Freeze-Out: A CASE FOR THE STRENGTHENING OF STATUTORY PROTECTION OF MINORITY SHAREHOLDERS

OVUNDA V. C. OKENE, PhD, Rivers State University of Science and Technology, Port Harcourt, Nigeria

Available at: https://works.bepress.com/ovunda_v_c_okene/37/
FREEZE-OUT PROBLEMS - A CASE FOR THE STRENGTHENING OF STATUTORY PROTECTION OF MINORITY SHAREHOLDERS

By
O.V.C. Okwue

INTRODUCTION

This paper is a study of freeze-out problems in corporate law. Its objective includes the determination of what freeze-out means in use, the protections available to freeze-out and a suggestion of ways of strengthening the protections available to freeze-outs who are invaded by the minority shareholders.

The term "freeze-out" means the race by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control, or the strategic use of a legal device or technique, to eliminate one or more of its owners or participants. This phrase could rightly be described as all instance of expulsion or oppression of business associates. A freeze-out normally does not contemplate pay out of the freezees of fair value for the interests, rights, or power which they lose. Real freeze-outs sometimes called easily distinguishable from cases of imagined injustices grounded in frustration or unrealistic expectations. In the mind of an unhappy shareholder there is often no clear-cut line between unpleasantness, dissension, or frustration on the one hand, and oppression, injustice, or freeze-out on the other.

NATURE OF FREEZE-OUT PROBLEMS

It is pertinent to note from the outset that freeze-outs are most often effected in relatively small corporations (usually referred to as "close corporations") by majority shareholders who use the tremendous powers which they have under the principle of majority rule to eliminate minority

1. W.R. [19*], 55 L., 55 M., Haro et-Akwu, Lecturer in Law, Faculty of Law, Rivers State University of Science & Technology, Port Harcourt, Nigeria.
2. The term "freeze-out" is often used as a synonym for "freeze-out".
3. See e.g. D. L., "Initial 1949", 245 L. 2461993 (5th Cir. 1957).
4. The term "close corporation" has been defined in various ways. A definition used frequently encountered describes a corporation simply as a corporation which has relatively few shareholders, and thus distinguishes it from the large public corporation. Another popular definition states that a close corporation is a corporation whose shares are not generally traded in the open market. For other definitions and a detailed discussion of the characteristics of the close corporation, see O'Neal, Close Corporations, Law and Practice, ch. I (1958).
interests. Professor G. A. Olawoyin, while commenting on the history of petitions under section 210 of the English Companies Act, 1948, said:

"The history of petitions under section 210 of the English Companies Act, 1948, has shown so far that cases of oppression are much more likely to arise in private companies where director-shareholders are usually in such a strong position as to make it possible for them to disregard at will the wishes of minority shareholders."

Perhaps a few words should be said at this juncture on the traditional pattern or corporate management. The principal control that shareholders have over operation or an incorporated business and that or its affairs is power to elect directors, who in turn manage the business and make policy determinations. In addition, shareholders approval is now almost invariably required by statute for fundamental corporate acts.

As a general proposition, a corporation operates under the principle of majority rule: the holders of a majority of the shares with voting power control the corporation.

The business of a corporation, at least all ordinary business, is conducted under the supervision of the board of directors. The directors in theory are supreme during their term of office. They determine corporate policies and they select corporate officers and employees.

The power to elect the directors, or most of them, is in the persons holding a majority of the voting shares; in turn, action by the directors is normally determined by majority vote. In practice directors are usually responsive to the wishes of shareholders who elected them.

Under this pattern of corporate control, majority interest can deprive minority interests of any effective voice in the operation of the business. Further, the danger is always present that majority shareholders will use their power to further their own interest to the detriment of minority shareholders.'

