts the discretion to grant leave, despite the absence of notice to the company if it is satisfied that it will be appropriate to do so. It is quite clear that where the fraudulent directors are in control, which in fact is a condition precedent for bringing the action under the Act. It is likely they would not bring an action against themselves. Hence the requirement of pre-action notice is unnecessary. The notice will best serve as an opportunity for directors to take adequate steps to cover their wrongdoings, it aids time wasting since there is no specific period stipulated under law. The discriminatory nature of the pre-action notice, provisions have led to agitations for its removal from all our laws as this requirement institutionalizes a preferential treatment in favour of the defendants.[462]

There is also the question of independence and impartiality on the part of the judiciary as amply provided under s.36 of the 1999 Constitution of the Federal Republic of Nigeria, as such corporation's such as government agencies are practically subsumed under the executive arm of government, as a result creating unwitting camaraderie between the judiciary and executive arm of government at the expense of the plaintiff. The Supreme Court equally appears to support this view on pre-action notice when it held in the case of *Mobil Production (Nig) Unltd v Lagos State Environmental Protection Agency*[463] that the right to be served with pre-action notice does not fall within the category of rights which cannot be waived through the application of the maxim "quilibet protest renunciare juri prose

[462] Ogbuabe, C.A, "Can Jurisdiction be waived? Waiver and jurisdiction in cases involving pre-action notice: Niger care development Company Ltd v Adamawa State Government & Ors Revisited", The Appellate Review, Vol.1, No.2, 2009/2010, P.222.
[463] (2002) JELR 17625 (SC).

introducto” meaning ‘an individual may renounce a law made for is special benefit’ based on an undisputed fact that there is no provision in the Constitution for special privileges to any class category of persons.

4.6.2 Application for Leave- After service of the pre-action notice, which was highlighted as a mandatory pre-condition for bringing the application for derivative action in Nigeria, s.303(1) CAMA 2004 makes express and specific provision for the shareholder intending to bring the derivative action to apply for leave of court as a mandatory precondition for the action. The CAMA 2004 merely provides that leave to bring the action must be granted by the court without necessarily specifying the procedure to be adopted in the application. This no doubt has created doubt on the procedure for the application of leave. When a case presented itself for the Supreme Court to clarify the appropriate procedure to be followed it failed. In *Agip Nig. Ltd v Agip Petroli International and others,*[464] the first respondent held 60% of the shares, while the remaining 40% were held by the remaining members. Pursuant to an international bid, the 1st respondent sold all its shares in the applicant company to the 2nd respondent (Unipetrol Nigeria Plc) under a sale agreement. The directors of the company, the Nigerian Stock Exchange and Securities and Exchange Commission approved the sale of the shares. The minority shareholders believed the sale was a fraud and sought to reverse the sale. They commenced an action in the Federal High Court by a writ of summons and filed an *ex parte* application for leave to commence the derivative action in the name of the company. The High Court granted the order for leave but on appeal the Court of Appeal held the writ of summons was incurably bad and a nullity. The applicants appealed to the Supreme Court, which upheld the decision of the Court of Appeal and made further pronouncement,[465]: The applicant must apply for leave to commence the derivative action, the procedure for obtaining leave is not embodied in the Federal High Court (Civil Procedure) Rules 2000, every application under the Act shall be made by originating summons and it must be served on the

[464] (2010) 5 NWLR Pt. 1187, Pg. 348.
[465] See also the case of *Chief Geofrey Ozuh v Chief Anthony Ezeweputa* (2005) 4 NWLR Pt.915, Pg.221. Ogunbiyi JCA explained the position thus in the instance case *“the applicants required leave before they can appeal. Even if they were members of the company, they could not go to court to protect the interest of the company without leave first sought and obtained”.*

respondents to enable them respond to the application, so that the directors be heard in the application for leave and failure to do this offends the constitutional provisions on fair hearing.[466] With reference to the judgment of the Supreme Court,[467] the court missed a great opportunity to give a direction and make a proper pronouncement in this area of law.

The Company Proceedings Rules 1992 by virtue of its Rule 2 merely states every application under the Companies and Allied Matters Act 2004(except those mentioned in rules 5 and 6 and Winding Up of Companies Proceedings) shall be made by originating summons, it did not specify if the originating Summons should be exparte or on notice. Likewise, s.303 CAMA 2004 did not specify the procedure to adopt but merely provided the applicant must apply for leave to bring a derivative action. The Supreme Court therefore cannot assume it has to be on notice. This therefore calls for a fair understanding of the nature of the application. Berkahn[468] explained the rationale for the application for leave is to *"prevent trivial or malicious actions from proceedings and also appears to be recognition of the facts that to burden the company with the costs of bringing action at the behest of someone with a relatively minor economic stake in the company may outweigh the benefits, even if the claim has merit"*. He went on to conclude that the uncontrolled access to the remedy could result in potential directors feeling so vulnerable that they decline managerial positions.

Under the Nigerian jurisdiction what can be interpreted as the main purpose of applying for leave to bring a derivative action is to allow the court to consider the application, ensure there is a prima facie case before the directors of the company are invited to oppose the application or the action itself. The insistence of the Supreme Court of Nigeria that the directors must be served with the originating summons from the onset defeats the intentions of the legislature and introduced technicalities in this area of law.

[466] Constitution of the Federal Republic of Nigeria 1999, s.33.
[467] https://lawcarenigeria.com/agip-nigeria-ltd-v-agip-petroleum-international-7-ors/ Accessed on 21/06/21.
[468] Berkahn, M "The Derivative Action in Australia and New Zealand: Will the statutory provisions improve shareholder's enforcement rights? Bond Law Review Vol. 10 No.1, 1998.

4.6.3. Good Faith- The applicant must show that the application was instituted in good faith,[469] this is necessary in order to discourage personal vendettas and vexatious actions. The proof of good faith is also a precondition in England and Wales.[470] Apart from the normal practice of merely declaring the application was brought in good faith, the only way to prove good faith is to simply prove that the application is valid and in no way prejudicial to any party. The disadvantage of this condition is that it is difficult to prove as the right to bring the action is that of the company. Where the directors have decided not to act, any action by another person is likely to be viewed as personal and malicious.

4.6.4 Interest of the Company- Section 303(2)(d) of the Companies and Allied Matters Act 2004 provides "no action may be brought, and no intervention may be made under subsection (1) of this section unless the court is satisfied that it appears to be in the best interest of the company that the action is brought, defended or discontinued". The refusal of the company to bring an action may be based on the interests of the company by considering the benefit in terms of cost of litigation and the outcome of the proceeding generally, whether it will benefit the company or not.

4.6.5 Powers of the Court - Section 304 of the Companies and Allied Matters Act 2004 listed the powers of the court under section 303. The court is authorised to make any one or more of the following orders:

(a) Authorising the applicant or any other person to control the conduct of the action.

(b) Giving directions for the conduct of the action.

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

The court in exercising its powers under section 304 shall not stay or dismiss an action simply because an alleged breach of a right or duty owed to the company has been or may be approved by the shareholders of such company, but the court is required to consider evidence of approval by the shareholders. Ratification by the company of wrongs done to the company is an effective bar to further

[469] Companies and Allied Matters Act 2004, s.303(2).
[470] Companies Act 2006, s.263(3).

proceedings in court provided the wrong is one that is capable of being ratified. We must be aware that although the issue of ratification is not a condition to be considered in an application for leave to bring the action under section 303 of the Act where the act complained of had been ratified, the directors will, if leave had been granted, show that the act had been ratified by the company and the company is not willing to take further action on the matter.[471]

Section 306 of CAMA 2004 also provides for situations where the parties have agreed to settle and withdraw the matter out of court. The courts must ensure that any applicant who may be affected by such dismissal, discontinuance is put on notice. This will also prevent collusive settlement between the parties for the benefit of the complainant and the defendants at the expense of the company. Once the court has approved the filing of a derivative action there should be no reason why such action should be discontinued with or without the approval of the court. If the applicant is no longer interested especially if he has been compromised, the court should be given the power to appoint an independent person or organization for e.g., the Corporate Affairs Commission to continue the due prosecution of the matter.[472]

Although statutory derivative action is an important tool available to a minority shareholder to protect their rights and that of the company, the courts have failed to give a proper, just and fair interpretation of the intentions of the legislature. While concerned with strict adherence to form and technicalities they have lost the opportunity to do substantial justice. The application of the term “sufficient interest” and “locus standi” also limit access to the court by applicants with genuine interests to protect when there is no such limitation under the Act. The court’s insistence on the applicant for a derivative action on behalf of their company to show sufficient interest is not supported by the law and is calculated to defeat the purpose of the legislature. The Act does not specify whether the application for leave to bring the derivative should be made *ex parte* or on notice. As a result, a lot is left to be desired in the interpretation of the statutes for the protection of minority shareholders. At this point

[471] Companies and Allied Matters Act 2004, s305.
[472] Aina K, ‘Current Developments in the Law on Derivative Action in Nigerian Company Law’,Babcock University Socio-Legal Journal (2014) Vol.1No.4 Pg.49.

there exist two approaches either a legislative reform of the current statutes or a legal transplant of the current process and procedures in England and Wales.

With particular emphasis on unfair prejudicial petition, the historical development of unfair prejudicial petition in Nigeria, its subsequent application in cases and the effects on minority shareholder protection will be examined in Chapter 5, the same comparative approach which was applied in the previous chapter will be adopted in this chapter.[473]

[473] *Supra* N 333, Pg.78.

<u>CHAPTER 5:</u> UNFAIR PREJUDICIAL PETITION IN NIGERIA.

<u>5.0 Introduction</u>

The Companies and Allied Matters CAMA2004 now CAMA 2020 [474] is the primary legislation that regulates the relationship between members and the company in Nigeria. CAMA recognises and enforces the right(s) of a member,[475] whether as a majority or minority shareholder.[476] In the event of a breach of a legally recognised right (corporate or personal) CAMA provides a wide range of remedies,[477] to redress the wrong done to a member or company. Recent statistics place Nigeria 64th out of 140 countries on minority shareholder's protection index.[478] This is indicative of the lack of adequate legislation and enforcement tools to protect minority shareholders. As a result, there is still a long way to achieve an adequate level of minority shareholder protection[479]. This chapter focuses on the remedy of unfair prejudicial petition under s.310 of the CAMA.

In Chapter Four, it was argued that the statutory derivative action in Nigeria as an alternative remedy for minority shareholders is somewhat ineffective. This was attributed to the failure of the courts to

[474] The Companies and Allied Matters Act, Cap. C20, Laws of the Federation of Nigeria 2004 (CAMA) was promulgated as Decree No. 1 of 1990. It was a period when the previous Companies Registry system under the Companies Act 1968 had become difficult in its application and enforcement. The CAMA 2004 was introduced to eliminate the obstacles, which affected the Companies Act 1968. The CAMA 2020 was signed into law by President Muhammadu Buhari on the 7th of August 2020. The CAMA 2020 repealed the CAMA Chapter C20 Laws of the Federation of Nigeria 2004, which originally came into force in 1990.

[475] Section 81 of the CAMA 2004 recognises that *"Every member has a right to attend any general meeting of the company and to speak and vote on any resolution before the meeting"*, provided that a member shall not be entitled to attend and vote unless all calls or other sums payable to him in respect of shares in the company have been paid.

[476]In *Omisade v Akande* (1987) 2 NWLR (Pt.55) 158 which is often, cited as an authority on the rights of minority shareholders, the term Minority Shareholders was defined as individuals who have minority stakes in a company that is controlled by majority shareholders. They are shareholders who own less than 50% of the total shares of a company and often the ones dependent on the will of the majority shareholders, who are in controlling positions because of the bigger amount of the share capital they own. The Supreme Court addressed the issue of minority protection in passing, the principal focus of the judgement was on the appropriate court that have jurisdiction to hear the matter, and unfortunately, the court did not decide the rights of the minority shareholder who instituted the action.

[477] The remedy includes injunction and declaration provided under s.30*3*, alteration of articles of association under s.4*8*, personal and representative action under s.301, Investigation of companies and their affairs under s.314, Winding up of a company under s.408 and statutory derivative action under s.299 discussed in the previous chapter.

[478]<u>https://guardian.ng/business-services/business/nigeria-ranks-64th-on-minority-shareholders-interest-index/</u> accessed 11/08/2020.

[479] The goal to achieve a satisfactorily level of minority shareholder protection in Nigeria is more of a myth than reality. This is attributed to factors that impede the realisation of minority rights for e.g., corruption, government interference in judicial decision-making and ineffective enforcement agencies.

give a purposive interpretation to the statute and most importantly give effect to the true intention of the legislature.[480] In analysing the remedy of derivative action in Chapter 4, the *Agip* case illustrates the challenges in instituting a derivative action and how easily a derivative action could fail on the grounds of procedural defect. The Supreme Court in my opinion should not have interpreted the statute strictly, because it defeats the aim of justice. This prevented the court from granting pre-emptive remedies *exparte* thus denying the court a key function of its jurisdiction. In *Kotoye v CBN,*[481] the Supreme Court held the power to grant *ex parte* injunctions in cases of urgency is an inherent power of a court of law and in accordance with the constitutional authority of the court. Although the facts are different from the *Agip* case being the *ex parte* application came after the action had been properly instituted, it did not require a prior approval of the court for leave to institute the suit. The facts of the *Agip's* case in my opinion support a familiar direction for the court to give similar judgement to the *Kotoye's* case.

In this Chapter, unfair prejudicial petition as a remedy available to a minority shareholder will be critically analysed with the intent of determining if it is an effective remedy for the protection of minority shareholder's rights in Nigeria. The historical background of unfair prejudice petition will be traced, and this will enable the reader to understand how the remedy has developed to its current implementation in matters affecting minority shareholders rights in Nigeria. In addition, the interpretation of s.310-315 of the CAMA 2004 in recent cases will be examined[482]. This will provide a platform to make an informed assessment on whether the remedy in question is effective taking into consideration factors such as corruption, which has made the judiciary ineffective in interpreting and enforcing the law.[483] Analysis of this remedy is important to ascertain how a minority shareholder can

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[480] In *Agip (Nigeria) Ltd v Agip Petroli International* (2010) 5NWLR Pt.1187, Pg.348, the Supreme Court held that s.303 of the CAMA 2004 and Rules 2(1)(2) of the Companies Proceedings Rules 1992, an application for leave to prosecute a derivative action is commenced by an originating summons with notice to the company. Hence, a derivative action, an ex parte application is inapplicable as the rule in *Foss v Harbottle* raises the issue of the plaintiff's standing in a derivative action, which ought to be determined at a pre-hearing stage by appropriate notice to the other parties.

[481] (1989) 1 NWLR Pt.98, Pg. 419.

[482] The CAMA 2020 provides for unfair prejudicial petition under s.353.

[483] The term "Ineffective" used in the sentence, include partiality, accepting bribes and perverting the course of justice.
http://www.premiumtimesng.com/news/top-news/214130-official-nigeria-supreme-court-judges-accused-corruption-step.html accessed on 11/08/2020.

best guard against mismanagement by the majority in control of the company and utilise this remedy to his/her advantage should the need arise.

5.1 Historical Development of Unfair Prejudicial Petition in Nigeria

In order to appreciate the development and growth of the remedy of unfair prejudicial petition it is pertinent to undertake a brief review of the winding up remedy. This is important because it lays the foundation for the enactment of unfair prejudice petition as an alternative remedy due to the shortcomings of the winding-up remedy.

5.1.1 The Winding-up Remedy

Unfair prejudicial petition developed as an alternative to the winding up remedy under s.209 (f) of the repealed Companies Act of 1968 in Nigeria. It was because of direct import of the law in operation in England and Wales, that this remedy became effective and applicable in Nigeria. During this period, Nigeria was under British colonial rule until October 1st, 1960, when independence was attained. The Nigerian independence Constitution (1960) and the Republican Constitution (1963) both contained provisions conferring law-making powers on federal and regional legislative assemblies. As seen from s.32 of the Interpretation Act, Cap.123 Laws of the Federal Republic of Nigeria 2004, Now CAMA 2020 which came into force on the 7th of August 2020 with the aim of reducing compliance costs and regulatory hurdles for businesses in Nigeria. There also exists corresponding reception clauses in regional/ state statutes, the main body of English Law imported into Nigeria during the colonial era (i.e common law, equity and pre-1900 Statutes of general application) could be overridden by the enactments of these legislative assemblies.

Thus, most of the laws enacted was a replica with little or no difference from the laws in England and Wales.[484] Nigeria's legal system was based on the common law system in operation in England and

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[484] s.32(1) of the Interpretation Act, Cap.123, Laws of the Federal Republic of Nigeria, 2004 provides that "*subject to this section and except in so far as other provision is made by any federal law, the common law of England and the doctrines of equity , together with the statutes of general application that were in force in England on the 1st day of January 1990, shall be in force in Lagos and in so far as they relate to any matter within the exclusive*

Wales and still is today,[485] although the winding up remedy was available to a shareholder in the event of breach of his rights, the Courts were not keen to apply this remedy. The underlying reason was the winding up of a company might result in financial loss to shareholders including the petitioner. The Courts saw the winding up remedy as a last resort and new provisions were accordingly enacted in the Companies Act 1968 for an alternative to winding-up.[486]

The shortcomings of the winding-up remedy enacted under the Companies Act 1968 made it inadequate for several reasons:

(A) The remedy will not avail a petitioner where it will undermine the powers of the directors,[487]

(B) The courts policy of non-interference in the internal affairs of companies constituted an obstacle to this remedy,[488]

(C) The remedy was subject to some restrictive conditions for e.g., the remedy was not available in cases of management without fraud and finally,

(D) The petitioner must have tangible interest, if he intends to enforce purely personal or ulterior motive the remedy of Winding-up will be unavailable.[489]

Winding up remedy is still applicable under the Companies and Allied Matters Act 2004[490] and s.564(1) CAMA 2020[491] as *winding up on the just and equitable ground* under s.408 (e) CAMA 2004. An important feature of the winding up remedy under the CAMA 2004 which was absent under the 1986

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legislative competence of the federal legislature shall be in force elsewhere in the federation". This section provides conditions under which English Law will be received into the Nigerian Legal System, and these include local context and jurisdiction, among other things. For further analysis see Niki Tobi "Sources of Nigerian Law "1996, Pg.25-28 also read the case of *Balogun v Balogun (*1935) 2 W.A.C.A. 290.

[485] The Companies and Allied Matters Act 2004 was largely based on the Companies Act 1985 which has been from re-enacted to a large extent in the United Kingdom Companies Act 2006.

[486] Orojo, O "Company Law and Practice in Nigeria 5th Edition (Lexis and Nexis Butterwort) 2008 Pg.215.

[487] *Charles Forte Investment Ltd v Amanada* (1963) 2 ALL E.R. 940.

[488] This is the judgement of the court in the case of *Re Jermyn Street Turkish Baths Ltd (1970) 1 WLR 1194*, in contrast to *UBA Plc v Coker* (1996) 4 NWR Pt.441, 23 where it was held that a court has the power to intervene in the management of a company when minority shareholder's interests are not being well cared for or looked after.

[489] *Re Expanded Plugs Ltd* (1966) 1 W.L.R. 514.

[490] Winding up remedy provided under *s.408 (e) of the Companies and Allied Matters Act 2004* was deliberately enacted to protect minority shareholders in cases of oppression by the majority. It should be noted the court's power under this paragraph is discretionary.

[491] By virtue of s.564(1) of the CAMA 2020, there are three specified modes by which the winding up of a company may be caried out: by court, voluntary winding up and by the supervision of the court.

Act, was the expansion of the category of persons that could institute the action known as "*Contributories*". Section 403 CAMA 2004 defines a *contributory* as: " *every person liable to contribute to the assets of the company in the event of its being wound up and for the purposes of all proceedings for determining all proceedings prior to the final determination of the persons who are deemed contributories, the expressions include any person alleged to be a contributory"* A literal interpretation of this section would suggest a contributory would include a member of a company including past members provided the member *"is liable to contribute to the assets of the company in the event of being wound up* ". It is this liability for contribution that defines a contributory. As a result, a minority shareholder qualifies as a contributory and automatically has the right to petition for winding up on just and equitable grounds. In exercising its equitable jurisdiction,[492] the court must exercise its discretion judicially and judiciously.[493]The courts are not inclined to grant this remedy especially when it appears to the court that an alternative remedy is available to the petitioner.[494] The petitioner is under a duty to present relevant evidence that will sway the court decision in his favour for an order of winding up. One of the requirements is that the petitioner must prove that there exist assets for distribution,[495] otherwise he/she will have no *locus* in instituting such action.

The interpretation of the term *contributory* expands the category of persons that can institute a petition. This promotes the protection of minority shareholders and reduces the floodgates of applications to the court by an individual who genuinely believes he has an interest to protect as a result s.410(2) of the CAMA 2004 and s.573(2) CAMA 2020. This aims to prevent indiscriminate petitions by an individual who claims to be a contributory. The instance where an order of winding up can be presented include: (A) Where the number of members of a company falls below two, and (B) where the shares of the contributory were originally allotted to him and were held and registered in his name for at least six months during the 18 months before the commencement of the winding up or have devolved on him

[492] *Ebrahimi v Westbourne Galleries Ltd* (1972) 2 ALLER 492 at 500.
[493] *Momah v Vab Petroleum* (2000) 1SCNQR 348.
[494] *Georgius Cole v RC Irvin & Co Ltd* (1971) 1 UILR 314.
[495]*Attorney General Lagos State v Nigerian Oxygen & Allied Gases Ltd Suit No. FRC/L/M3/77 (Unreported) of 13/3/80.*

through the death of a former holder. Unfortunately, there is no recent case law,[496] to illustrate the winding-up of a company by a minority shareholder for the breach of rights or overall corporate interest. The question whether there is any relevance for this remedy under the Nigerian jurisdiction if there is no recent case law supporting the application of the remedy for the protection of minority shareholder's rights is valid. A shareholder has more chance of success in instituting an unfair prejudicial petition.

<u>5.1.2 Unfair Prejudicial Petition Under the Companies Act 1968</u>

The unfair prejudice petition was originally enacted under s.201 of the repealed Companies Act of 1968.[497] It provided that *"Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members may petition the court for an order under this section"* while subsection (2) states "*the petitioner must convince the court that the affairs of the company is being conducted in a manner oppressive or the facts justify a winding up under the just and equitable ground but to wind up the company would unfairly prejudice that part of the membership"*. The scope of s.201 was interpreted in *Williams v Williams*[498] where it was observed that "*The relief afforded by this section is clearly an alternative remedy to the winding up of a company and has the enormous advantage in that it is less drastic and flexible, instead of …killing the company outright, it confers jurisdiction on the court to impose whatever solution it considers just and equitable*".

S.201 of the Repealed Companies Act of 1968 is a replica of the S.210 of the United Kingdom Companies Act 1948. As a result, the provision was subjected to considerable strain through judicial interpretation on what constitutes "oppressive conduct" under the Nigerian jurisdiction. Most importantly, the provision was linked to winding up (i.e., the courts could issue an order of winding up if it were just and equitable to do so). This position is different from the CAMA 2004 and CAMA 2020 where the remedy of unfair prejudice petition and winding up are independent remedies. Under the Nigerian Companies Act 1968, the Act failed to define what amounts to "*oppressive or discriminatory conduct"*. The courts accepted the definition of "oppressive conduct" under s.210 of the Companies

[496] Efforts were made to retrieve recent case law from journals, textbooks and online sources unfortunately it proved abortive. The researcher will continue to seek relevant information to keep the research up to date.
[497] The remedy is provided under *S.311* of the Companies and Allied Matters Act 2004.
[498] (1995) 2 NWLR Pt. 375, Pg.1-33.

Act 1948 of England and Wales. In *Re Jermyn Street Turkish Baths Ltd,*[499] the Court of Appeal in England held the position that oppression occurs when shareholders having a dominant position in a company either (a) exercise that power to procure that something is done or not done in the conduct of the company's affairs or (b) procure by express or implicit threat of an exercise of that power that something is not done in the conduct of the company's affairs. Viscount Simonds in *Scottish Co-operative Wholesale Society Ltd v Meyer,*[500] described oppression as *"burdensome, harsh and wrongful to other members of the company"*. This definition was applied in the Nigerian Case of *Ogunade v Mobile Films (WA) Ltd,*[501] where Karibi-Whyte J in explaining the nature of the oppression or fraudulent conduct contemplated by s.201 of the Companies Act 1968 noted *"the oppression or the fraudulent conduct of the majority must be harsh, burdensome and wrongful and must represent a consistent pattern of conduct directed at the oppressed minority over a period of time."* He went further to highlight exceptions to oppressive or fraudulent conduct, pointing out that negligence in conducting the affairs of the company or lack of business ability or inefficiency will not be sufficient. It is imperative that a petitioner proves that the oppressive conduct falls within the criteria indicated, failure of which any relief sought will not be granted. In *UBA Plc v Coker,*[502] the concept of *"oppressive conduct"* was interpreted in the management of company affairs, as connoting a situation where the company's affairs been conducted in a manner oppressive to some person(s) or causes injury to the rights of its members.

