A NEW LEGAL AND REGULATORY FRAMEWORK FOR DERIVATIVE ACTIONS IN NIGERIA

By

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Declaration of Originality

I, the undersigned hereby declare that this Thesis, which I submit for the degree Doctor Legum (LL.D) in the Faculty of Law at the University of Pretoria, is my work and has not previously been submitted for a degree at another University.

I have correctly cited and acknowledged all my sources.

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DEDICATION

To

Arúgbó ọJọ́ – The Ancient of days

For His loving kindness and tender mercies towards me in South Africa… which I can NEVER forget.

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Acronyms and Abbreviations

ACLC	**Australian Company Law Cases**
ACSR	**Australian Corporation & Securities Reports**
ALL NLR	**All Nigeria Law Report**
ALR	**Australian Law Reports**
APC	**Administrative Proceedings Committee**
BCC	**British Company Law Cases**
BCLC	**Butterworths Company Law Cases**
CAC	**Commission OR Corporate Affairs Commission**
CAMA	**Companies And Allied Matters Act**
CSIH	**Court of Session Inner House**
CPR	**Civil Procedure Rules**
ECHR	**European Court of Human Rights**
EWHC	**England and Wales High Court**
FRCR	**Federal Revenue Court Law Reports**
FWLR	**Federation Weekly Report**
ISA	**Investments and Securities Act**
LPELR	**Law Pavillion Electronic Law Report**
NCLR	**The Nigerian Commercial Law Report**
NWLR	**Nigeria Weekly Law Report**
NZLR	**New Zealand Law Report**
SC	**Supreme Court**
SCNJ	**Supreme Court of Nigeria Judgments**
SEC	**Securities And Exchange Commission**
WACA	**West African Court of Appeal**
WRN	**Weekly Reports of Nigeria**

Abstract

The enactment of the Companies and Allied Matters Act in August 2020('CAMA'), has birthed another legal framework for derivative actions in Nigeria. However, the mild reforms made in CAMA with respect to derivative actions appear to not be a substantial departure from what was obtainable under the Companies and Allied Matters Act 1990('Old CAMA').This thesis therefore, argues for a reform of the statutory derivative action regime in Nigeria as contained in the Companies and Allied Matters Act 2020. The proposed reform is hinged on the removal of existing hurdles and obstacles to instituting derivative actions; and the enactment of an all inclusive framework, which it is argued, may only be made possible by the abrogation of the common law derivative action regime and its attendant limitations. In addition, it is suggested that there should be an overhaul of the procedure for commencement of derivative actions; and incidental matters such as cause of action and parties. Also, since the requirement of applying for leave has been known to constitute a major hindrance to the commencement of derivative actions, this thesis argues for its simplification and modification. Thus, it is maintained that an applicant in a derivative action should only be required to prove that his application shows that there is a serious question to be tried. Meanwhile, in line with the elaborate remedies available under the unfair prejudice remedy, it is argued that additional remedies like judicial disqualification and removal of directors should be included in the remedies available under derivative actions. Furthermore, in order to address the problem of funding occasioned by the inadequacy of the system of costs and indemnification, this thesis argues for the adoption of the Contingency Fee Arrangement in the Nigerian derivative actions framework. Finally, towards enhancing the enforcement of corporate governance beyond litigation, this thesis argues for a facilitative and regulatory - Private Public Partnership 'PPP' model approach to derivative actions. It is posited that 'PPP' model will not only encourage the settlement of derivative actions through contractual means but also explore regulatory and administrative solutions to breach of corporate rights.

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CHAPTER ONE

INTRODUCTION: OBJECTIVES, SCOPE AND LIMITATION OF STUDY.

1.1 INTRODUCTION

Derivative Action is a tool of corporate governance which enables shareholders and other stakeholders in a company to bring actions to enforce breaches of corporate rights.[1]The concept of derivative actions constitutes one of the exceptions[2] to the common law rule of *Foss v Harbottle*, which encapsulates the Proper Plaintiff rule and the Majority Rule.[3] The Proper Plaintiff rule maintains that the proper plaintiff in an action in respect of a wrong alleged to have been done to a company or association of persons is prima facie the company or association of persons itself.[4]Meanwhile, the Majority Rule posits that where an alleged wrong is a transaction which might be made binding on a company or association and on all its members by a simple majority of its members, no individual member is allowed to maintain an action in respect of that matter.[5]

Therefore, derivative action is significant because it enables corporate rights to be enforced by minority shareholders or other stakeholders when the directors or the majority shareholders who are vested with powers to enforce those rights are reluctant to do so.[6]Nevertheless, allowing persons other than the proper plaintiff or majority shareholders to institute actions to protect the interests of the company is not without its problems. [7]Thus, the challenge in corporate governance has always been how to appropriately swing the pendulum between maintaining the rule in *Foss v Harbottle* and allowing minorities or non –

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[1]Paul L.Davies and Sarah Worthington, *Gower And Davies, Principles of Modern Company Law* (9th edn, Sweet & Maxwell, London 2012) 647. See Maleka Femida Cassim, *The New Derivative Action under the Companies Act – Guidelines for Judicial Discretion* (Juta, Claremont 2016) 5.
[2]The English case of *Edwards v Halliwell* [1950] 2 All ER 1064 at 1066. See Derek French *et al*, *Mayson, French & Ryan on Company Law (*29th edn*,* Oxford, London 2012-2013)559.
[3][1843] 2 Hare 461.
[4]David Kershaw 'The Rule in Foss v Harbottle is Dead: Long Live the Rule in Foss v Harbottle' [2015] 3 *Journal of Business Law* 274 at 276.
[5]*Ibid.* See the English case of *MacDougall v Gardiner* [1875] 1 Ch.D 13.
[6]The English case of *Wallersteiner v Moir (No.2*) [1975]2 WLR 389 at 395. See Alan Dignam & John Lowry, *Company Law* (7th edn, Oxford, London 2012)194.
[7]Maleka Femida Cassim, above n 1 at 25.

controlling shareholders to institute derivative actions.[8]In reality, in deference to the rule in *Foss v Harbottle*, an applicant must contest with several hurdles and requirements in order to be able to bring a derivative action.[9]The justification for the tightening of the right to institute derivative actions to curb breach of corporate duties, typified by the requirement that the applicant has to fulfill certain conditions in order to obtain leave to institute an action,[10] has often been premised on the notorious strike suits instituted in pursuit of personal gains or for a collateral purpose, or claims that are frivolous and therefore lack merit.[11]Thus, it is posited that instituting a derivative action appears to be tantamount to swimming against the tide.[12] However, if the precarious position of an intending applicant in a derivative action litigation is weighed against the current wave of corporate scandals across the globe,[13] it becomes imperative to shift the position of an applicant in a derivative action in the corporate governance pendulum further away from the rule in *Foss v Harbottle*.[14]The desire for this shift is the fulcrum of this discourse.

Meanwhile, in Nigeria, the Companies and Allied Matters Act 1990 ('Old CAMA')[15] codified the common law rule of *Foss v Harbottle,*[16] and made provisions for its exceptions which included derivative actions.[17] The common law derivative action however remained in force

[8]Paul L.Davies and Sarah Worthington, above n 1.
[9]Robin Hollington, *Hollington on Shareholders' Rights* (7th edn, Sweet & Maxwell 2013)159.
[10]Maleka Femida Cassim, above n 1 at 1.
[11]*Ibid*. See Paul von Nessen *et al* 'The Statutory Derivative Action: Now Showing Near You' [2008]7 *Journal of Business Law* 627 at 634. See *also the* English case of *Konamaneni v Rolls-Royce Industrial Power (India) Ltd* [2002] 1 All ER 979.
[12]A.J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, United Kingdom 2002)7, where the author referred to the minority shareholder as an unfavoured litigant.
[13]For example, the failure of Maxwell Publishing Company, Fidentia and Enron in the United Kingdom, South Africa and the United States of America respectively. See Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (2nd edn, Lexis Nexis, Durban 2009) 1.
[14]Nigerian Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law* [1988] vol. 1, p.239, which recommended the need for Nigeria to restrict the effect of the rule in *Foss v Harbottle*. See South African, *Van Wyk de Vries Commission of Enquiry into the Companies Act*, Main Report RP/45/[1970], para.42.10-18, which recommended the need for South Africa to move away from the common law derivative action which is plagued with limitations and difficulties both substantively and procedurally.
[15]Cap C20, Laws of the Federation of Nigeria (LFN) 2004.
[16]Old CAMA, s.299. See Olakunle Orojo, *Company Law and Practice in Nigeria* (Lexis Nexis, South Africa 2006)241.
[17]Old CAMA Part X, particularly, s. 303.