The losses which a minority shareholder suffers in a freeze-out are sometimes catastrophic. As already mentioned, he may be deprived of any effective voice in the making of business decisions. Not only that, majority

---

4 See (J. A. Olawoyin, Signs and Duties of Company Directors at page 289.
5 Section 210 of the English Companies Act, 1948 is the source of section 201 of the repealed Nigerian Companies Act of 1960 which provides for alternative remedy in winding-up in instances of oppression.
6 Section 248(1), Companies and Allied Matters Decree No. 1 or 1990.
participants may be able to withhold from him information on the affairs of the business and on policies being adopted and decisions being made. A shareholder, it is true, has a common law or statutory right to inspect corporate books and records. Often, however, this right is frustrated because those in control of the corporation resort to long drawn-out litigation. They may force him to go to court each time he seeks to see the books.

Quite commonly when a participant invests in a business he expects to work in the business on a full-time basis. He may put practically everything he owns into the business and expect to support himself from the salary he receives as a key employee of the company. Whenever a shareholder is deprived of employment by the corporation (as he frequently is in these freeze-plays) he may be in effect deprived of his principal means of livelihood. Even in the absence of the deliberate use of dividend-withholding as a freeze technique, close corporations, in order to avoid so-called “double taxation”, usually payout most of their earnings in the form of salaries rather than as dividends.

A shareholder may also find that the investment he made in the enterprise has become practically valueless. As has been pointed out, dividends are seldom paid in close corporations; one of the most commonly used freeze-techniques is to withhold dividends from minority shareholders where not employed by the company. Such a shareholder cannot withdraw the funds he has invested and he cannot find a purchaser for his interest. Seldom can anyone be found who is willing to buy a minority interest in a close corporation, especially an interest in a company divided by ill-will disputes.

That same court went on to repeat the old story, often told, of a prominent Eastern Newspaper man’s reply to the question of what the shares in his company were worth. His reply was quite apt:

“There are 51 shares” said he, “that are worth $250,000. There are 49 shares that are not worth a...”

THE FREEZE-OUT METHODS IN USE

The methods by which persons in control of an enterprise deprive minority owners of their interest in the business or of a fair return on their investment are numerous. Suffice it to say here that holders of a majority of voting shares in a corporation, through their ability to elect and control a majority of the directors and to dicicnuine the outcome of shareholder’s
vales on other mailers, have tremendous power to benefit themselves at the expense of minority shareholders.

Here are a few illustrations of such devices or modes of operation. The freezers may refuse to declare dividends, they may drain off the corporation’s earnings in the form of officers, or in the form of high rent by the corporation for property leased from majority shareholders or unreasonable payments by the corporation under contracts between the corporation and majority shareholders not arrived at in arm’s length dealings: they may deprive minority shareholders of corporate offices and of employment by the company; they may cause the corporation to sell its assets at an inadequate price to the majority shareholders or to companies in which the majority are interested: they may organize a new company in which the majority will have no interest, transfer the corporation’s assets or business to it, and perhaps then dissolve the old corporation; or they may bring about the merger or consolidation of the corporation under a plan unfair to the minority.

Another instance of oppression is the refusal by directors to register personal representatives of deceased shareholders so as to force the personal representatives to sell their shares to the directors at an inadequate price.” As has been indicated, the techniques listed here are merely illustrative. Furthermore, freeze techniques are often (in fact, generally) used in various combinations. For instance, dividend withholding is usually coupled with other freezes techniques, most often with arrangements for high compensation and favourable employee benefits for majority shareholder-officers. The story the complaining shareholders tell varies somewhat from case to case. Thus in the New York case of Goujried v. Gottfried the plaintiffs claimed that the directors, who owned the controlling stock, were withholding dividends to coerce minority shareholders into selling their shares to majority interests at a grossly inadequate price and to avoid heavy personal income taxes which majority shareholders would have to pay on dividend distributions; and that the directors by excessive salaries, bonuses, and corporate loans to themselves had eliminated their own immediate need of dividends while bringing pressure to bear on minority shareholders to sacrifice their holdings. In another New York Case, a minority shareholder alleged that majority shareholders had conspired to obtain her slack and that in order to induce her to sell they (1) refrained from declaring a fair dividend, (2) increased their salaries as corporate officers, and (j) represented that the company

10 73 N.Y.S. 2d 692 (Supreme C 011 1947).
had suffered reverses to such an extent that it would not pay a dividend larger than three percent and which it probably never would be able to pay more.