From an observation standpoint, the term, *"unfairness"* can be subject to both subjective and objective interpretation. The subjective test imposes a duty on a minority shareholder(s) to prove the majority shareholder(s) had conscious knowledge of their actions or any evidence of bad faith. On the contrary, an objective test implies whether a reasonable bystander would regard the act by the majority as unfair. The application of either of these tests is based on the facts and circumstance surrounding a particular case. Despite the application of a particular test to the circumstance of a case, it is not enough to allege

[499] (1970) 1 W.L.R. 1194.
[500] (1959) AC 31 at 34.
[501] (1976) 2 FRCR 10.
[502] (1996) 4NWLR Pt. 441, Pg. 239.

a conduct by the majority is unfairly prejudicial. Evidence of oppression or illegality must be present.[503] In *Yalaju-Amaye v Associated Registered Engineering Co Ltd (AREC),*[504] the court granted leave for a minority shareholder to institute an unfair prejudicial petition for the inappropriate withdrawal and spending of company funds by the majority without justification, as well as falsification of minutes of meetings and the appointment of new directors by the majority shareholder which was contrary to the interpretation of the articles of association. This case represents a typical example of unfair prejudicial conduct. The actions of the majority shareholder prejudice the interest of the minority and the company. In a situation where the court applied both the subjective and objective test, it would have reached the same decision. The evidence of gross unfairness was overwhelming. The similarity between the two tests is the evidence of unfairness by the majority towards the minority shareholder(s).

Another observation from the application of s.201 of the 1968 Act concerns the requirement that only a member of the company or his personal representatives may petition. In such a situation, a member must establish that he is being oppressed in his capacity as a member. When a wrong has been done to him/her in a different capacity e.g., as an officer of a company s.201 of the 1968 Act will not suffice. In *Elder v Elder and Watson,*[505] it was held that oppression within s.201 of the 1968 Act was between members, the allegations were issues affecting the petitioners in the character of directors or employees and were not within s.201of the 1968 Act and there was no evidence to justify a winding up order under the just and equitable grounds. The court's decision in the *Meyer* and *Elder* cases is sufficient to conceptualise a framework of limitations arising from s.201 of the 1968 Act in terms of its ability to protect a minority shareholder. It includes:

(a) An order cannot be made under the section unless "the facts would justify the making of a winding order on the ground that it was just and equitable that the company should be wound up" under s.209 (f) now s.408 (e).

[503] *Solanke v Ogunmefun* Suit No FHC/L/M/137/81 of 11th August 1983(unreported)
[504] (1986) 3NWLR, Pt. 31, Pg.85.
[505] *1952 S.C.49, Companies and Allied Matters Act 2004* s.310(1)(d), the Corporate Affairs Commission can institute an action if it deems it necessary.

(b) It had no application to isolated acts i.e., petitioner must show that there had been an oppressive conduct which continued to the actual time of petition as enunciated in *Re Jermyn Street (supra)*

(c) An order cannot be made under the section if the oppression has made the company insolvent so that the members no longer have tangible interest.

(d) unfair prejudice petition is only available to an individual who is a member of the company. Personal representatives of deceased members and others, to whom shares are transmitted by operation of law, cannot sue until their names are signed in the register of the company.

From the limitations mentioned, it is clear s.201 of the 1968 Act did not serve its practical purpose. At best it was a "window dressing" as a provision for the protection of minority shareholder, though it was linked with liquidation of the company at the instance of an oppressed minority. This provision made the success of minority shareholder protection more difficult than was anticipated because it was not in the best interest of the minority shareholder that the company for which he had laboured so hard to build be liquidated rather unceremoniously. Another possible reason for this disparity in the use of the remedies may lie in the restrictive interpretation to oppression under English corporate law, which is replicated in Nigeria.

To mitigate the hardship of s.201of the 1968 Act and find a middle ground, an alternative remedy was introduced. The repeal of s.201 of the 1968 Act made way for s.310-313CAMA 2004, which appeared to eliminate all the weakness of the 1968 Act. However, this statement raises the debate whether or not s.310 (unfair prejudice petition) is an effective remedy for the protection of minority shareholder's rights, an aggrieved shareholder(s) who is/are excluded from management can bring a petition against the majority shareholders and get judgement against the controlling shareholders without winding up the company in the process preserving the corporate personality of the company. In *Omisade v Akande,*[506] the parties in the suit were both directors and shareholders who had equal shares in the company. The court held that Omisade could institute a petition of unfair prejudice against Akande who

[506] (1987) 2 NWLR, Pt. 55 at 158. Also (1987) 18 NSCC 486.

made a false representation about the company to divert profit. The action taken by Akande amounted to a breach of fiduciary duty owed to Omisade.

5.1.3 The Companies and Allied Matters Act 2004

It is worthy of mention that the 1990 Act was included in the 2004 compilation of extant Nigerian Federal statutes and was in the process designated as Cap 20, Laws of the Federation of Nigeria.[507]The protection of minority shareholders was provided under Part X of the Companies and Allied Matters Act 1990 (protection of minority against illegal and oppressive conduct action by or against the company) specifically s.310 of the 1990 Act.

This section provided that: *"Any member, director or officer, creditor, the Commission or any other person who in the discretion of the court is a proper person to make an application may petition the courts on the grounds that the affairs of the company are being or have been or will be conducted in a manner unfairly prejudicial to the interest of its members including the petitioner himself."* To conveniently exploit the intent of this section the minority shareholder(s) must demonstrate evidence of "*oppression and unfair prejudice*",[508]. The requirement of the petition to be well founded is to ensure that the provision is not abused or used for a wrong purpose.[509] On the satisfaction of the above requirement the court in its discretion would grant any of the following reliefs which include, the winding up of the company or the purchase of shares of any member,[510] to mention a few. The application of this section in the event of oppressive and unfairly prejudicial conduct, and actual dissolution of the company is not the only remedy which is at the court's disposal. The statutes (1990 Act) authorised alternative remedies that were less drastic than dissolution. In *Re Harmer Limited,* [511] the court held that the acts complained of were oppressive to the petitioners as members of the company. It was irrelevant the petitioners were also directors, oppressed members who were directors were not

[507] https://www.aelex.com/highlights-of-the-new-companies-and-allied-matters-act/ accessed 14/08/2022
[508] *U.B.A. Plc v Coker* (1996) 4 NWLR Pt.441, Pg.239.
[509] D.Keenan, D Smith & Keenan's Company Law for Students (10th Edition) Pitman Publishing (1996) Pg.267-268.
[510] *S.312 (2)(a)* of the Companies and Allied Matters Act 1990.
[511] 1958 3 ALL ER 689.

disqualified from obtaining relief. From the facts of the case, Mr Harmer the owner of the company treated the company as his personal business, he ignored the interests of the shareholders, demands of his co-directors and resolutions of the board of directors and as a result, it became impossible to run the company. This in my opinion, constituted a ground for the dissolution of the company because the actions of Mr Harmer defeated the purpose of incorporation. The underlying reason for the court decision to avoid dissolution, I submit arises from the intent to preserve the corporate personality of the company. The section relating to unfair prejudicial petition under the 1990 Act (s.310) is pretty much the same under CAMA 2004 (s.311) and CAMA 2020 (s.353) and with little or no difference.

<u>**5.2 Relief on the Ground of Unfairly Prejudicial and Oppressive Conduct Under the Companies and Allied Matters Act 2004**</u>

Court proceedings for unfair prejudicial and oppressive conduct is instituted by a petition.[512] A petition under s.311 CAMA 2004 now s.353 CAMA 2020 need not be instituted unless it is the last resort to winding-up,[513] in instituting the petition, it is not enough to allege that a conduct by the majority is unfairly prejudicial, oppressive or illegal. The applicant must prove the circumstances of the oppression and illegality. Consequently, the petitioner must plead all the relevant facts that will prove the allegation.

As established unfair prejudice is a flexible term and is incapable of an exhaustive definition.[514] The absence of a definition enables the court to consider equitable considerations and admit that minority shareholders have rights and expectations that are not necessarily included in the articles of association.[515] The courts have applied a series of tests to establish if an act complained of is unfairly prejudicial. The first test which is the objective test is to determine if a hypothetical reasonable

[512] *Ihedioha v Okorocha* (2016) 1 NWLR (1492) Pg. 147.
[513] *Impress Angelo Farsure SPA v AG of the Federation*, Suit No: FHC/L/M/101/30/81 of 7/4/81 (Unreported)
[514] See generally Orojo Company Law and Practice in Nigeria Vol 1 Pg. 251- 252
[515] In *Longe v First Bank of Nigeria Plc* (2006) 3NWLR 967, it was held Articles of Association constitutes a binding contract between the company and its members and officers. The exercise of a power conferred by the Articles of Association cannot be challenged.

bystander would believe the act committed by the majority to be unfair.[516] In determining what amounts to unfairness a different approach can also be adopted. From my analysis the starting point is to inquire whether the conduct of majority shareholder, which the minority shareholders complain about is in accordance with the articles of association. The best protection for a shareholder is inserting protectionist clauses in the articles of association, recognising the rights of shareholders in the event of a breach. However, if the conduct complained of is in accordance with the articles, it will be difficult to succeed with an unfair prejudice petition. The courts would have difficulties figuring out the true intentions of the parties if the articles are silent on the rights of members. However, if such expectations exist from the circumstance of the case, a petitioner must present clear evidence of abuse by the directors/majority shareholders, or an infringement of legally protected rights for instance the right to vote. In the recent case of *Dys Trocca Valessia Ltd &Ors v Segun Sanyaolu &Ors,*[517] a case of unfairly prejudicial conduct was brought on appeal from the trial Court. The Court of Appeal held the appellant was guilty of unfairly prejudicial conduct, the reason being that the company was run by a one-man board of director which breached the provision of the CAMA 2004 and the principles of an incorporated company.

<u>5.2.1. Meaning of Oppressive Conduct</u>

The Companies and Allied Matters Act 2004 and 2020 is silent on what amounts to "*oppressive* conduct". However, the courts have over the years have construed the expression *"oppressive conduct"* mentioned under s.201 of the Nigerian Companies Act 1968. In *Ogunade v Mobile Farms (WA) Ltd,*[518] *Karibi Whyte* J explaining the nature of the oppressive conduct contemplated by s.201 of the Nigerian Companies Act 1968 was of the opinion that "The oppression or fraudulent conduct of the majority must be harsh, burdensome and wrongful and must represent a consistent pattern of conduct intentionally directed at the oppressed minority over a period of time". [519] However, negligence in

[516] *Morgan v 45 Flers Avenue Pty ltd* (1986) 10 ACLR 69.
[517] *(2016) LPELR-40516(CA)*
[518] *(1976) 2 FRCR 10*.
[519] *Scottish Co-operative Wholesale Society v Meyer (1958) 3 All ER 66*.

conducting the affairs of a company or lack of business ability or inefficiency will not suffice.[520] Interpreting the position of the law, oppression arises when a minority shareholder is subject to unfairness or prejudice by the abuse of power by the majority shareholder. One key requirement is that the act of the majority must represent a consistent pattern of conduct over a period. This requirement creates an opportunity for majority shareholders to take advantage, for instance a single act of oppression may not support a petition for unfair prejudice because of the requirement for a consistent act that is harsh, burdensome or wrongful. Shareholders have different competing interest, and it can be difficult or impossible for directors to make decisions that will be acceptable to all its members. Decisions taken by the board may have little or no direct effect on individual shareholders. Sensitive decisions taken for e.g., transfer of shares or the appointment or removal of directors have the potential to directly affect the individual shareholder’s interests.

On close analysis of the *Ogunade* case it can be observed that two elements must be present to succeed in a claim of unfair prejudice. The first is that the conduct must be prejudicial to the interest of minority shareholders and secondly that the conduct by the majority must be unfair.

Section 311 CAMA 2004 is a provision that seeks to empower those who are directly or indirectly involved in the management of the company either as members, creditors, directors, those to whom shares are transferred or transmitted to, the Corporate Affairs Commission (CAC)[521] as the supervisory agency over companies registered under the Act and indeed, to any other persons who in the discretion of the court is a proper person to make the application where they allege that oppressive or prejudicial and unfair conduct has been done or is threatened to be done against the petitioner . A petitioner is not obliged to wait for the oppressive act or omission to be completed before he or she can institute an action. In any event, neither the fact nor the oppressive conduct has been completed will leave the

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[520] *Re Five Minutes Carwash Service Ltd (1966)* 1 All WR 242.

[521] The “Commission” in this context refers the Corporate Affairs Commission, which was established by the Companies, and Allied Matters Act promulgated in 1990 to regulate the formation and management of companies in Nigeria. The establishment of the Corporate Affairs Commission as an autonomous body was a result of the perceived inefficiency and ineffectiveness of the company registry, a department within the federal ministry of commerce and tourism, which was then responsible for the administration of the repealed Companies Act of 1968.

applicant without any remedy. The remedy of unfair prejudice under s.310-313CAMA 2004 was introduced to eliminate the difficulties of s.201 of the Companies Act 1968 and widen the scope of relief,[522] available to a minority shareholder. For instance, the remedy covers both oppression and unfairly prejudicial conduct. Section.311(1) CAMA 2004,[523] prescribes the grounds upon which a petition for unfair prejudice can be made. For a petition of unfair prejudice to be successful the affairs of the company must be conducted in an illegal, oppressive, prejudicial, or unfairly discriminatory against a member or in disregard of the interests of a member(s) as a whole.

The case of *DYS Trocca Valessia Ltd & Ors v Sanyaolu & Ors,*[524]illustrates the attitude of the Courts in determining what constitutes unfair prejudice and oppressive conduct under the Nigerian jurisdiction. The Court of Appeal interpreted s.301 CAMA 2004 with slight modification acknowledging that the phrases *"illegal" "oppressive manner" "unfairly prejudicial"* are not defined under CAMA 2004. The trial judge *Joseph Eyo Ekanem J.C.A.* was of the opinion that *"oppression exists where an individual in a dominant position act in a manner that is unfair, burdensome, harsh and wrongful and it can be said that the affairs of the company are being conducted in an oppressive manner"*. He reiterated that any conduct that excludes participation in the management of the company or jeopardises the value of shareholding is *unfairly prejudicial*. Evaluating the facts of the case, the reasoning of the learned justice in holding oppression and unfairly prejudicial conduct by the appellants against the respondents was established based on the existing facts of unlawful constitution of the board of directors, unjustified sacking of aggrieved shareholder's appointees without valid reasons and unlawfully withholding treasury reports. The judgment of the trial Court (Federal High Court) was affirmed. Analysing the decision of the High court in *Sanyaolu* case it appears the learned trial judge gave a literal interpretation of s.311 CAMA 2004. This is like the interpretation by *Karibi Whyte J* in *Ogunade v Mobile Farms*

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[522] Sofowora, M.O "Modern Nigerian Company Law, 2nd edition Alpha Surulere, Lagos 1992, Pg. 501.
[523] See *S.311(1)* of the Companies and Allied Matters Act 2004 which states *"An application for the relief on the ground that the affairs of a company are being conducted in an illegal or oppressive manner may be made to court by petition"*.
[524](2016) LPELR-40423(CA), Suit No: CA/A/189/2015
http://www.lawpavilionpersonal.com/ipad/books/40423.pdf

(WA) Ltd,[525] It is apparent that for a petition to succeed the conduct complained about must be unfair and prejudicial and these two elements must coincide before such petition would be allowed. This is in line with the judgment in the *Ogunade* case. However, it depends on the facts of a case and circumstances surrounding it, as all cases are not similar. In my opinion where the facts of a particular case are glaring with sufficient evidence that the act of the majority prejudice the interest of the minority a literal interpretation of CAMA 2004 should be adopted. Where the facts are not clear whether the majority acted unfairly or there is confusion in the interpretation of the articles of association regarding the exercise of powers, then the court has the discretion to apply either the subjective or objective test to give a fair and just interpretation of CAMA 2004.

5.2.2 Legal Capacity to Sue

The situation involves a minority shareholder of a company alleging that the affairs of the company are being conducted in an illegal or oppressive manner under the Act (i.e., CAMA 2004). This was the case in *Ijale Properties Ltd v Omololu-Mulele.,*[526] Likewise on rare occasions such allegations can be made by a majority shareholder(s) of the company as exemplified in *Re Legal Costs Negotiators Ltd,*[527].

An additional improvement to the CAMA 2004 is the categories of persons who can institute a petition has been expanded. As a result, the case of *Elder v Elder & Watson,*[528] would have been decided differently. S.310 of the Companies and Allied Matters Act 2004 provides: *"An application to the court by petition for an order under S.311 of this Act in relation to a company may be made by any of the following persons: a member of a company, director or officer or former director or officer of the*

[525] *Supra. N20.Pg 7.*
[526] (2000) FWLR Pt.5, Pg. 709.
[527] (1999) 2 BCLC 171, in this case the majority (75%) shareholders presented an unfair prejudice petition against the minority (25%). The minority shareholder was dismissed by the majority on the basis that he failed to carry out specific responsibilities relating to the company's accounting function. Also, he was aggressive and domineering in conduct at board meetings. The Court of Appeal nonetheless held the majority shareholders had chosen to dismiss the minority shareholder rather than allowing their legitimate expectation to be fulfilled by letting him continue to contribute to the management of the company. As a result, the majority had put an end both to their legitimate expectation and to the prejudicial conduct of the affairs of the company by the minority, in such circumstance, there would be no access to the statutory unfair prejudice remedy.
[528] The expansion of the category of persons that can sue under CAMA Act 2004, would enable the petitioner as a director and employee of the company to institute an action for Unfair Prejudice which was limited to only members (which excluded a director and employee) under the 1968 Act.

company, a creditor, the Commission, or any other person who, in the discretion of the court is the proper person to make an application under s.311 of this Act."

In *Adibua v Storm 360 Ltd & 4 Ors,*[529] the petitioner was a shareholder and director in the first respondent company. The second, third and fourth respondents purportedly removed him as director. He alleged that his removal and the conduct of the respondents were illegal, oppressive and unfairly prejudicial (the respondents did not comply with the procedure for the issuance and length of notice of extra ordinary general meetings). The court held that the failure to follow statutory provisions was unfairly prejudicial and to the detriment of the appellant and consequently his removal was invalid.

For the purpose of this remedy under the CAMA 2004, the term *"member"* includes the personal representatives of a deceased member and any person to whom shares has been transferred or transmitted by operation of law,[530]. In *Aero Bell Nig Ltd v Fidelity Union Merchant Bank Ltd,*[531], one of the pertinent issues before the court was whether the plaintiff had *locus standi* to bring an action, since the plaintiff was a former director. The court held the plaintiff was entitled to bring an action for relief from oppressive and unfairly prejudicial conduct by the majority shareholders and directors of the company as former officers, creditors and directors of the company although they sold their shares to the first defendant bank. Interestingly under CAMA 2004, a creditor of a company is included in the category of persons that can apply because a creditor has a substantial interest in ensuring that the company is run in a manner that will make it possible for the realization of profit to the company. Contrary to the position under the Companies Act 1968 in a situation where a shareholder complains that the company was run in a manner that endangers his interest or the conduct of the directors were oppressive, the only option was to petition the court for a winding-up order. In addition, the complainant would be paid a share of the surplus assets after the company has ceased to exist. This is different under

[529] 2013 2CLRN FHC 12.
[530] *S.310 (2)* of the Companies and Allied Matters Act 2004.
[531] [2005] Law Pavilion Electronic Law Report 11339 (CA)

the CAMA 2004 where unfair prejudicial petition is not linked with the remedy of winding-up. It is recognised as an independent remedy.

The increase in the category of persons who may bring a petition might seem like the appropriate approach to take by the legislature for the protection of minority shareholder's interests. However, this extension *of locus standi* raises the question whether the petitioner must be aware of the affairs of the company for him or her to realise the affairs of the company has been conducted in an illegal or oppressive manner. This seems almost impossible where a minority member has no direct access to the affairs or audit books of the company and as a result, he/she cannot take advantage of this provision. Section311(1) states the conduct must be illegal or oppressive in addition, the inclusion of the criteria "*illegality of conduct*" of directors or the majority shareholders under the CAMA 2004 makes the scope wider than what is obtainable under the 1968 Act. Section 311 CAMA 2004 presents to an aggrieved minority shareholder a wide range of sections under the act to invoke where the conduct complained of is illegal depending on the type of relief, he or she seeks. Illegality of the conduct by the majority is a ground for the minority to apply to the court under s.300 of CAMA 2004, however the reliefs granted under the said section is limited to injunction and declaration. Where the application is instituted under s.311 of CAMA 2004 the applicant has a wide range of reliefs to claim. This section further covers other conducts not illegal but can be said to be an oppressive way of running the affairs of the company at the expense of the shareholders.

Section 311(2) of CAMA 2004 can be invoked by a shareholder" *where the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to or discriminatory against a member or members or in a manner is in disregard of the interests of a member or members*" or "*That an act or omission or proposed act or omission , by or on behalf of the company or resolution or a proposed resolution of a class of members was or would be oppressive or unfairly prejudicial to or unfairly discriminatory against a member or was or would be in a manner which is in disregard of the interest of a member or the members as a whole*". Section 312 CAMA 2004 empowers the court on an application made under the heading to make the orders outlined under s.312(2) CAMA 2004. These orders include winding up of the company, regulating the affairs of the company, ordering the purchase of the shares of any member by the members of the company and directing that an investigation be made into the affairs of the company by the Corporate Affairs Commission.

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It is submitted that an application for relief on the ground that the affairs of a company are being conducted in an illegal or oppressive manner under s.311 CAMA 2004 may be made to the court by a majority shareholder, either by virtue of s.310(1)(a) CAMA 2004 and s.311(2)(a) CAMA 2004 as a member of the company regardless of being a majority shareholder as the sections do not discriminate to the degree of the shareholding. In addition, s.310(1)(e) CAMA 2004 and s.311(2)(b) CAMA 2004 provided at the discretion of the court, that the majority shareholder is a proper person to make the application under s.311 CAMA 2004. In effect, in rare cases where there is minority shareholder control, and the affairs of the company are being conducted in an illegal or oppressive manner then the majority shareholder could petition for a relief under s.311 CAMA 2004 The interpretation of s.311 CAMA 2004 makes, this section an effective,[532]and veritable tool in the protection of minority shareholders of a company and any other person(s) with substantial interests in the company.

5.3 Action by the Corporate Affairs Commission

The Corporate Affairs Commission,[533] (CAC) is empowered by the CAMA 2004 under s.311(2)(c) to institute a petition on its own volition for relief from oppression and unfair prejudice which is intended to protect members of the company as well as the public interest. This institutional power of the CAC becomes useful in a situation where the minority cannot afford the time and exorbitant cost of litigation or for some reason cannot pursue the remedy. In addition, minority shareholders who are oppressed by the actions of the majority can request the CAC to exercise its powers under s.311 CAMA 2004 by

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[532] Effective in the sense, a minority shareholder has more chance of success in instituting petition under *S.311* than any other section under the Act. This stems from the attitude of the courts in the interpretation of the section. A majority of the decisions of the court cited tilts towards giving a judgement in the Minority Shareholder's favour.

[533] The function of the Corporate Affairs Commission is set out under *S.7* of the CAMA 2004, it includes: to arrange and investigate the affairs of any company where the interests of the shareholders and the public so demands.

commencing an action for relief from oppression on behalf of oppressed minority shareholders or for the sake of public interests. Unfortunately, what is unclear about the likelihood of this power being executed by the CAC is that the term *"public interests"* in the context of corporate law is not defined in the CAMA 2004. Although public interests cannot be confined to the interests of the investing public in company's securities or company's affairs, it could also extend to activities which are detrimental to social, moral, political and economic interests in the country including activities which are contrary to public policy. This will normally provide a ground for petition by the Commission. Accordingly, the Commission will have the power to bring a petition under s.311 CAMA 2004 against a company engaged in illicit activities.

A literal interpretation of the provisions of s.311(2)(I) of CAMA 2004 would suggest that the CAC's power to commence an oppression suit is sufficiently wide as to accommodate such a liberal interpretation. However, as comprehensive and laudable as this provision may appear, it remains to be seen how this power might be exercised by the CAC. This power exists in the statute but has largely remained unutilised by the CAC. In instances where reliefs from oppression have been pleaded, it was instituted by the minority not the CAC.[534] The closest incident where the courts granted the minority shareholder the right to institute a petition was made in the *"interest of justice"* in the case of *Edokpolor & Co Ltd v Sam-Edo Wire Industries Ltd,*[535] The Supreme Court held the minority shareholder was entitled to sue in his personal capacity to protect his personal right after been denied the right to notice of meetings and the right to vote. In the words of Aniagolu J.S.C.*" It appears to be one that it is a case in which a minority shareholder should in the interest of justice be allowed to sue".*

The function of the CAC in relation to a company is set out in s.7 of the CAMA 2004. It includes: to administer the Act including the regulation and supervision of the formation, incorporation, registration,

[534] In *Ijale Properties Ltd v Omololu-Mulele* [2000] FWLR Pt. 5, the minority shareholders alleged that years after the company was incorporated, they had not held any company meeting, not filed any annual return with the CAC, no auditors or company secretary was appointed, and the company was being run by the majority shareholders leaving the minority shareholders without any information regarding the affairs and financial status of the company. The court held that *S.311* would be applicable.
[535] (1989) 4 NWLR Pt. 116, 473.

management and winding-up of companies under or pursuant to the Act. In addition to arrange or investigate the affairs of any company where the interest of shareholders and public so demands. The wording of this section empowers the CAC to regulate and supervise the activities and management of a company from formation to winding up. Basically, the most potent of these powers once a company has been duly registered are the firstly the power to regulate the management of the company and in appropriate situations institute a petition for winding up of a company, and secondly the power to investigate and supervise the affairs of the company. Section 314 CAMA 2004 permits a member of a company to petition the CAC to investigate the affairs of the company, but unfortunately there is the requirement of 25 percent threshold of votes of the members holding one class of shares to petition for investigation. Also, s.315 CAMA 2004 empowers the CAC to appoint one or more competent inspectors to investigate the affairs of the company in matters involving fraud, oppression and prejudicial to the interest of members of the company if the court by order declares that its affairs ought to be investigated. A minority shareholder has more chance of success under this section than s.314 CAMA 2004.

