AN APPRAISAL OF DERIVATIVE ACTION CORPORATE MALFEASANCE IN NIGERIA

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Abstract

The Derivative action is the legal mechanism which allows a minority shareholder to change the balance of power within the corporation (at least temporarily) on the company's behalf. In other words, it is a statutorily prescribed remedial device which can be utilised to outwit the powerful majority in order to give succour to the weak minority in a company. This is possible because the device of derivative action affords opportunity for a (minority) member to be subrogated in the position of the company to remedy a wrong done to the company. The law recognises corporate malfeasance as an event in corporate life with a probability of occurrence. It thus prescribes a general code of conduct (in the form of duties) to superintend the acts of corporate officers. This paper adopted doctrinal method in observing that any case of corporate malfeasance will be either a managerial breach of duty or corporate wrongdoing under CAMA or under the company's constitutional document, these provisions keep the directors on their toes, so that chances for corporate maladministration are much reduced. Consequently, the CAMA improved upon this by now requiring the objective standard of a degree of competence expected from a company director having regard to the circumstances of the case. Corporate malfeasance destroys the corporate system. Apart from innate human greed, the structure of corporate ownership in Nigerian companies does more to encourage corporate malfeasance. In order to entrench good corporate governance culture and practices in Nigerian companies, the role of shareholders is indispensable once sensitised, the Nigerian shareholder becomes placed to demand that the affairs of the company be conducted fairly and prudently. In this way the efficacy of the remedial device will become naturally noticeable.

Keywords: Corporate; Constitution; Company; Legal; Minority; Statutory.

1. Introduction

Derivative action is "the legal mechanisms which allow a minority shareholder to change the balance of power within the corporation (at least temporarily) on the company's behalf". In other words, it is a statutorily-prescribed remedial device which can be utilized to outwit the powerful majority in order to give succour to the weak minority in a company. This is possible because the device of derivative action affords opportunity for a (minority) member

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to be subrogated in the position of the company to remedy a wrong done to the company of all the remedies for addressing corporate malfeasance, it stood out. One, it ensures that wrongs against the company do not go unredressed. Two, it avails members, in whose interest the company must be run; and three, it avails non-members, e.g., officers. This means that the action can still survive where there is unholy collusion between membership and management. Three, it can be fought and won by a member, but the fruits of the judgment will normally go to the company.[1]

As the company is a legal person with all the powers of a natural person of full capacity, why must it require the 'help' of a third party in order to remedy a wrong done to it? It is simple. If a third party commits wrong against the company, the collegiate board may not have difficulty pressing action to remedy the wrong. It is a different kettle of fish if the wrongdoers are the ones in control, either through possessory rights of management (de facto control), or economic rights of ownership (de jure control), in the company. Where this happens, as oftener the case, the question turns on "who will bail the cat?" The law provides that a member or other class of persons should bail the cat. This explains why derivative action operates as an exception to the general rule in Foss v Harbottle[2] that an individual shareholder could not be heard to complain about an irregularity regarding the conduct of the company's affairs if there was a constitutional facility affording its ratification (otherwise known as the proper plaintiff principle).[3]

Derivative action displaces the application of the proper plaintiff principle. Thus under the law[4] a member may bring an action in the name, or on behalf, of the company or intervene in an action to which the company is a party, in order to prosecute, defend or discontinue the action. But this is subject to statutorily permitted circumstances.[5] Additional to the permitted circumstances under Companies and Allied Matters Act (CAMA), a further permitted circumstance has been added by the Nigerian courts. It states that the Foss v Harbottle rule will not apply where the interest of justice demands.[6] The interest of justice exception, it is submitted, imports that where the grouse of a dissentient shareholder falls outside the statutorily permitted circumstances, the court of law and equity might still disregard the Foss v Harbottle rule and permit an otherwise incompetent action.

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[1] Talbot, L.E., Critical Company Law, Oxford: Routledge-Cavendish (2008), p. 197.
[2] (1843) 2 Hare 401. Fully articulated in the case of Mozley v Alston (1847) 16 LI Ch 217.
[3] Abbot, et al, Business Law, 7th edition, London: Continuum (2002) p. 422.
[4] Company and Allied Matters Acts CAP C20 LFN.
[5] See section 300 CAMA.
[6] Edokpolo & Co Ltd v Semo-Edo Industries Ltd (1984) 7 SC 119.

Conversely, corporate malfeasance means any want of duty, whether in the form of acts or omissions, on the part of corporate management whose acts or omissions are capable of attracting the sanction of the law (in this case the 'CAMA'). It can also be seen as incompetent or dishonest management or administration of a company. Corporate malfeasance can be classified into two broad degrees: the first border on compliance matters, like notices,[7] returns flung 'or registrations' required to be made to the Corporate Affairs Commission (hereafter called the CAC) by companies;[8] while second are grave acts of illegality, fraud and breach of duty. Whatever may be the degree of its occurrence, corporate malfeasance chiefly emanates from unwholesome acts and omissions of corporate management, who are entrusted with corporate managerial powers. For example, the English Cadbury Report[9] and the US Tread way Report[10] revealed that top managements and boards were deceitful, untrustworthy and unreliable. Consequentially, corporate malfeasance had led, and will continue to lead, to total and near corporate collapses, except effective remedial controls are put in place (like derivative action).

At this juncture, one may ask why derivative action and corporate malfeasance? This is because the health of Nigerian companies has become a factor in the socioeconomic stability of the country. For instance, the United Nations Conference on Trade and Development, the activities of the largest loo companies accounted for 4.3 per cent of world GDP in 2000, while Ford, DaimlerChrysler, General Electric and Toyota were comparable in size with Nigeria'. This means that any case of corporate failure will unleash untold socioeconomic consequences upon the society). Most corporate failures result from corporate malfeasance. Sadly, the latter is on the increase. Decrying this situation, Alan Greenspan reinforcing the earlier insightful submission of Akume lamented that it was not that humans have become any greedier than in generations past; but it was that avenues to express greed have grown so enormously. The recent but receding global economic meltdown, which brought world economies, Nigeria inclusive, to its knees derives from amoral acts of corporate managers. All these cast doubt on the efficacy of the remedies for corporate malfeasance. This is a problem.

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[7] In this paper, corporate malfeasance is interchangeably used with its cognate expressions, which include 'corporate misbehaviour' corporate maladministration, corporate wrongdoing', etc.

[8] Under the English jurisdiction it is a ground on which the court can make a disqualification order against a director who persistently fails in this compliance matters, see section 3, Company Directors Disqualification Act, 1986.

[9] Report of the Committee on the Financial Aspects of Corporate Governance (popularity known as the "Cadbury Report") (1 Dec 1992).