in Nigeria side by side the statutory derivative action. [18]Unfortunately, the Companies and Allied Matters Act 2020('CAMA) which repealed the Old CAMA, re-enacts the Old CAMA in this regard. [19]This means that the common law derivative action is still applicable in Nigeria, particularly in the absence of any express abrogation.[20]However, in other climes such as South Africa[21] and the United Kingdom, [22]the common law derivative action owing to its inherent limitations, has been abrogated and replaced with the statutory derivative action.[23]Nonetheless, there are claims that the common law is still applicable in some areas of the United Kingdom Jurisprudence, particularly with regards to multiple derivative actions.[24]

One of the major accomplishments of the statutory derivative action is the expansion of the categories of those who are entitled to bring derivative actions from shareholders only as obtains under common law to other stakeholders, including regulatory institutions.[25] Nonetheless, it appears that the institution of derivative actions, (though rare),[26] is still primarily centered on shareholder enforcement. [27]However, it is posited that enforcement of breach of corporate governance cannot be developed without the active participation of regulatory institutions because they are better positioned to overcome some of the hindrances to instituting derivative actions such as lack of coordination by shareholders, access to information, expertise, funding, etc.[28]

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[18]Joseph E.O.Abugu, *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers, Lagos 2014)372. See Fabian Ajogwu, *Corporate Governance in Nigeria: Law and Practice* (Centre for Commercial Law Development, Lagos 2007) 123. See the Nigerian case of *CBN v Kotoye* [1994] 3 NWLR (Pt. 330) 66.
[19]CAMA, ss.341 & 346(1).
[20]Olakunle Orojo, above n 16 at 247. See Joseph E.O.Abugu, above n 18 at 247.
[21]SA Companies Act 2008, s.165 (1). See Brighton M Mupangavanhu' Evolving Statutory Derivative Action Principles in South Africa: The Good Faith Criterion and Other Legal Grounds' [2021] 65(2) *Journal of African Law* 293 at 296. See also Ramani Naidoo, above n 13 at 95.
[22]UK Companies Act 2006, s.260 (2). See Andrew Keay and Joan Loughrey 'Derivative Proceedings in a Brave New World for Company Management and Shareholders' [2010] 3 *Journal of Business Law* 151.
[23]Linda Coetzee,' A Comparative Analysis of the Derivative Litigation Proceedings under the Companies Act 61 of 1973 and the Companies Act 71 of 2008' in Tshepo H Mongalo (ed), *Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010)290 at 294.
[24]David Kershaw, above n 4 at 275. See *contra* Pearlie Koh' Derivative Action ''Once Removed'' '[2010] 2 *Journal of Business Law* 101 at 105.
[25]Andrew Keay 'Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act' [2016] 16(1) *Journal of Corporate Law Studies* 39 at 45. See Ramani Naidoo, above n 13 at 95.
[26]Andrew Keay, above n 25 at 41.
[27]*Ibid* at 45.
[28]Ian M.Ramsay, 'Models of Corporate Regulation: The Mandatory/ Enabling Debate' in Ross Grantham & Charles Rickett (eds),*Corporate Personality in the 20th Century*(Hart Publishing, Oxford 1998) 215 at 219-220.

Since the primary aim of this thesis is to address the problems hindering the development of derivative actions in Nigeria and to proffer solutions, a new legal and regulatory framework for derivative actions is being proposed to replace the existing regime.

The proposed reforms are hinged on the principles of improved accessibility to the law through a comprehensive reform, simplification of the procedure for bringing derivative actions and elimination of the hurdles to which derivative actions are accustomed.[29]However, these objectives raise some Research Questions which this thesis shall attempt to answer. Also, in view of the latitude of this topic and the constraints of this discourse in terms of time and space, it is expedient that this study be discussed within certain boundaries. This thesis shall therefore attempt to address the scope and limitation of this study, and the methodology to be applied.

1.2 OBJECTIVES OF STUDY

This thesis argues for a new derivative action regime in Nigeria in which the common law derivative action is abolished.[30] The abolition of the common law derivative action is desirable because it will bring to an end in the Nigerian jurisprudence, the applicability of the procedural hurdles of requiring an applicant in a derivative action to show that there is fraud on the minority[31] and that there is wrongdoer control.[32]Although CAMA has now abolished the latter requirement of wrongdoer control which was expressly stipulated in the Old CAMA,[33] it is posited that the failure of CAMA to abolish the common law derivative action means that the requirements of fraud on the minority and wrongdoer control still form part of the derivative action framework in Nigeria.[34]However, it is important to state that the statutory derivative action regime has also been characterised by a somewhat retention of the common law rule of *Foss v Harbottle,* even in jurisdictions where the common law derivative action regime has been expressly abolished.[35] Thus, the abrogation of the common law derivative action has been described as an incomplete abrogation since it is only the

[29]Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford University Press, Oxford 2007) 129.
[30]SA Companies Act 2008, s.165 (1).
[31]Maleka Femida Cassim, above n 1 at 1.
[32]*Ibid.* See Brenda Hannigan, *Company Law* (4th edn, Oxford University Press, Oxford 2015) 527.
[33]CAMA, s.346 (2).
[34]Lindi Coetzee, above n 23 at 298.
[35]UK Companies Act 2006, s.260 (2). See Maleka Femida Cassim, above n 1 at 6. See also David Kershaw, above n 4 at 283, where the author maintains that the proper plaintiff rule cannot be separated from the concept of wrongdoer control.

exceptions to the rule in *Foss v Harbottle* that have been abrogated; the rule itself has been retained.[36] Consequently, it appears that some of the challenges of derivative actions under the common law derivative actions that are rooted in the rule in *Foss v Harbottle,* whereby only the directors or majority shareholders may undertake litigation on behalf of the company have been transferred to the statutory regime.[37] Thus, under the statutory derivative action regime, for instance, a minority is required to obtain leave before he can be allowed to bring a derivative action.[38]Also, in deference to the majority rule principle of *Foss v Harbottle*, ratification of a wrongful act by the majority may be taken into consideration in the final determination of an action.[39]

Meanwhile, Chapter Two of this thesis is firstly focused on the examination of the theoretical framework of derivative actions. This entails an excursion into the development of derivative actions from the common law regime up till the present statutory regime. Chapter Two rejects the present dual regime, whereby the common law derivative action exists side by side the statutory derivative action in Nigeria;[40] and advocates for the abolition of the common law derivative action.[41] The Chapter also addresses the need to curb the consequences arising from the retention of the rule in *Foss v Harbottle as* aforesaid.[42]

Secondly, this thesis argues that many salient issues relating to the procedure for the commencement of derivative actions have not been expressly provided for under CAMA and; the Companies Proceedings rules.[43]This has resulted for instance, in the courts having to decide on the mode or form of commencing derivative actions and the concept of parties in

[36]Maleka Femida Cassim,above n 1 at 6. See Kathy Idensohn 'The Fate of Foss under the Companies Act 71 of 2008' [2012] 24(3) *SA Mercantile Law Journal* 355 at 359.
[37]David Kershaw, above n 4 at 287. See Helena H. Stoop 'The Derivative Action Provision in the Companies Act 71 of 2008' [2012] 129 *The South African Law Journal* 527 at 551, where the author expressed the view that the requirement of demand is reminiscent of the Majority Rule.
[38]Lindi Coetzee, above n 23 at 301. See Arad Reisberg, above n 29 at 112.
[39]Jennifer Payne 'A Re- Examination of Ratification' [1999] 58(3) *Cambridge Law Journal* 604. See Derek French *et al*, above n 2 at 562.
[40]CAMA, s.346(1).
[41]Andrew Keay & Joan Loughery 'Something Old, Something New, Something Borrowed: An Analysis of The New Derivative Action Under The Companies Act 2006' [2008] 124 *Law Quarterly Review* 469.
[42]Lindi Coetzee, above n 23 at 303, on the lack of automatic right by the applicant in a derivative action to access information from the company.
[43]Cap C20, Laws of the Federation of Nigeria (LFN) 2004. See Motunrayo.O.Egbe 'Global Trends in Statutory Derivative Actions' [2013] 12 *Nigerian Law & Practice Journal* 51 at 67. See c*ontra* UK Civil Procedure rules 19.9 & Practice Direction 19C. See also Alan Dignam & John Lowry, above n 6 at 202.

derivative actions by reliance on the common law. [44]Thus, Chapter Three is concerned with re-assessing the provisions of the law in this regard.