The conduct of investigations by CAC is still subject to some doubts for instance where a civil proceeding is required to be commenced against persons investigated in the *public interest,*[536] the cooperation of the company,[537] is required. This may be difficult if those in charge colluded with the wrongdoers. In *Adibua v Storm 360 Ltd & 4 Ors,*[538] the petitioner alleged the respondents purportedly removed him as a director unlawfully and that the respondents did not comply with the requirements of the CAMA 2004. He asked the Court to determine if the affairs of the respondents had been conducted in an illegal, oppressive and unfairly manner and whether his removal as a director of the company would be valid and sustainable in law. The Court held that the failure here to follow statutory provisions was unfairly prejudicial. The petition was instituted by the shareholder, although he or she had the option to petition the CAC. The problem of the CAC diligently instituting an action on behalf of an

[536] *S.321 of the Companies and Allied Matters Act 2004*
[537] *S.322 of the Companies and Allied Matters Act 2004.*
[538] 2014 2 CLRN 168.

aggrieved shareholder is worrisome, coupled with the fact that as a government agency there is the existence of administrative bottlenecks that slows down the administrative process. In a situation where the CAC is the sole authority to institute a petition on behalf of a shareholder it would be counterproductive, cause delay and may result in the denial of justice. Section 313 of the CAMA 2004 is to the effect *"Any Person who contravenes or fails to comply with an order made under section 312 (powers of the court) of this Act that is applicable to him shall be guilty of an offence and liable to a fine of N500 or Imprisonment for one (1) year or to both such fine and imprisonment."* Though this section criminalises any act that breaches the rights of the minority, it does not prevent the commission of such breach of rights by the majority. During my research I have not found an instance where this power has been exercised.

The punishment prescribed is insignificant, the fine payable is less than a £1 applying the current exchange rate[539]. This section is likely to be honoured in breach than in the observation. It is doubtful if a minority shareholder has the time or can afford the expense required to remedy any wrong committed against the company by majority shareholders or cause an investigation into the affairs of the company including the lawyer's fees for instituting the petition would serve as a deterrent.

The CAC can on its own motion, by application of a member or an order of the court appoint an inspector to investigate the affairs of a company. The report of the inspector will determine the course of action the CAC may take. In appropriate case, the CAC may refer the matter to the Attorney General of the Federation either for civil or criminal prosecution of those indicted by the report. The CAC after considering the report, if it thinks it is expedient in the public interest that the company will be wound up, may present a petition for the company to be wound up if the court thinks it is just and equitable to do so. A critical evaluation would reveal the CAC cannot institute an action to prosecute an erring director or officer of the company indicted directly on its own. From this development the question arises if the CAC is an appropriate body for the protection of minority shareholders right since there

[539] http://www.xe.com/currencyconverter/convert/?Amount=1&From=NGN&To=GBP accessed on 25/06/2021.

exist limitations in the exercise of its functions under the Act. Although members have the right to petition the CAC to investigate the affairs of the company. It is my observation that the provisions which initiate investigation of the company,[540] by CAC be more useful to minority members than s.314 CAMA 2004 this is because the requirement of the 25% threshold of the votes of the members holding one class of shares to petition for investigation under s.314 CAMA 2004. Another issue arising is how the minority shareholders will make up 25% of their class vote in order to take advantage of this provision. Apart from the problem identified, there is also the problem of outcome of investigations, for instance, where a civil proceeding is required to be commenced against the persons investigated in the public interests, or any person is guilty of an offence and thus criminally liable, the cooperation of the officers of the company is required to proceed in both cases[541]. This cooperation may be difficult to achieve especially when those in charge acted with the wrongdoers.

Investigation of a company's affairs by the CAC and other statutory checks on the affairs of a company are meant to give voice to the voiceless members of the company whether shareholders or creditors of the company and with the aim of protecting the general public against the majority shareholders. The dictum of Lord Denning in an English case in explaining the workings of the Department of Trade is instructive in other to fully appreciate the significance of the current provision of s.314 CAMA 2004 which has evolved from the lessons experienced in England. In *Northwest Holst Ltd v Secretary of State for Trade &Ors,*[542] he opined, *"it is important to know the background of the legislation, sometimes public companies are conducted in a way which is beyond the control of the ordinary shareholders. Most of the shares are in the hands of two or three individuals. They have control of the company's affairs, the other shareholders know little and are told little. There is an annual general meeting but few of the shareholder's attend. The whole management and control are in the hands of the directors. They are a self-perpetuating oligarchy and are virtually unaccountable"*

[540] *S.315* of the Companies and Allied Matters Act 2004.
[541] *S.322* of the Companies and Allied Matters Act 2004.
[542] (1978) 3 ALLER 280 at 291-292.

Seeing that the directors are the guardians of the company, the question is asked*: quis custodiet ipsos custodies?* - Who will guard the guards? The above statement referred to the corporate climate in England and Wales where there is a culture of public accountability. It is more glaring and relevant in Nigeria where the culture of impunity is entrenched and where majority of individuals in charge of public affairs do not care about the interests of other members or the organisation. It is suggested that s.314 CAMA 2004 be effectively implemented rather than mere letters in the statutes.

The role of the CAC as a corporation's ombudsman in its effectiveness in the protection of minority shareholders and the public interest shown that in its proactive nature it is envisaged that the CAC will go beyond being simply an ombudsman that is it will be a "fact finder" in order to become a defender of rights i.e., the public as well as shareholder interests. As far as the major issue of minority shareholder protection is concerned, it has been established that the functions ascribed to the CAC give it enough scope to be able to achieve success to a degree. Indeed, the combined effect of the various powers given to the CAC to initiate proceedings on behalf of the oppressed or prejudiced minority in a company and the power of investigation into different facet of the company life and dealings points the way to an extent of minority shareholder protection. The power of the CAC illustrates the potential of the institution as a catalyst for necessary changes that may be brought to Nigerian Company Law in general. The failure of the CAC to perform these functions despite the enabling statutory provisions, adequate finance and other facilities have been attributed to several factors, not least of which is the lack of awareness on the part of the public. In recent times, there has been speculation about amendments to the CAMA 2004, which are expected to address, among other things, some lapses of that statute with respect to the CAC. At the time of writing this thesis, on August 7th, 2020, the President Muhammadu Buhari assented to the bill which was passed as a result the CAMA 2020 has come into effect. The combined effect of such positive amendments to CAMA and some suggestions made in this chapter should be a CAC with a more positive impact on the affairs of companies. Ultimately, such an organisation will be better able to fulfil its mandate as a corporation's ombudsman and defender of the minority and public interests. A critical analysis of this provision enabling the CAC reveals it is bleak and suffers grave inadequacies and has no in-built safeguards nor reforms to give it a competitive edge due to changes in the corporate world.

Chapters 6 and 7 form the core of this thesis, as they set out a comparative analysis of derivative claim/action and unfair prejudicial petition in England & Wales and Nigeria. The core question to be addressed is by carrying out a comparative analysis of the remedy of derivative claim and action and/or unfair prejudicial petition, what is the extent of effectiveness in the protection of minority shareholders rights against breach by majority shareholders. The outcome of this assessment will demonstrate the current state of minority shareholder protection in England and Wales and Nigeria. Most importantly, what could be learnt from each jurisdiction to achieve greater protection.

To achieve this task the researcher has adopted the analytical method of comparative law.[543] in applying this method, the relevant sections in the CA 2006, CAMA 2004 most importantly the CAMA 2020 will be put into focus to determine if these statutes achieve the functions for which they were originally intended. Secondly, the law-in-context approach of comparative law is utilised to seeks to justify the rationale behind the current law in its application in England and Wales and Nigeria in the enforcement of minority shareholders protection. Finally, the common core approach will be helpful in identifying the differences between the different jurisdictions in the protection of minority shareholders and the problems faced in enforcement and the possibility of harmonisation of the different laws.

[543] Supra No.19

<u>CHAPTER 6:</u> COMPARATIVE ANALYSIS OF DERIVATIVE CLAIM IN ENGLAND & WALES AND DERIVATIVE ACTION IN NIGERIA

<u>6.0 Introduction</u>

Statutory provisions for minority shareholder protection in England and Wales and Nigeria give effect to fiduciary obligations on directors to exercise their duties to protect the personal interest of its members.[544] The focus of this chapter is to determine the extent of the effectiveness of derivative claim/action in the protection of minority shareholders against breach by majority shareholders under observation. Chapters 6 and 7 forms the core of this thesis, as the chapters critically analyses the remedy of derivative action/claim and unfair prejudicial petition in England and Wales and Nigeria as it affects shareholders rights.[545]Secondly, these chapters clearly identify the current state of the legal framework in the different jurisdictions.[546] in regarding the protection of minority shareholders,[547] in order to evaluate the respective efficacy of the relevant provisions in the protection of minority shareholders.[548]

This chapter argues that although derivative suits in both jurisdictions have similar features one of which is, they are both of common law origins, comparatively England and Wales have more flexible, liberalised rules that enhance and protect the rights and interests of minority shareholders as opposed to those established in the Nigerian jurisdiction. In addition, the statutes in England and Wales confer wide discretionary powers on the courts to regulate the procedure of derivative claims, which can be contrasted to the position in Nigeria.

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[544] In *Vald Nielsen Holding A/S* v *Baldorino* [2019] EWHC 1926, the Court considered the circumstances in which directors owe fiduciary duties to the company's shareholders. The Court held that directors do not owe fiduciary duties to shareholders by virtue of their office of director except where there is a 'special relationship' which this was not.

[545]Ubochinma, W "*A Comparative Analysis of Shareholders' Derivative Action under the United Kingdom and Nigerian Companies Ac*t, 2016 Business Law Review 37(4) Pg. 136.

[546] As already stated, the focus of this thesis is centered on minority shareholder protection in England and Wales and in Nigeria with reference to the remedy of derivative action /claim and unfair prejudicial petition.

[547] Derivative claim is provided for under s.260 of the Companies Act 2006 in England and Wales, and s.301 of the Companies and Allied Matters Act 2004 in Nigeria, now s.346 CAMA 2020.

[548] Zimmermann, R & Riemann, M *'The Functional method of comparative law'*: The Oxford Handbook of Comparative Law, OUP Oxford 2006.

Finally, this chapter concludes by recommending that Nigerian laws be reformed along the lines of the England and Wales statutes, however with retention of various extant provisions that enhance the rights of minority shareholders.

6.1 Nature of Derivative Action/ Claim

Despite the difference in terminology '*statutory derivative claim'* in England and Wales and *"derivative action"* in Nigeria,[549] both phrases have the same meaning. The nature of the suit being *derivative* is that the party bringing the action does not have the right to sue as a primary party such right is derived from the company.[550] It is an action against directors brought by a shareholder on behalf of the company.[551] Where a breach of corporate interest arises due to a breach of duty by a director, the company is entitled to take an action against the director, but may be reluctant to do so,[552] because the other directors wrongfully or mistakenly refuse to take action. Derivative claim/action enables shareholders to enforce director's liability on behalf of the company.[553] In order to achieve an in-depth comparative analysis of derivative action/claim in England and Wales and in Nigeria recourse must be made to the history of derivative action in both jurisdictions briefly, not restating the history as this was succinctly traced in Chapters 2 and 3. Thus, cross referencing will be made to previous chapters to avoid repetition.

Derivative action developed in the courts of equity, its origin lies in the judicial recognition of a new wrong or maladjustment for which pre-existing legal procedures proved less adequate. A considerable number of procedural hallmarks of the derivative action / claim that exists today developed in early

[549] In *Agip (Nigeria) Limited v Agip Petrol International (2010) ALL FWLR PT 520, 1198 S.C* a brief definition was attempted *"A derivative action known as a shareholder derivative suit is a lawsuit brought by a shareholder on behalf of a company against a third party, often the third party is an insider of the corporation such as the director or executive officers"* P.1230, Paras. D-G, from this definition two facts emerge: first in a derivative action, the defendants are third parties for the duration of the suit and secondly, the third parties do not necessarily have to be directors alternatively an individual holding an executive position is not exempt from bringing an action.

[550] Berkahn M, *'The Derivative Action in Australia and New Zealand; will the statutory provisions improve shareholders enforcement rights?* Bond Law Review Vol. 10 No 1 1998.

[551] Baum H, Puckniak D.W and Ewing-Chow M (Ed., *'The Derivative Action in Asia: An Economic, Historical and Practice-oriented Approach'* Cambridge Press Pg.7, 2012.

[552] *Burland v Earle* (1902) AC 83.

[553] Takahashi K '*Shareholder derivative action: safeguards against abuse* 'Amicus Curiae 1998 (7). pp.31-32.

cases. One of the cases is a *locus classicus Foss v Harbottle,*[554] where the rule laid down is basically a rule of the majority and without the exception to the rule, it is a complete bar to minority shareholder action and seems to give the directors and majority shareholders absolute powers. In a derivative action the courts' required the company to be a party to the litigation to prevent the possibility of double recovery in an action later brought by the corporation. Any recovery would go to the corporation as opposed to the individual that instituted the action. This made the corporation's role in these actions that of a passive recipient of the proceeds as the most logical and convenient mode of aggregate recovery.

6.2 Comparative Analysis of Derivative Claim in England and Wales Under the Companies Act 2006 and Companies and Allied Matters Act 2004 now CAMA 2020 in Nigeria

In order to undertake a comparative analysis of the remedy of derivative claim in England and Wales and derivative action in Nigeria, critical analysis is made on comparative themes such as the procedural framework, scope, individuals' eligibility to institute a claim/action, requirement of notice, and finally the presence of fraud under the different jurisdictions. Carrying out this review enables an analysis to determine whether the remedy was designed for the protection of the management and/or whether it has failed to provide avenues for minority shareholders seeking relief under derivative claim or action. Finally, an overview of the current position of derivative claim in England and Wales and derivative action in Nigeria will be provided. This will set the tone for recommendations in the final Chapter (8) flowing from the comparison.

The first step is to focus on the:

1)Procedure for Commencement – In England and Wales, s.260 of the Companies Act 2006 provides for *"statutory derivative claims'* Subsection (1) defines derivative claims, by highlighting three basic elements: the action is brought by a member of the company, the cause of action is vested in the company and the relief sought is on the company's behalf. The reforms of derivative claims are

[554] (1843) 67 ER 189.

naturally part of this wider drive, which is to steer a middle course between excessive reliance on a litigation remedy and judicial course for the shareholders on the one hand, and unreasonable interference in the affairs of the company on the other hand.[555] Section 260(3) CA 2006 specifies the category of breach of duty under which a derivative claim may be brought. It includes actions arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of a company. This breach extends to the general duties of directors in Chapter 2 of Part 10 of the CA 2006, including the duty to exercise reasonable care, skill and due diligence.

A two-stage Court procedure must be adhered to in England and Wales. This demonstrates the intention of Parliament to protect both the company and the shareholders from abuse of legal procedure. The first stage under s.261 CA 2006 requires a member to disclose that a *prima facie* case exists. In addition, the Court must give permission (leave) for the claim to commence. This prevents disgruntled shareholders bringing unmeritorious derivative claims and, in the process, protects the company from unnecessary litigation.

The second stage involves the court considering the factors set out in s.263(3) CA 2006. These include whether the member is acting in good faith to continue the claim also the capacity of the individual acting in accordance with s.172 CA 2006 to promote the success of the company. However, there have been an instance where the two stages have been combined, with the agreement of the parties; for instance, in *Stimpson v Southern Private Landlords Association Ltd*[556] and *Bridge v Daley*,[557] the High Court explained that combining the stages was a pragmatic approach. However, combining the two could just become a much more expensive and time-consuming way of finding that there is no legitimate claim to proceed with, at the second stage (at this point, the court is satisfied that the applicant has a prima facie case). The Court will decide in a hearing and on evidence from the applicant and the defendant whether the case should proceed. Section 263(2)(a) CA 2006 codified the common law test

[555] Reisberg A Derivative *Actions and Corporate Governance: Theory and Operation* (Oxford University Press, 2007) 186.
[556] [2009] EWHC 2072.
[557] [2015] EWHC 2121.

in *Airey v Cordell,*[558] in determining whether permission ought to be given in bringing a derivative claim. In this case, the court held that this would depend on whether a hypothetical and independent board of directors would sanction the claim, and it was not for the court to assert its own view of what it would do if it were the board, but merely to be satisfied that a reasonable board of directors could take the decision that the minority shareholder applying for permission to proceed would like it to take.

The question of whether an individual with a duty acting to promote the success of the company (that is, a hypothetical independent director) would seek to continue the claim or not was considered in *Franbar Holdings Ltd v Patel.* [559] Here, the application for permission to continue a derivative claim was refused because a director, acting in accordance with his duty to promote the success of the company, would not seek to continue the claim.

Another factor for the refusal was the ability of the shareholder to seek relief based on unfair prejudice under s.263(3)(f) of the 2006 Act. In *Mission Capital Plc v Sinclair,*[560] the Sinclair appointment as directors was terminated by the board and a new director appointed. The Sinclair challenged the validity of the board action. They applied for permission to continue a derivative claim against the non-executive directors claiming that the company would not be managed satisfactorily without them. The Court refused permission because the alleged damage to the company was speculative, and a director would not attach much importance to it. In addition, the former executive directors could pursue an action by way of an unfair prejudice petition instead. In *Stimpson v Southern Private Landlords Association,*[561] permission to continue a derivative action was refused as there was no evidence that the association's merger with a larger landlord's association would be detrimental to its members, which suggested a lack of good faith on the claimants' part.

In view of these factors, the Court concluded that a hypothetical director, acting in accordance with their duty to promote the success of the company, would not seek to continue the claim. This was

[558][2006] EWHC 2728.
[559][2008] BCC 885 ('Franbar').
[560] [2008] EWHC 1339.
[561] [2009] EWHC 2072.

the same decision in *Langley Ward Ltd v Trevor ('Langley')*.[562] I agree with this position and reasoning in this judgment of the court. In the quest to ensure all procedures are adhered to by the applicant, a recent High Court decision in the United Kingdom, has highlighted the need for litigants to strictly abide by court procedures when commencing a derivative action. *Saggart Motors Ltd v NG Motors Ltd*, [563] concluded that the High Court will take a dim view of failure to comply with these procedural requirements. In this case, a minority shareholder had commenced unauthorized proceedings on behalf of the company and obtained interim injunction without notice orders against a defendant offering a potentially onerous undertaking as to damages on behalf of the company as a requirement of the grant of the orders. The shareholder sought to remedy the position and continue the proceedings as a derivative action in addition he sought to continue the interim relief against the defendant.

The majority shareholder objected that the proceedings had not been authorized by the plaintiff's board of directors and were barred in law, leave to commence proceedings had not been obtained and so a derivative action could not be maintained, *Pilkington J* was satisfied that none of the threshold criteria necessary to establish an entitlement to proceed by way of a derivative action had been met specifically and that none of the exceptions to the rule in *Foss v Harbottle* applied. The action was struck out. This case illustrates the current position on instituting derivative claims in England and Wales that the Court will be critical of failures to comply with its mandated procedures in and around derivative actions. It also re-emphasizes the need for litigants to be fully aware of and to comply with their duty of full and frank disclosure when seeking onerous *exparte* relief.

With reference to the Nigerian jurisdiction, section 303(1) CAMA 2004 contained an express provision for a shareholder intending to bring the derivative action to apply for leave of court as a mandatory precondition for the action. This position has been replicated under s.346 CAMA 2020.
CAMA 2004 merely provided that leave to bring the action must be granted by the court without necessarily specifying the procedure to be adopted in the application. This created a lot of doubt and

[562] (2011) All ER 78.
[563] [2019] IEHC 390.

misconceptions and unfortunately the Supreme Court when given the opportunity to do so failed to explain the appropriate procedure to be followed. In *Agip Nig. Ltd. v Agip Petrol International and others,*[564] the first respondent was a company which had its registered office in Amsterdam held 60% of the appellant's shares while the balance of 40% of the appellant's shares were held by a company in Nigeria. Pursuant to an international bid, the first respondent sold all its shares in the applicant company to the second respondent (Unipetrol Nigeria Plc) under a sale agreement. The directors of the applicant were aware of the sale of the shares to the second respondent which was approved by the Nigerian Stock Exchange and Securities and Exchange Commission. The minority shareholders believed that the sale of the shares was a fraud on them and sought to reverse the sale. They commenced an action in the Federal High Court by filing a writ of summons and filed an exparte application for leave to commence the derivative action in the name of the company. The High Court granted the order for leave to bring the action. The defendants appealed, to the Court of Appeal, the Court which held that the writ of summons was incurably bad and a nullity. The applicants appealed to the Supreme Court against the judgment of the Court of Appeal, the Supreme Court which upheld the decision of the Court of Appeal and held that the applicant must apply for leave to commence the derivative action. The Supreme Court also held that the originating summons must be served on the respondents to enable them respond to the application, so that the directors must be heard in the application for leave and that failure to do this offends the constitutional provisions on fair hearing,[565].

With due respect to the Supreme Court, missed a great opportunity to give a clear direction and make a proper pronouncement in this area of the law. The Company Proceedings Rules, 1992 by virtue of its Rule 2 merely states that every application under the CAMA 2004 (except those mentioned in Rules 5 and 6 and Winding Up of Companies Proceedings) shall be made by Originating Summons. We must note that s.303 CAMA 2004 does not specify the procedure to adopt but merely provides the

[564] Kunle Aina, *'Current Developments in the Law on Derivative Action in Nigerian Company Law,'* available at http//academia.edu. Accessed on 30/6/2020. Also (2010) All FWLR (PT. 520) 1198 S.C
[565]Aina K Current Developments in the Law on Derivative Action in Nigerian Company Law,' Babcock University Socio-Legal Journal (2014) Vol.1 No.4 Pg.49

applicant must apply for leave to bring a derivative action, likewise the position is the same under s.346 the only difference is an applicant may also apply to the court for leave to bring an action in the name or on behalf of a company or the company subsidiary. The ability to bring an action on behalf of a company subsidiary was absent in CAMA 2004.

However, the Companies Proceedings Rules 1992 did not specify whether the originating summons should be *exparte* or on notice. The Supreme Court therefore cannot assume that it must be on notice, I submit that the rules are silent on the mode of the originating summons. This therefore calls for a fair understanding of the nature of the application and the comparative position in other jurisdictions. The main purpose of applying for leave to bring a derivative action is to enable the court to first consider the application, to sift through all the documents in support of the application, to carry out an exhaustive review of the grounds for bringing the application and ensure that a prima facie case has been established before the directors of the company are invited to oppose the application or the action itself.

Finally, the applicant must show that the application was filed in good faith. The proof of good faith is said to be necessary in order to discourage personal vendettas and vexatious actions.

From the above analysis , I suggest the requirement of good faith be removed from s.303 CAMA 2004, the reason being that where fraud has been committed by the directors, and they are in control of the company, they are unlikely to institute an action against themselves and if a shareholder decides to take action, the good faith of the shareholder ought not to be of any material importance but the immediate concern of the court should be to arrest the situation.[566].

<u>2) Scope-</u> Section 260 to 269 CA 2006 introduced a wide range of circumstances in which a derivative claim may be brought by a shareholder. These includes in respect of an actual or proposed act or omission involving negligence, default, breach of duty or trust by the directors of the company. In *Tonstate Group Limited and Ors v Edward Wojakovsk*i[567] the Court granted a derivative claim against

[566] *Ibid*
[567] [2019] EWHC 857 (CH).

the defendant who fraudulently obtained funds from the company's account without the permission of members of the company, Furthermore, the statutes regulating securities adequately provide exit strategies for any oppressed minority shareholder[568]. The case of *Dinglis v Dinglis*[569] has developed the law surrounding a shareholder's ability to institute a derivative claim and unfair prejudice petition in situation involving family run companies providing cautionary tales for family members who choose not to formalise matters sufficiently. The interconnection between derivative action and unfair prejudice in Nigeria is non-existent as each remedy is considered as independent of the other.

3) Individuals that can institute a Claim/Action- In the Nigerian context, s.309CAMA 2004 and now s.352 CAMA 2020 provides a list of individuals who can apply to the court for a derivative action. It includes: a registered holder, director, beneficial owner, Corporate Affairs Commission or a former registered holder, director or beneficial owner of a security of a company. In *Chie*f *Akintola Williams & Ors v Edu,*[570] the Court of Appeal was of the view that a non-member of a company cannot institute a derivative action under the section despite the provisions that allows an individual to apply at the discretion of the Court. The Courts refused to permit former shareholders and directors on the basis they lack sufficient interest in the outcome of a derivative action, contrary to the fact the statutes expressly permit them to bring the application. This is an example of misinterpretation of CAMA 2004 which the court falls into as exemplified in *In Jacobs Farm Ltd v Jacob.,*[571] The Court was of the view that it was not the intention of the legislature to allow every former director to bring application for derivative action which contradicts the intention of the legislature and the spirit and letters of CAMA 2004.

However, in England and Wales s.260 CA 2006 permits only a member to bring the derivative action. Section 112 CA 2006 defines a member as 'every other person who agrees to become a member of a company, and whose name has been entered in its register of members, is a member of a company.'