[10] Committee of Sponsoring Organizations of the Treadway Commission International Control – Integrated Framework (AICPA, New York, Sep 1992).

While corporate malfeasance is an act which destroys the corporate system; derivative action is a device which is directed at restoring the corporate system to its purpose of promoting the interest of its members in whose interest it must be run. The occurrence of the former activates the latter, creating an inversely causal link between the two themes of this paper. Thus, this paper will appraise derivative action with the objective of showing the extent of its efficacy in remedying acts of corporate malfeasance in Nigeria. To attain this objective, a comparative approach is adopted, hence the provisions of CAMA pertinent to the topic of this paper are examined vis-à-vis the provisions of the English companies' legislation.[11]

2. Corporate Malfeasance

As pointed earlier, corporate malfeasance means corporate wrongdoing which can occur in one of two main categorized degrees. The degrees of corporate malfeasance which can, and do, occur are considered below: Before that, it is important to consider the general code of conduct which the law thrust upon managers of Nigerian companies. These codes, which do not specifically tell what to do, appear to set the stage for corporate malfeasance.

2.1 Reality of Corporate Malfeasance: Duties of Directors

The law recognises corporate malfeasance as an event in corporate life with a probability of occurrence. It thus prescribes a general code of conduct (in the form of duties) to superintend the acts of corporate officers. In fact, any case of corporate malfeasance will be either a managerial breach of duty under CAMA or under the company's constitutional document.[12] The duties include trusteeship duties[13] in respect of corporate money, property and powers hut they are not trustees of a debt due to the company;[14] agency duties[15] under contractual situations; and occur. As between corporate officers in, and as between corporate managements of different companies the approach to the duties cannot expectedly be similar.[16] This brings to fore, and lends credence to, Theories X and Y assumptions propounded by McGregor.[17] In other words, there will always be those who will do their

[11] English Companies Act 2006 (hereafter the CA 2006).
[12] See Longe y FBN pic (2006)3 NWLR (Pt 967) 228 CA; (2010) 2-3 SC (pt 11)61 SC; (2010) 6 NWLR (Pt 1189) 1 Sc.
[13] Section 283(1) CAMA.
[14] See, Re Lands Allotment Co (1894) 1 ch 616, where it was recalled that "ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees".
[15] Section 283(2) CAMA.
[16] 1n Longe y FBN Pic (supra) the approach of the execUtive managing director was deplorable, being one fraught with impropriety.
[17] McGregor's Theory X assumes inherently lazy, requiring coercion and control, but effective only at seeking security that is undercutting the system. Generally see, McGregor, D.., The Human Side of Enterprise, New York: McGraw Hill, 1960, pp. 47-48; and McFarland, 0.E., Management:
Principles and Practices, 4th edition, New York: Macmillan, 1974, p. 543.

work; and there will always be others who will pursue self-interest goals at the expense of the company and bent only on feathering their own nests. In this paper, only the core duties are examined.

2.1.1 Fiduciary Duty As against the company, the director is a fiduciary and must observe utmost good faith towards the company in any transactions with or on behalf of the company.[18]

Thus, in order to preserve the assets of the company, further its business and promote its objects, the director shall act in what he believes to be the best interest of the company as a whole.[19] A fiduciary is "a person who agrees, or undertakes, to act for, or on behalf of, or in the interests of, another person in the exercise of a power or of discretion which will affect the interests of that other person in a legal or practical sense".[20]

Always, the directors stand in fiduciary relationship towards the company. However, the director with the company shall owe fiduciary duty to a particular shareholder under certain circumstances.[21] Thus the director and the company owe fiduciary duty to a particular shareholder where the director is specifically acting as agent of that particular shareholder whether or not dealing in the company's securities; and where the director is not specifically acting as an agent, but the shareholder (or any other person) was dealing with the securities of the company.[22] This submission is based on (a) the maxim *lex nil frustra facit*[34] (b) the fact that the shareholder (and any other person) depends on the director(s) for information and advice creating a relationship of confidence;[23] and it is trite to state that the directors represent the mind and brain of the company.

Under common law, the duty can he owed to individual shareholders if it is shown that there was a special factual relationship between the directors and the shareholder in the particular case.[24]

[18] Section 279(1) CAMA.
[19] Section 279(3) CAMA.
[20] Hospital Products Ltd y United States Surgical Corporation (1984) 156 CLR 41; see also Mayson et al., Mayson, French & Ryan on Company Law, 4th edition, London: Financial Training Publication, 1987, p. 392
[21] Section 279(2) (a)-(b) CAMA.
[22] However, see the opposing views of Osunbor, O.A., "The Company Director: His appointment, powers and duties", Essays on Company Law, Ed.: Akanki E O p. 130; and supporting position of Ali H.L., The Powers of Directors In Nigerian Company: An Analysis of the Dynamics of Director's Dominance in Modern Companies" An Analysis of the Dynamics of Director s Dominance in Modern companies". (Unpublished) LLM Thesis, Department of Commercial Law, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria, (1996), pp. 31 -33
[23] Coleman y Myers (1977) 2 NZLR 225.
[24] Platt y Plats (1999) 2 BCLC 745; Peskin y Anderson (2001) 1 BCLC 372. This is also the case under CA 2006,s. 170(3).(4).

The components of this duty include (a) the duty to act bona fide in the interests of the company;[25] (b) the duty to exercise power for the purpose for which it is specified and not for a collateral purpose;[26] and (e) the duty not to fetter their decision by acting as mere puppets on the instructions of another.[27] This latter duty must be kept in proper perspective as cases arise where the company will enter into a contract and the directors agree to exercise their powers in a way such as to ensure the proper execution of the contract. But the decision to enter into such a contract must be taken in good faith as far as the interests of the company are concerned. Were it not so, it would make companies unreliable contracting parties. This will deprive them the chance to go into commercially beneficial long term contracts.[28]

As regards (a) above, it is owed to the company, but where the Company is receding into insolvency, the interests of' creditors crystallize so that the duty to act bona fide in the interests of the creditors becomes ripened.[29] Also, CAMA requires the director to have regard to the interest thereof, The company's employees in general as well as of its members in the discharge of this duty.[30] To test the bona fides of the director, it has been held that the question will always turn on whether the director honestly believed that his acts or omission was in the interests of the company. The test is as to the director's state of mind.[31] This stance of the law is to exclude the courts from second-guessing the decisions of the directors as to where the best interests of the company lie.[32] However, it means the company can expect little result from this aspect of directors' duties, if the directors, as they often do, stray from the duty of promoting the interest of the company for the members.[33] This is why it is said that this aspect of the duty is "vague and the possibility of enforcement is remote, for the duty is owed by the directors to the company and the company alone".[34]