Furthermore, it is posited that the fact that an applicant has to apply for leave constitutes a major barrier to bringing derivative actions.[45]Moreover, the requirements for obtaining leave remain vague and bland provisions of the law,[46] particularly in Nigeria where they appear not to have been tested by the courts.[47] Chapter Four of this thesis examines these requirements and offers suggestions as to their meaning and application. More importantly, suggestions are made for simplifying the requirements so that they would not continue to constitute stumbling blocks to the development of derivative actions.[48]In addition, other matters that may affect an applicant's decision to apply for leave such as the concept of ratification or ratifiabilty of a wrong by the company, [49] the problem of accessing the requisite information necessary to institute a derivative action are re-evaluated, [50]in order to proffer suggestions for the removal of these disincentives.[51]

Thirdly, this thesis explores the possibility of broadening the remedies available under derivative actions to include such remedies as the removal[52] and disqualification of erring directors and officers of the company.[53]This approach appears necessary in view of the growing influence of the unfairly prejudicial remedy in corporate governance.[54]Meanwhile,

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[44]The Nigerian Case of *Agip Nig. Ltd v Agip Petroli International & Ors*. [2010] 5 NWLR (Pt.1187) 348 at 394.
[45]Arad Reisberg, above n 29 at 111. See the Nigerian case of *Citec Int'l Estates v. Francis* [2021] 5 NWLR(Pt.1768) 148 at 192-193, where an action brought without leave of court was sustained because the court held that it was a personal action and not a derivative action.
[46]Maleka Femida Cassim, above n 1 at 23.
[47]Joseph E.O.Abugu, above n 18 at 376.
[48]Jennifer Payne' Shareholders' Remedies Reassessed' [2004] 67(3) *Modern Law Review* 500 at 504.
[49]Maleka Femida Cassim, above n 1 at 133. See K.W.Wedderburn 'Shareholders' Rights and the Rule in Foss v Harbottle (Continued) [1958] 16(1) *Cambridge Law Journal* 93 at 105.
[50]J.H.Farrar *et al*, *Farrar's Company Law* (2nd edn, Butterworths, London 1998) 381.
[51]*Ibid*.
[52]*Ibid*. See Rehana Cassim, 'Governanace and the Board of Directors' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3rd edn, Juta, Cape Town 2021) 535 at 594. See also Nigerian Banks and Other Financial Institutions Act 2004, ss.33 &35, which gives the Governor of the Central Bank of Nigeria power to remove directors of Banks and Financial Institutions, and to appoint new directors to replace them. See also Gabriel Onoh & Babajide Komolafe' CBN sacks 5 Banks' CEOs, Appoint MD/CEOs' Vanguard Nigeria (August 14, 2009) www,vanguardngr.com/2009/08.
[53]Rehana Cassim, above n 52 at 584. See Brenda Hannighan above, n 32 at 374.
[54]Brenda Hannigan 'Drawing Boundaries between Derivative Claims and Unfairly Prejudicial Petitions' [2009] 6 *Journal of Business Law* 606 at 614. See HGJ Beukes &WLJ Swart 'Blurring the Dividing line between Oppression Remedy and Derivative Actions: Kudumane Investment Holdings Ltd v Northern Cape Manganese (Pty) Ltd and others' [2012] 24(4) *SA Mercantile Law Journal* 467 at 471.

the unfairly prejudicial remedy has been criticised for its being used to outflank derivative actions.[55]There is also the claim that it has become the choice of litigants because of the wider remedies available under it.[56] It is submitted that since the use of the remedies such as removal of directors [57]and disqualification of directors[58] is rare owing to the difficulties of enforcement by shareholders,[59] their inclusion in the derivative action remedies regime may help to enhance the importance of derivative action, and make it more attractive to potential applicants. This is besides the fact that the inclusion of these remedies in the sphere of derivative actions would help to further curtail directorial wrongdoing.[60] Chapter Five of this Thesis is concerned with addressing these issues.

The Fifth objective of this thesis borders on resolving the problem of costs and funding which has been identified as a major barrier to instituting derivative actions.[61] This problem is particularly very profound because the benefit of the derivative action litigation accrues to the company and not to the plaintiff who brought the action.[62] Chapter Six of this thesis is dedicated to addressing this problem. More importantly, other options for funding derivative actions such as the USA Contingency Fee Arrangement ('CGFA')[63] and the UK Conditional Fee Arrangement ('CFA'),[64] which enable the burden of the costs of litigation to be shifted to the legal practitioner, since the plaintiff becomes liable to pay only if he wins the action, are also analysed in the chapter.

With respect to the sixth objective of this thesis,it is argued in Chapter Seven, that the review of the existing statutory derivative action regime as contained in CAMA, being proposed,

[55]See the opinion of Hoffmann LJ, in the English case of *Saul D Harrison & Sons Plc,Re* [1995] 1 BCLC 14 CA 18.
[56]CAMA, s.355. See Victor Joffe, 'Unfair Prejudice: The Statutory Remedy' in Victor Joffe *et al* (eds), *Minority Shareholders – Law, Practice, and Procedure* (4th edn, Oxford University Press, United States 2011) 237 at 318.See also Arad Reisberg, above n 29 at 274-275.
[57]Rehana Cassim, *The Removal of Directors And Delinquency Orders Under The South African Companies Act* (Juta, Cape Town 2020) 1.
[58]*Ibid* at 227.
[59]*Ibid* at 241. See the South African case of Lewis *Group Limited v Woollam* [2017] (2) SA 547. See also Andrew Keay 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders' [2007] *Journal of Business Law* 656 at 675. See also Pereowei Subai' Disqualifying Unfit Directors: What Lessons Can Nigeria Learn From The Commonwealth Countries?'[2020] *Commonwealth Law Bulletin* 1 at 8.
[60]Arad Reisberg, above n 29 at 22.
[61]Maleka Femida Cassim, above n 1 at 139.
[62]Arad Reisberg, above n 29 at 88.
[63]*Ibid* at 41.
[64] A.J.Boyle, above n 12 at 37.

should also focus on how derivative actions can shift from shareholder/ private enforcement towards a more public or regulatory participation and enforcement.[65]The need for public participation is premised on arguments such as limited financial resources and limited access to information available to private stakeholders when compared to their counterparts in the public sector.[66]Thus, Chapter Seven highlights the importance of enhancing the participation of regulatory bodies in Nigeria, such as the Corporate Affairs Commission ('CAC'),[67] the Financial Reporting Council of Nigeria ('FRCN')[68] and the Securities and Exchange Commission [69]('SEC'), in derivative actions. Meanwhile, it is posited that regulatory enforcement must be founded on decriminalisation of corporate law to pave way for administrative /regulatory offences. [70]

In furtherance of the objective of enhancing regulatory involvement in derivative actions, this thesis argues for a Private Public Partnership 'PPP" Model of derivative action.[71] The 'PPP' regime being suggested in this thesis, is a combined legal and regulatory framework that both mandates and facilitates the collaboration of regulatory bodies with shareholders and other stakeholders to ensure easier, quicker and cheaper resolution of derivative actions disputes without resort to litigation.[72] It is therefore proposed that a Companies Tribunal[73] be established under the law in Nigeria as obtainable in South Africa for the adjudication of corporate disputes including derivative actions, with powers to resolve disputes using the

[65]Arad Reisberg, above n 29 at 31.
[66]See however, *ibid* at 31-32. See also Maleka Femida Cassim, above n 1 at 171.
[67]CAMA, s.8.
[68]Financial Reporting Council of Nigeria Act 2011, s.8.
[69]Nigerian Investments and Securities Act 2007, s.13.
[70]Dennis M.Davis, 'Dealing with Corporate Defaulters: Curbing the Unfettered Access of Criminal Law' in Tshepo H Mongalo (ed), *Modern Company Law for A Competitive South African Economy* (Juta, Claremont 2010) 411 at 412.See Maleka Femida Cassim, 'Enforcement And Regulatory Agencies' in Farouk Hl Cassim (ed), *Contemporary Company Law*(3rd edn, Juta, Cape Town 2021) 1135 at 1136-1137. See also Vicky Comino' Australia's ''Company Law Watchdog'': The Australian Securities and Investments Commission and the Civil Penalties Regime' [2014]3 *Journal of Business Law* 228.
[71]Aina Oyetunde, 'Public Private Partnership, A Tool For Sustainable Development And Corporate Responsibility' in Epiphany Azinge *et al* (ed), *Corporate Governance and Responsibility: A Tribute in Honour Of Professor I.A.Ayua*(Nigerian Institute of Advanced Legal Studies, Lagos 2014) 249, where the author defined Public Private Partnership-(PPP) as an alliance between government and private sector investors or companies.
[72]Iris H.Y. Chiu 'The Role of a Company's Constitution in Corporate Governance' [2009] *Journal of Business Law* 697 at 712.
[73]Rehana Cassim, above n 52 at 611.

Alternative Dispute Resolution (ADR) methods available under the law.[74] Meanwhile, the facilitative aspect of the 'PPP' Model, it is argued will enable prospective applicants to lodge complaints against the wrongdoing of directors and other officers of the company with a regulatory authority under a defined complaints procedure, which may result in the institution of derivative actions.[75] It is suggested, that the facilitative aspect of the 'PPP' Model of derivative actions would also involve the enhancement of the use of the provisions of the Articles of Association and Shareholders' Agreements,[76] to aid contractual resolution of disputes in derivative actions.[77]

Finally, the findings, conclusions and recommendations that are expected to arise from the objectives highlighted above shall be contained in Chapter Eight of this thesis.