568 Ben-Ishai S "The Promise of the Oppression Remedy: *A Review of Markus Koehnen's Oppression and Related Remedies'* (2005) 42 Can Bus LJ 450 AT 455.
569 [2019] EWHC1664 (CH)
570 (2002) 3 NWLR (Pt 754) 400.
571 (1992) OJ No. 813 (Ont. Gen. Div)

This definition lacks clarity as to the identity of a member, one can only guess by instituting a claim and wait for the Courts to decide whether he or she has the 'locus standi' to bring the claim.

In Nigeria, the Courts have reiterated in several cases that the issue of *locus standi* is very crucial to the filing of a derivative action. This position is rather strict and restrictive as the CAMA 2004 had specified the categories of persons that may file a derivative action and there is no mention of other conditions to deter this set of persons. The Court ought not bring other extraneous matters to inhibit the legislature's clear intentions' in allowing a broader number of persons opportunity to seek redress on behalf of the company.[572]

The CA 2006 in England and Wales provides that the cause of action may be against the director, a third party, or by the company from an act involving a breach of duty on the part of the director, the company or both.[573] This means a member could bring a derivative claim against a third party where the damage suffered party has improperly received property as a result of the said breach (for example, for knowing receipt of money or property transferred in breach of trust or for knowing assistance in a breach of trust). Moreover, a derivative claim may be brought by a member in respect of wrongs committed prior to his or her becoming a member. Although there is no equivalent provision under the Nigerian jurisdiction, it might be argued that a member would nonetheless be entitled to bring a derivative action in respect of wrongs committed prior to his becoming a member, because the provision in the CAMA 2004 reflects the fact that the rights being enforced are those of the company rather than the member. The definition of a 'director' under s.244 CAMA 2004 and s.269 2020 CAMA includes a former director, and a shadow director.[574] For the purpose of a derivative action the general duties of directors apply to shadow directors as well. However, this position has not been brought before a Court of law for determination.

[572] Aina K Current Developments in the Law on Derivative Action in Nigerian Company Law,' Babcock University Socio-Legal Journal (2014) Vol.1 No.4 Pg.49.
[573] Companies Act 2006, s 260(3).
[574] *Smithson Ltd v Naggar* [2013] EWHC 1961(Ch)

4) Requirement for Notice- Section 303(2)(b) CAMA 2004 now under s.346(2)(b) CAMA 2020 requires an applicant who intends to bring a derivative action to give reasonable notice to the directors of the company of his intention to apply to the Court. After giving such notice, if the directors do not bring, diligently prosecute or defend or discontinue the action the applicant can file a derivative action. The service of a pre-action notice is compulsory. The advantage is that it is possible that the directors had not thought of this course of action and since the right of action is that of the company, it should be given the first opportunity to seek redress for itself. It is only if this is not done after reasonable notice has been given that the applicant may file the application. The disadvantage of this provision is there is no specification as to the time frame that will constitute a reasonable notice, and as such directors of a company may argue that the notice provided was not reasonable. The ultimate decision is then left in the hands of the judge to decide whether such notice is reasonable or not. Thus, in my opinion reasonable notice may span three to seven working days or weeks or months depending on the facts and circumstance of each case. The flexibility of this provision is advantageous in emergency circumstance where a notice period of two to five days may be deemed appropriate by the courts, also it can serve as a basis of the avoidance of unnecessary litigation in the Courts as there exist no requirement in England and Wales.

Secondly it does not specify the contents of the notice, whether the notice must contain such details as to enable the directors to know the specific actions to remedy the breach. Unfortunately, the Nigerian CAMA 2004 likewise CAMA 2020 does not provide any exception to pre-action notice likewise CAMA 2020. This is important where the fraudulent directors are in control, which in fact is a condition precedent for bringing the action[575]. it is unlikely they will institute an action against themselves; the requirement of pre-action notice is therefore superfluous and unnecessary. The notice will at best serve as an opportunity to organize their affairs or take steps to cover up their misdeeds. It also assists to waste time unnecessarily, and since there is no specific time stipulated under the law, it could be argued that the company is indeed ready to act but will require more time. This provision

[575] See American Law Institute, 1995. Principles of Corporate Governance, Analysis and Recommendations at 55.

should be amended to give courts the discretion to allow determine whether to waive the requirement based on the circumstances surrounding the situation. Section 303 CAMA 2004 recognises the applicant must seek leave to bring an action on behalf of the company, and the relief sought accrues to the company. This is contrary to the position in England and Wales, which requires a member to establish that a prima facie case exists. In addition, the court must give permission (leave) for the claim to commence. This prevents disgruntled shareholders bringing unmeritorious derivative claims and, in the process, protects the company from unnecessary litigation. The second stage involves the Court considering the factors set out in S.263(3) CA 2006. These include whether the member is acting in good faith to continue the claim and the capacity of the individual acting in accordance with s.172 CA 2006 to promote the success of the company. This ensures certainty of the law, as it is providing a clear procedure what must be attained before a claim can be instituted.

5) Presence of Fraud- Section 300 of the CAMA 2004 and s.343(d) CAMA 2020 as a starting point retained the definition of the concept fraud under common law. One important factor in instituting a derivative action is the presence of fraud. The Courts in interpreting the concept *"fraud"* have failed to establish the requirements of an act to constitute fraud but have instead declared that the concept is wider than common law definition of fraud. This is however misleading because in interpreting what constitutes fraud, the judges go beyond the common law definition by expanding the categories of actions or omission which might constitutes fraud which have the disadvantage of multiplicity of suits.

The Courts in interpreting the presence of fraud permit a minority shareholder to sue even in the absence of fraud where directors have abused their powers intentionally or unintentionally, fraudulently or negligently, in a manner which benefits themselves at the expense of the company. The Law Reform Commission has introduced this as a statutory exception now expressed in s.300(f) CAMA 2004.

The next hurdle is the claimant must present sufficient evidence that the wrongdoer(s) are in control and will not institute the action themselves. It is important to note that the Nigerian law has moved away from the common law position by simply stating in S.300(d) CAMA 2004 that any member may by injunction or declaration restrain the company from committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done.

From S.300(d) CAMA 2004 it will seem that the Nigerian law has discarded the condition that the directors must not only have committed fraud on the company or the minority but must be in control. However, S.303(2)(a) CAMA 2004 in highlighting the requirements that must be satisfied by a claimant trying to commence a derivative action stipulates that the court must be satisfied that (a) the wrongdoers are the directors who are in control and will not take the necessary action. The correct position will be to read the two provisions together, such that the 'control' aspect of the exception is still the law in Nigeria. Further, the Nigerian Law Reform Commission,[576] proposed an amendment to the common law position with the aim of giving minority shareholder is more opportunities to enforce their rights. The CAMA 2004 also retained the phrase *"ultravires"* in relation to acts or omissions that are in breach of the recognised duty by law. As stated above common law makes a distinction between mere negligence or incompetence and negligence benefitting the wrongdoer.

Section 260(2) CA 2006 provides that the claim may only be brought under this chapter or in pursuance of an order of the court under s.994 (proceedings for protection of members against unfair prejudice). Interpreting this section, it is evident that an action can be brought within an action by the recommendation of the court. This feature is absent under the Nigerian jurisdiction as different actions cannot be simultaneously brought before the court on the same matter. In a derivative action under the Nigerian jurisdiction, the applicant must prove that not only has fraud been committed but also the wrongdoers are the directors who are in control and will not take necessary action,[577] It is arguable whether a derivative action can be instituted in a situation where the director had been negligent in the conduct of his duties which resulted in a breach and has benefited or likely to have benefitted from their negligent act.[578] Where the applicant cannot prove fraud, breach of duty or negligent act, the applicant

[576] Nigerian Law Reform Commission Report on Reform of Nigerian Company Law Vol. 1, 2 & 3.
[577] Section 303(2(a) CAMA 2004.
[578] Section 303(a) CAMA 2004.

will only need to prove that the wrongdoers are in control at the time of breach. The applicant will not only be tasked with proving the nature of the wrong committed against the company but must also prove that they are in control. Under the Companies Act 2006 in England and Wales s260(3),[579] laid down the procedure for instituting a derivative claim and provides that a claim may be brought only in respect of a course of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. Clearly in England and Wales, there is no need to the prove fraud on the minority or the company or that the wrongdoers are in control. In a situation where the directors had acted in good faith and have not profited personally, the claim can still be brought,[580] Interestingly, the Nigerian provision,[581] is quite restrictive and limits the circumstances when an applicant may bring a derivative action. However, in explaining the position in Nigeria, the Supreme Court had taken a more liberal position and defined fraud on the company in *Yalaju-Amaye v A.R.E.C. Ltd*,[582] as a term of so wide in import that it is idle to attempt to define it and maintained at that any act which may amount to an infraction of fair dealing or abuse of confidence, or unconscionable conduct or abuse of power as between a trustee and his shareholders in the management of a company is fraud which may take the issue outside the rule *in Foss v Harbottle.*[583]

DERIVATIVE CLAIM IN ENGLAND AND WALES	DERIVATIVE ACTION IN NIGERIA
1)The procedure for commencing a derivative claim is provided in s.260 of the CA 2006. It clearly specifies the categories of breach under which a derivative claim can be brought. Also, clarity on the institution of the claim is stated.	1)Section 303 of the CAMA 2004 enables an individual who intends to institute a derivative action to seek leave of the court without necessarily specifying the procedure be adopted in the application, by virtue of s.346(2)(d)of the

[579] Companies Act 2006 UK.
[580] Section 300 (f) CAMA 2004.
[581] Companies Act 2006 (UK).
[582] (1990) 4NWLR Pt.145, Pg422.
[583] Section 303 (2) (d) CAMA 2004.

	CAMA 2020 it provides an extra requirement which must be satisfied before the courts will allow the action: which is the notice should contains a factual basis of the claim and the actual potential damage caused to the company. This subsection is absent under the CAMA 2004.
2)The Scope of derivative claim is broad, as there exist a connection between derivative clam and unfair prejudicial petition based on the facts of a particular case, the judge may allow a petition of unfair prejudicial despite a derivative claim has been instituted.	2)The interconnection between derivative action and unfair prejudicial petition is virtually non-existent under the Nigerian. This is also reflected under the CAMA 2020
3) Section 260 of the CA 2006 is open ended on who can bring a claim, as a result a derivative claim can be brought by an individual in respect of wrongs committed prior to his or her becoming a member.	3)Section 309 of the CAMA 2004 publishes a list of individuals who can institute an action, this is also replicated in s.352 of the 2020 Act.
4) The requirement of the existence of a *prima facie* case is crucial under s.262(3) of the CA 2006.	4) The requirement of notice is crucial in instituting a derivative action in Nigeria, as provided for under s.303(2)(b) of the CAMA 2004 likewise under s.346(2)(b) of the 2020 Act.
5) The requirement that the wrongdoers have committed fraud on the minority and in control of the company is absent, in a situation where the directors have acted in good faith and have not profited personally, the claim can be brought by virtue of s.260(3) of the CA 2006.	5) The presence of fraud by the majority on the minority coupled with the majority are in control of the company is pertinent for a derivative action to succeed under s.300(d) of the CAMA 2004 and s.343(d) of the 2020 Act.

As a result of the comparative analysis conducted on the remedy of derivative claim/ action in the different jurisdictions, The conclusions reached are as follows:

6.3 The Nigerian Position

Statutory derivative action is a very important tool available to a minority shareholder to protect their rights and that of the company. There is no doubt that the derivative action under the CAMA 2004 to a large extent has mitigated the hardship arising from the common law rule. However, the provisions are not without shortcomings. The vagueness in the derivative action provision and the strict interpretation adopted by the courts may have a significant impact on the protection of minority shareholders. For instance, the pre-action notice required to be provided by the applicant does not stipulate the number of days, weeks or months required.

Secondly, the rigid interpretation and the rules of the courts in including the *'locus standi'* and insisting upon a particular procedural mode of commencement of the action can frustrate the use of derivative action as a remedial tool for minority shareholder protection. In addition, the lengthy proceedings arising from the delay tactics orchestrated by the directors or their counsel as a result of the vague statutory provisions could be burdensome for minority shareholders who do not want to incur legal costs chasing a matter for which they are not certain to a reasonable degree that they will obtain a remedy. The situation is compounded where legal costs to be incurred over a long span of time[584] are enormous and unreasonable compared to the minority shareholder's investment unless the courts make an order for interim cost incurred by the applicant be paid by the company as provided for in s.308 CAMA 2004 In the absence of such an order for interim costs, the best business decision for the aggrieved minority shareholders will then be to discontinue the matter, or not institute the action in the first place having calculated the estimated time span for the action, legal costs and the chances of not obtaining a remedy. For instance, the case of *Union Bank Nigeria Plc v Ayodare and Sons (Nig)*

[584] https://punuka.com/where-are-we-in-curbing-delays-in-administration-of-justice-in-nigeria/ accessed on 30/9/2021.

Limited[585] was instituted in the state High Court in 1989 but was not finally disposed of by the Supreme Court until 2007, a period of 18 years. The courts have failed to give a proper, just and fair interpretation of the intentions of the legislature, have been more concerned with strict adherence to form and technicalities and have lost the opportunity to do substantial justice and in the process scared away litigants with genuine interests.

My opinion is shared by Kunle Aina,[586] who provided a deep insight into derivative action. He posits that *"Derivative action as an exception to the majority rule ensure that fraudsters who are in control of the company's machinery for filing an action in the name of the company do not use the opportunity to enrich themselves to the detriment of the company."* Despite the deterrent approach derivative action sought to achieve against the illegitimate practices by the majority, it does not achieve this goal because by evidence, there are cases,[587] before the enactment of the CAMA 2004 where the personal right of a member or the corporate interest of the company had been infringed and the court gave judgement giving effect to the majority rule, as a result derivative action in Nigeria is not an effective remedy for the protection of minority shareholders compared to England and Wales.

The adoption by the Nigerian courts of the strict application of the rule in *Foss v Harbottle* was instrumental in depriving minority shareholders of their rights to institute an action. However, a glimmer of hope appeared in *Edokpolor & Company Ltd v Sem-Edo Wire Industries Ltd,*[588] where the courts in interpreting the statute based on the facts and circumstances surrounding the case, allowed the action to succeed. The courts created an exception to the majority rule. The rule will not apply *"where in the interest of justice requires it not to be applicable."* Going from the record of cases on the

585 [2007] 13 NWLR (Pt.1052) 567

586 Aina K Current Developments in the Law on Derivative Action in Nigerian Company Law,' Babcock University Socio-Legal Journal (2014) Vol.1 No.4 Pg.49.

587 *Shell Petroleum Development Company V Nwawka* (2001) FWLR 1223-1425 Pt.48, 1363, *see also Tika Tore Press Ltd v Abina* [1973] 1 ALL NLR 400 *and Ejikeme v Amaechi (1998)3 NWLR Pt.542, 456,* The court in the above cases held where a wrong is committed, it was open to the shareholders in general meeting to ratify their wrongs, as a result the courts will not take over the management of a body corporate and run its affairs.

588 (1984) 7 SC 119.

institution of derivative action this is the only instance where the court has gone outside its guidelines of strict application of the statutes. Unfortunately, after the enactment of the 2004 Act the exception *"interest of justice" was* omitted as an exception to the majority rule.

Unfortunately, the Courts, law makers and the general public do not view the shareholder derivative action in the positive light that they once did. Derivative action functions more as a deterrent against the actions of the majority, although it is enacted as a remedy readily available to minority shareholder, its interpretation by the courts does not give full effect to its intent. This is still the present position in relation to its application, and nothing has changed. Under CAMA 2020 act one major difference which sets it apart from CAMA 2004 is the presence of a new subsection which defines the term 'major asset transaction' under s.342(1) CAMA 2020 it is defined as a transaction or related series of transaction which include the purchase or other acquisition outside the usual course of the company's business. It goes further to state the board of directors shall recommend the transaction and direct that it be submitted for approval to an annual and extraordinary meeting. At the meeting the members shall approve the transaction by special resolution unless started otherwise this provision acts as a check and balance on the powers of the majority at the helm of affairs of the company, and it prevents the majority from unilaterally taking decision without the knowledge of the minority. This is a welcomed development.

6.4 The Position in England and Wales

The statutory provision broadens the ground for bringing a derivative claim by including cause of action in respect of 'an actual or proposed act or omission involving negligence, default, breach of duty, breach of trust by a director of a company'. It is no longer necessary for the claimant to show that the act alleged is a fraud on the minority, so that a claim could be brought against pure negligence without demonstrating the defendant director has personally gained. Likewise, the requirement of proving 'wrongdoer in control' ceases to be a decisive factor for the court to consider. This makes it possible for a derivative claim to be brought in a public company where shares are widely dispersed. The expansion of the scope combined with the codification of director duties under Chapter 2 of part 10 of the CA 2006 has raised concerns that it would make it easier for individual shareholders to bring claims against directors. Even though this is true to an extent, there have not been a floodgate of shareholders action brought under this framework[589] However, directors may feel much comfortable that the balance of power remains in their favour. Section 260 of the CA 2006 does not change the established rule in *Foss v Harbottle.* However, under the CA 2006, the 'fraud on the minority' and 'control of wrongdoer' concepts have now been jettisoned in favour of a general discretion for the court to decide whether to allow an application to proceed at an obligatory initial ''leave'' stage. Breach of almost any duty or ''mere negligence'' is potentially actionable, and statutory codification of directors' duties expands the scope for derivative claims. The radical change is that under the Act, ''fraud'' by a director (or an approximation) is no longer a prerequisite; all that is required to gain a foot in the door is a ''mere'' breach of duty, trust or negligence either actual or proposed.[590]

In addition, the rule did not intend to alter the traditional Court's reluctance to intervene in business management as portrayed in the case of *Mission Capital Plc*[591] *v Sinclair* and *Franbar Holdings Ltd v Patel* [592] may provide some reference regarding the Court's traditional reluctance to allow derivative action to continue. It is noteworthy that the claimants in the two reported cases were both denied permission to continue. The glimmer of hope available to a minority shareholder will be the exercise of extensive discretion by the judges in cases brought before them for determination under s.263(3) and I believe that in such situations, whether directors are exposed under the risk of increasing lawsuits and whether derivative claim could be an effective governance tool will largely depend upon how the courts discharge he unfettered discretion entrusted on them.

Despite the restrictive nature of derivative claim, my view is it is a veritable remedy in the protection of minority shareholders made possible by the exercise of discretionary power by the judge

[589] Keay, AR 'Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006', Journal of Corporate Law Studies, 2016 Vol 16 pg. 39-68
[590] https://levisolicitors.co.uk/wp-content/uploads/2018/03/JPS-link.pdf accessed on 30/09/2021
[591] [2008] EWHC 1339 (Ch)
[592] [2008] EWHC 1534 (Ch)

and can be a useful tool. In addition, the basic approach to the right to bring a derivative claim by individuals is that it should be done in exceptional circumstances i.e., where it is apparent that the actions of the majority breached the rights of the individual instituting the claim and if not remedied at an appropriate time will be detrimental to the company. This strikes a balance between ensuring access to a remedy by minority shareholder while not allowing troublesome shareholders to impede the carrying on the proper business of the company.

The recent case of *Boston Trust Company Ltd v Szerelmey Ltd (No2*[593]*)* is an interesting development that has the potential of expanding the category of claimants that can be given conditional permission can be given to, who in ordinary circumstances would be denied permission, due to an irregularity which deprives them of standing. However, while such a development would not necessarily lead to a floodgate of litigation by claimants, particularly in complex corporate structures, there would be avenue for a significantly wider class of claimants to seek redress, including those without direct shareholding in the injured company to seek redress. It would be interesting to follow up on the consequence of this decision if it stands at a time when shareholders and stakeholders will be closely examining the decision making of company directors.

The next Chapter rounds up the comparative analysis by critically analysing unfair prejudice petition in England and Wales and in Nigeria to determine if it is an appropriate form of action by the minority shareholder against the breach of duties by the majority. The outcome of this question will demonstrate and determine the extent of minority shareholder protection in the two jurisdictions to achieve this task the researcher applied the following methods of comparative methodology which is: analytical, law in context and common core methods.[594]

[593] [2020] EWHC 1352(Ch)
[594] Supra, No.525.

<u>CHAPTER 7:</u> COMPARATIVE ANALYSIS OF UNFAIR PREJUDICIAL PETITION IN ENGLAND AND WALES AND NIGERIA.

<u>7.0 Introduction</u>

Minority shareholder claims principally consists of unfair prejudice petitions instituted by members on their own behalf and derivative actions brought by members on behalf of the company.[595] One of the major factors responsible for the winding up of a company is mismanagement by directors coupled with the excessive cost of litigation in shareholders disputes.[596] In order for a minority shareholder to succeed in an action for unfair prejudicial petition, he or she must present evidence that the actions of the majority is or was unfair and prejudicial to his or her interest in the company.[597] Unfairness is an essential criterion which must be proven in minority shareholder petitions.[598] Chapter 3 discussed the historical development of unfair prejudicial petition and the process of instituting the remedy in England and Wales. Chapter 5 adopted the same approach under the Nigerian jurisdiction. However, this Chapter takes a step further by conducting an in-depth comparative analysis of unfair prejudicial petition in England and Wales and Nigeria. Emphasis is placed on the process and procedure in each jurisdiction and most importantly its application by the courts. The case law under the different jurisdictions has clarified the role and impact of s.994 of the Companies Act 2006 in England and Wales and s.311 CAMA 2004 and s.353 CAMA 2020 in Nigeria on minority shareholder protection most importantly, whether they are consistent with the intention of the legislature in enacting the statutes which is the protection of minority shareholders.

This analysis concludes that although unfair prejudice petition provides a platform where minority shareholders can protect their interests however this is not the case in Nigeria as the challenges faced

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[595] Squire, G. Derivative Actions and Unfair Prejudice Petitions, The Law Society Gazette (23 September 2019) https://www.lawgazette.co.uk/practice-points/derivative-actions-and-unfair-prejudice-petitions/5101437.article accessed on 10/11/2020.

[596] Steven C. Bahls S.C‘Resolving Shareholders Dissension: Selection of the Appropriate Equitable Remedy’ [1990] 15 J. Corp. L. pg., 285, 287.

[597] Interactive Technology corporation ltd v Fester &Ors [2016] EWHC 2896 (CH), this case is an authority in England and Wales of the wide discretionary power a judge wields in adjudicating cases brought before them for determination. In this case though there was evidence of prejudice by the majority, no relief was granted to the petitioner in the judge’s opinion,’ the petitioner misconduct was much graver than that of the other parties.’

[598] Halpern D & Bowmer M “Unfair Prejudice Petitions: What makes Prejudice Unfair”? 3rd July 2019.

by an applicant is slow judicial process and legal enforcement. This may be contrasted with the position in England and Wales where there is certainty of the law, and the remedy is accessible to a minority shareholder. The way forward would be a legal reform by amending the CAMA 2004 which will bring much needed improvements to enhance the protection of minority shareholders.

7.1 Brief Synopsis of Unfair Prejudicial Petition (Pre-Companies Act 2006 in England & Wales and Companies and Allied Matters Act 2004 in Nigeria Now 2020 Act)

In England and Wales, unfair prejudice petition is a statutory form of action that can be instituted by an aggrieved shareholder against their company. In *Re Saul D Harrison plc*,[599] Hoffman LJ remarked that unfair prejudice is a deliberately imprecise language which was chosen by the Parliament because its earlier attempt in s.210 of the Companies Act 1948 to provide a similar remedy had been too restrictive. The word previously used which was "oppressive" was held by the House of Lords in *Scottish Co-operative wholesale Society v Meyer*,[600] to mean burdensome, harsh and wrongful. This gave rise to some uncertainty as to whether 'wrongful' required actual illegality or invasion of legal rights. The Jenkins Committee on Company Law which reported in 1962, believed it should not require illegal act or invasion of legal rights and instead, recommended the term 'unfairly prejudicial' which the Parliament adopted in s.75 of the Companies Act 1980. This concept was later introduced under s.459 of the Companies Act 1985 and is currently in force under Part 30 of s.994-999 of the Companies Act 2006. Hence the unfair prejudice remedy was introduced as an implicit instruction to the Courts to liberalize and expand the law to allow more petition by minority shareholders.[601]

In contrast, in Nigeria, unfair prejudicial petition developed as an alternative to the winding up remedy under s.209(f) of the Companies Act 1968. This statute was enacted as a response to the shortcomings of the winding up remedy, due to the courts' policy of non-interference with the internal affairs of the company and secondly, where the application of the remedy would have undermined the

[599] [1995] BCC475, 488.
[600] [1959] AC 324.
[601] Coffee J.C, 'The Mandatory Enabling Balance in Corporate Law: An Essay on the Judicial Role' (1989) 89 Columbia Law Review 1618, 1688-9.

interests of the directors, the remedy would not avail the petitioner.[602] Unfair prejudice petition had the advantage of preserving the company and was flexible, since it gave the court's the jurisdiction to apply the remedy as far as it was just and equitable to do so. The prevailing test was to prove the existence of oppressive conduct by the majority for the action to succeed.[603] Section 210 of the 1968 Act provided that an oppressed minority shareholder may apply to the Court for an order that the "Court may deem fit". This provision did not specifically state the orders the Court may make in such circumstances and surprisingly, was adopted in Nigeria in 1968 when the oppression remedy had already proved inadequate in England as a result of the strict approach and interpretation of the provision by the English judiciary.[604]

As a result of the vagueness of the orders the court could make as a remedy, this provision seemed inadequate as it continued to be linked with the liquidation of the company at the instance of the oppressed minority, the main reason the legislators were trying to avoid in the first place. In *Ogunade v Mobile films (WA) Ltd,*[605] the judge attempted to define oppression by stating that the oppression or fraudulent conduct of the majority must he harsh, burdensome, wrongful and must represent a consistent pattern of conduct intentionally directed at the oppressed minority over a period. However, in *Solanke v Ogunmefun,*[606] The Court took a different approach stating it is not merely enough to allege that a conduct is unfairly prejudicial or illegal, the circumstances of the oppression or illegality must be disclosed in the petition for relief.