[25] Section 279(3)-(4) CAMA; section 172(1) CA 2006.
[26] Section 279(5) CAMA; section 171 CA 2006.
[27] Section 279(6) CAMA; section 173 CA 2006.
[28] Smerdon, R., A Practical Guide to Corporate Governance, 3rd edition, London: Sweet & Maxwell (2007) p. 92; Davies, PL., Gower and Davies' Principles of Modem Company Law, 7°' edition, London: Sweet & Maxwell (2003) p. 391. See Thorby y Goldberg (1964) 112 CLR 597; Fuiham Football Club Ltd y Cabra Estates pic (1994) 1 BCLC 363.
[29] See West Merda Sàfetywear Ltd y Dodd (1988) BCLC 250.
[30] Section 279(4) CAMA; section 309 CA 1985. In Okeowo y Migliore (supra), Eso JSC quipped that "it is the duty of the directors of a company to exercise powers vested in them for the benefit of the company" and not for individual advantage.
[31] Regentcrest Pic y Cohen (2001) 2 BCLC 80. See particularly Section 279(3) CAMA which states that the director "shall act in what he believes..."
[32] Davies, op.cit, p.389.
[33] In CA 2006 the wording is "promoting the success of the company for the benefit of its members".
[34] Thorne J. Prentice D., (Eds), Butterworths Company Law Guide, 4°' Edition, London: LexisNexis (2002), p. 212.

Apparently mindful of the above uncertainty, the CA 2006 now requires that to promote the interest of the members the directors are to have regard to a range of matters which include the likely long term effects of any decision; the interests of the company's employees; the need to foster the company's business relationships with suppliers, customers etc; the impact of the company's operations on the community and the environment; the desirability of the company maintaining a reputation for high standards of business conduct; and the need to act fairly as between members of the company. It has been submitted that this "take into account after shareholders" section embodies the "enlightened shareholder value" (ESV) approach. The duty to take into account these factors is what injects and infuses the "enlightenment" into the shareholder value principle. The enlightenment is needed by the directors, not the shareholders.

Thus, if the company is a going concern, meaning shareholder interests are well taken care of, it will not do the members any good if the company has dissatisfied customers, faces an antagonistic government or regulatory agency and has angry pressure groups bumping into its annual general meetings. This pluralistic precept helps the directors to manage the affairs of the company in a socially responsible way. Hence, there is a nexus between corporate social responsibility and the attainment of shareholder interests. The ESV approach is preferred, as it synchronizes the company with the society, and entitles members of the society the demand that the business of the company be conducted in a way that protects the interest of all stakeholders. It is submitted this is akin to socializing the company (a private property), and making capitalism less capitalistic.

Further, the ESV provision has been criticized as likely to result in paper trail. Thus, in order to stave off likely claims for breach of this duty the directors will not only monitor the basis of their deliberations, decisions and actions, they will also have to establish appropriate processes where they have delegated their powers. Also, company secretaries will pay particular attention to the wording of board decisions in order to show that the various factors have been taken into account.

In the same vein, Chambers agrees that paper trail is indeed a real danger when he states that the conduct of boards and board committee meetings, the content of agenda papers and the drafting of minutes will be adopted so that it will be possible, retrospectively for companies to show that their managers had regard to the factors when making decisions. This will be critical for publicly held companies where greater risk of derivative action exists.

However, Lord Goldsmith understandably disagrees, stating that directors will not be "subject to a breach if they cannot demonstrate that they have considered every element; and it will be for the person who is asserting breach of duty to make that case good". The differing positions remain academic conjectures as to (he probable effects of the provision. However, it may afterward be construed by the courts, it is submitted that where the directors arc not careful to observe the ESV provision, the risk for them is that any member pursuing a claim for alleged breach of fiduciary duty can, evidentially, draw attention to any apparent failure to take into account the factors. Having done so, the onus shifts on the erring director for rebuttal. Hence, both positions are not without merits. In any case, the provision keeps the directors on their toes, so that chances for corporate maladministration are much reduced.

2.1.2 Conflicts of Duties and Interest A director must not place himself in a position where his duty to the company and his personal interest's conflicts, and in particular he shall not make any secret profits or achieve other unnecessary benefits in the course of managing the affairs of the company or in applying the property of the company. The CA 2006 captures this duty more clearly that "a director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflict, or possibly may conflict, with the interests of the company". This implies there are three broad conflicted situations that a director can find himself or herself, to wit, (a) conflicts with the interests of the company in relation to transactions/arrangements to which the company is not a party (e.g., exploitation of an opportunity, whether or not the company could have taken advantage of it); (b) conflicts in relation to a proposed transactions/arrangements to which the company will be a party; and (c) conflicts in relation to existing transactions/arrangements to which the company is party. Once there is conflict, the director will be called to account.

As regards (b) and (c) above, the rule against profit and conflict of interest and duty is strict. Thus as early as 1854, the chairman of the board of directors used his position to execute a contract for purchase of components from an undertaking of which he was the managing partner. Upholding repudiation of the contract by the company, the court held that no fiduciary "shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or what may possibly conflict with the interests of those whom he is bound to protect". Where the directors have made the secrets profits or derived secret benefits, they would be made to disgorge the proceeds. In Regal (Hastings) Ltd v Gulliver, the directors of Regal who made profit of almost £3 per share on the sale of their shares in the subsidiary were made to spew the proceeds having obtained them in the course of the execution of their office as directors, albeit they had acted bona fide. To escape liability, the director concerned must disclose his interest fully. The closure is before the general meeting. When is disclosure said to be effectively made? On this question, it has been held that "a man declares his interest, not when he states that he has an interest, but when he states what his interest is". However it is submitted that this requirement is likely to be circumvented following the neutralizing provision in CAMA, which allows directors to retain unnecessary benefits or gifts which are made after the transaction has been completed in a form of unsolicited gift as a sign of gratitude, provided he declares it before the board (not the general meeting in this case) and that fact shall also appear in the minutes hook of the directors. This is a subtle way of sanctioning post-transaction secret benefits. The disclosure must be precedent to making the secret profit, otherwise the conflicted director must account and no subsequent disclosure will relieve him from liability.

With respect to (a) above, the directors must not profit from the use of corporate property. The corporate property likely to fall under this aspect includes corporate assets, corporate opportunity and information. The provision prohibiting directors profiting from corporate opportunity or information is justified on the premise that to allow directors to decide that the company shall not accept an opportunity and then to accept the opportunity themselves is to impose great a strain on their loyalty and integrity. Thus in Cook y Decks & Ors, three of the four directors in the Toronto Construction Co Ltd who used their majority votes to divert a business opportunity away from the company were made to account to the company for the profits made from the contract.