The oppression and deprivation of minority shareholders' rights notwithstanding, there are still some legal principles which obstruct relief. For instance, the American courts traditionally have been reluctant to interfere in the internal affairs of corporations, even when dissension develops among shareholders and minority shareholders claim they are being oppressed or freezed out. In denying relief to freezees, the courts usually rely on one or both of the following principles: (1) the business judgment rule, or (2) the principle of majority control. Furthermore, many courts apparently feel that there is a legitimate sphere in which the controlling shareholders can act in their own interest even if the minority suffers.\(^1\)

The business judgment rule recognizes a broad discretion in the directors to determine business policy and to conduct corporate affairs. As the late Professor Ballantine has pointed out, courts:

"hesitate to substitute their judgment on complicated questions of business policy for that of the elected managers or tile business and have limited the scope of judicial review which they are willing to undertake."\(^ 2\)

In the absence of some special control arrangement, set up by contract or special charter or by-law provisions, a corporation is subject to the principle of majority rule: holders of a majority of voting shares govern. "The very foundation principle of a corporation," commented a Georgian Judge many years ago, "is that the majority of its stockholders have the right to manage its affairs. so long as they keep within their charier right."\(^3\)

Funcriuore. where a wrong is done to the corporate membership right of a member, it is the company which strictly speaking, can bring an action to enforce redress. But since the decision to bring the action will be that of the directors and in the last resort, of the controlling shareholders, efforts to secure redress may be blocked. This supremacy of the majority has been formalised in and reinforced by what is referred to as the rule in Foss v. Harbottle.\(^4\)

\(^1\) See Comment, Duke L.J. 436, 437-441, 1959.
\(^2\) Ballantine, Corporations (rev. ed. 1946). 231
\(^3\) Harv. v. Dexter, 41 Ga. 154. 41.1 (1871).
\(^4\) [1843] 2 K.B. 461; 67 E.R. 189.
THE RULE IN *FOSS v. HARBOTTLE*

In *Foss v. Harbottle*, it was alleged that the company was entitled to damages from some of the directors for their fraudulent acts. In consequence, a general meeting was held and the majority decided that no action be taken against the directors: but two of the minority shareholders took proceedings against the directors on behalf of themselves and all others, except the defendants, to compel them to pay the damages. It was held that the acts of the directors were capable of confirmation by the company and if the majority wanted to take action they could have done so. The action was thus dismissed since it was for the majority to decide whether or not the action was necessary for the benefit of the company.

The origin of what is now known in English Law as the rule in *Foss v Harbottle* could be traced to some early nineteenth century decisions in the law of partnership. In the previous century, it was established that the chancellor would not interfere in the internal disputes of a partnership “except with a view to a dissolution”, since harmony between them is in vain. In the early nineteenth century, however, the chancellors relented from their previous refusal to intervene except with a view to dissolution. The old rule was restated in a form better adapted to the needs of the increasing number of unincorporated jointstock companies. The restatement of the rule was to the effect that only in the case of “matters of internal regulation” that the chancellor would refuse to act except with a view to dissolution. This rule, and the rule in *Foss v. Harbottle*, is which grew out of it, were entirely creations of the chancellor. The chancellor had acquired almost exclusive jurisdiction over internal disputes in partnership and companies. In the case of companies this jurisdiction was originally founded upon the trust created by the deed of settlement and, at a later date, upon the remedies sought and the fiduciary duties of the directors.

It is not a matter of chance that, while the chancellor applied a general rule of non-interference to every type of partnership, this rule took the particular form described above only in the case of joint-stock companies. In such companies, with a large and fluctuating membership, ownership was already considerably divorced from management. Shares were in practice freely transferable and an internal procedure for remedying grievances was frequently provided.” In the form in which the old rule

---

3. supra.

---
was applied to such partnerships it bears a far more tenuous resemblance to the 1-o-ss v. Harbottle rule as it laurer developed.