The differing views and absence of guidelines or precedent led to determination of cases based on the whims of the judges. To ensure a degree of uniformity, recourse was made to English Law cases for guidance.[607] As a result, the approach was subsequently applied to cases within the Nigerian

[602] Orojo J.O, Company Law and Practice in Nigeria (Johannesburg: LexisNexis, 2008) at 82.
[603] *Ibid.*
[604] *Ibid.*
[605] (1976) 2 FRCR 10.
[606] Suit No. FHC/L/M/137/81 of August 11th, 1983 (Unreported),
[607] *Re Jermyn Street Turkish Bath Ltd* (1970) 1 W.L.R. 1194.

jurisdiction.[608] This approach gave a restrictive construction to unfairness and prejudice. The concept unfair prejudice was subject to both subjective test (imposing a duty on the minority shareholder to prove the majority had knowledge of their action and acted in bad faith) and the objective test (whether a reasonable person would regard the act of the majority as unfair). This resulted in technicalities, on the proper test to apply. However, a minority shareholder was able to obtain a remedy,[609] based on the circumstance of the case. In 1990, the Nigerian Law Reform Commission acknowledged the inadequacy of this remedy especially the application of the different tests in the protection of minority shareholders and recommended a more comprehensive provision that would state the exact powers of the court and accommodate both oppressive and unfairly prejudicial conduct.[610] The response was the enactment of s.310-312 CAMA 2004 now s.353-355 CAMA 2020 which provides for relief that may be made on the ground that the affairs of the company are being conducted in an oppressive or unfairly prejudicial manner or that the interests of the shareholders are unfairly disregarded.

7.2. Comparative Analysis of Unfair Prejudicial Petition Under the Companies Act 2006 (England &Wales) and Companies and Allied Matters Act 2004 (Nigeria Now CAMA 2020)

In order to accurately prepare a comparative analysis of the remedy of unfair prejudice petition in England & Wales and in Nigeria, critical analysis would be made on comparative themes such as the grounds for application, wide discretionary powers by the Courts, relief by the Court and the doctrine of reasonable expectations. This analysis it will enable the researcher to reach a conclusion whether the remedy was designed for the protection of the management and or whether it has failed to provide avenues for minority shareholders seeking relief by instituting the petition. Finally, an overview of the current position of unfair prejudicial petition in England & Wales and in Nigeria will be made this will set the tone for recommendations in the final Chapter (8) flowing from the comparison.

[608] *Ogunade v Mobile Films Ltd* (1976) 2 FRCR 10, it was stated that the oppression or the fraudulent conduct of the majority must be harsh, burdensome and wrongful and must represent a consistent pattern of conduct directed at the oppressed minority over a period of time”

[609] *Yalaju-Amaye v Associated Registered Engineering Co Ltd (AREC)* 1986 3 NWLR, Pt. 31, Pg. 85.

[610] Nigerian Law Reform Commission “Working Papers on the Reform of Nigerian Company Law Vol.1 Review and Recommendations” (Lagos: Nigerian Law Reform Commission, 1989).

The first step is to focus on the **1) Grounds for Application-** Section 994 of the Companies Act 2006 in England and Wales permits a member to petition the court for relief on the basis that the company's affairs are being or have been conducted in a manner that causes unfair prejudice to the interests of members generally (including at least him or herself). A petitioner under s.994 must establish four requirements to the satisfaction of the court: (1) the conduct of the company's affairs; (2) has prejudiced; (3) unfairly; (4) the petitioner's interests as a member of the company. In other words, the conduct must be both prejudicial and unfair. Both requirements need to be satisfied and, if either is not, the petition will not be well founded.[611] These were the four issues which arose out of the interpretation of s.994 CA 2006. The first was who has the right to complain against whom? The second was what does company affairs mean? The third was when is an act unfair and prejudicial? And finally what counts as an interest of a member? The Company Law Review[612] decided that it would not update the unfair prejudice provisions in the Companies Act 2006, despite considering various proposals from the Law Commission,[613] the reason being the sheer volume of cases brought often with long complicated histories as shareholders dig into the past. Secondly active case management has been one solution being pursued since the Civil Procedure Rules 1998.[614]

In evaluating the requirements, the first thing that a petitioner must prove to the satisfaction of the courts is that conduct about which the complaint is made relates to conduct of the company's affairs. The term 'the company's affairs' is of wide ambit,[615] and encompasses all matters decided by the board of directors and includes the acts of shareholders in their personal capacity and not corporate conduct.[616] The second requirement "prejudice" includes financial damage to the value of the petitioner's shares. As a rule, where a company is insolvent, the petitioner must show that his shares would have had a

[611] *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 31, Neill LJ citing Peter Gibson J in Re Ring Tower Holdings plc (1989) 5 BCC 82 at 90.
[612] Developing the Framework, para 4. 100-111, completing the structure, para 5. 75-81 and final report I, para 7 . 41-45
[613] Law Commission, Shareholder Remedies (Law Com 142, 1996, 55-102 and Law Com 247, 1997, Parts 2-4)
[614] *Re Rotadata Ltd* [2000] 1 BCLC 122.
[615] *Gross v Rackind* [2005] 1 WLR 3505 26-32, *Graham v Every* [2014] BCC376 38-41, *Re Charterhouse Capital* Ltd [2015] 2 BCLC at 45.
[616] *Re Coroin Ltd* 2 BCLC 583, *Re Charterhouse Capital Ltd* [2015] 2 BCLC 627.

greater value but for the wrongdoing of the respondent.[617] The Court employs a broad interpretation of prejudice suffered by a shareholder. Accordingly, even if the shares have no value the petitioner may be held to have suffered prejudice in some capacity connected with his shareholding for instance, a loan made as part of the same investment as that which led to the acquisition of the shares.[618]

Prejudice is not limited to financial loss it includes prejudice caused by disregarding the petitioner's right to participate in management.[619]

The third requirement of unfairness is a rather more complicated term. In *O'Neill v. Phillips,*[620] the only case of unfair prejudice which reached the House of Lords, Lord Hoffmann observed that fairness depends on the context in which it is applied; conduct which might be fair between competing businessmen might not be fair between members of a family. He stated, all is said to be fair in love and war. This denotes what is fair is heavily dependent on the background facts and corporate setting. This makes it difficult to predict with any certainty whether the prejudice will be held to be unfair. Nevertheless, some broad guidance can be given, based on the case law which has emerged in the last two decades since *O'Neill v. Phillips,*[621] Interpreting the test of unfairness, the test as to what amounts to unfair prejudice is objective.

Hence, it is not necessary for the petitioning shareholder to show that an individual acted in bad faith or with the intention of causing prejudice. The Court will regard the prejudice as unfair if a hypothetical reasonable bystander would believe it to be unfair. However, not every breach of the petitioner's rights as a member will amount to unfairness: the breach must be fundamental,[622] mere procedural irregularity, trivial or technical infringement of the articles would not generally be enough to institute a petition,[623] The test for unfair prejudice is objective as demonstrated in *RA Noble & Sons Clothing Ltd,* [624] is

[617] *Re Tobian Properties Ltd* [2013] *2 BCLC 567 at 11*
[618] *Galesteden Fastigheter AB v Baltic Partners Ltd* 2007 *1 BCLC 468.*
[619] Ibid No 4
[620] [1999] 1 WLR 1092 at 1098F.
[621] Ibid No 14.
[622] *Re Sunrise Radio [2010]1 BCLC 367 at 7, HHJ Purle QC*
[623] *Re Saul D Harrison & Sons plc [1995] 1 BCLC 14 at 18, Hoffmann LJ*
[624] [1983] BCLC273 AT 290.

whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interest.

The literal interpretation of this in my opinion is whether a third party who is neither a member nor has shares in the company would consider the actions of the majority in running the company to be prejudicial to the interest of the minority either directly or indirectly. In addition, reasonable bystander may translate to the general public (public opinion). As a result, fairness can be determined by whether the actions of the majority in the conduct of their duties are acceptable by the general public.

Unfairness can also be examined in the context of a commercial relationship, the contractual terms of which are set out in the articles of association of the company and in any shareholder agreements. Therefore, if the conduct is in accordance with the articles to which the shareholder has agreed, it would be difficult to succeed in an unfair prejudice petition. Although the articles of association usually confer no right to be involved in management or to be consulted on decisions which do not have to be taken by a general meeting, such additional rights may be conferred by an agreement, or understanding between all or some of the members for instance, a quasi-partnership[625] where there is an agreement that the petitioner be involved in management or be consulted before certain decisions are taken. However, not every breach of a promise to involve the petitioner in management will amount to unfair prejudice. The Court of Appeal has recently confirmed that exclusion from management might not amount to unfair prejudice if it was done openly as a result of a *bonafide* dispute, even though the respondents were later found to have been in the wrong.[626]

In Nigeria, s.311 CAMA 2004 and s.353 the CAMA 2020 empowers an applicant to institute an action by way of petition, on the ground that the affairs of the company are being conducted in an illegal or oppressive manner.[627] In practice unfair prejudice usually arises where a minority shareholder

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[625] E*brahimi v. Westbourne Galleries Ltd* [1973] AC 360, HL.
[626] *Re Sprint Room Ltd* [2019] EWCA Civ 932.
[627] Companies and Allied Matters Act 2004, s.311(20(a).

is subjected to unfairness by the abuse of power or control by the majority over the company.[628] By virtue of s.311(2)(b) CAMA 2004 this provision was designed to protect both members of a company and the public at large. For instance, oppressed minority shareholders who do not have the resources to institute an action in court or for any other reason may request the Corporate Affairs Commission (CAC) to institute an action on their behalf. The CAC may also on its own volition bring an action against a company on the ground that it disregards public interest. However, it is surprising that despite the extremely broad powers of the CAC to seek redress for oppressed minority shareholders and the public, this power has remained unutilized by the CAC.[629]

There are two factors that must be present to succeed in an unfair prejudice petition: A) The conduct must be prejudicial in the sense of causing prejudice or harm to the interest of the member of the company and B) it must be unfair [630]. In determining what constitutes unfairness the courts apply the objective test i.e., it is not mandatory for the petitioner to show that an individual or group of individuals acted in bad faith or with the intention of causing prejudice. The Courts will resolve the prejudice as unfair if a hypothetical bystander would believe it to be unfair. It is the same approach adopted by English courts in determining if the actions of the majority are tainted with unfair prejudice.

Unfortunately, just like the word ‘oppression’ s.311 CAMA 2004 now s.353 CAMA 2020 do not provide a definition of the phrase “unfair prejudice” and as such, recourse is to be had to the judicial interpretation of the phrase. The Court in *Re R.A Noble &Sons (Clothing) Ltd*.[631] held that the test of unfairness is objective, and it was not necessary to show any conscious knowledge on the part of the offender that it was unfair, or any other evidence of bad faith. The question that arises is whether a reasonable bystander would regard the act or omission as unfairly prejudicial.[632] The answer is to take a close look at the facts of the case, and if the circumstances suggests that the act of the majority is

.[628] *Ijale Properties Ltd v Omololu-Mulele* (2000) FWLR, Pt 5, 709.
[629] *Ibid.*
[630] Supra
[631] [1983] B.C.L.C 273.
[632] Morse G, Marshall E and Morris R, *Charlesworth’s Company Law*, 13th ed. (London: Stevens &Sons Ltd, 1987) at 449.

unequivocally unlawful and prejudicial to the interest of the minority without any shadow of doubt then the minority can enforce his rights through the institution of the petition.

One of the instances where the Nigerian Courts have granted this remedy was in *Ijale Properties Ltd v Omololu-Mulele*[633]where a minority shareholder alleged the company was run by the majority shareholders with impunity and that in addition the company had not held any meetings or filed annual returns with the corporate affairs commission (CAC) since it was incorporated. The Court held that this was a clear case where s.311 CAMA 2004 would be invoked as a basis of action. Unfortunately, the reason why the Court decided s.311 applied was not clearly stated, neither was there any analysis as to the factors the Courts should look out for in deciding whether such act is oppressive, unfairly prejudicial or unfairly disregards the rights of the shareholder.

Another requirement under the Nigerian Jurisdiction to establish unfair prejudice is that the act of the majority must represent a consistent pattern of conduct over a period. In my opinion, this requirement is detrimental to a minority shareholder who intends to institute an action as it creates a loophole for majority shareholders to take advantage of, for instance a single act of oppression may not support a petition for unfair prejudice because of the key requirement for a consistent pattern of conduct which must either be harsh, burdensome or wrongful. However, the courts have taken note of this loophole and have devised ways to bridge the gap especially in situations where there is evidence of gross misconduct. In *DYS Trocca Valessia Ltd &Ors v Sanyaolu &Ors.*[634] the Court acknowledged that the phrases *'illegal'*, *'oppressive manner'*, and *'unfairly prejudicial'* are not defined in the CAMA 2004 The trial judge Joseph Eyo Ekanem J.C.A. believed *"oppression exists where an individual in a dominant position act in a manner that is unfair, burdensome, harsh and wrongful and it can be said that the affairs of the company are being conducted in an oppressive manner"*. He reiterated that any conduct that excludes participation in the management of the company or jeopardises the value of shareholding is unfairly prejudicial.

[633] *Ijale Properties Ltd v Omololu-Mulele* [2000] FWLR Pt 5709.
[634] (2016) LPELR-40423(CA), Suit No: CA/A/189/2015.

2)Wide Discretionary Powers by the Courts- From the wording of s.994 CA 2006 it is evident that shareholders (invariably those with a minority holding) who do not have an active role in the management of the company or have been excluded from management by the majority shareholder, will often have no alternative but to issue a petition to protect the value of their shares as exemplified in *Estera Trust (jersey) Ltd v Singh,*[635] This case highlights how important it is to correctly identify the precise nature of the relief being sought. In this case the petitioner realised that the purchase of their shares by the company would result in an unfavourable tax treatment. The Court however, amended the tax order in a manner which would be beneficial to the petitioners. This case shows the preciseness of the remedy, it cannot be altered at any point in time hence it is of utmost importance that a petitioner, at a very early stage know precisely what relief they are seeking and if necessary, obtain tax advice on the proposed relief. In addition, it displays the wide discretionary powers of the judges in presiding over cases brought before them for determination. In a recent judgement of *Re G&G Properties Ltd.*[636] the High Court reaffirmed the position that relief from unfair prejudice is at the court's discretion and the court must satisfy itself that the unfair prejudice has occurred even where the allegation is no longer contested. In *Wootliff v. Rushton-Turner and others*.[637] the unfair prejudice claim included a claim for compensation for wrongful dismissal which the respondents applied to have struck out. The Court, noting there was no previous authority dealing directly with a challenge to a claim for wrongful dismissal in an unfair prejudice petition, declined to strike out the application. As the language of the Court's discretion to give relief to a successful petitioner was so wide, it did not shutout relief for compensation for breach of a service agreement.

In the face of the broad statutory language of s.311 CAMA 2004 and s.354 CAMA 2020 the Nigerian Courts have yet to establish clear cut rules to determine when an oppressive and unfairly prejudicial act has occurred. It appears that prevailing in the case of genuinely "oppressive acts" is easy

[635] [2019] EWHC 1540.
[636] [2018] EWHC 1035 (Ch).
[637] [2016] EWHC 2802 (Ch).

since “oppression” connotes harsh and wrongful acts that affect the rights of the shareholders.[638] However, in relation to “unfair prejudice” this leads to a situation where shareholders who intends to institute an action under s.311 CAMA 2004 are uncertain about the likely decision of the Court since there are no judicial precedents setting out guidelines which the court adhere to in delivering judgements. This uncertainty may operate to discourage minority shareholders from invoking this section to protect their interest.[639] The way forward will be an extensive legislative reform or legal transplant to provide clearer guidelines formulated by the Courts to address the problem. However legislative reforms settings out instructions to guide the Courts may still not capture every circumstance especially in view of the broad nature of corporate misconducts. However, guidelines established by the courts may be revised upon reviewing the facts of each case as the need arises.

3)Relief by the Court- Section 996(2) of the Companies Act 2006 provides a checklist of different orders which the Courts can make if it decides that there has been unfair prejudice, although the Court retains a general discretion under s.996(1) to make any order it thinks fit, such as an order to regulate the company affairs in future or to require the company to refrain from doing or continuing an act complained of. It is observed that unfair prejudice petition is a flexible remedy, it does not restrict a petitioner to a sole remedy but gives the court unlimited access to a list to choose from based on the circumstance of each case. From an analysis of recent cases, the most common remedy awarded to a successful petitioner is an order from the Courts that their shares be purchased by the majority.[640] In *Donald Booth & Others v Clarence Kenneth Frederick Booth & Other,*[641] the Court held that the company’s no dividend policy was unfair and prejudicial. The Court reasoned that it would not be possible for the parties to agree on a suitable alternative dividend policy and ordered the company to buy back the minority shareholders shares at a value as if the directors excessive renumeration had never been paid. In some circumstances it may be appropriate for the court to order the majority to

[638] *Scottish Cooperative Wholesale Society Ltd v Meyer [1959] AC 324.*
[639] Aduma, O & Ibekwe C.S. “Protection of Minority Shareholders under Nigerian Company Law” Nnamdi Azikiwe University Journal of International Law and Jurisprudence. (2019)
[640] *Re Edwardian Group Ltd* (2019) 1 B.C.L.C 171.
[641] [2017] EWHC 457(Ch).

dispose of his or her shares by sale to the petitioner.[642] Interpreting this outcome clearly signifies that the remedy of unfair prejudice seeks to a large extent redresses the injustice of the majority against the minority.

By virtue of s.310 and 311 of the CAMA 2004 and s.353 and 354 CAMA 2020 where the Court is satisfied that a petition is well founded, it may make such orders as it thinks fit to bring relief in respect of the matter complained of such as an order restraining a corporation from engaging in specific conduct or requiring that a corporation does a specific thing in order to remedy a wrong done to the minority shareholders in the company. However, there are no set out guidelines that can assist applicants to determine how the Courts will arrive at its conclusion or what specific orders the Courts will deem fit in any individual case and thus this remedy is to a large extent at the discretion of the Court.

4) Reasonable Expectations- Despite the hurdles a minority shareholder petitioner might face in establishing that the act or omissions of the majority is unfair and prejudicial against his/her interest, the influence of unfair prejudice petition has grown which has led to its application to the sporting arena as demonstrated in *VB Football Assets v Blackpool Football Club.*[643] In this case, the High Court gave further insight into the breadth of remedies available to the court when considering unfair prejudice petitions. This case involved a shareholder's dispute regarding the way the majority shareholders conducted the affairs of Blackpool football club to the detriment of its minority shareholders. The Court discovered that despite the existence of three written agreements, there was an unwritten oral (gentlemen's) agreement which affected the rights of the parties. It was held that the improper payments were not for the benefit of the club but were disguised as "secret dividends" it was also held that the minority shareholder had a reasonable expectation they would be treated equally and be allowed to take part in the decision-making process, which was not implemented, and that the adoption of the new articles was not clearly unfair to be unfairly prejudicial. Due to the nature of s.994 of the Companies

[642] *Thomas v Dawson* 2015 EWCA 706
[643] [2017] EWHC 2767 (Ch).

Act 2006 there will be no reason to complain of unfairness if there had been no breach of the terms upon which the petitioner has agreed that the affairs of the company should be conducted.

The position is different under Nigerian law, where the case in which the unfair prejudicial petition has been successfully litigated relating to loss of reasonable expectation by the minority is only in closely held corporation[644], The Court held in the Edokpolor case that there was evidence of reasonable expectation in the interest of justice to prevail. The adaptation of the reasonable expectation test is not clearly pronounced or set out as a standard for the Nigerian courts in deciding oppression cases, the reason being that the Nigerian courts have yet to establish clear cut rules to determine when an oppressive and unfairly prejudicial act has occurred. The term "unfairly prejudicial" acts comprise a broad range of corporate misconducts which are dependent on whether the court is of the opinion that such acts qualify as unfair prejudice. This leads to a situation whereby shareholders who intend to bring an action under s.311 CAMA 2004 and s.353 CAMA 2020 are uncertain about the likely decision of the court since there are no judicial precedents setting out guidelines which the courts follow in reaching such judgments. This uncertainty may operate to discourage minority shareholders to use this right which eventually also decreases the likelihood that majority shareholders will have appropriate incentives to respect minority shareholders' rights.[645] It is important that the Nigerian courts clearly provide guidelines to assist in determining whether an unfair prejudice petition applies in any given case. This will provide a level of certainty for all parties, so that minority shareholders and other stakeholders understand that certain acts may be declared a violation of the reasonable expectations of the minority shareholder (s) or any other stakeholder. Regarding derivative claims the Nigerian jurisdiction is silent on the process for the application of leave to institute the action (*exparte* or on notice). This situation has created doubts and misconceptions, adding to the confusion. The Supreme Court when given the opportunity to clarify the position failed in *Agip Nig Ltd v Agip Petrol International and Others*[646], to overcome this obstacle.

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[644] *Edokpolor & Co Limited v Sem-Edo Industries Limited* [1984] 7 SC 119.
[645] Aduma, O & C.S. Ibekwe *"Protection of Minority Shareholders under Nigerian Company Law"* (2019) 8:2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence.
[646] (2010) 5 NWLR Pt. 1178, Pg.348.

The position in England and Wales by virtue of s.263 CA 2006 could arguably be adopted which will require the applicant to establish a *prima facie* case for the grant of permission (first stage) and if the court is satisfied there exists a case, it will then decide in a leave hearing on the evidence of the applicant and defendant whether the case should proceed. It is evident that a minority shareholder in England and Wales has a better chance of success in an action of unfair prejudice. This is especially so in situations where the minority shareholders can secure a remedy on behalf of the company through a derivative action that could be instituted concurrently with the unfair prejudice petition[647] which makes it more desirable compared to the Nigerian jurisdiction.

5)Persons entitled to bring an Application- In England and Wales by virtue of s.994(1) CA 2006, members of a company and non-members to whom shares in a company who have been transferred by the execution and delivery of a proper instrument of transfer under s.994(2) CA 2006 may petition. In addition, non-members to whom shares in a company have been transmitted by operation of law (for example trustee in bankruptcy of a bankrupt member or personal representative of a deceased member) under s.994(2) CA 2006 may petition. The Secretary of State for Business, Enterprise and Industrial Strategy also has the power to bring a petition under s.995 where investigations or report reveal that the company affairs are been conducted in an unfairly prejudicial manner, but such petitions are rare. Also, majority shareholders are not precluded from petitioning under s.994 but prejudice will not be unfair when the petitioner can readily rectify the prejudicial situation himself, in such circumstances, a petition may be struck out as well.

In Nigeria, s.310 CAMA 2004 now s.353 CAMA 2020 highlights the category of persons who can institute an action, which includes: a member, director or former director, creditor, the CAC and any other person who in the discretion of the courts is the proper person to make an application under s.311 CAMA 2004. Section 310 CAMA 2004 does not appear to specifically limit a member qualified to bring an action under s.311 CAMA 2004 to 'a minority member'. Interpreting s.79 CAMA 2004 now

[647] *Cooke v Cooke* [1997] 2BCLC 28.

s.105 CAMA 2020 to determine who a "member" of a company. A member of a company includes: a subscriber of the memorandum of a company and a person who agrees in writing to become a member of a company, and whose name is entered in the company's register of members. In the case of a company having share capital, each member shall be a shareholder of the company of the company and shall hold at least one share. To this end, a 'member' under s.310 CAMA 2004 now s.353 CAMA 2020 is not limited to minority shareholders, but also includes majority shareholders. Consequently, a combined reading of s.7 CAMA 2004 now s.4 CAMA 2020 and s.310(2)(a) to 313 CAMA 2004 now s.353(2)(a) to 356 would reveal that the emphasis of the provisions is on whether the affairs of the company are being conducted in an illegal or unfairly oppressive or prejudicial manner, in contrast to whether the person instituting the action, being a member of the company, is a minority shareholder or a majority shareholder.[648]

In effect, majority shareholders can petition under s.311 CAMA 2004 now s.354 CAMA 2020 where the affairs of the company are being conducted in an illegal or unfairly oppressive or prejudicial manner, in *Re Legal Costs Negotiators Ltd.*[649] a majority shareholder presented an unfair prejudice petition against the minority after his dismissal from employment, on the basis that he failed to carry out his duties and he had been aggressive at board meetings. The majority shareholders sought to argue that their legitimate expectations that they would have contributed to the management was defeated by the minority conduct. The Court of Appeal held the actions of the majority had put an end both to their legitimate expectations and to the prejudicial conduct of the affairs of the company by the minority. In such circumstances there would be no access to the statutory unfair prejudice remedy. This is an interesting development because the Courts has the discretion to decide who can institute a petition. It expands the category of persons who can institute an action as it is evident that this remedy is not restricted to the minority. In rare cases where there is minority shareholder control, and the affairs of

[648] *Aero Bell Ltd v Fidelity Union Merchant Bank Ltd* [2005] Law Pavilion Electronic Law Report 11339 (CA), the judge agreed with the position of the plaintiff that they had the locus standi to bring an action of unfair prejudicial petition against majority shareholders and directors of the company as former officers, creditors, although they had sold their shares to the 1st defendant bank.
[649] (1999) 2 BCLC171.

the company are being conducted in an illegal or oppressive manner then the majority shareholder could petition for the relief.[650] However, the court is not likely to grant a majority shareholder a remedy under s.311 CAMA 2004 now s.354 CAMA 2020 where the prejudice can be avoided by the exercise of his rights as majority shareholder. This is absent in England and Wales, where the persons who can bring an action is clearly stated with little or no flexibility left for the Courts. In this instance, the position in Nigeria can could arguably be adopted by England and Wales.