The court held that men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests that they are bound to protect, and while ostensibly acting for the company, divert to their own favour business which should properly belong to the company. A company may not be a party to an arrangement, but if the arrangement was concluded by virtue of and in the course of the director's fiduciary relationship, it will bring the arrangement within the prohibition.

Where liability will attach to a director on account of misuse of corporate information or opportunity, a mere employee of the company or third party who benefited from the transaction may escape with his booty, while the affected director or directors will be compelled to disgorge theirs. This was the position in Regale's case. The company's solicitor (on whose advice the directors had acted) who subscribed for shares and profited personally was allowed to retain it because he acted with the knowledge and consent of the company exercised through, and represented by, the board of directors. Conversely, the directors would have avoided liability if members in general meeting had ratified the transaction.

Further, there is a continuing duty not to fall in breach of this aspect of the duty even after cessation of employment with the company. That is the director may be accountable and can be restrained from misusing the information received by virtue of his previous position. Based on the law that generally contracts in restraint of trade are void, this provision must be viewed with caution, especially where the cessation of employment was not prompted by the desire to exploit a corporate opportunity which emerged while working for the company;[35] or where the company was not actively pursuing any business opportunity with the particular client. Where this is the case, it would be an unlawful restraint of trade to inhibit a former employee, since "directors, no less than employees, acquire a general fund of knowledge and expertise in the course of their work, and it is plainly in the public interest that they should be free to exploit it in a new position".[36] Thus, if the bona tide of a director's action is in place, he is entitled to compete with his former principal without falling foul of the law,[37] provided the particular transaction was not one which the company was maturing at the time of the director's employment.

On the face of it, the CAMA provision 'appears' stricter than the CA 2006 since all authorization, except post-transaction secret benefits, must be by the general meeting. Yet, unlike the CA 2006, it did not take into account economic reality as no distinction is made between private[38] and public[39] companies. Also, the CAMA did not provide for a situation that "cannot reasonably be regarded as likely to give rise to a conflict of interest".[40] Although the CAMA is apparently stricter, it is prone to be circumvented than the CA 2006. For instance, a director by sheer voting power can move the company to pass a resolution for a contract in which he is or is likely to be conflicted, since he is not disqualified from voting on such a resolution.[41] That is, except the provision is pragmatically construed by the courts on the basis that allowing the director to vote is to make him judge in his own case, a conflicted transaction[42] may likely escape sanction.[43]

[35] Talbot, op cit, p. 170.
[36] Talbot, op cit, p. 171. See gener3liy, Island Export Finance Ltd V timunna (1986) BCIC 460.
[37] In section 280(5) CAMA.
[38] Directors can authorize the act in private companies, section 175(5)(a) CA 2006.
[39] In public company's directors can authorize if the articles so permit. section 175(5)(b) CA 2006.
[40] Section 175(4)(a) CA 2006.
[41] North West Transportation Company y Beaty (1887) 12 App Cas 589
[42] Other provisions complementing or reinforcing the no conflict duty include the requirement of prior approval of the company in general meeting of director's contract of employment for more than five years, Section 291 CAMA; and arrangements involving substantial property transactions with directors must be approved by the body of shareholders in general meeting (provision obviously targeted at asset-stripping), Section 284 CAMA.
[43] Since CAMA merely requires disclosure to, and approval of, the general meeting.

Conversely, under the CA 2006 the company could avoid the transaction by the combined effect of the provisions[44] which requires such consent to be at a quorate meeting without reckoning with (i) the director or other interested director and (ii) the vote of the conflicted director must not he counted; and which disqualifies the director from voting on the resolution to authorize the act. The position of CA 2006 is preferred because it is more probably to address and effectively attack the mischief (e.g., mingling corporate assets with personal assets, etc) which the law seeks to cure.

2.1.3 Duty of Care and Skill[45] The good faith duty underpins all other duties of the director, and this is very much emphasized under the duty of care and skill.[46] Under the Common Law, low standard was used to test a director's knowledge. Thus in Re City Equitable Fire Insurance Co Ltd[47] it was stated that the standard of skill expected of the director is "no greater skill than might reasonably be expected of a person of the director's knowledge and experience"; while the standard of care expected was "such care as an ordinary man might be expected to take on his own behalf".[48]

The common law standard, it is submitted, is today inappropriate, both as regards executive directors who are paid large sums of money for the expertise which they profess they can bring to the business, and the non-executive directors who, as economic owners, wield and exert influence 'on the direction and management of the affairs of the company.

Consequently, the CAMA improved upon this by now requiring the objective standard of a degree of competence expected from a company director having regard to the circumstances of the case. On the other hand, the CA 2006[49] went a step further. It requires two-fold standards of (a) objective test, constituting the basic benchmark of care, skill and diligence; and (b) subjective test, which recognizes that some directors may have special knowledge, skill and experience in which case they will be expected to conform to that standard.[50] Thus in **Re Barings Pic & Ors (No. 5)**,[51] a bank went into insolvency because of unauthorized securities trading of an individual employee. The executive chairman of the blink unsuccessfully defended himself that his expertise was in the corporate finance side of the

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[44] See sections 175(6) and section 239(3) CA 2006.
[45] Section 282(1) - (4) CAMA; section 174(1) - (2) CA 2006.
[46] Section 282(1) CAMA.
[47] (1925) 1 Ch 407; Re Brazillian Rubber Plantations and Estate I.td (1911) Ch 425.
[48] This hollow approach was adopted by the Nigerian Supreme Court in Shonowo y Adebayo (1969) 1 All NLR 170.
[49] See Section 174 CA 2006.
[50] Re D'ian of London Ltd (1993) BCLC 646.
[51] (1999) 1 BCLC 433; see also Re Continental Assurance Co of London (in liquidation) (No. 1) (1997) 1 BCIC 48.

business, and that he had very little understanding of the activities in which the trader was involved and that he relied on the internal audit unit and external auditors.

Rejecting the defence, the court said that there is a continuing duty incumbent upon the directors to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to discharge their duties.

With respect to negligence and responsibility, the CAMA provides that failure to take reasonable care will ground an action in negligence and breach of duty. It is submitted that it will be difficult to maintain a successful action against delinquent and greedy directors for negligence under this head of duty. For example, where directors arc shown to have been negligent, which amounts to breach of duty, it must be shown that they benefited or are likely to benefit from their negligence.

It is submitted that once there is breach of duty, whether negligence is present or not, the law should run against the director in order to save the system, since little drops of managerial breach will make a mighty ocean of corporate failure.