In a "private" partnership there was never any question of an aggrieved partner first seeking a remedy within the partnership even if he were in a minority. The chancellors simply refused to intervene in "partnership squabbles" or "mere passing improprieties". However, by the early nineteenth century the chancellor would grant relief without insisting upon a dissolution where to do so would be of advantage only to the wrongdoer.

Applying the principle in Foss v. Harbottle in the latter case of Macdougall v. Girchin, Mellish L. J. said inter alia:

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

The procedural problem which the rule poses for an injured shareholder was explained in Edwards v. Hallwell where Jenkin L. J. said:

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

21 Smith v. Jones (1951) 4 All E 4503.
23 (1873) 13 B 13 at p. 25.
24 (1950) 2 All E R 1064.
The rationale for this rule as enunciated in *Foss v. Harbottle* are manifold. Cardinal among these justifications is the fact that litigation at the instance of a minority of shareholders is futile if the majority do not want it. The court will therefore allow majority decision to prevail because where an irregularity which is capable of ratification has been done to a company it is only the majority who can complain that what they should have done was done irregularly. Otherwise, the minority will be a stumbling block on the wishes of the majority whenever there is difference of opinion in respect of internal management.

If a minority shareholder were to institute an action in every case where there is an alleged wrong or irregularity; done to a company then the floodgate to multiplicity of suits will be opened by the court. But by evoking the rule, baseless and frivolous actions by a minority shareholder will be avoided. Mellish, L. J. was not oblivious of this fact when he stated that if every irregularity in the management of a company:

"gives a right to every member of the company to file a bill to have the questions decided, then if there happens to be one cantankerous member, or one member who loves litigation, every irregularity will be litigated; whereas, if the bill must be filed in the name of the company, then unless there is a majority who really wish to litigate, the litigation will not go on. Therefore, holding, that such suits must be brought in the name of the company docs certainly tend to stop litigation.";

There is also the need for the court to preserve majority right vis-a-vis the conduct of company's affairs. This is because any irregularity which arises in a company deals with its internal management which the majority can take whatever action it deems fit.

Furthermore, the rule has been justified because of the futility of any attempt by the court to interfere in corporate matters when its decisions could easily be set aside by the majority.

Professor Olawoyin in his book" also justifies the rule by saying that since a company is separate and distinct from its shareholders" it follows as a matter of inexorable logic that it is only the company itself (via the

---

2. Olawoyin G. A. *op. cit.* page 262.
27. See Elias C.J.N (as he then was) in *Abubakar v Smith Supra*.
majority) thai can litigate whenever there is any allegation of wrongdoing or irregularity in the conduct of its affairs."

In Pavlides v. Jensen" a minority shareholder brought an action on behalf of himself and all other shareholders (except three directors) against these directors and the company alleging that the directors negligently sold the company's asset for a price less than its market value. The company was controlled by another company and the majority voting power was controlled by the same directors. II was held that the action was not sustainable since it couldn't be established that the action of the directors was fraudulent, ultra vires or an expropriation of assets of the company by the majority shareholder in fraud against the minority.

Under the rule, the court will refrain from interfering with irregularities at meetings at the instance of a shareholder."

In Alac Dougall v. Gardineri" the court held that the action brought by a shareholder against the conduct of the chairman of a company vis-a-vis the taking of poll was not maintainable since it was only the company itself that could sue if a wrong was alleged to have been done to it.

The rule has been held to apply not only to incorporated bodies, but also to (registered) associations such as trade unions, religious bodies and friendly societies.5

However, majority rule as laid down in Foss v. Harbottle should not be accepted as a rigid principle because it is subject to a number of exceptions which safeguard the interest of the minority shareholders. The exceptions are thus better discussed under protection of minority shareholders.

THE PROTECTION OF MINORITY SHAREHOLDERS

Notwithstanding the wide powers of the majority shareholders, various devices both at common law and by statute exist for the protection of the oppressed minority shareholders.

30 Olawoyin, G. A. 01' cit. p.263.
32 Foss v. Harbottle (supra).
34 (1875) Ch. D. 13 [CA].
As from early days the courts have indicated a willingness to relax the rigor of the rule, where to do otherwise might have led to a travesty of justice. In *Foss v. Harbottle* itself, Wilgrams, V. C. was quick to point out that

"If a case should arise of injury to a corporation by some of its members, for which not adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot think that...the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue."