UNFAIR PREJUDICIAL PETITION IN ENGLAND AND WALES	UNFAIR PREJUDICAL PETITION IN NIGERIA
1)A Petitioner must satisfy four (4) requirements in s.994 CA 2006 for a petition to stand. Also, the courts give a broad interpretation to these requirements.	1)A petitioner must satisfy two requirements for a petition to succeed, also each requirement is subject to an objective test. This is the same procedure under s.353 CAMA 2020.
2)Judges exercise wide discretionary powers in cases brought before them for determination, such flexibility does not shout out relief for compensation for breach of a service agreement.	2)The broad statutory language of s.311 CAMA 2004 and s.354 CAMMA 2020 makes it difficult for the courts to make a clear-cut decision when an oppressive and unfairly prejudicial act has occurred as a result, some of the cases the strict interpretation of the statutes is applied.
3)S.996 CA 2006 presents a plethora of order the courts may make based on the circumstance of each case.	3)There exists no guideline under s.311 CAMA 2004 and s.353 CAMA 2020 how the courts arrive at its conclusion neither is there a list of orders the courts may grant, it is entirely at the court's discretion.
4)There exists the reasonable expectation which is often applied by the courts despite the	4)Despite the existence of reasonable expectation which can be inferred from the agreement

[650] *Re Ravenheart Service (Holdings) Ltd* (2004) 2 BCLC 3.

existence of written agreements, the courts may infer an unwritten oral contract (gentlemen's) contract which affects the rights of the parties.	between the parties, petitions have been successfully litigated to loss of reasonable expectation is only in closely held corporations.
5)S.996 CA 2006 lists out the category of individuals that can bring an action in court, the list is restrictive as it does not permit anyone outside this list. There is little or no flexibility left for the courts.	6)By virtue of s.310 CAMA 2004 and s.353 CAMA 2020 the courts have the discretion to decide who can bring a petition. This petition is not limited to minority shareholders.

7.3 The Position in England and Wales

Application for unfair prejudice petition by virtue of s.994 CA 2006 as a remedy by the courts in my opinion is not as easy as reading the respective section, the reason being that cases brought before judges for determination are different based on facts and circumstances. From the cases cited it was easy to identify common examples of acts or omissions that may constitute unfair prejudicial conduct such as exclusion from management in circumstances where there is a legitimate expectation of participation[651], diversion of business to another company in which the majority shareholder holds a substantial stake, the award of excessive renumeration by the majority shareholder, to mention a few. The Courts over the years have restricted the extent to which relief is given for unfair prejudice petition. The logic behind this I believe is the availability of alternative remedies such as derivative claim[652] as they encourage litigants to seek other avenues for relief. In England and Wales, a petition for unfair prejudicial petition can constitute a path to institute a derivative claim,[653]due to the flexible and adaptable nature of unfair prejudicial petition under its jurisdiction. In *Clark v Cutland*,[654] the Court of Appeal acknowledged that under s.994 it might be possible for a remedy to give effect to both the petitioner's interests and the

[651] *Braganza v. BP Shipping Ltd* [2015] 1 WLR 166.
[652] Companies Act 2006, S.260
[653] *Re Allied Business and Financial Consultants Ltd, O'Donnell v Shanahan & Others* [2009] EWCA Civ 751, allowed a clamant to seek relief under s.994 where the unfair prejudicial conduct was a breach of managerial duty, a ground normally reserved for a derivative claim.
[654] [2003] EWCA Civ 810.

interests of the company as a whole. To supplement this blurring of the distinction, a recent decision by the Privy Council in *Gamlestaden v Baltic,*[655] took the position that the court has the power to make an order for the payment of damages to the company even when that company is insolvent. As a result, the petitioner will not benefit in his capacity as a shareholder, but rather in his position as the company's creditor, this a remedy provided for under s.996 provides an avenue for a shareholder to obtain a remedy through a statutory derivative claim.[656]

Gray[657] however argues that the scope of the unfair prejudicial petition has become 'unduly wide', because it invests the decision to litigate in the hands of the individual which contradicts the principle of majority rule and no reflective loss principle in *Prudential Assurance*.[658] which precludes the recovery of loss by shareholders where the wrong is done to the company. This is a valid argument the reason being that if no member believes that beginning a derivative claim is worthwhile, it likely means that no one believes it would promote the success of the company (s.172 CA 2006) and the action would fail under s.263(2)(a) CA 2006 at the permission stage. It seems contrary to the principles in *Foss v Harbottle* that the minority shareholder should be able to circumvent his requirement and achieve the same affect under a broad s.994 interpretation. However, the flexibility of s.994 CA 2006 have been witnessed in instances where the court granted relief to the petitioner who sought personal and corporate relief.[659] This makes it an attractive remedy to a petitioner. However, it would be difficult for the courts to develop a general principle which would enable judges to connect cases into a coherent doctrine or predict how future cases would be decided. Whilst there is no perfect system of minority protection in England and Wales, the principal remedy is s.994 of the Companies Act 2006 with minority shareholders stake being bought out from the company at a fair value[660] as an exit strategy. The impact

[655] [2007] UKPC 26.

[657] Gray, A.M '*The Statutory Derivative Claim: An outmoded superfluous*? *Company Law* 2012, 33 (10) , pp. 296, 299.
[658] [1982] 1Ch 204.
[659] *Bhullar v Bhullar* [2004] 2BCLC 241.
[660] *Thomas v Dawson* 2015 EWCA 706. Also, in *Davies v Lynch-Smith and Others* {2018] EWHC 2336, notwithstanding the judge ruling that Mr. Davies exclusion from management was justified, he was granted permission to sell his shares at a fair price.

of s.994 reveals a potent remedy in minority shareholder protection in England and Wales. The effect of this remedy in my opinion makes a minority shareholder not restricted to his or her legal rights but extends to legitimate expectations[661] arising from the nature of the company for instance quasi partnership[662] and shareholders agreements[663] between the contracting parties, coupled with the exercise of wide discretionary by the Courts.

7.4 The Nigerian Position

The oppression remedy is one of the broadest remedies available to minority shareholders under the Nigerian corporate law system. With the inclusion of the words 'unfair prejudice', 'disregard' and 'discriminatory' in its provisions, it ensures that minority shareholders can bring a petition at the slightest violation of their legal rights or interests. Unlike derivative action, this provision does not set out prerequisites to be fulfilled before instituting a petition before the court. In the adjudication of cases brought before judges for determination, the Courts are empowered to make a wide range of orders, including an order restraining a corporation from engaging in specific conduct or requiring that a corporation does a specific thing in order to remedy a wrong done to the minority shareholders in the company. However, there are no set out guidelines that can help applicants determine how the court will arrive at its conclusion or what specific orders the court will deem fit in any individual case and thus this remedy is to a large extent entirely within the discretion of the court. In the recent case of *Eko Corps Plc v Geoff Ohen Ltd*,[664] which illustrates the current position of the courts in matters of unfair prejudice, the Federal High Court has declared the attempted takeover of Eko hospital by Geoff Ohen Ltd through the alleged acquisition of over 30 percent shares of the company without due process unlawful and illegal (the respondent failed to disclose their shareholding standing Eko Corp, when the board discussed the issue of private placement). The judge held they also failed to obtain shareholders'

661 *O'Neill v Phillip* [1999] 1WLR 1092, legitimate expectation enabled the court to give full effect to the terms and understanding between the parties, which the company was incorporated.
662 *Don King v Warren* [2000] Ch 291 at 40 CA.
663 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, HL, the purpose of a shareholders' agreement is to protect the shareholders' investment in the company, to establish a fair relationship between the shareholders and govern how the company is run.
664 2018 FHC, 24 (unreported).

approval at the AGM before the Securities Exchange Commission (SEC) approval was sought and obtained. Hence, the basis upon which the SEC granted its approval was non-existent and such approval was therefore invalid. This case showed the lapses of the unfair prejudicial petition under the Nigerian jurisdiction. One may suggest legal process and procedures can be adopted from the jurisdiction in England and Wales one of which is the exercise of wide discretionary powers by the courts in the grant of remedy for instance the sale of shares at a fair value as an exit strategy for minority shareholders. Secondly the recognition of the existence of legitimate expectation and more important, the possible expansion of this remedy into a new sphere of human activity depending on the facts of a case.[665] The aspects of the current law of England and Wales which is preferable to Nigeria in relation to the institution of unfair prejudice petition is the existence of shareholders expectations and the understanding that it cannot be found in the company constitution or other contractual documentation.[666]

This is evident in the wide discretion exercised by the courts in *Dinglis v Dinglis*[667] where it rejected the petitioner's argument that the company was a quasi-partnership and found there was no relevant understanding that the petitioner and his sister would remain directors of the company. However, liability was established that following the petitioner's exclusion from management there had been breach of duty by the defendant. A share purchase at a discount was ordered on that basis, which is not a common feature under the Nigerian jurisdiction, to bridge the gap between majority rule and minority protection, the adoption of exit strategy would be imperative, to grant minority shareholders a lifeline. To add to this confusion derivative action and unfair prejudice petition are viewed as separate remedies independent of each other, hence there is no nexus between them. There exists the need for the consideration that both remedies have the aim in the protection of individual and corporate rights as a result a connection.

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[665] *Fulham Football Club v Richards* (2012) (Ch) 33, The Court of Appeal confirmed that there was no reason of public policy why arbitration clauses should not bind claims for unfair prejudicial petition.
[666] Cheffins B R, Company Law: *Theory, Structure and Operation* (Oxford: Clarendon Press, 1997) at 464.
[667] [2019] EWHC 664 (CH).

Chapter 8 the concluding chapter to this thesis, provides a summary of findings relating to minority shareholder protection in England and Wales and Nigeria and addresses the core question whether derivative claim/action and or unfair prejudicial petition is the appropriate forms of action by the company or the minority shareholder against the breach of duties by the majority.

The researcher suggests a legal reform by enacting/amending relevant sections under the CAMA 2004 to match the flexibility of the CA 2006. Another option considered is the adoption of a partial legal transplant of process and procedures under the CA 2006 into the CAMA 2020 in Nigeria to bridge the gap in the protection and enforcement of minority shareholders rights. Finally, recommendations are made for further research on the subject by building on the premise laid by this thesis.

CHAPTER 8: CONCLUSION

8.0 Introduction

The objective of this thesis was to assess by means of comparative analysis, whether derivative claim and action and/or unfair prejudicial petition is/are effective in the protection of minority shareholders' interests against breach(es) of duties by the majority. The pursuit of this enquiry demonstrated and determined the extent of minority shareholder protection in the two jurisdictions: England and Wales, and Nigeria.The outcome of the comparative analysis has revealed that although derivative claim/action and unfair prejudice petition have a similar function, which is to protect minority shareholders interest and advance the course of justice, their effectiveness in practice is not the same in both jurisdictions. In other words, a minority shareholder in England and Wales enjoys greater protection against a breach of legally recognised rights, coupled with a greater chance of success in instituting a suit in Court, than they do in Nigeria. However, as between derivative clam/action and unfair prejudicial petition considered, the latter is a potent remedy owing to the flexibility in its application to the facts of a particular case, coupled with the wide discretion exercised by the judges and the availability of an exit strategy.[668].

This finding led to my recommendation that for Nigeria to achieve an effective minority shareholder protection regime it is vital that a legal reform should be undertaken by amendments of process and procedures in the application of the remedies of derivative action and unfair prejudicial petition. These reforms would position the provisions in CAMA 2020 in line with developments in the CA 2006 in England and Wales. The desirability of unfair prejudicial petition in England and Wales is attributed to its flexibility and its expanding category of unfairly prejudicial conduct under s.994 of the CA 2006 for instance, in the context of sporting activities,[669] an area which is unknown under the Nigerian jurisdiction.

[668] *Sethi v Patel* [2010] EWHC 1830, the court held a buyout price must be fair in addition, other factors that should be taken into consideration includes the reduction in value of the business as a result of the unfair prejudicial conduct of the respondent.
[669] *VB Football Assets v Blackpool Football Club* [2017] EWHC 2767 (Ch)

Most importantly, there exists a connection between unfair prejudice petition and derivative claims in England and Wales,[670] as either remedy may be adopted by a litigant in a suit, this is enabled by the exercise of wide discretion by judges in cases brought before them for determination.[671]

Derivative claims are broadly conceived under s.260 of the CA 2006, which expands the criteria for bringing such a claim by including a cause of action in respect of 'an actual or proposed act or omission involving negligence, default, breach of duty, breach of trust by a director of a company'. The above examples may provide a useful template for a reform of the corresponding aspects of the Nigerian law by the amendments of key provisions for the Nigerian statutes to match the flexibility of the statutes in England and Wales.

Another option is a partial legal transplant[672]of process and procedures from England and Wales to reinforce gaps in the existing CAMA 2020. However, doing so is very contentious and a hotly contested area of legal reform. Nigeria could adopt laws from England and Wales with relative ease, the reason being that both legal systems have a common origin, the common law system which is still in operation in both jurisdictions. Secondly, Nigeria is a former colony of the British empire and a member of the Commonwealth of nations: as a result, the majority of its laws were modelled from the United Kingdom as a statute of general application.[673] Presently the pre-1900 English statutes of general application in force within the Nigerian legal system have diminished considerably over the years for a variety of reason, one of which is the focus on enacting law that is suited for Nigeria.

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[670] *Cooke v Cooke* [1997] 2 BCLC 28, the Petitioner was granted leave to join an unfair prejudicial petition to a derivative claim, since the petition was based on allegations of breach of duty and unfairness on the part of the majority.

[671] *Thomas v Davis* [2015] EWCA 706, The case highlights the wide discretion conferred on the courts while ordering relief under s.994. the company. In a turn of events, the court granted the petitioner an option to purchase the majority shares at a fixed price also be permitted to continue to have conduct with the management of the company. This was a surprise move because more often the judges usually permit the majority shareholder(s) to purchase the shares of the minority at a fair value.

[672] Ogbonnaya, J and Iteshi, C: The Jurisprudential Issues Arising from Legal Transplant: An Appraisal. Journal of Law, Policy and Globalization Vol.50, 2016. Legal transplant has literally been interpreted to be the acceptance of law of a different society or race by another, which may be either by imposition or voluntary.

[673] The History and development of Nigerian Corporate Law is broadly categorized in three stages namely, before 1876, 1876 to 1912, and 1912 to present, from 1861 when Lagos colony was ceded by the British empire there was no local laws governing companies operating in Nigeria. English common laws and doctrines of equity were applicable to the extent they were deemed applicable to Nigeria.

Further, both countries share bilateral economic and investment treaties.[674] In adopting a partial legal transplant in Nigeria, the Nigeria legal system can benefit from England and Wales for instance, in situations when a shareholder can make a claim for unfair prejudice. s.994 CA 2006 provides a list of instances where a claim of unfair prejudice will be allowed, this gives the judges a guideline of what is tenable. Most importantly it refers to a breach of Articles of Association or a shareholder's agreement, introducing such provisions into CAMA 2020 will give minority shareholders clear support in the event of breach of their legal rights, it would enable them to enforce their shareholders' agreement(s). Likewise, majority shareholders could protect themselves from a costly unfair prejudice claim being brought against them if everything was clearly laid out in an agreement.

Secondly, in England and Wales, if the Court agrees with the unfair prejudice claim, it can grant a remedy to address the misconduct under s.996 CA 2006. The Court decides on the type of unfair prejudice remedy to order on a case-by-case basis. This is absent under the CAMA 2020, the adoption of this approach would enable a litigant to plead his or her case with the remedy needed based on the circumstance of the breach. However, this would streamline what the judges could grant because currently the remedies ordered by the Courts in Nigeria are based on the discretion of the judges. Having this subsection will make judgements easier.

Finally, the most common unfair prejudice in England and Wales is where the Court orders the defendant to purchase the claimant's shares at a fair value and by a particular date. Typically, the courts would order that the shares be valued at the date when the unfair prejudice began. The adoption and use of this remedy by the Nigerian Courts would prevent the devaluation of the claimant shares.

However, in the process of adopting a partial legal transplant, among the challenges to be encountered in the Nigerian jurisdiction regarding reform of the legal framework are: i) the prevalence of bias in the

[674]https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-reaties/2692/nigeria---united-kingdom-bit-1990-

judicial system, which is a major obstacle hindering the fight against corruption in the country;[675] Also, ii) political context, with government interference in judgment by the Courts; iii) coupled with delays in delivering judgments and iv) inconsistent adherence to court procedures. All of which, as a result whittle down the potential efficacy of a partial legal transplant.

8.1- Summary of Research Findings - Chapters 6 and 7 set out a comparative analysis of derivative claim/action and unfair prejudicial petition under the two jurisdictions. From this analysis the researcher was able to highlight the flaws in the legislative provisions and judicial interpretation by the courts in both jurisdictions. As a result, it was concluded that under the Nigerian jurisdiction the rigid interpretation of CAMA 2004 now CAMA 2020 by the courts in cases brought before the judges for determination can hinder the corporate governance structure from providing adequate protection to minority shareholders in a company. On the other hand, England and Wales presented a blueprint for good corporate governance. The findings of the comparative analysis are discussed below with particular focus on the enforcement weaknesses and systematic inefficiencies that could affect minority shareholders' protection under the Nigerian corporate law regime. This presents a credible argument in favour of legal reform which is the process of examining existing law and advocating and implementing change in a legal system. The mode of law reform to be adopted can be the repeal of the current law by amendments to modernise the law by bringing it into accord with current conditions, elimination of defects in the law, the simplification of the law, and the adoption of new or more effective methods for the administration of the law and the dispensation of justice. Alternatively, the adoption of a partial legal transplant which is the transfer of rules, principles and legal concepts from one or more than one legal system to another legal system[676]

[675] Abdulrauf Salihu, H and Gholami, H '*Corruption in the Nigeria Judicial System*: An Overview journal of financial crime Vol 25, issue 3 2018.
[676] https://en.wikipedia.org/wiki/Legal_transplant accessed on 15/09/2021

8.1.1 Derivative Claim/Action in England & Wales and Nigeria.

Derivative claim is provided for under s.260 of the Companies Act 2006 in England and Wales and s.303 CAMA 2004 now s.346 CAMA 2020. They have similar provisions that provide for the protection of recognised legal rights. Comparative analysis reveals there are significant differences which are to be found in the judicial approach to statutory interpretation and patterns of enforcement. Principally, s.260(3) CA 2006 in England and Wales, highlights the categories of person authorized to institute a derivative claim. It authorizes only members of a company: this includes a person who is not a member but to whom shares have been transferred or transmitted by operation of law by virtue of s.260(5) CA 2006. Although there is no prohibition in the CA 2006 on a majority shareholder bringing a derivative claim, this would likely be dismissed.[677]

On the other hand, s.309 CAMA 2004 now s.352 CAMA 2020 in Nigeria highlights the class of individuals authorized to institute a derivative action. It includes a director, former director or an officer of the company, a registered owner, beneficial owner or former registered owner of a security in a company, the corporate affairs commission or any person who in the discretion of the court is a proper person to make an application. This is contrary to the position in England and Wales which prevents interested third parties from bringing a claim. The reason is to give priority to individuals who have the *locus standi* to institute a claim, most importantly prevent frivolous claims.

However, despite s.309 CAMA 2004 now s.352 CAMA 2020 authorising a wide range of individuals to bring an action in practice this is not the case.[678] As a result, the regulation in the statute is different from practice. On a literal interpretation the Nigerian jurisdiction is generous on the category of individuals that can bring an action, it appears that the intention of the legislature is to allow a broader

[677] *Cinematic Finance Ltd v Ryder and Others* [2010] EWHC 3387 (Ch), the High Court held only in exceptional circumstances will it be appropriate to permit a derivative claim brought by a shareholder in control of a company. The court found it difficult to envisage what those exceptional circumstances might be.

[678] *Chief Akintola Williams and Ors v Edu* (2002) Pt. 754, Pg.400. Here, the Court of Appeal held that a non-member of a company cannot institute a derivative action, despite the provisions that allows anybody at the discretion of the courts. Also, in *Schafer v International Capital Corporation* (1997) 4 WWR 99, the court refused former directors' permission to institute an action, because they lack sufficient interest in the outcome of the action, when the Act expressly permit such individual to bring the action.

number of persons not expressly mentioned under the section subject to the discretion of the Courts, this can act as a model for England and Wales to adopt. However, the downside in the Nigerian model is the Courts are unwilling to exercise this discretion. This position was confirmed by the Supreme Court in *Adenuga v Odumeru*[679] where it held that even though the plaintiff were financial contributors of the body corporate and were instituting an action against the defendants on behalf of the council, the decision-making body of the association, they did not have the *locus standi* to institute such an action. The Court emphasized the sufficient interest rule.[680] This extraneous condition adopted by the Courts is quite restrictive and an attempt to frustrate the intentions of the legislature which is clearly to accommodate the persons specified in the section to seek redress on behalf of the company.

Secondly, s.262 CA 2006 provides that a derivative claim may be commenced in a summary manner. It leaves the discretion to the individual seeking the remedy to proceed by way of action. Most importantly, the courts have declared that they will not set aside the originating process on the ground of wrong mode of commencement. In contrast the position in Nigeria is that by virtue of Rule 2 (1)(2) of the Companies Proceedings 1992 all applications, including the derivative action must be brought by originating summons. The Courts have rejected applications not brought in this form.[681] The strict interpretation of the statutes by the Nigerian courts has its advantages as it serves as a safeguard to enable intending litigants to bring the right action by the correct process before they come before the courts for a determination of the suit. On the other hand, it serves as an obstacle to genuinely instituted actions by individuals who have *locus standi*, merely by a technicality. This is a bar to the realisation of recognised rights. In contrast, the adoption of the model in England and Wales would provide more avenues for individuals to institute an action on behalf of the company, coupled with the exercise of discretion by the judges, which serves as check and balance on the number of suits that would be granted leave. However, in the absence of legislative amendment, the court should adopt a more flexible

[679] (2002) FNWDR, 821, Pg.163.
[680] Supra N446, Pg.104.
[681] *Udene v Ugwu* [1997] 3 NWLR Pt.491, Pg.57. Also, the case of *Braithwaite v Skye Bank Plc* (2013) 5NWLR Pt 1346, 1 at 15 paras C-E is indicative of the current position of the courts. The court held failure to commence a suit with the right writ, goes to the root of the action. The suit is not instituted by due process is incompetent and ought to be struck out.

approach such that where the non-compliance is one that relates to the form and not substance of the application, then the courts should apply the principles of equity and not outrightly declare it a nullity.

Thirdly, s.261(1) of the CA 2006 sets out a two-stage court procedure for instituting a derivative claim: it requires a claimant who wishes to bring a derivative claim to issue a claim form to the court for permission to continue. No further steps in proceedings can then be taken without the permission of the court, and the court must dismiss the application if the evidence disclosed does not establish a prima facie case. Also, the court must consider the factors set out in s.263 CA 2006, some of which require the court to refuse permission if not satisfied that there exists a *prima facie* case.

However, s.301 CAMA 2004 now s.344 CAMA 2020, sets out four pre-requisites an applicant must satisfy before a leave to commence a derivative action can be granted by the court. In addition, the applicant is required to show that the wrongdoers are the directors who are in control and will not take the necessary steps to sue. In order to protect the interest of the company and shareholders while avoiding unreasonable interference with the management of the company, the law allows stakeholders to initiate derivative action against the directors, or any wrongdoer provided those shareholders have fulfilled all statutory requirements. Hence, the courts have no discretion to refuse an action if it satisfies all requirements.

Even though this remedy plays a fundamental role in protecting shareholders rights and interests, this remedy is not available in every circumstance. As a result, a minority shareholder may be left without a remedy, and the courts are not in the habit of recommending or unilaterally taking a decision on an alternative remedy, the reason being that derivative action and unfair prejudicial petition are regarded as independent of one another, but this is position is different in England and Wales. Under s.260 of the CA 2006 the courts have the option to apply s.994 CA 2006.

By virtue of s.303-309 CAMA 2004 now s.346-352 CAMA 2020 clearly sets out the circumstance under which the remedy will be available and the procedural requirement that a shareholder will need to comply with before instituting a derivative action for instance: leave, notice and good faith.

S.303(2)(b) CAMA 2004 and s.346(2)(b) CAMA 2020.this section requires the applicant to show that he has given reasonable notice to the directors of his intention to file an application for a derivative action on behalf of the company. Unfortunately, the statute does not define the term 'reasonable notice' nor does it give the specification as to the number of days that constitutes reasonable notice. The term is imprecise, there is more confusion as there exist no provision which provides for an exception to the pre-action notice.[682] The position in England and Wales depicts clarity and certainty of the law, a claimant must provide sufficient evidence before the courts before his or her claim can be granted as a result the outcome of the claim is at the discretion of the courts. In contrast the Nigeria provision can be used as a tool by the directors to delay such derivative action on the ground that the company is not ready to act and will require more time since there is no specific time stipulated in CAMA 2004.