The above submission is fortified by the requirement of responsibility under this duty. Accordingly, each director shall be individually responsible for the actions of the board in which he participated, and absence from the board deliberations, unless justified, shall not relieve a director of such responsibility. This means (a) directors who play truancy at hoard meetings without justification do so at their own peril; (b) it requires constructive engagement of the directors in all deliberations of the Board; and (c) a director who cares less about what is happening at board meetings plays with fire for it would be in the highest degree rash to permit a director to say when any particular incident arises that he/she was thinking of something else (absent-minded) at the meeting. Sadly, Board appointments in Nigerian companies are frequently enmeshed in corporate politics. In some cases, most executive directors are appointees of overbearing managing director, who use them to gain unfair advantage of voting power at hoard meetings, making independence nearly or totally impossible. In such a situation, observance of this duty becomes compromised and increases the tendency to foist corporate malfeasance on the system, despite the law. The two-fold test under the CA 2006 is preferred because they make escape difficult for the director who may wish to plead defence either generally or specifically with respect to the activities of the company.

3. Degrees of Corporate Malfeasance

Corporate malfeasance can be categorized two broad degrees, first and second degree cases.

3.1 First Degree Cases The cases falling under this category border on compliance matters (which require returns or filings or registrations to be made to the CAC by companies). It is submitted that default in this duty is the result of failure to appreciate the corporate governance role of the information required to be filed or registered. At times the consequence of failure or breach of this duty is so negligible or insignificant that companies blatantly disregard, neglect to obey or refuse to comply with it. For instance, where a company alters its share capital, it is under duly to give notice to the CAC within one month of any such alteration, and any default attracts a daily penalty laughable fine of N50 in which the default continues. The Nigerian case is worrisome, when viewed against the hard stance of the English jurisdiction. In England, failure to discharge the duty relating to compliance matters can be a ground for disqualifying one from directorship for not less than five years.

3.2 Second Degree Cases The cases under this category are so fundamental that they put at risk the future of the company as a going concern and ultimately trigger rigorist remedies (like derivative action). They include ultra vires or illegal acts (like political donations), procedural defects, expropriation of corporate property and fraudulent negligence, to mention a few. An example of procedural defect can be seen where, a manager in breach of his duty of care, enmeshes himself in acts of impropriety, thereby utterly disregarding the procedures of the company. Thus, where the managing director improperly and in disregard of guidelines grants loan facility to a customer of the respondent bank, this would amount to breach of duty of care and skill. Also it is an act of corporate malfeasance where the directors grossly undervalued the assets of the company, caused the company to sell the land to one of their own, and four years later moved the company to repurchase the same property at 28 times the amount it was sold. Showing the courts distaste for unconscionable acts as this, Vince Lott J retorted that "to put up with foolish directors is one thing; to put up with directors who are foolish that they make a profit of £115,000 odd at the expense of the company is quite another". The case would be different if no fraud or personal benefits are shown. Whatever the degree of occurrence of any case of corporate, the minority is not left helpless, having regard to derivative action remedy.

4. Reasons for Persistent Cases of Corporate Malfeasance

Corporate malfeasance has become a common feature of corporate life, and it can be discoverable from many factors which include fraud and failure of corporate governance, shareholder passivity, and statutory issues, among others. Only two are considered here.

4.1 Fraud and Failure of Corporate Governance Corporate governance refers to the conduct of the corporate management, which requires an overriding commitment to a positively rewarding culture that permeates all aspects of board and management conduct. It is creating a culture of transparency and accountability within the corporate system through the adoption of value-based internal corporate code of conduct, which guide and direct the action of management and staff. Where this is non-existent, fraud will take the centre stage. Fraud is any illegal acts characterized by deceit, concealment or violation of trust, the purpose of which is to make a gain or to cause another or to expose another to a risk of loss. Frauds are perpetrated by individuals and companies to obtain money, property or services; to avoid payment or loss of services; or to secure personal or business advantage. As at 1996, fraud is said to have cost businesses more than $10 billion globally on a yearly basis.[52] In 2009 the Central Bank of Nigeria (hereafter the CBN) intervened in the affairs of Nigerian banks due to fraud and governance failures.[53]

4.2 Statutory Issues The devolution of power provision under CAMA states that powers of management reside in the board of directors.[54] Thus, the corporate management of a Nigerian company is not bound to obey the directions or instructions of the owners (acting in general meeting).[55] There is no problem with this provision, which is targeted at institutionalizing a Berlet Means corporation[56] in Nigeria. The problem has to do with the peculiar ownership patterns in Nigerian companies.[57] As to the latter, in Dangote Sugar Refinery pic 67.66% of the company's shares are in the hands of Dangote Industries Ltd, a private company owned by its chairman, as against 1.76% of the company's shares that are in the hands of 89,340 shareholders representing 81% of the shareholders of the company.[58] With the kind of ownership structure in Dangote Sugar Refinery pic[59] it becomes

[52] Sherwin, D., Head of Fraud Investigation and Risk Management at the Accountants Ernest & Young, London, quoted in: "Business Hit by Rampant Fraud", Sunday Times, 19 May, 1996, P. 29,
[53] On the ubiquity of frauds in Nigerian banks and its socioeconomic impact see, Goldface-lrokalibe, J., Law of Banking in Nigeria, lagos: Maithouse Law Books, (2007), pp. 175-201.
[54] Section 63(3) CAMA.
[55] See section 63(4) CAMA.; see also section 40 CA 2006.
[56] A company is said to be a Berle-Means corporation if it has diffuse and dispersed shareholder base such that there is no one shareholder weathering sufficient voting power to direct and control the activities of management. In such a case, ownership is said to be distinct and separate. from control. For detailed reading see, Berle, A., and Means, G., The Modern Corporation and Property, London: Macmillan (1932), and for antithetical view see, Michel De Vroey, "The Separation of Ownership and Control in Lorge Corporations", Review of Radical Political Economics, Vol 17, No 2 (1975), p. 1.
[57] The peculiar ownership patterns are characterised by family holdings as in the cases of FCMB Bank pic arid Oceanic Bank pic that were family founded and owned businesses; founding bloc holdings as in the case of Intercontinental Bank pic, that was formed, and still owned, by a group of Nigerian business men; and overbearing economic member/owner.
[58] See 2009 Annual Report and Accounts, Dangote Sugar Refinery pic, p. 13. But in First Bank with over 1.3 million shareholders, no single owner holds more than 0.5% equity, see 2009 Annual Report and Accounts, "Strength and Stability in Uncertain Times", First Bank of Nigeria plc, p. 39.
[59] This appears to be a common feature among Nigerian public companies. For example see, 2009 Annual Report and Accounts, "In Block and White", Diamond Bank plc, p. 28.

commonplace to situate two corporate organs in one entity. This makes it near impossible to remedy corporate wrongs by those in control, especially when regard is had to another provision of the law.[60]

Fortunately, company law, as a functional area of law, provides checks against abuse inherent in the corporate structure. Thus, where the proper plaintiff rule will not enforce action against wrongdoers because ownership and control is locked, the hand of a member or an officer or even a proper person (subject to the discretion of the court), becomes the company's outstretched arm with which to remedy that wrong, hence derivative action.