This observation has been elaborated upon in later cases, establishing a number of generally recognised situations where the court would relax the rule in order to enable complaining minority shareholders to maintain actions in respect of certain wrongs done to their company. These situations are:

1. where there has been an invasion of personal rights of minority shareholders;
2. where the approval of the action which the subject of the dispute requires a special procedure, such as a special resolution;
3. where the act complained of by the minority shareholders is *ultra vires* the company;
4. where the action of the wrongdoers amount to what is generally referred to as fraud on the minority and the wrongdoers are themselves in control of the company; and
5. in every other case where the interests of justice demand the relaxation of the rules.

It is apt to point out however, that these common law exceptions are now contained in Decree No. 1 of 1990. Therefore, they are now statutory protection. However, most of the judicial pronouncements and decisions on the various common law exceptions are still germane to our discussion. Recourse would therefore be had to them where appropriate.

### STATUTORY PROTECTION OF MINORITY SHAREHOLDERS

By virtue of the provisions of section 300(a) of Decree No.1 of 1990, any member of a company can apply to court for an injunction or declaration

---

36 *Rule a Foss v. Harbottle (supra)*
37 (1843) 2 Hare 461 * 67 E.R. 189, pp. 492 and 203 respectively.
38 *Companies and Allied Matters Decree No. 1 of 1990.*
39 Part x of the *Companies and Allied Matters Decree No. 1* 1990 deals extensively with the minority protection.
restraining the company from entering into any transaction which is illegal or *ultra vires*. Accordingly, in cases where the act complained of is wholly *ultra vires* the company or association the rule (in *Foss v. Harbottle*) has no application because there is no question of the transaction being confirmed by any majority. Any individual or minority shareholder can therefore sue to restrain an *ultra vires* action as, for instance, a plan to misapply the funds of a company contrary to the provisions of its memorandum. He can also ask for a declaration that certain actions which directors propose to take are *ultra vires* the company.

An aggrieved shareholder can file a suit against the company if the company purports to do by ordinary resolution any act which by its constitution or the Decree requires to be done by special resolution. Thus, the rule:

"does not prevent an individual member from suing if the irregular act in respect of which he is suing is one which could validly be done or sanctioned by a simple majority of the members of the association, but only by some special majority."

The justification for limiting in this way the scope of the rule is that if the rule were to cover matters requiring special procedure this could well become a dead letter since directors would normally feel free to disregard it without much fear of their behaviour being questioned.

Thus, where a union disregarded the special procedure laid down in its rules for the variation of members' contributions, the purported *increase* in the union's subscriptions by ordinary majority members was denied. Similarly the rule has no application where directors have failed to give the special notice required for the purpose of meetings convened in order to pass a special resolution.

An individual shareholder could also enforce his right against the company where his personal right is invaded. Section 41 of the *Companies and Allied Matters* Decree provides, inter alia, that the memorandum and articles, when registered shall have the effect of a contract under seal between the company and its members and officers. Thus if a member discovers that his rights under the articles have been infringed, he is
normally allowed to bring an action to redress such wrong. In *Pender, v. Lushington* a shareholder who was prevented from casting his vote at a general meeting was able to compel the company to record his vote. Jessel, M.R. who granted the plaintiff an injunction restraining the company from acting on the resolution passed at the general meeting said as follows:

This is an action by Mr. Pender for himself. He is a member of the company, and whether he votes with majority or the minority he is entitled to have his vote recorded - an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in *Foss v. Harbottle* and that line of cases. He has a right to say, "whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you."