The specific content of the notice is not set out, but such notice should contain sufficient details to enable directors to ascertain the specific action to remedy. Where directors act by filing the action on behalf of the company, a derivative action will not be necessary. However, this is usually not the case where the directors are wrongdoers in control which is a condition precedent in bringing the action. The requirement for notice is unnecessary, it creates an opportunity for directors to organize their affairs or cover up their wrongdoing. It is arguable that removing this provision may go against the principle of fairness bearing in mind that the CAMA 2004 and 2020 ordinarily empowers directors to authorize bringing an action on behalf of the company and proceeding to do so without informing the directors may violate their statutory powers.

Finally, the requirement of good faith in instituting a derivative action/claim is provided in both jurisdictions under s.263(3)(a) CA 2006 and s.303(c) CAMA 2004 now s.346(e) CAMA 2020 In practice the applicant must show the application was instituted in good faith. The proof of good faith is essential in order to discourage personal vendettas and vexatious actions. Apart from the normal practice of merely declaring that the application was instituted in good faith, the only way to prove good faith is to simply prove that the application is meritorious and supportable. The disadvantages of this

[682] Supra N448, Pg.105.

condition are it is difficult to prove as a result there are no recent cases on this requirement. In a derivative claim/action the right of action belongs to the company, and where the directors have decided not to act, any action by an individual is likely to be viewed as personal and malicious. The effect is detrimental to the company as it allows the courts to shut down meritorious application on the assertion that it was not instituted in good faith.

8.1.2 Recommendations for the Nigerian Derivative Action

Party to institute a Derivative Action: The Companies and Allied Matters Act 2020[683], permits shareholders of a corporation to institute a derivative action on behalf of the subsidiary of the corporation by virtue of s.346 CAMA 2020. As a result, a shareholder can remedy any wrong done to a subsidiary of the corporation. The courts should exercise the discretion of interpreting the letters of the statutes in their ordinary meaning which would enable proper person as described in the statutes for instance, former directors and shareholders who has sufficient interest to institute an action. It is worthy of note that on the 7th of August 2020 President Muhammadu Buhari assented CAMA 2020[684] which repealed and replaced CAMA 2004 by virtue of s.869 CAMA 2020[685].

The CAMA 2020 provides a robust framework for reforming legal, regulatory and administrative bottlenecks which for the past 30 years have doing business difficult particularly for micro, small and medium enterprises (MSMEs) and impeded investments in Nigeria for instance: mergers, acquisitions and business combinations, general company operations, shareholders/board meetings and company secretarial matters. A careful reading alongside the corresponding sections of CAMA 2004 reveals that although both sets of provisions are identical in many respects, CAMA 2020 has also introduced a number of changes matters pertaining to the legal protection of minority shareholders.[686] However, provision is made under s.184(1) CAMA 2020 provides for 'shares buyback' whereby a limited liability

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683 On the 15th of May 2018 the Nigerian House of Senate passed the bill, the amendment seeks to promote financial stability and to reduce the time and cost of setting up companies in Nigeria.

684 Supra N36, Pg.16.

685 https://www.nipc.gov.ng/2020/08/08/president-buhari-signs-amended-companies-and-allied-matters-bill/ accessed on 1/09/2020.

686 https://www.banwo-ighodalo.com/grey-matter/companies-and-allied-matters-act-2020-reforming-provisions-that-impact-the-nigerian-business-community-1 accessed on 8/07/2021.

company may now buy back their own shares from its shareholders or security holders in a manner permitted pursuant to a scheme of arrangement sanctioned by the Court in relation to its shareholder either in the open market, or from employees of the company who hold shares pursuant to an employee share scheme. This is like the buy-out remedy in England and Wales which is a welcomed development.[687]

Mode of Commencement of Derivative Action: The Nigerian Companies Proceeding Rules 1992 should be amended to enable the applicant to decide the mode of instituting an action, as far as the conditions precedent for a derivative action required under the CAMA 2004 is fulfilled. The word "shall" used under Rule 2 (1) of the Nigerian Companies Proceedings Rules should be amended to read 'may" to imply that the applicant has the discretion to bring an application for a derivative action in any other mode. This would send a message to the courts that the intention of the legislators is to eradicate such unreasonable adherence to technicality. This would enable the courts adopt a flexible approach in line with the position in England and Wales in interpreting the provisions of the Companies Proceedings Rules However in the absence of such amendment, the Nigerian courts should overlook the technicality so long as the non-compliance relates to form and not the substance of the application.

Notice to Directors: The CAMA 2004 did not specify whether the application for leave to bring the derivative action should be made *ex-parte* or on notice. It is suggested that the Nigerian legislature adopt the provision relating to the notice to directors in the CA 2006 in England and Wales, by setting a specific notice period. Also, it should also set out provisions permitting the court to exercise its discretion in matters of urgency when irreparable damage may be done to the interests of the corporation if no action is taken before the mandatory notice period to directors required under the law. In addition, a method should be put in place that would require shareholders the ability to nominate an individual who would serve as lead plaintiff. This may help prevent unnecessary and frivolous actions.

[687] https://www.harlemsolicitors.com/2020/08/30/companies-and-allied-matters-act-cama-2020-an-overview-of-notable-innovations/ accessed on 8/07/2021.

Conditions Precedent to Bringing Derivative Actions: It is recommended that s.203(2) CAMA 2004 which requires the applicant to show that the wrongdoers are the directors, who are in control and will not take the necessary steps should be removed from the provisions under the statute. The reason is that it clearly connotes that the directors are the only proper defendants in a derivative action. It is important for this provision to be removed so as not to create further restriction on shareholders who intend to institute a derivative action on behalf of the corporation. Section 260(3) CA 2006 should be adopted, there is no requirement to prove fraud on the minority, company or the wrongdoers are in control, so in situations where the directors have acted in good faith and have not gained any profit personally, the action can still be made.

Good Faith: The requirement of good faith to institute an action under s.303 CAMA 2004 now s.346 CAMA 2020 should be withdrawn because in the event of fraud by the directors they would be reluctant to act against themselves as a result, the good faith of the shareholder ought not to be of any material importance but the immediate concern of the court to address the situation.

Interrelation between Derivative action and Unfair Prejudicial Petition: In situations where a derivative action has been instituted by a shareholder, he or she should be given leave to join an unfair prejudice petition to the derivative action, a procedure like what is applicable in England and Wales under s.260(2)(b) CA 2006. [688] For instance, in *Cooke v Cooke,*[689] a derivative claim was stayed on the basis that the unfair prejudice petition would allow the court to decide the dispute between the parties. This was held to be a convenient approach because the petition was based on allegation of breach of duty by the majority as well as allegations of unfairness. This flexible procedure should be adopted from England and Wales. An applicant can also institute a subsequent application in a suit, if he or she believes it will be important to the case or the circumstances suggest. Adopting this process and

[688] Section 262 and 265 establish that a derivative action may only be brought through the procedure set out in Part 2 of the Companies Act 2006 or by way of a court order made as a remedy after a successful unfair prejudice petition has been brought.
[689] [1997] 2 BCLC 28.

procedure in Nigeria will ensure that applications will not be dismissed for a mere technicality of wrong suit.

8.2 Unfair Prejudicial Petition in England & Wales and Nigeria

Unfair prejudicial petition is set out in s.994 CA 2006 in England and Wales and s.310-312 CAMA 2004 now s.353-355 CAMA 2020 in Nigeria. Both provisions are very similar, but some differences exist. Section 994 of the CA 2006 permits a minority shareholder oppressed by the majority to bring an action to obtain redress. However, s.310 CAMA 2004 now s.353 CAMA 2020 provides a list of individuals entitled to file a petition in court for relief on the ground that the affairs are conducted in an illegal, oppressive or unfairly prejudicial manner that is unfairly discriminatory to them. This includes: a member, director, former director, officer, creditor, the Corporate Affairs Commission, any other person who in the discretion of the court is the proper person to make an application. This section is flexible which makes it possible for an individual to bring an action to protect his rights or that of a minority shareholder. The position in England and Wales is restricted. The possibility of a majority shareholder instituting a petition against other majority shareholders on the ground that their act is unfairly prejudicial to the interest of minority shareholders is rare. However, in the interest of fairness and justice it might suffice that a majority shareholder should have the moral obligation to institute a petition not just to protect the interest of the minority but his or her own if it is at risk. In this instance, England and Wales can adopt this process from their Nigerian counterpart.

Secondly, in determining what constitutes unfair prejudice the Courts in England and Wales have held that the test is objective not subjective.[690] It is necessary to show that the majority shareholder(s) acted in the knowledge that their conduct would prejudice the petitioner. The question is whether a reasonable man would regard the conduct as having unfairly prejudiced the minority interests. The CAMA 2004 nor the CAMA 2020 in Nigeria does not define or provide guidance on what constitutes an oppressive

[690] *Saul D Harrison and Sons, Re* [1995] 1 BCLC 14.

or unfairly prejudicial conduct[691] or an act that will disregard the interests of a minority shareholder. Section 311(2) CAMA 2004 now s.354(2) CAMA 2020 permits an applicant to institute an action for a proposed act or omission that would be oppressive, unfairly prejudicial or discriminatory against the applicant. This uncertainty may operate to discourage minority shareholders to invoke this right which eventually decreases the likelihood that dominant shareholders and directors would respect minority shareholders rights.[692]

Finally, in determining whether an oppression remedy will be granted, the Court in England and Wales have adopted the reasonable expectation test.[693] The application of the test offers broad protection to shareholders, such that clear bargains and even expectations of parties do not present in the legal documents can be enforced by the Courts on the basis that the complainant reasonably expected fair treatment. unfortunately, the reasonable expectation test is not applied in deciding oppression remedy cases in Nigerian Courts.

8.2.1 Recommendation for the Nigerian Unfair Prejudicial Petition Remedy

Reasonable Expectation Test: Another area of focus is the uncertainty of the test for liability under the oppression remedy. It is recommended that the courts adopt the "reasonable expectations" test adopted by the courts in England and Wales, this will provide some level of clarity and certainty. The application of this criteria will enable all stakeholders in a company understand that certain acts will not amount to oppression, unfair prejudice or unfair disregard of minority shareholders' interests.

A clear definition of Unfair Prejudice and Oppressive Conduct: This can be achieved by legislative reform or clear guidelines formulated by the courts will address this problem. However, legislative

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[691] *Ijale properties Ltd v Omololu-Mulele* [2000] FWLR Pt.5, Pg.709 the basis upon which the court decided that s.311 applies was not clearly stated, neither was there any analysis as to the factors the courts should look out for in deciding whether such act is oppressive, unfairly prejudicial or unfairly disregards the rights of the shareholder.

[692] Aduma O.C & Ibekwe C.S *"Protection of Minority Shareholders under Nigerian Company Law"* (2019) 8:2 Nnamdi Azikiwe University Journal of International Law and Jurisprudence [Aduma] at 93.

[693] *O'Neill v Phillip* [1999] 1WLR 1092.

reform setting out instructions to guide the courts may still not capture every circumstance especially in view of the broad definition of corporate misconduct. However, guidelines established by the courts may be revised upon reviewing the facts of each case as the need arises.

8.3 Practical Enforcement Obstacles Under the Nigerian jurisdiction

The result of the comparative analysis of the remedy of derivative action and unfair prejudice petition revealed minority shareholders enjoy less protection in Nigeria than in England and Wales. This is attributed to factors that impede the protection afforded to minority shareholders. This paragraph will identify the pattern of enforcement in Nigeria, particularly highlighting enforcement errors, juridical approaches to statutory interpretation, court procedures and professional norms among lawyers that could impede effective enforcement. These enforcement patterns reflect the attitudes and approaches that the courts adopt in interpreting the provisions of the statutes, delays in delivering judgments, and different court procedures, to mention a few.

According to La Porta et al,[694] the importance of an effective judiciary cannot be emphasized enough in adequately protecting shareholders. In other words, besides ensuring the Nigerian statutory provision for the protection of minority shareholders' is adequate, there is the need for an effective judiciary in place to enforce the statutory provisions. However, the effectiveness of the judicial system has been questioned in recent times especially considering the delay in judicial proceedings caused by unnecessary adjournments orchestrated by the lawyers and even judges, in some instances, the judges are overburdened with cases they are required to hear weekly, thereby making them adjourn when they feel overstretched. This is because the registrar may have fixed too many cases on a particular day without informing the judge simply because the registrar cannot turn down applications of lawyers who

[694] La Porta R et al, *"Law and Finance"* (1998) 106:6 Journal of Political Economy 1113 at 1142.

will prefer a particular date, which will not be convenient for the court.[695] Lawyers are not exempt, they often pressurise the registrars of courts or even offer bribes in order to get a certain date which may not be convenient for the court. Consequently, the judges have no option other than to adjourn when there are too many cases to be heard on a day that is inconvenient for the court. Delay is caused primarily by the legal practitioner who may purposely request for adjournments where he is unprepared or believes his case is not likely to come out positively. In such cases, he may feel the need to keep requesting for such adjournments and if granted by the courts, these adjournments may frustrate the other party and perhaps even lead the other party to drop the suit.[696] Even though this is against the Nigerian rules of professional conduct for lawyers, a considerable number of legal practitioners have continued these practices thereby causing unnecessary delays in proceedings, probably because there are not obvious consequences for these actions.[697] Judges are not left out as evidence shows that they contribute to the delay in administering justice by taking bribe.[698]

In Nigeria, statistics have shown that the average period to begin and conclude litigation is about six to ten years.[699] Recent figures also show that the beginning of the 2018/2019 legal year, 191,766 cases were still pending at the Federal High Court (the Court bestowed with the jurisdiction to handle company matters)[700] across its various divisions in Nigeria.[701] These statistics could be very discouraging to a minority shareholder who is seeking a remedy, who may have fears of spending several years in court while also incurring significant legal costs. At the margins, prospective investors

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695 Agbonika J and Alewo M *"Delay in the Administration of Criminal Justice in Nigeria*: Issues from a Nigerian Viewpoint"(2014) 26 Journal of Law, Policy and Globalization 130 at 131.

696 *Ibid.*

697 https://www.pulse.ng/news/local/judicial-corruption-judge-sends-senior-nigerian-lawyer-to-jail-for-bribery/0dle115 accessed on 3/1/2022.

698 https://www.pulse.ng/news/local/judges-arrest-7-justices-in-dss-custody/q82b4kg accessed on 3/1/2022.

699 For instance, in the case of *Ariori v. Muraimo Elemo* (1983) 1 SC 13, proceedings commenced in October 1960 and took 23 years to reach the Supreme Court of Nigeria.

700 Constitution of the Federal Republic of Nigeria 1999, s.251

701 Statistics available at https://punchng.com/judiciary-still-in-search-of-solution-to-delayed-justice/ on 14/06/2020.

conducting due diligence on the Nigerian legal system before investing may be put off by the estimated timeline for obtaining a remedy if a breach has occurred. Conversely, if litigation processes were known to be timely and efficient, the threat of effective enforcement of minority shareholders' rights could deter corporate management and other stakeholders from abusing minority shareholders' rights, especially where such parties may predict that the court will speedily protect the minority shareholders' rights.[702]

Although the legislative provisions relating to the derivative claim/action and unfair prejudice petition under the CA 2006 and CAMA 2004 are very similar, the above factors may be responsible for the different outcomes in the protection of minority shareholders in Nigeria. However, there is the hope the Courts would consider granting adjournments sparingly especially where such adjournments are simply used as a delay-tactic by the defendants. Furthermore, it is important that policymakers make conscious efforts to reduce the delays in the attainment of the minority shareholders' remedies by setting specific timelines within which the courts should decide remedy related cases. The fact that a case of derivative action could last between 2 to 3 years before being decided does not speak well of the Nigerian legal system and makes a mockery of the legislative commitment to ensure the protection of minority shareholders through the statutes.

8.4 Effectiveness of s.260 and 994 of the Companies Act 2006 in England and Wales vis a vis the position under s.303 and 310 of the CAMA 2004 now S.346 and 353 CAMA 2020 under the Nigerian jurisdiction

In England and Wales, the recent cases of *Dinglis v Dinglis*[703] and *Tonstate Group Ltd and Ors v Edward Wojakovski*[704] reaffirmed the position of the law surrounding a shareholder's ability to institute

[702] Yahaya Abdulkarim, *"Socio-Economic Effects of Judicial Corruption in Nigeria"* (2012) 1:1International Journal of Humanities and Social Sciences Invention 31 at 34.

[703] [2019] EWHC 1664 (Ch)
[704] [2019] EWHC 857 (Ch)

a claim and a prejudicial petition. They mostly involve family run companies, providing cautionary tales for family members who choose not to formalise matters sufficiently. In practice, courts impose restrictions on matters considered to be within company member's interests on a case-by-case basis. Members of large public companies are likely to have their interests limited to the running of the company in accordance with the articles of association. However, if a quasi-partnership exists as pointed out in *Ebrahimi v Westbourne Galleries*[705] by *Lord Wilberforce* a court may decide to include within the ambit of unfair prejudicial petition conduct acts and omissions that are contrary to the parties' relationship and informal agreements.

The combined effect of s.260 and 994 CA 2006 on the Nigerian jurisdiction would have the practical purpose of avoiding a multiplicity of proceedings as it effectively bypasses a time consuming and expensive mini trial at the permission stage. [706] Retaining the court's power to authorise derivative action under unfair prejudice petition would permit courts deal with circumstances where for example, derivative action is required to recompense the unfair prejudicial treatment of the shareholder adequately. Likewise in a situation where a shareholder successfully proves the unfair prejudice and seeks a personal remedy such as a purchase order in addition to a derivative action, it may be wasteful to institute a separate derivative action based on the same facts. Furthermore, the overlap between the two remedies provides an avenue where justice is served to the company as opposed to simply upholding the petitioner's interests. It solves the policy problems arising out of the different threshold tests as both remedies intertwine as a result streamlining the threshold tests which allows the court to examine issues of ratification and authorisation by the company.

Derivative claim under Pt 11 of the CA 2006 in England and Wales effectively empowers the shareholders to bring a claim of negligence.[707] This reinforces the attitude of the legislators in the

[705] [1973] AC 360
[706] Law Commission, Shareholders Remedies (Law Com No246, 1997) para 6.71.
[707] Paul, Sykes, 'The continuing paradox: a critique of minority shareholder and derivative claim under the companies act 2006' (2010).

protection of minority shareholders rights and if this stance is adopted under the Nigerian jurisdiction, a minority shareholder will be in a more advantageous position to get relief in the event of a breach.

8.5 Observations on the Impact of the Companies and Allied Matters Act 2020 on the CAMA 2004 regarding Minority Shareholder Protection in Nigeria

The CAMA 2020 impact on the CAMA 2004 has made intentional efforts to see to the efficient, accountable and transparent management of companies in Nigeria. This can be seen in the areas of directors, secretaries, audit and auditors, meetings and corporate finance. The observations are as follows:

Restriction on the President /CEO position in a Private Company- To strengthen the protection of a company's minority shareholders, s.265(5) CAMA 2020 prohibits private companies from appointing a director to the position of Chairman and Chief Executive Officer.

Significant Control and Substantial Interest- To ensure transparency in corporate governance, the CAMA 2020 has extended the requirement to notify the company in writing of significant control or divestment of shares by virtue of s.190 CAMA 2020. Previously this obligation applied only to public companies. This is no longer the case as shareholders with majority stake in any type of company are now required to make such disclosures. Notably, CAMA 2020 makes no definition of what constitutes significant control. This is critical because both private and public companies are required to disclose significant controlling interests. The term 'significant shareholder' as defined under s.120(2) CAMA 2020, applies to public companies. Regardless, it is reasonable to assume that the same should apply to private businesses. Additionally, CAMA 2020 redefines a shareholder's percentage interest in order to qualify as a substantial shareholder they most hold at least 5% of total voting rights (this contrasts with the 10% requirement imposed by the CAMA 2004)

Disclosure of Members at the Helm of Affairs – By virtue of s.791 CAMA 2020, private, public and limited liability companies must disclose who is at the helm of affairs / in charge of running the company. The CAC maintains a register of such persons which increases accountability and prevent assets shielding.

Despite the good intentions underpinning this provision, the problems that would be encountered in practice are that companies might not provide adequate records of the individuals in charge of the business especially when directors are changed frequently. Also, enforcement might be an issue as there may be no adequate measures put in place to combat breach.

Share Buyback- Section 184 CAMA 2020 provides for shares "buy back" that is it allows a limited liability company to buy back its shares from its shareholders in a manner permitted pursuant to a scheme of arrangement sanctioned by the courts in relation to shareholders or employees who hold shares pursuant to an employee share scheme.

8.6-Summary of Proposed Changes of Derivative Action and Unfair Prejudice Petition under the Nigerian jurisdiction

1. Amendment of the Companies Proceedings Rules 1992 by providing an applicant the correct option on the mode of instituting a derivative action;[708]

2. The pre-requisite for leave to institute a derivative action should be made clear, hence there should be a specified notice period[709]

3. The condition to prove wrongdoers are the directors in control and would not take the necessary steps to rectify the act or omission should be removed as it clearly connotes that only directors are proper

[708] Supra, N548, Pg. 107,138,139.
[709] Supra N450, Pg.106,138.

defendants in a derivative action and creates an obstacle to shareholders who genuinely intends to institute an action on behalf of the company[710]

4. The requirement of good faith should also be withdrawn as it provides an opportunity for directors to refuse to institute an action against themselves in situations where they are the wrongdoers[711]

5. Directors in subsidiaries and affiliates of a mother company in which he or she is a holder of a registered security should be held liable for actions which affects the rights and interest of a shareholder and there should be no bar from prosecution[712]

6. The adoption of the reasonable expectation test by the courts will create an atmosphere of clarity and certainty which eliminates confusion on the acts or omissions that constitutes unfair prejudice[713]

7. Establish clear guidelines by the legislature on the definition of 'unfair prejudice' and 'oppressive conduct'[714]

8. Establish a nexus between derivative action and unfair prejudice petition. This connection ensures the flexibility of each remedy, and most importantly will prevent the dismissal of applications in court by reason of a mere technicality or wrong suit[715]

9. There should be clarity on pre-action notice as to the duration of service of notice, content of such notice and factors that constitute an exemption of such notice[716]

10. A clear definition of 'Significant Control' under s.19 CAMA 2020 must be made and in what circumstances can it be declared.

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[710] Supra N559, Pg.144.
[711] Supra N550, Pg.140.
[712] Supra N441, Pg.103.
[713] Supra N625, Pg.160.
[714] Supra N615, Pg157.
[715] Supra, N649, Pg.167.
[716] Supra N448, Pg.105.

8.7 Summary of Proposed Changes of Derivative Claim and Unfair Prejudicial Petition in England and Wales

1. The expansion of the category of individuals that can institute a derivative action under s.309 CAMA 2004 as it appears that the intention of the legislature was to permit a broader category of persons not expressly mentioned under the section subject to the discretion of the courts. This could act as a model for England and Wales to adopt from the Nigerian jurisdiction.

8.8- Proposed Changes to Shareholders' Agreement in Nigeria

1. It is imperative that every shareholder protects his or her business interests by executing a shareholders' agreement. There arises the need for a less formalized approach to shareholders' agreement structure in Nigeria. As a result, to improve shareholders protection, it is imperative that every shareholder protects his or her business interests by executing a shareholders' agreement. Legislations should be introduced to make such agreements mandatory, in the form of an incorporation document, as a component of a wider shareholder protection regime in Nigeria.

8.9– Potential Application of Research Findings and Suggestions for Further Research

It is proposed that this thesis be used as a foundation for further research in the field of corporate governance under the Nigerian jurisdiction, specifically in relation to minority shareholder protection with emphasis on the remedy of derivative action and unfair prejudicial petition. It could underpin further exploration of enforcement reforms.

Further, this research presents to prospective investors, legal personnel, academics and government agencies responsible for policy making in both jurisdictions, a clearer picture of the fundamental protections available to shareholders, particularly minority shareholders in a company. It reveals the attitudes of the courts in the respective jurisdictions in interpreting statutory provisions protecting the rights and interests of the minority shareholders. This thesis not only provides a comparison of derivative claim/action and unfair prejudicial petition in England and Wales, and Nigeria, it has identified the most effective remedy for minority shareholder protection between the two remedies under review which is unfair prejudicial petition. This finding led to the recommendation that for Nigeria to achieve an effective minority shareholder protection regime it is vital that a legal reform or partial transplant of process and procedures in the application of the remedy to render the statute consistent with developments in England and Wales. In other words, a minority shareholder in England and Wales enjoys greater protection against breaches of legally recognised rights coupled with a greater chance of success in instituting a legal claim in Court than in Nigeria. In addition, it recommends changes that will make the statutes in England and Wales more effective. The introduction of CAMA 2020 has had a positive effect by improving the Nigerian business landscape by increasing the availability of commercial opportunities within the country and beyond international borders. However, the challenges faced in the corporate sector in Nigeria it's the implementation of these provisions. It is hoped that the CAC implementation of the CAMA 2020 will maximize the protection of minority shareholders rights.

Finally, this thesis acts as a blueprint for future revision of legislation in Nigeria by the Houses of Assembly in the coming years and will assist in the process of developing a system that can stimulate significant corporate law reform. In my opinion this thesis will help to advance this journey.

APPENDIX A

RELEVANT SECTIONS OF DERIVATIVE CLAIM AND UNFAIR PREJUDICIAL PETITION RELATING TO MINORITY SHAREHOLDER PROTECTION IN ENGLAND AND WALES UNDER THE COMPANIES ACT 2006.

260 Derivative claims

(1) This Chapter applies to proceedings in England and Wales or Northern Ireland by a member of a company—

(a)in respect of a cause of action vested in the company, and

(b)seeking relief on behalf of the company.