5. Derivative Action

Derivative action is an action which a member, director, officer or any other proper person commences in the name, or intervenes (for the purpose of prosecuting, defending or discontinuing) on behalf of the company, because the latter could not take steps to remedy a wrong done to it. It is derivative because the power of the applicant is derived from the power of the company. It ¡s founded on the wisdom that it would be improper to allow corporate malfeasance by directors to escape sanction because they control the management of the company. Specifically, it is used to remedy wrongs done to the company, where the wrongdoers are the ones in control and will not remedy it. To keep it within bounds and discourage abuse, certain conditions or grounds must be met before it can be allowed by the court.

5.1 Grounds for Commencing Derivative Action

Apart from the permitted circumstances and now the interest of justice exception, there are conditions which must be met before derivative action can be commenced. One of the foremost grounds is leave or permission to commence or intervene. Before leave is granted, the applicant must meet other conditions considered below.

5.1.1 Fraud on the Minority It has been held that fraud in this context goes beyond fraud and illegality at common law, but includes fraud in the wider equitable sense of an abuse or misuse of power by the directors.' Generally, fraud on the minority has been said to lie in the use the controllers make of their power of control. A clear case is where the majority used its voting power not in order to promote their group interests to the disadvantage of the minority. It is not every breach of duty that amounts to a fraud on the minority.

[60] Section 299 CAMA permits only the company (as the proper plaintiff) to remedy a wrong, or ratify an irregularity, done against the company.

5.1.2 Wrongdoer Control The court must be satisfied that the wrongdoers are the ones who are in control, and will not take necessary action.[61] Wrongdoer control is said to exist "if the wrongdoer has a majority of the votes or the majority has actually approved a fraud on the minority, or the company has otherwise shown that it is not willing to sue".[62] It is submitted that under CAMA defector as well as de jure control will meet the wrongdoer control test. This is because the board of directors,[63] irrespective of the quantum of their shareholdings in the company, can block the action from being brought by means of manipulation of their position in the company.[64] However, under the CA 2006, an applicant can derivatively sue 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.[65] This means, preferably, that there is no need to show wrongdoer control under the CA 2006,[66] and it involves mere negligence, breach of duty, default, etc.

As to the nature of wrongs, the ratification or non-ratification of an alleged wrong is not a bar to derivative action under CAMA.[67] However, ratification, or the possibility of it, may be taken into consideration by the court when making an order.[68] It means that if a rectifiable wrong is alleged and a derivative action is pursued, the court may direct the company to ratify the act.[69] It is submitted that this provision invites he courts to second-guess the fairness or otherwise of a purported ratification. Although in making its orders the court may have regard to the common law principles of internal management[70] and irregularity.[71]

Under the CA 2006, however, the court must refuse an application if a person acting in line with section 172[72] would not seek to continue the claim; or where in respect of an act or omission that is yet to occur, authorization has been given by the company; or where in respect of an act or omission that has already occurred, the act or omission was authorized before it occurred or has been ratified by the company alter its occurrence. Thus, under the

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[61] Section 303(2)(a) CAMA.
[62] Russell y Wakefield Waterworks Co (1875) LR 20 Eq 474.
[63] It must be remembered that CAMA did not distinguish between executive and non-executive directors.
[64] Orojo, J.O., Company Law and Practice in Nigeria, tI edition, Durban: Lexis Nexis (2008) p. 270.
[65] Section 260(3) CA 2006.
[66] In fact derivative action may be commenced against a third party: section 260(3) CA 2006.
[67] Section 305 CAMA.
[68] Section 304 CAMA.
[69] Section 304(1) CAMA.
[70] Okoya y Santili (1990) 2 NWI.R (Pt 131) 172; Williams y Edu (2002) 3 NWLR (Pt 754) 400.
[71] Elufloye y Halilu (1993) 6 NWLR (Pt 301) 57Ò, where, approving the irregularity principle the court observed that rectification of irregularity or procedural informality is always intra vires the company.
[72] That is, duty to promote the success of the company for the benefit of its members; see above, n. 58, p. 8.

CA 2006 the courts do not have the room for second—guessing and this removes the possibility of flooding the court with frivolous claims'.

Further, under CAMA derivative action may not be allowed except it is shown that the controllers benefitted from their negligence. That is, negligence simplicity, however gross, is not sufficient to permit derivative action; and this means that the maxim *nullus commodum capere potest deinjuria sua propria* applies under CAMA. Thus, where the directors were grossly negligent in selling a company asset without personally benefiting from their negligence, the court will refuse application for derivative action; but where the directors use their powers, intentionally or unintentionally, fraudulently or negligently, in a way which benefits themselves at the expense of the company, the minority shareholder will be allowed to derivatively sue to remedy that act of managerial banditry. In comparison, negligence simplicity is sufficient to commence derivative claim under the CA 2006.

5.1.3 Notice to the Company The CAMA requires as a condition proof that reasonable notice has been given to the company (of course represented by the directors) of the applicant's intention to apply to the court for a derivative action. What is reasonable notice is not defined under CAMA.

However, it is submitted that derivative action is a special matter, and will fall under category of issues of which special notice of 28 days would be required. By analogy, a minimum of 28 days' notice must have been served on the company.

In fact, the English Company Law Commission proposed 28 days' notice, but this proposal was rejected as the requirement of notice was not in the CA 2006. In its place, a two stage process was provided. The first stage is ex parte application stage in which the evidence filed by the claimant is expected to disclose a prima facie case for giving permission, otherwise the court must dismiss the application and may make any consequential orders, e.g., as to costs. At the second stage, the court considers evidence from the company, i.e., the company is put on notice.

Without doubt, the English provision is preferred because it enables the court to discover and dismiss unmeritorious claims and removes it from the manipulative schemes of directors who may be directly affected. To make derivative action an effective remedial tool for corporate malfeasance in Nigeria, the directors must not be given any room (through the requirement of notice) to compromise the action, which if done will weigh against the interests of the company.

5.1.4 Good Faith and Interest of the Company Doubt must not be cast on the merits of the application. Thus good faith will not avail if the applicant participated in the wrong of which complaint is now being made. Further, the action must be in the interest of the company. Hence, a member who seeks to pursue a claim in order to settle personal scores with the management or for personal benefit cannot be said to be acting in the interest of the company.

Under the CA 2006 the good faith requirement is also provided. The interest of the company requirement under CAMA is replaced by a subjective requirement of "the importance that a person acting in accordance with the duty to promote the success of the company would attach to the claim, and an additional objective requirement of the "views of members of the company who have no personal interest, direct or indirect, in the matter. The latter provision derived from the decision in Smith v Croft (No 2), where the minority members having 12% holding brought a derivative claim against the excessive remuneration paid to directors holding altogether 62% of the company's share capital. Striking out the case, the court took the view of an independent shareholder with 20% who did not wish that the action should proceed.