However, the limits of the principles under this heading have been gravely blurred by the decision in *Macirougall v. Gardiner* where the wrongful refusal of a poll, duly demanded as required by the articles of a company, was said to be a matter of internal irregularity to which the rule in *Foss v. Harbottle* applied: hence demurrer to a suit asking for a declaration that the refusal was illegal and improper was upheld. James, L.J., said he could not conceive that there is any equity on the part of a shareholder to contend that he has a right, and every individual has a right to have a meeting held in strict form in accordance with the articles. Both His Lordship and Mellish, L.J. seemed to be more concerned with the 'internal management' aspect of the case rather than with the alleged infringement of the rights of the plaintiffs under the contract established by the articles." This case is a clear example of violation of personal right of members concerned and it is difficult to reconcile it with *Pender v. Lushington*. Accordingly, one can only conclude that the case stands "in glaring contrast at the centre of modern company law."

Section 300(d) of the 1990 *Companies and Allied Matters* Decree allows a minority shareholder to institute action in court restraining the company from committing fraud on either the company or the minority shareholders.

---

48 (1877) 6 Ch D. 70.
50 (1875) 28 Ch D. 13.
51 ibid p. 23.
52 ibid pp. 25 - 26.
54 Supra.

...where the directors fail to take appropriate action to redress the wrong done. In Edwards v. Halliwell,56 Jenkins, L.J., said:

"Where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company, the rule in Foss v. Harbottle is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others".

What amounts to 'fraud' in this context, according to Professor Olawoyin, does not appear to have any precise definition, and it is said that no proper investigation, even if it were possible, has ever been made in relation to its exact meaning. In Jenkins Report,59 the phrase "fraud on the minority" is referred to as a '[notoriously] vague concept'. However, Professor L.E. Gower60 opined that "fraud" here connotes an abuse of power analogous to its meaning in a court of equity to describe a misuse of a fiduciary position. The following cases have been held to have constituted fraudulent act on the minority.

In Cook v. Deeds61 where the directors of a company purported to benefit by a contract the proceeds of which should properly go to the company this was held to amount to fraud by the majority on the minority.

Also in Menter v. Hooper's Telegraph Works62 where majority shareholders misused their power in order to compromise a pending action in their favour to the detriment of minority shareholders it was held that this amounted to fraud on the latter so as to make later's action maintainable.

At common law, in order to maintain an action under this heading the complainant must not only show that there has been an appropriation of the company's property amounting to "fraud", but also that the wrongdoers themselves control the company, thus making it impossible for any action to be taken against them if the rule in Foss v. Harbottle were to be applied.

Under the common law, a minority shareholder's action is maintainable where the interest or justice so requires. The exact scope of the generic

56 Supplement p. 1067.
57 Olawoyin G.A., op cit p. 270.
61 (1916) 1 A.C. 554.
62 (1874) 1 R.9 Ch. App. 350.
word "justice" is not yet settled." In fact, all the exceptions discussed above can also be categorised under the said generic word." There are conflicting decisions as to whether this interest of justice exists as a separate exception." The Nigerian Supreme Court, however, recognised it as a separate exception in *Edoropo's case*.66

### OTHER STATUTORY PROTECTIONS

Apart from the former common law protections, now codified, discussed above, the following statutory protections exist. For instance the cases where the rule does not apply, broadly speaking, there are three different types of action open to an aggrieved shareholder.

1. **PERSONAL ACTION** - By 5.301(1) of the *Companies and Allied Matters* Decree, a member of the company can sue in his capacity as a shareholder when he has been deprived of his right. The authorities have recognized the right of a minority shareholder to personal action in the following situations: 1. where there has been, or there is, about to be an infringement of the articles of a company." Second, to restrain an *ultra vires* act.68 Third, to assert personal statutory right if such right exists.

2. **REPRESENTATIVE ACTION** - This is a situation whereby a shareholder sues on behalf of a delineated set of people (shareholders) having a common interest with him when there has been an infringement of their rights under the article. Section 301(2) of Decree No. 1 of 1990 so provides.

In both personal and representative actions, the plaintiff(s) 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.70

3. **DERIVATIVE ACTIONS** - The term "derivative" has been used to describe these actions to emphasise the fact that they are used as a device to enforce the rights of the company. That is, they derive from the need to

---

67 *ibid*., p. 272.
69 (*1847*7) 5S.C.IJ9.
70 *ibid*., p. 272.
enforce certain rights belonging to the company. The enabling Decree states at section 303(1):

"subject to the provision 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".