This is referred to in this Chapter as a “derivative claim”.

(2)A derivative claim may only be brought—

(a)under this Chapter, or

(b)in pursuance of an order of the court in proceedings under section 994 (proceedings for protection of members against unfair prejudice).

(3)A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

The cause of action may be against the director or another person (or both).

(4) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

(5) For the purposes of this Chapter—

(a) “director” includes a former director;

(b)a shadow director is treated as a director; and (c)references to a member of a company include a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

261 Application for permission to continue derivative claim

(1)A member of a company who brings a derivative claim under this Chapter must apply to the court for permission (in Northern Ireland, leave) to continue it.

(2) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission (or leave), the court—

(a)must dismiss the application, and

(b)may make any consequential order it considers appropriate.

(3) If the application is not dismissed under subsection (2), the court—

(a)may give directions as to the evidence to be provided by the company, and

(b)may adjourn the proceedings to enable the evidence to be obtained.

(4) On hearing the application, the court may—

(a)give permission (or leave) to continue the claim on such terms as it thinks fit,

(b)refuse permission (or leave) and dismiss the claim, or

(c)adjourn the proceedings on the application and give such directions as it thinks fit.

262 Application for permission to continue claim as a derivative claim

(1)This section applies where—

(a)a company has brought a claim, and

(b)the cause of action on which the claim is based could be pursued as a derivative claim under this Chapter.

(2)A member of the company may apply to the court for permission (in Northern Ireland, leave) to continue the claim as a derivative claim on the ground that—

(a)the manner in which the company commenced or continued the claim amounts to an abuse of the process of the court,

(b)the company has failed to prosecute the claim diligently, and

(c)it is appropriate for the member to continue the claim as a derivative claim.

(3)If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission (or leave), the court—

(a)must dismiss the application, and

(b)may make any consequential order it considers appropriate.

(4)If the application is not dismissed under subsection (3), the court—

(a)may give directions as to the evidence to be provided by the company, and

(b)may adjourn the proceedings to enable the evidence to be obtained.

(5) On hearing the application, the court may—

(a)give permission (or leave) to continue the claim as a derivative claim on such terms as it thinks fit,

(b)refuse permission (or leave) and dismiss the application, or

(c)adjourn the proceedings on the application and give such directions as it thinks fit.

263 Whether permission to be given

(1)The following provisions have effect where a member of a company applies for permission (in Northern Ireland, leave) under section 261 or 262.

(2)Permission (or leave) must be refused if the court is satisfied—

(a)that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or (b)where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or

(c)where the cause of action arises from an act or omission that has already occurred, that the act or omission—

(i)was authorised by the company before it occurred, or

(ii)has been ratified by the company since it occurred.

(3)In considering whether to give permission (or leave) the court must take into account, in particular—

(a)whether the member is acting in good faith in seeking to continue the claim;

(b)the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;

(c)where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—

(i)authorised by the company before it occurs, or

(ii)ratified by the company after it occurs;

(d)where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

(e)whether the company has decided not to pursue the claim;

(f)whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.

(4) In considering whether to give permission (or leave) the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.

(5) The Secretary of State may by regulations—

(a)amend subsection (2) so as to alter or add to the circumstances in which permission (or leave) is to be refused;

(b)amend subsection (3) so as to alter or add to the matters that the court is required to take into account in considering whether to give permission (or leave).

(6) Before making any such regulations the Secretary of State shall consult such persons as he considers appropriate.

(7) Regulations under this section are subject to affirmative resolution procedure.

264 Application for permission to continue derivative claim brought by another member

(1) This section applies where a member of a company ("the claimant")—

(a)has brought a derivative claim,

(b)has continued as a derivative claim a claim brought by the company, or

(c)has continued a derivative claim under this section.

(2) Another member of the company ("the applicant") may apply to the court for permission (in Northern Ireland, leave) to continue the claim on the ground that—

(a)the manner in which the proceedings have been commenced or continued by the claimant amounts to an abuse of the process of the court,

(b)the claimant has failed to prosecute the claim diligently, and

(c)it is appropriate for the applicant to continue the claim as a derivative claim.

(3) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission (or leave), the court—

(a)must dismiss the application, and

(b)may make any consequential order it considers appropriate.

(4) If the application is not dismissed under subsection (3), the court—

(a)may give directions as to the evidence to be provided by the company, and (b)may adjourn the proceedings to enable the evidence to be obtained.

(5) On hearing the application, the court may—

(a)give permission (or leave) to continue the claim on such terms as it thinks fit,

(b)refuse permission (or leave) and dismiss the application, or

(c)adjourn the proceedings on the application and give such directions as it thinks fit.

266 Requirement for leave and notice

(1) Derivative proceedings may be raised by a member of a company only with the leave of the court.

(2) An application for leave must—

(a)specify the cause of action, and

(b)summarise the facts on which the derivative proceedings are to be based.

(3) If it appears to the court that the application and the evidence produced by the applicant in support of it do not disclose a prima facie case for granting it, the court—

(a)must refuse the application, and

(b)may make any consequential order it considers appropriate.

(4) If the application is not refused under subsection (3)—

(a)the applicant must serve the application on the company,

(b)the court—

(i)may make an order requiring evidence to be produced by the company, and

(ii)may adjourn the proceedings on the application to enable the evidence to be obtained, and

(c)the company is entitled to take part in the further proceedings on the application.

(5) On hearing the application, the court may—

(a)grant the application on such terms as it thinks fit,

(b)refuse the application, or

(c)adjourn the proceedings on the application and make such order as to further procedure as it thinks fit.

267 Application to continue proceedings as derivative proceedings

(1) This section applies where—

(a)a company has raised proceedings, and

(b)the proceedings are in respect of an act or omission which could be the basis for derivative proceedings.

(2)A member of the company may apply to the court to be substituted for the company in the proceedings, and for the proceedings to continue in consequence as derivative proceedings, on the ground that—

(a)the manner in which the company commenced or continued the proceedings amounts to an abuse of the process of the court,

(b)the company has failed to prosecute the proceedings diligently, and

(c)it is appropriate for the member to be substituted for the company in the proceedings.

(3) If it appears to the court that the application and the evidence produced by the applicant in support of it do not disclose a prima facie case for granting it, the court—

(a)must refuse the application, and

(b)may make any consequential order it considers appropriate.

(4) If the application is not refused under subsection (3)—

(a)the applicant must serve the application on the company,

(b)the court—

(i)may make an order requiring evidence to be produced by the company, and

(ii)may adjourn the proceedings on the application to enable the evidence to be obtained, and

(c)the company is entitled to take part in the further proceedings on the application.

(5) On hearing the application, the court may—

(a)grant the application on such terms as it thinks fit,

(b)refuse the application, or

(c)adjourn the proceedings on the application and make such order as to further procedure as it thinks fit.

Granting of leave

(1) The court must refuse leave to raise derivative proceedings or an application under section 267 if satisfied—

(a)that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to raise or continue the proceedings (as the case may be), or

(b)where the cause of action is an act or omission that is yet to occur, that the act or omission has been authorised by the company, or

(c)where the cause of action is an act or omission that has already occurred, that the act or omission—

(i)was authorised by the company before it occurred, or

(ii)has been ratified by the company since it occurred.

(2) In considering whether to grant leave to raise derivative proceedings or an application under section 267, the court must take into account, in particular—

(a)whether the member is acting in good faith in seeking to raise or continue the proceedings (as the case may be),

(b)the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to raising or continuing them (as the case may be),

(c)where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—

(i)authorised by the company before it occurs, or (ii)ratified by the company after it occurs,

(d)where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company,

(e)whether the company has decided not to raise proceedings in respect of the same cause of action or to persist in the proceedings (as the case may be),

(f)whether the cause of action is one which the member could pursue in his own right rather than on behalf of the company.

(3) In considering whether to grant leave to raise derivative proceedings or an application under section 267, the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.

(4) The Secretary of State may by regulations—

(a)amend subsection (1) so as to alter or add to the circumstances in which leave or an application is to be refused,

(b)amend subsection (2) so as to alter or add to the matters that the court is required to take into account in considering whether to grant leave or an application.

(5) Before making any such regulations the Secretary of State shall consult such persons as he considers appropriate.

(6) Regulations under this section are subject to affirmative resolution procedure.

269 Application by member to be substituted for member pursuing derivative proceedings

(1) This section applies where a member of a company (“the claimant”)—

(a)has raised derivative proceedings,

(b)has continued as derivative proceedings raised by the company, or

(c)has continued derivative proceedings under this section.

(2) Another member of the company (“the applicant”) may apply to the court to be substituted for the claimant in the action on the ground that—

(a)the manner in which the proceedings have been commenced or continued by the claimant amounts to an abuse of the process of the court,

(b)the claimant has failed to prosecute the proceedings diligently, and

(c)it is appropriate for the applicant to be substituted for the claimant in the proceedings.

(3) If it appears to the court that the application and the evidence produced by the applicant in support of it do not disclose a prima facie case for granting it, the court—

(a)must refuse the application, and

(b)may make any consequential order it considers appropriate.

(4) If the application is not refused under subsection (3)—

(a)the applicant must serve the application on the company,

(b)the court—

(i)may make an order requiring evidence to be produced by the company, and

(ii)may adjourn the proceedings on the application to enable the evidence to be obtained, and

(c)the company is entitled to take part in the further proceedings on the application.

(5) On hearing the application, the court may—

(a)grant the application on such terms as it thinks fit,

(b)refuse the application, or

(c)adjourn the proceedings on the application and make such order as to further procedure as it thinks fit.

994 Petition by company member

(1)A member of a company may apply to the court by petition for an order under this Part on the ground—

(a)that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b)that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(1A) For the purposes of subsection (1)(a), a removal of the company's auditor from office—

(a)on grounds of divergence of opinions on accounting treatments or audit procedures, or

(b)on any other improper grounds,

shall be treated as being unfairly prejudicial to the interests of some part of the company's members.**]**

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

(3) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, “company” means—

(a)a company within the meaning of this Act, or

(b). . . . . S. 994(3)(b) omitted (26.5.2015) by virtue of Deregulation Act 2015 (c. 20), s. 115(3)(r), **Sch. 23 para. 28(7)**

995 Petition by Secretary of State

(1) This section applies to a company in respect of which—

(a)the Secretary of State has received a report under section 437 of the Companies Act 1985 (c. 6) (inspector's report);

(b)the Secretary of State has exercised his powers under section 447 or 448 of that Act (powers to require documents and information or to enter and search premises);

(c)the Secretary of State or the Financial Services Authority has exercised his or its powers under Part 11 of the Financial Services and Markets Act 2000 (c. 8) (information gathering and investigations); or

(d)the Secretary of State has received a report from an investigator appointed by him or the Financial Services Authority under that Part.

(2) If it appears to the Secretary of State that in the case of such a company—

(a)the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members, or

(b)an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial,

he may apply to the court by petition for an order under this Part.

(3) The Secretary of State may do this in addition to, or instead of, presenting a petition for the winding up of the company.

(4) In this section, and so far, as applicable for the purposes of this section in the other provisions of this Part, "company" means anybody corporate that is liable to be wound up under the Insolvency Act 1986 (c. 45) or the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)).

996 Powers of the court under this Part

(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of subsection (1), the court's order may—

(a)regulate the conduct of the company's affairs in the future.

(b)require the company—

(i)to refrain from doing or continuing an act complained of, or (ii)to do an act that the petitioner has complained it has omitted to do;

(c)authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d)require the company not to make any, or any specified, alterations in its articles without the leave of the court;

(e)provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

APPENDIX B

RELEVANT SECTIONS OF DERIVATIVE ACTION AND UNFAIR PREJUDICIAL PETITION RELATING TO MINORITY SHAREHOLDER PROTECTION IN NIGERIA UNDER THE COMPANIES AND ALLIED MATTERS ACT 2004.

Action by or against the company

299. Subject to the provisions of this Act, 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.

300. Without prejudice to the rights of members under sections 303 to 30S and sections 310 to 312 of this Act or any other provisions of this Act, the court on the application of any member, may by injunction or declaration restrain the company from the following - (a) entering into any transaction which is illegal or ultra vires; (b) purporting to do by ordinary resolution any act which by its constitution or the Act requires to be done by special resolution; (c) any act or omission affecting the applicant's individual rights as a member; (d) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done; (e) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; and (f) where the directors are likely benefit, or have profited or negligence or from their breach of duty.

301. (1) Where a member institutes a personal action to enforce a right due to him personally, he shall not be entitled to any damages but to a declaration or injunction to restrain the company or the directors from doing a particular act. (2) Where a member institutes a representative action on behalf of himself and other affected members to enforce any rights due to them, he shall not be entitled to any damages but to a declaration or injunction to restrain the company and/or directors from doing a particular act. (3) Where any member institutes an action under this section, the court may award costs to him

personally whether or not his action succeeds. (4) In any proceedings by a member under section 300 of this Act, the court may, if it thinks fit order that the member shall give security for costs.

302. For the purpose of sections 300 and 301 of this Act, "member" includes - (a) the personal representative of a deceased member; and (b) any person to whom shares have been transferred or transmitted by operation of law.

303. (1) Subject to the provisions of subsection (2) of this section, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company, or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company. (2) No action may be brought and no intervention may be made under subsection (1) of this section, unless the court is satisfied that - (a) the wrongdoers are the directors who are in control, and will not take necessary action; (b) the applicant has given reasonable notice to the directors of the company of his intention to apply to the court under subsection (1) of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action; (c) the applicant is acting in good faith; and (d) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.

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

305. An application made or an action brought or intervened in under section 303 of this Act shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or a duty owed to the company has been or may be approved by the shareholders of such company, but evidence of approval by the shareholders may be taken into account by the court in making an order under section 304 of this Act.

306. An application made or an action brought or intervened in under section 303 of this Act shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit and. if the court determines that the rights of any applicant may be substantially affected by such stay, discontinuance. settlement or dismissal, the court may order any party to the application or action to give notice to the applicant.

307. An applicant shall not be required to give security for costs in any application made or action brought or intervened in under section 303 of this Act.

308. In an application made or an action brought or intervened in under section 303 of this Act the court may, at any time. order the company to pay to the applicant interim costs before the final disposition of the application or action.

309. In sections 303 to 308 of this Act9 "applicant" means - (a) a registered holder or a beneficial owner and a former registered holder or beneficial owner, of a security of a company; (b) a director or an officer or a former director or officer of a company; (c) the Commission; or (d) any other person who in the discretion of the court, is a proper person to make an application under section 303 of this Act.

Relief on the grounds of unfairly prejudicial and oppressive conduct

310. (1) An application to the Court by petition for an order under section 311 of this Act in relation to a company may be made by any of the following persons - (a) a member of the company; (b) a director

or officer or former director or officer of the company; (c) a creditor; (d) the Commission; or (e) any other person who, in the discretion of the court, is the proper person to make an application under section 311 of this Act. (2) In sections 311 to 313 of this Act, "member" includes - (a) the personal representative of a deceased member; and (b) any person to whom shares have been transferred or transmitted by operation of law.

311. (1) An application for relief on the ground that the affairs of a company are being conducted in an illegal or oppressive may be made to the court by petition.

(2) An application to the court by petition for an order under this section in relation to a company may be made-- (a) by a member of the company who alleges - (i) that the affairs of the company are being conducted in a manner that is oppressive or unfairly pre-judicial to, or unfairly discriminatory against, a member or members, or in a manner that is in disregard of the interests of a member or the members as a whole, or (ii) than 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 to, 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; or (b) by any of the persons mentioned tinder paragraphs (h), (c) and (e) of subsection (I) of section 310 of this Act who alleges- (i) that the affairs of the company are being conducted in a manner oppressive or unfairly pre-judicial to or discriminatory against or in a manner in disregard of the interests of that person, (ii) that an act or omission, or a proposed act or omission was or would be oppressive or unfairly prejudicial to. or unfairly discriminatory against, or which is in a manner in disregard of the interests of that person; or (c) by the Commission in a case where it appears to it in the exercise of its powers under the provisions of this Act or any other enactment thaw- (i) the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members or in a manner which is in disregard of the public interest or (ii) any actual or proposed act or omission of the company (including an act or omission on its behalf) which was or would be oppressive, or unfairly prejudicial to or unfairly discriminatory against a member or members in a manner which is in disregard of the public interest.

312. (1) If the court is satisfied that a petition under sections 310 and 311 of this Act is well founded, it may make such order or orders as it thinks fit for giving relief in respect of the matter complained of.

(2) Without prejudice to the generality of subsection (1) of this section, the court may make one or more of the following orders that is, an order - (a) that the company be wound up; (b) for regulating the conduct of the affairs of the company in futures (c) for the purchase of the shares of any member by other members of the company; (d) for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capitals (e) directing the company to institute, prosecute, defend or discontinue specific proceedings. or authorising a member or members or the company to institute, prosecute, defend or discontinue specific proceedings in the name or on behalf of the company; (f) varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract; (g) directing an investigation to be made by the Commission; (h) appointing a receiver or a receiver and manager of the property of the company; (i) restraining a person from engaging in specific conduct or from doing a specific act or thing; (j) requiring a person to do a specific act or thing.

(3) Where an order that a company be wound up is made under this section, the provisions of this Act relating to winding-up of companies shall apply, with such adaptations as are necessary, as if the order had been made upon an application duly filed in the court by the company.

(4) Where an order under this section makes any alteration in addition to the memorandum or articles of a company, then, notwithstanding anything in any other provision of this Act but subject to the provisions of the order, the company shall not have power without the leave of the court, to make any further alteration or addition to the memorandum and articles inconsistent with the provisions of the order but, subject to the foregoing provisions of this subsection, the alteration or addition shall have effect as if it had been duly made by a resolution of the company.

(5) A certified true copy of an order made under this section altering or giving leave to alter, a company's memorandum or articles shall, within fourteen days from the making of the order or such longer period as the court may allow, be delivered by the company to the Commission for registration; and if the company makes default in complying with the provisions of this subsection, the company and every

officer of it who is in default shall be guilty of an offence and liable to a fine of N 50 and, for continued contravention, to a daily default fine of N25.

313. Any person who contravenes or fails to comply with an order made under section 312 of this Act that is applicable to him shall be guilty of an offence and be liable to a fine of N 500 or imprisonment for one year or to both such fine and imprisonment.

APPENDIX C

RELEVANT SECTIONS OF DERIVATIVE ACTION AND UNFAIR PREJUDICIAL PETITION RELATING TO MINORITY SHAREHOLDER PROTECTION IN NIGERIA UNDER THE COMPANIES AND ALLIED MATTERS ACT 2020.

346.A (1) Subject to the provisions of subsection (2), an applicant may apply to the Court for leave to bring an action in the name or on behalf of a company or a company's subsidiary, or to intervene in an action to which the company or the company's subsidiary is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company or the company's subsidiary.

(2) No action may be brought and no intervention may be made under subsection (1), unless the Court is satisfied that—

(a) a cause of action has arisen from an actual or proposed act or omission involving negligence, default, breach of duty or trust by a director or a former director of the company;

(b) the applicant has given reasonable notice to the directors of the company of his intention to apply to the Court under subsection (1) ;

(c) the directors of the company do not bring, diligently prosecute, defend or discontinue the action;

(d) the notice contains a factual basis for the claim and the actual or potential damage caused to the company;

Commencing derivative action.

Companies and Allied Matters Act, 2020 2020 No. 3 (e) the applicant is acting in good faith ; and

(f) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.

(3) An action under this section may be against the director or any other person (or both).

(4) In any action referred to in this section the plaintiff shall have the right to obtain any relevant documents from the defendant and the witnesses at trial and may in pursuance of that right request categories of documents from such person without identifying specific documents.

347.—(1) In connection with an action brought or intervened under section 346 of this Act, the Court may, at any time, make any such order or orders as it deems fit.

(2) The Court may make an order—

(a) authorising the applicant or any other person to control the conduct of the action ;

(b) giving directions for the conduct of the action ;

(c) directing that any amount adjudged payable by a defendant in the action is paid, in whole or in part, directly to former and present security holders of the company instead of to the company ; and

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

348. An application made or an action brought or intervened in under section 6 shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or a duty owed to the company has been or may be approved by the shareholders of such company, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 347.

349. An application made or an action brought or intervened in under section 346 shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the Court given upon such terms as the Court deems fit and, if the Court determines that the rights of any applicant may be substantially affected by such stay, discontinuance, settlement or dismissal, the Court may order any party to the application or action to give notice to the applicant.

350. An applicant shall not be required to give security for costs in any application made or action brought or intervened in under section 346 of this Act.

351. In an application made or an action brought or intervened in under section 346, the court may at any time order the company to pay to the applicant interim costs before the final disposition of the application or action.

RELIEF ON THE GROUNDS OF UNFAIRLY PREJUDICIAL AND OPPRESSIVE CONDUCT

353.—(1) An application to the Court by petition for an order under section 354 in relation to a company may be made by—

(a) a member of the company ;

(b) a director or officer, former director or officer of the company ;

(c) a creditor ;

(d) the Commission ; or

(e) any other person who, in the discretion of the Court, is the proper person to make an application under section 354.

(2) In sections 354 and 355 of this Act, “member” includes—

(a) the personal representative of a deceased member ; and

(b) any person to whom shares have been transferred or transmitted by operation of law.

354.—(1) An application for relief on the ground that the affairs of a company are being or have been conducted in an illegal or oppressive manner may be made to the Court by petition.

(2) An application to the Court by petition for an order under this section in relation to a company may be made by—

(a) a member of the company who alleges that—

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

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

(b) any of the persons mentioned under section 353 (1) (b), (c) and (e) who alleges that—

(i) the affairs of the company have been or are being conducted in a manner oppressive or unfairly prejudicial to or discriminatory against or in a manner in disregard of the interests of that person, or

(ii) an act or omission, or a proposed act or omission was, is or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, or was or is in disregard of the interests of that person, or

(c) the Commission in a case where it appears to it in the exercise of its powers under the provisions of this Act or any other enactment that—

(i) the affairs of the company were or are being conducted in a manner that was or is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members, or was or is in disregard of the public interest, or

(ii) any actual or proposed act or omission of the company, including an act or omission on its behalf which was, is or would be oppressive, or unfairly prejudicial to, or unfairly discriminatory against a member or members in a manner which was or is in disregard of the public interest.

355.—(1) If the Court is satisfied that a petition under sections 353 and 354 is well founded, it may make such order or orders as it deems fit for giving relief in respect of the matter complained of.

(2) Without prejudice to the generality of subsection (1), the Court may make an order—

(a) that the company be wound up ;

(b) for regulating the conduct of the affairs of the company in future;

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

(d) for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital ;

(e) directing the company to institute, prosecute, defend or discontinue specific proceedings, or authorising a member or the company to institute, prosecute, defend or discontinue specific proceedings in the name or on behalf of the company ;

(f) varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract ;

(g) directing an investigation to be made by the Commission ;

(h) appointing a receiver or a receiver and manager of property of the company ;

(i) restraining a person from engaging in specific conduct or from doing a specific act or thing; or

(j) requiring a person to do a specific act or thing.

(3) Where an order that a company be wound up is made under this section, the provisions of this Act relating to winding-up of companies shall apply, with such modifications as are necessary, as if the order had been made upon an application duly filed in the Court by the company.

(4) Where an order under this section makes any alteration or addition to the memorandum or articles of a company, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company does not have power, without the leave of the Court, to make any further alteration or addition to the memorandum and articles inconsistent with the provisions of the order but, subject to this subsection, the alteration or addition shall have effect as if it had been made by a resolution of the company.

(5) A certified true copy of an order made under this section altering or giving leave to alter a company’s memorandum or articles shall, within 14 days from the making of the order or such longer period as the Court may allow, be delivered by the company to the Commission for registration, and if the company defaults in so complying, the company and each officer of it are liable to a penalty as the Commission shall specify in its regulations.

356. Any person who contravenes or fails to comply with an order made under section 355 that is applicable to him, commits an offence and is liable to a penalty as the Commission shall specify in its regulations.

GLOSSARY

Articles of Association- A legal document that specifies the regulation of a company's operation and defines the company's purpose. The document lays out how tasks are to be to be accomplished within the organization, including the process for appointing directors and the handling of financial rec

Company- a legal entity formed by a group of individuals to engage in and operate a business, the line of business the company is in will generally determine which business structure it chooses such as partnership, proprietorship or corporation.

Comparative Law- the study of the differences and similarities between the law of different countries.

Damages- Monetary Compensation paid to an individual for injury or loss.

Derivative Action- Also known as derivative claim is a suit which permits a minority shareholder as representative of all the other shareholders, to institute proceedings on behalf of the company to redress a wrong perpetrated by the majority shareholders on the company.

Majority Shareholder- An individual or entity that owns and controls more than fifty percent of a company outstanding shares, who has a significant amount of influence over the company especially if their shares are voting shares.

Memorandum of Association- A legal statement signed by shareholders or guarantors when they agree to from a limited company.

Minority Shareholder- An individual who do not exert control over a company. A minority shareholder does not owe a fiduciary duty to other shareholders.

Redress- An act or instance of seeking remedy or compensation for wrong or loss.

Shares- Units of equity ownership interest in a corporation that exist as a financial asset providing for equal distribution of any residual profits, if any are declared, in the form of dividends.

Unfair Prejudicial Petition- it permits a member of a company to petition the court for relief on the ground that the company's affairs are being or have been conducted in a manner that causes unfair prejudice to the interests of members generally or of some part of its members (including at least him/herself)

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