Other requirements under this head pertinent to the CA 2006[73] include the court must consider in the case of a cause of action arising from an act or omission that is yet to occur, whether the company could, and in the circumstances would likely, authorize the act or omission before it occurs or ratify it after it occurs. Where it relates to an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely, ratified by the company. Where the company has decided not to pursue the claim the court is called upon to take it into account. The court is to consider whether the act or omission complained of affected the member personally which can be personally pursued rather than on behalf of the company.

Importantly, the CA 2006 empowers the Secretary of State to make regulations so as to alter or add to the circumstances in which permission is to be refused or to the matters to be taken into account in giving permission.[74] In order to check abuse, regulations made thereto shall be subject to affirmative resolution procedure.[75]

Generally, the CA 2006 provides greater insight into the concept of "good faith" and "interest of the company" through its detailed provisions of issues the court is called upon to consider. However, it is submitted that the interest of the company provision under CAMA is preferred because chances are that the interest of the company can be sacrificed on the altar of either

[73] Section 263(3)(c)-(f) CA 2006.
[74] Section 263(5) CA 2006.
[75] Section 263(7) CA 2006. On the meaning of affirmative resolution procedure see section 1290 CA 2006.

the subjective views of the person purportedly promoting the interest of the company or the apparently objective views of disinterested shareholders of the company. The court, not being embroiled in corporate politics, can dispassionately determine what the interest of the company is. Albeit, it may he argued that that interest can only be discovered when the subjective as well as objective factors enumerated under the CA 2006 are taken into consideration. Conversely, the need for courts under the CA 2006 to take into account the ratification or non-ratification of an act or omission is a quality system meant to thwart frivolous cases. The power donated to the Secretary of State ensures that derivative action under CA 2006 is kept in tandem with the fluidity of the business environment.

5.1.5 Standing An applicant for leave to commence, or to intervene in, an action on behalf of the company must be registered holder or beneficial owner, whether present or former, of a security in the company; a director or an officer, whether present or former, of the company; the commission (i.e., CAC); or any other person who in the discretion of the court is a proper person to make an application for derivative action. An officer is defined as including a director, manager or secretary.[76] It is submitted that the secretary, manager, etc can be a qualified applicant for derivative action, either as an officer or as a proper person, to bring a derivative suit. Proper persons, it is submitted, will include persons to whom shares have been transferred or transmitted by operation of law (and even employees)[77] will fall within this category. Under the CA 2006 only two classes of persons are permitted to bring an application:[78] a member and it is immaterial whether the cause of action arose before or after the applicant became a member of the company; and a person, albeit not a member, to whom shares in the company have been transferred or transmitted by operation of law.[79]
Insightfully under the CA 2006, unlike CAMA, where a member of the company has brought a derivative claim or has continued as a derivative claim a claim brought by the company, another member (applicant) of the company can apply to take over and continue the claim on the ground that the manner in which the proceedings have been conducted or continued by the first member (claimant) amounts to an abuse of the process of the court or the claimant has failed to prosecute the claim diligently.[80] This provision makes it difficult for the derivative claim to be compromised, actively or passively, by the claimant.

[76] Section 567 CAMA.
[77] See section 384 CAMA. Where fraud denies the statutory right of the employee, he can approach the court.
[78] Sections 260(1), 260(4) and 260(5)(c) CA 2006.
[79] This is equivalent to "proper person" provision in CAMA save that CAMA is more extensive and subject to the court's discretion.
[80] Section 264 CA 2006.

6. Weaknesses, Benefits and Implications of Derivative Action

6.1 Weaknesses

a) The requirement of notice could operate to make an intended action a stillbirth. If Miss Derivative Action (Ms DA) sees Mr Corporate Malfeasance (Mr CM) notice that she intends to remedy a wrong, negligently and fraudulently undertaken by Mr CM and in breach of Mr CM's, statutory or constitutional duties, will Mr CM sit down and dare Ms DA? The first response from M CM may be face-saving boasting, followed by intimidation and then finally talking over. The last stage will nail the coffin of the intended action and a good cause will be lost.

b) Secondly, its major weakness may be in the fact that derivative action cannot be commenced against a third party, where the latter is the wrongdoer. This means that managers will be at liberty to execute their designs through third parties. This is because the law states that it is in their power to remedy a Wrong done to the company by (in this case, an Ostensible) third party. Although, the members have residual powers to institute legal Proceedings in (he name and on behalf of the company, if the board of directors (as managers) refuse or neglect to do so, this power can only be activated on the passage of resolution to that effect. Now what if the managers are, as observed earlier, the majority? Where this is, as oftener, the case it means that the two principal organs of the company are situated in one and the same body. This means the minority will not be able to muster sufficient votes to pass such a resolution.

6.2 Benefits

a) One of the benefits of derivative action is that it helps to keep the managers on their toes with respect to their duties. It does this by ensuring that a wrong does not go underdressed this benefit is based on the premise that the minority can be empowered to control the conduct of the action. It should be noted that the action here refers to an action to remedy a Wrong done to the company by those in control who benefited or are likely to benefit from their fraudulent negligence and breach of duty. This means that the member will take all reasonable steps, investing all time and engaging the best team of legal experts to ensure that the wrong is remedied and the wrongdoing directors called to account. The directors will act with caution if they know that any breach of duty will not go underdressed.

b) It is a cost effective remedy. The remedy costs almost nothing to the applicant. Once leave is granted the action becomes the Company's action except that the applicant is the company's outstretched arm through which the action is conducted. One, no security for cots is required on the applicant, albeit, as observed earlier, this may operate as a demerit of the remedy. Two, the applicant can recover preliminary costs of the action even before it is finally disposed of.[81] Three, the legal fees reasonably incurred in connection with the proceedings will be defrayed out of the company's finances.[82]

c) Once leave is granted, the action cannot be easily compromised. This is because the applicant can be authorized to control the conduct of the action. This means that the applicant, knowing that failure is adverse to his interests in the company, will do all he can to engage the services of legal practitioners with sufficient bottom in company law and management. Secondly, the action is put beyond the wrongdoing directors, since the action cannot be compromised without the permission of the court. There is wisdom here, which is that a wrong to the company is not just a wrong to the applicant alone. It is a wrong which affects other members or officers or proper persons, so such a compromise, if permitted, can potentially keel) out other victims of managerial malfeasant acts from justice. However, passive compromise is possible. This is a case where the applicant fails to prosecute the action diligently.[83]

6.3 Implications for Malfeasant Directors

Where the directors commit, to one of them commits, corporate wrong and derivative action is successfully pursued to remedy that wrong; the implications can be very serious for the wrongdoing director. This places derivative action as a special remedy. Thus, it could imply that the erring directors could be made to pay damages, or rendered to account of profits'68 or compelled to restore the property[84] or amenable to removal from directorship[85] or the erring director could even face summa dismissal.[86] Take a case where the directors made a loan to one of their own which was not approved by, and subsequently resulting in a loss to the company. They could be made to refund the loan and to pay damages resulting from the loss.[87]

7. Findings and Conclusion

The following findings and conclusions are drawn from this paper with a view to reinventing derivative action with a view to curbing growing cases of corporate malfeasance in Nigeria.