Justifying the need for derivative actions, Professor Olawoyin, in his book 72, said, first multiplicity of actions is avoided. The instance of this form of collective suit means that a single action suffices to cater for all aggrieved.

Derivative action is also in consonance with the concept of separate corporate entity. Thus where a company ought to institute an action but fails to do so and justice demands that action should be taken to remedy the wrong, such action must be taken on behalf of the company. This would ensure that justice is done to all parties concerned. For derivative actions to be allowed, certain conditions, to which we now turn our attention, have to be satisfied by the plaintiff shareholder.

Section 303(2) of the C. & A.M.D. provides the conditions to be satisfied. These include the need to satisfy the court 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 court if the directors or 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.

Section 304(1) empowers the court to make any such order or orders, as it thinks fit in connection with an action brought or intervened under section 303.

JUST AND EQUITABLE WINDING UP

Section 408(c) of Decree No. 1 of 1990 provides that a company may be wound up by the court if the court is of opinion that it is just and equitable that the company should be wound up. This section provides a measure of

71 Companies and Allied Matters Decree No. 1 of 1990.
In construction of the just and equitable clause, it has been held that the clause confers very wide discretion on the court."

In the determination of the issues in a petition under the clause, the justice and equity which comes under examination is said to be that which prevails between two classes of persons - those who support the petition and those who oppose it - and that in reaching its conclusions on this question the court is entitled to take account of every consideration which is fair and reasonable for the interests concerned." The onus on the petitioner to establish that it would be just and equitable for his company to be wound up is a heavy one. This is largely because the courts feel that the majority should be allowed to exercise the right to manage the affairs of their company in the way they think fit; also because to put an end to the life of a company is a very serious matter, and the request of a petitioner ought not to be satisfied lightly.

The general approach of the court in these cases was explained in the case of Lock v. Blackwood Ltd.,76 where Lord Shaw, said, inter alia:

"...is undoubtedly true that at the foundation of applications for winding up on the just and equitable rule there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors in regard to the company's business. Furthermore, the loss of confidence must spring from dissatisfaction at being outvoted on the business affairs or what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up..."

There are several situations" in which the court may be inclined to make a winding up order under the "just and suitable" clause. These include (1) where the substratum of the company had gone; (2) where the management

---

73 See section 410 of C. & A.M.D. for the category of persons who may petition under section 408(c).
75 McI'hcson, lac. cit. p 283. See also Lord Kinross in Virie v. Stewart (1904) 6 T (ct. of sess) 847.
76 (1924) A.C. 783 at 788.
77 See Palmer's Company Law (21st Ed.) p. 739 for a catalog of such situations.
of the company has reached ‘deadlock’ and (3) where control or management of company’s affairs is characterized by oppression.  

Apart from the rather unattractive, and probably self-destroying-petition for the winding up of their company, sections 310 and 311 of the 1990 Decree provide relief on the grounds of unfairly prejudicial and oppressive conduct to minority shareholders.”

CONCLUSION

The codification of the former common law exceptions to the rule in Foss v. Harboule is rather very salutory and most welcome. Nevertheless, it is submitted that the categories of when a minority shareholder can sue should not be closed for otherwise justice which is the ultimate aim of any law will become an unachievable phenomenon. Whenever the interest of justice demands, our courts should be able to come in by breaking any clog in the wheel of justice in the course of their decisions” and such decisions incorporated into our statute books from time to time.

Furthermore, it is hoped that, when faced with cases arising under the various sections we have discussed, our courts will feel quite free to disregard the generally restrictive approach of the English Courts to the construction or the equivalent provisions of their Act and to give us, instead, creative judgments which would accord with the purpose for which the sections were originally designed, an effective weapon in the armory of oppressed minority shareholders. This we believe would go a long way in strengthening the statutory protection available to Ireccees. After all, good business ethics ought to be supported and reinforced by both statutory provisions and judicial decisions.

---

78 Op cit at pages 289-290.
79 See Hogg v. Corrphor Ltd. (1966) All E.R.