1.3 RESEARCH QUESTIONS.

In furtherance of the above-mentioned objectives, this thesis shall endeavour to answer the following questions:

1. What can be done to remove the barriers and limitations connected with bringing derivative actions in Nigeria?
2. How can the existing remedies available under derivative actions in Nigeria be enlarged?
3. How can derivative actions in Nigeria shift from private enforcement towards a more public or regulatory enforcement?

1.4. SCOPE AND LIMITATION

[74]SA Companies Act 2008, s.166, which stipulates that a matter could be referred to the Companies Tribunal, an accredited entity or any other person for mediation, conciliation or arbitration. See Institute of Directors Southern Africa, King IV *Report on Corporate Governance for South Africa* [2016], and Part 111: 35, which advocates for the use of formal mechanisms for engagement and communication including dispute resolution mechanisms and associated processes in stakeholder relationships. See also The Nigerian Arbitration and Conciliation Act, Cap C19, LFN 2004. See also Nigerian Investments and Securities Tribunal (Procedure) Rules 2003, rule 3(4), which provides for reconciliation and amicable settlement of disputes before the Investments and Securities Tribunal.

[75]Maleka Femida Cassim, above n 70 at 1156.

[76]Rita Cheung' Shareholders' Agreements: Shareholders' Contractual Freedom in Company Law' [2012] *Journal of Business Law* 504 at 505.

[77]Harry Mc Vea 'Section 994 of the Companies Act 2006 and the Primacy of Contract' [2012] 75(6) *Modern Law Review* 1123.

In pursuit of the objectives of this discourse, a comparative approach is adopted. This reveals the strength, weaknesses and development of the law in different jurisdictions, and also highlights global best practices, thus, providing a rational basis for the recommendations for law reforms made in this thesis.

The primary and secondary sources of the law that are compared with Nigerian law are laws of countries with the same legal origin with Nigeria, either because they are Commonwealth countries or otherwise countries with the history of English Common law, particularly in the area of corporate law. It is in this context that South Africa, the United Kingdom and the United States of America, particularly the State of Delaware[78] have been chosen. It is posited that these countries have robust legal frameworks in the area of corporate law and corporate governance generally, and have been trail blazers in the development of principles of corporate law.[79]

For instance, The South Africa Companies Act 2008 abolished the Companies Act 1973, and made changes geared towards a very high standard regime of corporate governance, particularly in the area of derivative actions.[80]Furthermore, the United Kingdom has made extensive and far reaching reforms in its corporate governance framework as contained in its Companies Act 2006, included in the reforms is the overhaul of its derivative action regime.[81]In spite of the fact that the foundation of derivative actions is traceable to the English famous rule in *Foss v Harbottle,* and its exceptions, it appears that the original cases from which the concept of derivative actions was developed, emerged from the United States of America, and were already in existence prior to the rule.[82]In particular, it is said that a good number of companies in the United States prefer Delaware as their State of Incorporation.[83] This preference has been attributed among other factors to the liberal approach to corporate

[78]Delaware General Corporation Law 2013; Delaware Limited Liability Company Act 2013. See Leo Herzel, Laura D. Richman,' Delaware's Preeminence by Design' in R. Franklin Balotti and Jesse A. Finkelstein(eds),*The Delaware Law of Corporations and Business Organisations* (vol.1, Law and Business Incorporated, New Jersey 1986) lix.
[79]For instance the Robert Maxwell scandal in the United Kingdom precipitated the publication of the Report on Corporate Governance, also known as Cadbury Report in 1992; and this has led to the proliferation of Codes of Good Governance all over the world. See Ramani Naidoo, above n 13 at 3.
[80]Lindi Coetzee, above n 23 at 290.
[81]Andrew Keay & Joan Loughrey, above n 41 at 469.
[82]The American cases of *Ogden v Kip 6 Johns* Ch. 160 (N.Y 1822); *Dodge v Woolsey* 59 US 18 How 331 1855. See also Maleka Femida Cassim, above n 1 at 122.
[83]Leo Herzel, Laura D. Richman, above n 78.

transactions in line with the wishes of the majority shareholders and the Board. [84] This is in addition to its specialised court system with respect to corporate litigation and award of the plaintiffs' lawyers fees based on the Common Fund doctrine.[85]However, sources from the United States of America would only be consulted in this thesis in a limited perspective by reason of time and space. In addition, where appropriate, references are made to sources from other Commonwealth countries aside the ones aforementioned. It is posited that the experiences of these countries are very instructive for the objective of birthing a new derivative action regime in Nigeria.

1.5. CONCLUSION

The objectives of this thesis focus on a vigorous derivative action regime which is premised on the abrogation of the common law derivative action, [86]a reform of the existing law; and the enactment of a new comprehensive statutory derivative action regime sustained by a liberal and inclusive approach to corporate governance; and in which the disincentives to derivative actions are minimised.[87]

Thus, the new statutory derivative action regime being proposed is expected to codify or accommodate those aspects of the common law derivative actions that are not contained in the current statutory derivative action law such as issues bordering on who are the plaintiffs or defendants in a derivative action,[88] formulating a broader definition of the cause of action that will be regarded as a derivative action,[89]revising the mode of bringing applications to obtain leave or institute derivative actions etc.[90]I argue that the inclusion of such issues in CAMA and in the Companies Proceedings rules [91] will help to make the proposed new derivative action regime more comprehensive, and thus, avoid the need for the courts to make any recourse to common law in order to adjudicate on derivative actions.[92]Meanwhile,

[84]*Ibid*.
[85]*Ibid*.
[86]Maleka Femida Cassim, above n 1 at 9.
[87]Andrew Keay & Joan Loughrey, above n 41 at 469.
[88]Paul L.Davies, *Gower And Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell, London 2008)615.
[89]Andrew Keay, above n 25 at 48.
[90]Daniel Lightman, 'Derivative Claims' in Victor Joffe *et al* (eds), *Minority Shareholders- Law Practice and Procedure* (4th edn, Oxford University Press, Oxford 2011)29 at 40.
[91]Cap C20, Laws of the Federation of Nigeria (LFN) 2004.
[92]Andrew Keay & Joan Loughrey, above n 22 at 152.

I posit that the retention of the common law rule of *Foss v Harbottle* as encapsulated by the Proper Plaintiff and Majority rule has resulted in issues such as the requirement of leave to institute derivative actions, [93] application of the principle of ratification of acts in breach of corporate rights by the majority[94] and limited access to information[95] by applicants in derivative actions. Consequently, it appears that as a result of the rule in *Foss v Harbottle,* corporate governance has tilted more towards the protection of the rights of the company and the defendants' directors than the enforcement of breach of corporate duties through the institution of derivative actions.[96] This thesis therefore advocates for the modification of the principles arising from the rule in *Foss v Harbottle* on more liberal terms such that they will not continue to constitute disincentives to the bringing of derivative actions.[97]

In addition, I posit that it is necessary that the remedies applicable to derivative actions should be broadened such that the unfairly prejudicial remedy does not continue to remain more attractive to prospective applicants than derivative actions.[98] Furthermore, I argue for the reformulation of the costs, indemnity and funding provisions under the current law to the end that the more broadminded USA Contingency Fee approach to funding derivative actions may be made applicable in Nigeria.[99]

Beyond legal reforms, and in line with its comprehensive and inclusive approach, this thesis argues for a new regulatory framework for the enforcement of derivative actions under a Private Public Partnership, 'PPP' Model.[100] The regulatory framework is particularly sought as a means of resolving the problem of funding derivative actions;[101] and surmounting its characteristic challenge of access to information.[102] In accordance with the liberal approach to resolving the problem of derivative actions, the 'PPP' Model shall focus on using more of

[93]Daniel Lightman, above n 90 at 44.
[94]A.J. Boyle, above n 12 at 21.
[95]Maleka Femida Cassim, above n 1 at 139.
[96]Arad Reisberg, above n 29 at 122.
[97]Maleka Femida Cassim, above n 1 at 29.
[98]*ibid* at 274.
[99]Estelle Hurter 'Contingency Fees:The British Experience and Lessons for South Africa' [2001] 34(1) *Comparative and International Law Journal of South Africa* 73.
[100]Aina Oyetunde, above n 71.
[101]Maleka Femida Cassim, above n 1 at 139.
[102]*Ibid*.

the administrative and facilitative method of resolving disputes such as the Alternative Dispute Resolution (ADR) in the stead of derivative action litigation. [103]

Finally, I submit that if the recommendations made in this thesis are implemented they will not only help to birth a better,more comprehensive and new statutory derivative action regime that would be more accessible and ultimately provide greater access to justice for litigants but also help to upgrade corporate governance in Nigeria.[104]

[103]Dennis M.Davis, above n 70.
[104]Andrew Keay & Joan Loughrey, above n 41 at 469.