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[81] Section 308 CAMA.
[82] Section 304(2)[dj CAMA.
[83] Under CA 2006 such a scenario is well taken csre of, see section 264 CA 2006.
[84] Sections 381 and 386 CAMA; Bairstow & Others y Queens Moat Hos5 (2000) 1 BCLC 549.
[85] Re Harmer (1959) 1 WLR 62
[86] Longe y FBN pic (supra).
[87] Sections 270(1) and (3) CAMA; Cranleigh Precision Engineering Ltd y Bryant (1965) 1 WLR 1293.

7.1 Findings

a) Generally, there is an inversely correlating connection between corporate malfeasance and derivative action. Corporate malfeasance destroys the corporate system, being reflective of a breach of the general code of conduct thrust upon managers by CAMA or corporate constitutional document; while derivative action is a device which is directed at ensuring that any case of corporate malfeasance does not go underdressed. Specifically, it is directed at remedying any act of corporate malfeasance committed against the company by those in control of the company's affairs.

b) Apart from innate human greed, the structure of corporate ownership in Nigerian companies does more to encourage corporate malfeasance. Thus, where ownership and control (as in Dangote Sugar Refinery pic and many other Nigerian companies) resides in one entity, it means that two corporate organs are held by one and the same entity. Deriving from the position of CAMA[88] corporate malfeasance will not only ensue but chronically fester. This appears to have facilitated the massive frauds and corporate governance failures discovered ¡n eight Nigerian banks.

c) Derivative action is a remedial device designed to ensure that corporate officers are committed to their duty to the company yet it has remained largely unutilized in Nigeria. Rather the battle here appears to have been left to government agencies, like the Economic and Financial Crimes Commission (EFCC). In any case, the EFCC will not get justice for the company, but for the state.[89] Generally, the Nigerian shareholder sleeps away his rights, whines helplessly and then relapses into paranoia. The complacent disposition of the shareholder dangerously stokes directors' proclivity for acts of corporate misbehaviour. Recently it was reported[90] that at the AGM of May & Baker pic, the shareholders curiously asked its chairman to declare the status and worth of his shares. This unnerving call can only mean that the law as to disclosure of substantial interest in shares[91] is being disregarded or the company has failed in its responsibility to demand such disclosure from the chairman. Did this mere call remedy the wrong? The bossy Managing Director (MD) of one of the banks affected by the Central Bank Nigeria (CBN) interventionist actions denigrated the sanctity of

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[88] See sections 63 and 299 CAMA.

[89] Only on 8/10/2010 in the case of FRN y IBRU, Charge No FHC/L/296C/2009 (unreported), the accused was convicted and ordered to forfeit assets worth over N190 billion. The forfeited assets are to be managed by the Assets Management Corporation of Nigeria (AMCON), a Federal Government corporation established pursuant to AMCON (Establishment) Act 2010. Meanwhile the bank, which was fleeced by the accused, is still tottering between survival and insolvency.

[90] "Capital Market: Shareholders ask Danjuma to declare shares", The Nation Newspaper, vol. 5, No. 1462, Wed 21/7/2010, p. 57.

[91] Section 95 CAMA.

the board by approving and disbursing several loan applications declined by the board. Yet nothing happened to this managerial rascality, until the regulatory sledge hammer fell on the bank following the discovery the rot by the CBN special examination.[92]

In another instance, a company that this writer worked with could not as at first quarter 2009 hold its board meetings for over four years. All attempts to convene and hold the meeting was, then, scuttled by the sitting MD whose tenure had expired having attained the compulsory retirement age of, clearly contained in the Articles of Association of the company. The other members of the board, including the chairman, sat down helplessly, bemoaned their situation with complaints as though they were indeed helpless. In the face of all these, did complaining, complacency, inaction and apathy solve the problem of these companies? Or could the indifference be the result of the fear of management prejudice, which could be likened to the beginning of wisdom?[93]

d) There are hurdles which impede the efficacy of derivative action in Nigeria. These include the, requirement of notice which increases the possibility of rendering an otherwise meritorious claim a stillbirth; the requirement of fraudulent negligence and wrongdoer control; the regrettable fact that it is not maintainable against third parties or total strangers so that abetters and facilitators of corporate malfeasance go free; and the absence of legal device for ensuring that novel situations can be Captured as businessmen get more Sophisticated in their circumventive bid to thwart this remedy.

7.2 Conclusion

In order to complement derivative action as a remedy against corporate malfeasance it is suggested that the position of the minority should be strengthen by ensuring that the minority has a voice in the management of the company at the highest level through the Voting mechanism of cumulative Voting or Voting trust. This will tackle the disproportionately unfavourable pattern of ownership and control in Nigeria companies which makes it difficult to comply with the structural devolution of powers under CAMA. Once the devolution of power section under CAMA is flouted, it opens the floodgate of acts of corporate malfeasance, because, more often than not, corporate ownership and control become locked in one entity instead of two separate entities.

In Nigeria, we need shareholders that will talk, demand action and enforce action through the Use of derivative action. This means that shareholder activism in Nigeria is inevitable if this remedy is to deliver on its purport and intent. It is hereby suggested that organized

[92] Section 94 CAMA.
[93] See Re Bird Precision Bellows (1984) 3 All ER 444.

shareholder bodies and the regulatory organ of CAC should partner to stimulate shareholder activism through education and sensitization In order to entrench good corporate governance Culture and practices in Nigerian companies the role of Shareholders are indispensable Once Sensitized, the Nigerian shareholder becomes placed to demand that the affairs of the company be conducted fairly and prudently. In this way the efficacy of the remedial device will become naturally noticeable.

It is suggested that our law (that is CAMA should Be reviewed and amended with a more modem, flexible and accessible criteria for Commencing derivative action (including putting in place a System of ensuring that the conditions for grant or refusal of consent are constantly reviewed and updated) This means that the hurdles or the Shortcomings which impede its use and efficacy will be removed. This will favourably impact upon our investment climate, especially in the area of confidence building, a stimulus for foreign capital inflows which Nigeria direly needs.