CHAPTER TWO

FOUNDATIONAL PRINCIPLES AND POLICIES

2.1. INTRODUCTION

In recent times, there have been global concerns on how to curtail breaches of corporate wrongdoing.[1] These concerns are largely attributed to the agency problems arising from the separation of ownership from control, [2]in which directors who are agents of the shareholders are more interested in protecting their own interests in the company than the interests of the shareholders or principals.[3] It is perhaps for this reason that corporate law has given enormous attention to managing and resolving conflicts between the several interests in the company i.e. between the minority stakeholders and the directors, and between minority stakeholders and the majority stakeholders.[4] Unfortunately however, the traditional methods of corporate governance such as the company's internal mechanism of providing for general meetings,[5] the right of shareholders to attend and vote at meetings, [6]the right of shareholders to remove directors,[7] etc. have failed to resolve the agency problems between the owners and the agents.[8] Equally, modern attempts to resolve corporate governance problems such

[1]John C.Coffee Jr, 'What Caused Enron? A Capsule Social and Economic History of the 1990s' from Journal of Financial Economics [1976] in Thomas Clarke(ed), *Theories of Corporate Governance* (Routeledge, Oxon 2004) 332. See Etienne A Oliver 'Regulating Against False Corporate Accounting: Does The Companies Act 71 of 2008 Have Sufficient Teeth?' [2021] *SA Mercantile Law Journal* 1.

[2]John Armour *et al*, 'Agency Problems and Legal Strategies' in Reinier R. Karaakman *et al* (eds), *The Anatomy of Corporate Law* (2nd edn, Oxford, New York 2009) 36. See however, Susan Watson' How the Company Became an Entity: A New Understanding of Corporate Law' [2015] 2 *Journal of Business Law* 120, where the author maintains that the Shareholder primacy model is outdated on account of the existence of the company as a separate entity from its members.

[3]John Armour *et al*, above n 2.

[4]*Ibid*.

[5]Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003) 257.

[6]Iris H.Y. Chiu 'The Role of a Company's Constitution in Corporate Governance' [2009] *Journal of Business Law* 697 at 702.

[7]CAMA, s.288.See Andrew Keay 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders' [2007] *Journal of Business Law* 656 at 659.

[8]Tshepo Mongalo, above n 5 at 167. See Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford University Press, Oxford 2007) 25. See also C.A. Riley 'Controlling Corporate Management: UK and US Initiatives' [1994] 14(2) *Legal Studies* 244.

as the application of the principles of market control,[9] the concept of independent directors, [10]etc. have failed to align the interests of agents with the interests of their principals.[11]

However, derivative action is central to corporate governance because it gives the minority shareholders and other stakeholders in the company the opportunity to challenge corporate wrongdoing through litigation and other alternative dispute resolution mechanisms where the directors who are supposed to enforce corporate rights have refused to do so.[12] Thus, derivative actions serve a dual purpose of enabling an applicant in a minority action to be able to obtain compensation on behalf of the company,[13] and also help to ensure that directors and officers of the company are monitored and are held accountable for any breach of corporate responsibility.[14]Furthermore, the enforcement of corporate rights by means of derivative actions may also serve a tertiary purpose of deterring breaches of corporate rights.[15]

In particular, derivative actions have also been said to be the only means by which the interests of shareholders can be aligned with the interests of directors, in breaches of duties which involve one off cases of illegality and self- dealing.[16]Meanwhile, multiple derivative action in which a member of a holding company can bring an action to enforce the rights of a subsidiary company,has been said to be effective in curbing the corporate governance problems of group of companies,[17] whereby holding companies use their subsidiaries to cover

[9]Caroline Bradley 'Corporate Control: Markets and Rules' [1990] 53(2) *Modern Law Review* 170. See Fabian Ajogwu, *Corporate Governance in Nigeria: Law and Practice* (Centre for Commercial Law Development, Lagos 2007)25.
[10]Iris H.Y. Chiu, above n 6 at 698.
[11]Olaojo Aiyegbayo, Charlotte Villiers' The Enhanced Business Review: Has it Made Corporate Governance More Effective?'[2011] 7 *Journal of Business Law* 699.
[12]Maleka Femida Cassim, *The New Derivative Action under the Companies Act – Guidelines for Judicial Discretion* (Juta, Claremont 2016)1. See Andrew Keay 'Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act'[2016]16(1) *Journal of Corporate Law Studies* 39 at 42, to the effect that derivative action is a mechanism for reducing agency costs.
[13]Arad Reisberg, above n 8 at 59, where the author argues that constant changes in the composition of shareholders, the fact that the injury to company is not the same as injury to the shareholders, the de *minimis* recovery on a per share basis, and the possibility of non-tangible relief do not fully justify the compensatory argument of derivative actions.
[14]Maleka Femida Cassim, above n 12 at 8.
[15]Arad Reisberg, above n 8 at 51.
[16]*Ibid* at 39.
[17]Carl Stein, *The New Companies Act Unlocked* (Siber Ink, Cape Town 2011) 243.

corporate governance infractions.[18] In addition, it appears that derivative actions may help to align the interests of the shareholders with the interests of other stakeholders, since the categories of applicants who may bring derivative actions are no longer restricted to shareholders.[19]Furthermore, since derivative action has been held to be applicable to registered Not for Profit Organisations or Incorporated Trustees, [20]it is capable of ameliorating the concerns about the corporate governance of Not for Profit Organisations.[21]Thus, derivative actions may not only help to connect Corporate Social Responsibility ('CSR') with corporate governance but also help in extinguishing some of the negative notions about 'CSR'.[22]

Nonetheless, in spite of the impressive profile of derivative actions as a means of enforcing corporate obligations, Olson[23] argues that the right to derivative action is not an ideal right of corporate governance, and that this assertion is justified by the fact that derivative actions arise only when the directors have refused to take any action. Similarly, Reisberg[24] argues that derivative actions create a risk of compromise by minorities, because they open up possibilities for gold digging claims, which may result in private collusion of settlements.[25]Reisberg[26]maintains that the fear of derivative actions may discourage directors from taking risks, and that this may hinder companies from maximising their potential for growth and profit making. This thesis however, maintains that the advantages of derivative actions as enumerated above far outweigh the problems.

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[18]Janet Dine, *The Governance of Corporate Groups* (Cambridge University Press, United Kingdom 2000) 47.See the Hong Kong case of *Waddington Ltd v Chan Chun Hoo Thomas* [2009] 2 BCLC 82.

[19]CAMA, s.352. See SA Companies Act 2008, s.165 (2). Compare with UK Companies Act 2006, s.260 (1), which stipulates that only members can bring derivative actions.

[20]The English case of *Cotter v National Union of Seamen* [1929] 2 Ch.58.See the Nigerian case Abubakri *v Smith* [1973] 1 All NLR (Pt.1) 730. See also the South African case of *Grundling v Beyers* [1967] 2 SA 131 at 139.

[21]The Nigerian Non-Governmental Organisations (NGO) Regulation Bill 2017, which sought to establish a Commission to regulate the activities of NGOs and Civil Society Organisations in Nigeria. See The Department of Social Development's Code of Good Practice for South African Non Profit Organisations 2001.See also UK Charities Act 2011.

[22]Ramon Mullerat, 'Global Responsibility of Business' in Ramon Mullerat (ed), *Corporate Social Responsibility : The Corporate Governance of the 21st Century*(Kluwer Law International, Hague 2005) 3 at 5.

[23]John Folsom,' South Africa Moves to a Global Model of Corporate Governance but with Important National Variations' in Tshepo H Mongalo (ed), *Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010)219 at 246.

[24]Arad Reisberg, above n 8 at 7.

[25]Maleka Femida Cassim, above n 12 at 24.

[26]Arad Reisberg, above n 8 at 49.

Given the unique importance of derivative actions in corporate governance, [27]this chapter is concerned with highlighting the evolution of derivative actions in the Nigerian jurisprudence. Since derivative actions in Nigeria evolved from the common law derivative action regime in the United Kingdom, [28]this chapter shall attempt to examine the factors and circumstances leading to the progression of derivative actions from the common law derivative action regime to the present statutory derivative actions in Commonwealth countries, particularly, the abrogation of the common law derivative action. [29]Also, attention shall be given to the concurrence of both the common law derivative action and the statutory derivative action jurisdiction in Nigeria. [30]Afterwards, this discourse shall be engaged in the assessment of the factors which appear to be responsible for the inability of statutory derivative action to adequately address the corporate governance deficit which exists at the moment in corporate management and administration. [31]It is posited that a critical evaluation of the dynamics of both the common law and statutory derivative action regimes would explicate the theoretical underpinnings of this thesis and set the tone for the ensuing chapters which are dedicated to the new statutory legal and regulatory framework founded on the comprehensiveness and liberalisation of the law with respect to derivative actions. [32]

2.2. THE COMMON LAW DERIVATIVE ACTION

2.2.1 THE RULE IN FOSS V HARBOTTLE

The rule in *Foss v Harbottle*[33] has dominated the corporate landscape since its evolution in 1843. In that instant case, the plaintiffs, on behalf of themselves and all other shareholders brought an action against the defendants alleging that the defendants sold the company's property at a gross undervaluation. The English Court however, held that the suit could not be sustained at the instance of the shareholders since it involved a wrong done to the company and not to the individual shareholders. [34]The acceptance of the principle in *Foss v*

[27]Maleka Femida Cassim, above n 12 at 1.
[28]Nigerian Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law* [1988] vol. 1, p. 1.
[29]See Daniel Lightman, ' Derivative Claims' in Victor Joffe *et al* (eds), *Minority Shareholders- Law Practice and Procedure* (4th edn, Oxford University Press, Oxford 2011)29 at 36.
[30]Ji Lian Yap 'Whither the Common law Derivative Action?' [2009] 38 *Common Law World Review* 197.
[31]Andrew Keay, above n 12 at 44-45.
[32]Andrew Keay &Joan Loughrey 'Something Old, Something New, Something Borrowed: An Analysis of The New Derivative Action Under The Companies Act 2006' [2008] 124 *Law Quarterly Review* 469.
[33][1843] 2 Hare 461.
[34]K.W Wedderburn' Shareholders' Rights and the Rule in Foss v Harbottle' [1957] 15(2) *Cambridge Law Journal* 194.

Harbottle as espoused in latter cases in England,[35] where the principles were further clarified and adumbrated has never been in doubt. In the English case of *Edwards v Halliwell*,[36] Jenkins L.J said as follows:

> ''The rule in *Foss v Harbottle*, as I understand it, comes to no more than this: firstly, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or 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 its members, no individual member 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 cadit quaestio''.

The rule in *Foss v Harbottle* is hinged on two principles;[37] the first principle being the Proper Plaintiff rule, which maintains that the proper plaintiff in respect of any breach of corporate right,is the company itself.[38] This principle is supported by the corporate personality principle, which is to the effect that an incorporated company is a legal entity distinct from its shareholders.[39] The Proper Plaintiff rule sustains the *locus standi* principle in civil procedure which prevents A from bringing an action against B to recover damages or procure other reliefs on behalf of C for an injury done to C by B.[40] This in turn secures the advantage of preventing multiplicity of suits and unwarranted litigation, thereby allowing directors to concentrate on the management of the company.[41] The Proper Plaintiff rule therefore, precludes a shareholder from obtaining any compensation or damage from the company to the exclusion or detriment of his fellow shareholders as established under the reflective loss principle at common law.[42]

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[35]The English cases of *Burdland v Earle* [1902] AC 83; MacDougall *v Gardiner* [1875] 1 Ch.D 13.
[36] [1950] 2 All ER 1064.
[37] Stephen Girvin, Sandra Fribsy and Alastair Hudson, *Charlesworth Company Law* (18th edn, Sweet & Maxwell, England 2010) 509. See Kunle Aina *'*Current Development In the law of Derivative Action in Nigerian Company Law*'* [2014] 1 *Babcock University Socio- Legal Journal* 49 at 50-51.
[38]Stephen Girvin *et al*, above n 37 at 509.
[39]The English case of *Salomon v Salomon* [1897] AC.22.
[40]The English case of *Prudential Assurance Co.Ltd v Newman Industries Ltd (No.2)* [1982] 1 All ER 354 at 357. See Daniel Lightman, above n 29 at 32.See also Carl Stein, above n 17 at 243.
[41]Joseph E.O.Abugu, *Principles of Corporate Law In Nigeria* (MIJ Professional Publishers Limited, Lagos 2014)362.
[42]The English case of *Johnson v Gore Wood* & *Co (No.1)* [2002] 2 AC 1 at 62. See Arad Reisberg, above n 8 at 250.

The second principle of the rule in *Foss v Harbottle* is the Majority rule, which postulates that where any wrong or act of the company has been ratified by the majority of the shareholders, then no action can be brought against their collective decision.[43] This rule derives its justification from the common law principle of corporate democracy whereby a shareholder who has joined himself to a company is expected to be bound by the wishes of the majority;[44] and also from the common law principle of judicial non- interference. [45]

Although, there is justification for the rule in *Foss v Harbottle* as explained above, its consequences might result in injustice being done because breaches of duties to the company might remain without redress as encapsulated by Lord Denning MR as follows-.[46]

> ''If (a company) is defrauded by a wrongdoer, the company itself is the one person to sue for damage…. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again, the company is the only person who can sue. But suppose it is defrauded by insiders who control its affairs-; by directors who hold majority of the shares, who then can sue for damages? Those directors who are themselves the wrongdoers? If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose, injustice would be done without redress.''[47]

Another consequence of the rule in *Foss v Harbottle* is that although the Memorandum and Articles of Association, constitutes a contract between the members and the company, it does

[43]Stephen Girvin *et al*, above n 37 at 509.
[44]Joseph E.O. Augur,above n 41 at 359. See the South African case of *Sammel v President Brand Gold Mining* [1969] (3) SA 629 at 678.
[45]The English case of *Carlen v Drury* [1912] 35 ER 61, where the court was of the opinion that a court is not in every occasion required to take over the management of every playhouse and brew house in the Kingdom.
[46]The English case of *Wallersteiner v Moir (No.2)* [1975] 2 WLR 389 at 395.See Tshepo Mongalo, above n 5 at 266.
[47]Maleka Femida Cassim, 'Shareholder Remedies and Minority Protection' in Farouk Hl Cassim (ed), Contemporary *Company Law* (3rd edn, Juta, Cape Town 2021) 1015 at 1053.

not give right to a remedy at all times by the members as obtains in ordinary contracts.[48] This is because as maintained earlier, under the Proper Plaintiff rule, the company is the only one vested with the *locus standi* to protect corporate rights.[49] Consequently, the enforceability of any contractual rights created by the Memorandum and Articles of Association has been limited to personal rights by virtue of the rule in *Foss v Harbottle*. [50] In addition, owing to the Majority rule, remedy is not available to the company for 'mere breaches' of regulations by the directors that have been ratified by the majority of the members of a company.[51]Thus, Prof Davies rightly argues that the rule in *Foss v Harbottle* has been over-extended in this area since shareholders' general right to enforce all the provisions of the Articles has been curtailed by the rule. [52] However, it appears that the courts prefer to be on the side of the majority rule on this matter, the resultant effect being the defeat of shareholders' right to bring personal actions.[53] Also,in line with the position of the courts, the opinion of the Nigerian Law Reform Commission on the issue is expressed as follows:[54]

> ''There was a forceful argument that shareholders have a general right to enforce all the provisions of the Articles……. The fact still remains that non-observance of the terms of the Articles and the provisions of the Companies Act is a wrong done to the company itself except in certain circumstances where an individual shareholder is wronged personally.''

Perhaps, in recognition of the value of the rule in *Foss v Harbottle*, the Nigerian Law Reform Commission recommended the codification of the rule in the Old CAMA.[55]This posture has also been adopted in the Companies and Allied Matters Act 2020 ('CAMA').[56]It is remarkable

[48]The English case of *MacDougall v Gardiner*, above n 34 at 13. See A.J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, United Kingdom 2002) 17.
[49]Daniel Lightman, above n 29 at 32.
[50]The Nigerian case of *Daily Times (Nigeria) Plc v Akindiji* [1998] 13 NWLR 22 at 37, where the court held that the rule in *Foss v Harbottle* cannot override the rights of individuals under Statute, and especially under the Constitution.
[51]A.J. Boyle, above n 48 at 52.
[52]Paul. L.Davies, *Gower And Davies Principles of Modern Company Law* (8th edn, Sweet & Maxwell, London 2015) 450.
[53]*Ibid*. This argument is typically demonstrated in the English cases of *Pender v Lushington* [1877] 6 Ch.D 70, where a right to vote was held to be a personal right ;*MacDougall v Gardiner,* above n 35, where a wrongful denial of the right to a poll was held to be a mere breach of corporate right capable of being ratified.
[54]Nigerian Law Reform Commission, *Working Papers*, above n 28 at 232.
[55]Old CAMA, s.299.
[56]CAMA, s.341.

that the exceptions to the rule in *Foss v Harbottle* have never been codified under the Nigerian statutory derivative actions but have however, been codified as grounds for bringing Personal/Representative Action for the remedy of declaration and injunctions.[57]Consequently, the exceptions to the rule in *Foss v Harbottle* are only applicable in Nigeria with regards to derivative actions by virtue of the existence of the common law derivative action and not under statutory derivative action.[58]Nonetheless, the importance of this observation is undermined by the fact that it is possible to institute an action founded on both personal/representative and derivative action.[59] Meanwhile, the rule in *Foss v Harbottle* has not been codified in South Africa[60] and in the United Kingdom. [61] However, the common law rule continues to be applicable in both jurisdictions since it has not been abrogated. [62]The rule in *Foss v Harbottle* also applies by correlation in the American jurisprudence.[63]

2.2.1.1. The Recognised Exceptions to the Rule In Foss v. Harbottle

In order to ameliorate the dire consequences of the rule in *Foss v Harbottle,* the common law allowed exceptions to the rule.[64] These exceptions are intended to provide protection for minority shareholders against the Proper Plaintiff rule and Majority rule. [65]Thus, a

[57]*Ibid at* s.343. See Old CAMA, s.300.
[58]*Contra* Kunle Aina, above n 37 at 56. See Joseph E.O. Abugu, above n 41 at 372, to the effect that a member who brings an action under the exceptions to the rule in *Foss v Harbottle* under the section 300 of the Old CAMA is not restricted to the formulation of such action as a personal one or as a derivative action since the section was enacted without prejudice to the right to bring a derivative action or an action under the unfair prejudice remedy.
[59]*Prudential Assurance Co.Ltd v Newman Industries Ltd* (*No.2)*, above n 40 at 355. See Geoffrey Morse, *Charlesworth & Morse Company Law* (16th edn, Sweet & Maxwell, London 1999) 314.See also Joseph E.O.Abugu, above n 41 at 372.
[60]Maleka Femida Cassim, above n 12 at 10.
[61]See however, David Kershaw 'The Rule in Foss v Harbottle is Dead: Long Live the Rule in Foss v Harbottle' {2015] 3 *Journal of Business Law* 274 at 282, to the effect that the UK Companies Act 2006, has not dislodged the Proper Plaintiff rule.
[62]Paul A. Carsen' Derivative Actions Under English and German Corporate Law- Shareholder Participation Between The Tension Filled Areas of Corporate Governance and Malicious Shareholder Interference'[2010] *European Company and Financial Law Review* 81 at 87.
[63]Paul von Nessen *et al'*The Statutory Derivative Action: Now Showing Near You '[2008] *Journal of Business Law* 627 at 633-634. See A.J Boyle, above n 48 at 38, to the effect that the American version of the rule in *Foss v Harbottle* is referred to as the 'Requirement of Demand'. See also the US case of *Dodge v Woolsey* 59 U.S. (18 How.)331[1855].
[64]Stephen Girvin *et al*, above n 37 at 511. See Wallersteiner *v Moir (No.2)*, above n 46 at 395.
[65]Daniel Lightman, above n 29 at 33.

shareholder is allowed to bring derivative actions under the common law in any of the four circumstances or causes of action as follows:[66]

(i) When the company is acting or proposing to act ultra vires.[67]

(ii) When the act complained of, though not ultra vires the company could be effective only if resolved by more than a simple majority and the required resolution has not been passed.[68]

(iii) Where the personal rights of the shareholder have been infringed.[69]

(iv) Where the wrongdoers who are perpetuating the fraud on the minority are the ones in control.[70]

Gower[71] maintains that the exceptions point to the fact that the rule in *Foss v Harbottle* would not apply, and thus allow an individual shareholder to sue to enforce corporate rights where his grouse or complaints cannot be validly ratified by a simple majority of the shareholders. The learned author further maintains that in spite of the fact that the possibility of ratification is also a complete bar to an action by a shareholder at common law, the courts have sometimes given the company the opportunity to ratify the actions complained of at a general meeting.[72]Gower further posits that the development of this attitude by the courts has resulted in the extension of the exceptions to the rule in *Foss v Harbottle* to include allowing a shareholder to bring an action where a general meeting of a company cannot be convened in time to be of any practical use in redressing a wrong done to the company or to the minority shareholders.[73]

One of the most notable limitations of the common law derivative action is the exclusion of negligence as a cause of action.[74] However, the courts appear to have included negligence as a cause of action where the directors benefitted from the negligence. Thus, in the English case

[66]L.C.B. Gower, *Modern Company Law* (4th edn, Stevens & Sons, London 1979)644.See Paul von Nessen *et al,* above n 63 at 630-631. See Edwards *v Halliwell*, above n 36 at 1064.
[67]The English case of *Parke v Daily News Ltd* [1962] Ch.927at 963.
[68]*Edwards v Halliwell*, above n 36.
[69]*Pender v Lushington*, above n 53.
[70]The English case of *Cook v Deeks* [1916]1 AC 554.
[71]L.C.B. Gower, above n 66 at 645.
[72]*Ibid at* 646. *See the English case of Hogg v Cramphorn Ltd* [1967] Ch.254.
[73]The English case of *Hodgson v NALGO* [1972] 1 WLR. 130.
[74] The English case of *Pavlides v Jensen* [1956] Ch. 565.

of *Daniels v Daniels*,[75] the sale of a company's asset done negligently and at a gross undervaluation was held to fall within the exceptions to the rule in *Foss v Harbottle,* because the directors had benefitted from the negligence at the expense of the company.[76]
Furthermore, the English courts appear to have also added another exception, - the interests of justice exception, in deference to the statement of Wigram V.C who held in the case of *Foss v Harbottle* as follows:

> ''The claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporators are required to sue.'' [77]

The interest of justice exception which was originally embraced in the English case of *Russell v Wakefield Waterworks*,[78]and has been applied subsequently in a couple of English cases[79] is not however without controversy.[80] While the exception was admitted by Vinelott J in the case of *Prudential Assurance Company Ltd v Newman Industries Ltd (No 2),* at the court of first instance, it was rejected by the English Court of Appeal,[81] which preferred that the court of first instance should have adjourned proceedings to enable a meeting of the shareholders of the company to be called to enable it to determine shareholder control in the light of the conduct of, and proceedings at the meeting.[82]Nevertheless, the interest of justice exception has been accepted by the courts in Nigeria[83] and South Africa[84] and other Commonwealth countries.[85]However, in Nigeria, the opinions of academic writers on the position of the Nigerian Supreme Court in the case of *Edokpolo v Sem Edo Wire Industries Ltd*, [86]where the

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[75][1978] Ch.406.
[76]See however, LCB Gower, above n 66 at 649, who posits that the case comes under the traditional exceptions to the rule in *Foss v Harbottle* because it illustrates that there has been fraud on the minority.
[77]*Foss v Harbottle*, above n 33 at 492.
[78] [1875] LR 20 Eq. 474.
[79]A.J Boyle, above n 48 at 27. See the English cases of *Heyting v Dupont* [1964] 1 WLR 847*; Edwards v Halliwel*l, above n 36 at 1067.
[80]Paul von Nessen *et al,* above n 63 at 631.
[81]Above n 40 at 366.
[82]A.J Boyle, above n 48 at 28, where the author opined that the position of the English Court of Appeal on the purpose of meetings ignores the difficulty of determining the motivation and conflicting interests of various shareholders at a company meeting.
[83]The Nigerian case of *Edokpolo v Sem Edo Wire Industries Ltd*, [1984] 7 SC 119.
[84]The South African case of *Mcllelland v Hulett & Ors.* [1992] (1) SA 456.
[85]The Australian case of *Biala Pty Ltd & Anor. V Mallina Holdings Ltd & Ors.* [1993] 11 ACLC 1082 at 1102. See Anil Hargovan 'Under Judicial and Legislative Attack: The rule in *Foss v Harbottle*' [1996] 113 *The South African Law Journal* 631 at 634-635.
[86]Above n 83.

interest of justice rule was applied, appear very divided. Barnes[87] applauds the decision as a triumph of justice over legal technicalities,[88] while Osunbor[89] describes the interest of justice exception as being too nebulous, vague and infinitely elastic to be considered an exception. Meanwhile, the position of Olawoyin [90] on the interest of justice exception is as follows:

> ''The exact scope of the exception or rather the precise moment when the exception becomes operative, is far from clear''.

Nevertheless, it is posited that the interest of justice exception is a veritable means of escaping from the limitations of the cause of action existing at common law with respect to derivative actions owing to its flexibility as opposed to the rigidity and limitation created by the recognised exceptions under the common law derivative actions. [91]However, it is admitted that this exception may not be the panacea to the myriads of problems bedeviling the common law derivative actions since its flexible nature may dictate that each case should be handled based on its own merit.[92]

2.2.2. PROCEDURAL AND OTHER DIFFICULTIES OF THE COMMON LAW DERIVATIVE ACTION

Part of the problem caused by the limitation of the cause of action in the common law derivative action has already been discussed above. [93] However, the challenges posed by the cause of action in the common law derivative action sphere appears to be profoundly demonstrated by procedural difficulties occasioned by the insistence of the courts that a derivative action cannot be maintained under the common law without the applicant showing that there has been fraud on the minority and wrongdoer control.[94] However, apart from the problem of cause of action, there are other challenges of the common law derivative action that this thesis aims to address.

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[87]Kiser D. Barnes, *Cases and Materials on Nigerian Company Law* (Obafemi Awolowo University Press Limited, Ile-Ife 1992) 378.

[88]Kenneth K.Mwenda 'Corporate –Law Safeguards Against Oppression of Minority Shareholders'[1999] 11 *South African Mercantile Law Journal* 29 at 36, where the author described the right of a shareholder to bring a derivative action at common law under the interests of justice exception as being axiomatic to the case of *Foss v Harbottle.*

[89]O.A. Osunbor 'The Doubtful Exception to the Rule in *Foss v Harbottle*' [1984] 14 *The Lawyer* (Nigeria) 37 at 46.

[90]G.Olawoyin, *Status and Duties of Company Directors* (University of Ife Press, Ile-Ife 1977) 272.

[91]*Edwards v Halliwell*, above n 36.

[92]G.A.Olawoyin, above n 90 at 272, to the effect that if the interest of justice exists at all, it is of limited value.

[93]Daniel Lightman, above n 29 at 34.

[94]Maleka Femida Cassim, above n 12 at 1.

2.2.2.1 Fraud on the Minority

The fourth conventional exception to the rule of *Foss v Harbottle* is the requirement of fraud on the minority.[95] It however appears to be recognised as the only true exception to the rule since the other conventional exceptions have been described as situations where the rule in *Foss v Harbottle* does not apply in the real sense.[96]

The concept of fraud on the minority has been successfully applied without any hitch or criticism in a plethora of cases.[97]However, these cases have maintained that fraud is not restricted to the common law sense but rather includes the wider equitable sense of unconscionable acts, breach of fiduciary duty, breach of trust, misappropriation of funds, property or advantages, abuse or misuse of power, etc.[98]Nonetheless, it has been said that the expression 'fraud on the minority' is vague or misconceived since the courts have established that the wrong is not a wrong done to the shareholders but a wrong done to the company. [99] The expression has however been premised on the argument that the fraud must be sustained by the action of the majority who are in control and have refused to take any action to protect the interests of the company.[100] Consequently, the concept of fraud on the minority and wrongdoer control appear to be mutually inclusive.[101]

Nonetheless, the more difficult task appears to be in trying to reconcile decided cases relating to wrongs that can or cannot be ratified.[102]For instance, in the English case of *Cook v Deeks*,[103] where the directors diverted the company's contract to themselves, it was held that their action was an illegality that could not be ratified. However, in another English case of *Regal (Hastings) Ltd v Gulliver,*[104] where the directors made use of corporate information which the company lacked the resources to exploit, the directors were held to have breached their

[95]*Edwards's v Halliwell*, above n 36.
[96]Tshepo Mongalo, above n 5 at 268. See Paul von Nessen *et al*, above n 63 at 631.
[97]Motunrayo. O.Egbe 'Global Trends In Statutory Derivative Actions: Lessons For Nigeria' [2013]12 *Nigerian Law & Practice Journal* 51 at 54.See the English case of *Menier v Hooper's Telegraph Works Ltd* [1874] Ch. App 350.However, in the English case of *Heyting v Dupont,* above n 79, the court wondered if there might not be cases where derivative actions could be allowed without fraud.
[98]The English case of *Estamanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 909 at 992. See John H Farrar, *Farrar's Company Law* (4 th edn, Butterworths, London 1998) 436.
[99]L.C.B Gower, above n 66 at 616.
[100]Robert Flannigan 'Shareholder Fiduciary Accountability' [2014] 1 *Journal of Business Law* 1 at 14.
[101]A.J Boyle, above n 48 at 25-26. See Paul von Nessen *et al*, above n 63 at 631.
[102]L.C.B Gower, above n 66 at 616.
[103]Above n 70 at 564.
[104][1942] 1 All ER 378 at 382.

fiduciary duty. The court however, opined that the directors would not have been held liable to account for their profit if the transaction had been ratified.[105] In effect, while the former case was regarded as an illegality, the latter case was treated as a mere irregularity. [106]The confusion was perhaps brought to the fore in the seminal case of *Prudential Assurance Ltd v Newman Industries Ltd (No.2),* where the court held that fraud lies not in the character of the act or transaction giving rise to the cause of action but in the misuse of the voting rights of the directors.[107]Meanwhile, some writers have argued that the cases are reconcilable. [108]They maintain that while cases like *Cook v Deeks*[109]can be classified under misappropriation of company's assets, the other cases, such as *Regal*[110]fall under breach of the No-Conflict rule.[111] Nevertheless, it remains uncertain when the courts would consider a matter of corporate wrongdoing a mere irregularity and when it would not.[112]

2.2.2.2. Wrongdoer Control

As has been mentioned earlier, one of the negative side effects of the requirement of fraud on the minority is the prerequisite that the applicant must show that the wrongdoers are in control.[113] Although, the problem of determining what constitutes 'control' appears to be more noticeable,[114] there are pointers to the fact that the term 'wrongdoer' is equally problematic. For example, the concept of wrongdoing is responsible for limiting the cause of action in common law derivative actions to actions taken in breach of corporate duties thereby, excluding negligence.[115] With regards to control, it has now been established that

[105]*Ibid*.
[106]*Ibid*.
[107]Above n 40 at 364. See W 'Derivative Actions and Foss v Harbottle' [1981] 44(2) *Modern Law Review* 202 at 207.
[108]A.J Boyle, above n 48 at 26.
[109]Above n 70.
[110]Above n 104.
[111]W, above n 107 at 206. See A.J Boyle, above n 48 at 26.
[112]Jennifer Payne 'A Re- Examination of Ratification' [1999] 58(3) *Cambridge Law Journal* 604.
[113]Robert Flannigan, above n 100
[114]Paul von Nessen *et al*, above n 63 at 631.In the South African case of *Francis v South African Reserve Bank*[1992] (3) SA 91(A), the court declined an application to institute a derivative action because the alleged wrongdoer, said to be in control was the Reserve Bank,who was held not to be an insider in the company. See Tshepo Mongalo, above n 5 at 270.
[115]Paul von Nessen *et al*, above n 63 at 632.See the UK Law Commission *Shareholders Remedies* Consultation Paper ('Consultation Paper') No. 142, (1996),para. 14.1- 14.4. See also Daniel Lightman, above n 29 at 34.

control may be *de jure* or *de facto*.[116] However, in the earlier English case of *Pavlides v. Jensen,*[117] the court held that control means a majority of the votes capable of being cast at a meeting i.e. *de jure* control.[118] Nonetheless, it is possible that control may be arrived at on de-facto basis.[119] This is because *de jure* control is somewhat elusive since the decision at a particular meeting is determined by a majority of those present and voting at the meeting.[120]This is particularly true in public companies with dispersed shareholding structure where poor attendance at general meetings is not uncommon.[121] Thus, in *Prudential* case,[122] the English trial court allowed a derivative action on the basis of the interest of justice principle, even though it was not pleaded and could not be alleged that the defendants had voting control.[123]Although, the Court of Appeal in the *Prudential* case disagreed with the idea of the interest of justice principle,[124] this thesis posits that the position of the lower court is justified since the defendants controlled the corporate assets and were in possession of the corporate information which was required to prove the several allegations.[125] If this position is correct, it can then be said that the concept of wrongdoer control requires that an applicant in derivative claim must show that the defendant directors are capable of preventing the company from suing on its own at a general meeting.[126] Consequently, it appears that the directors can prevent a suit to redress a wrong done to the company not only through their majority shareholding but also through their influence.[127] This position may explain why the Court of Appeal in the *Prudential* case defined control in very liberal terms as follows:[128]

'' a wide spectrum extending from an overall absolute majority of votes at one end to a majority of votes at the other end made up of those likely to be cast by the delinquent himself plus those voting with him as a result of influence or apathy.''

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[116]*Prudential Assurance Co.Ltd v Newman Industries Ltd (No.2)*, above n 40 at 364.See Andrew Keay & Joan Loughrey ' Derivative Proceedings in a Brave New World for Company Management and Shareholders' [2010] *Journal of Business Law* 151 at 172.
[117]Above n 74.
[118]Alan Dignam, John Lowry, *Company Law* (7th edn, Oxford, London 2012)199.
[119]K.W. Wedderburn, above n 34 at 94.
[120]CAMA, s. 258.
[121]Andrew Keay, above n 7 at 659. See K.W. Wedderburn, above n 34 at 94.
[122]Above n 40 at 359.
[123]W, above n 107 at 205.
[124]A.J Boyle, above n 48 at 28.
[125]*Ibid* at 27.
[126]Robert Pennington, *Company Law* (7th edn, Butterworths, London 1995) at 882. See the English case of Birch *v Sulliman* (1958)] All ER 56.
[127]Maleka Femida Cassim, above n 12 at 7.
[128]*Prudential Assurance Co.Ltd v Newman Industries Ltd (No.2)*, above n 40 at 364.

However, in the English case of *Smith v Croft (No.2),*[129] *the court took* a stricter approach when it held that, even where the persons in control of a company are able to prevent it from suing, a derivative action may not be commenced or continued if the persons who can exercise a majority of the votes which can be cast at a general meeting of the company (other than those who are in control), i.e. the majority of the minority are opposed to it.[130] Given the position of the court in this case, it may be right to agree with the position of some learned authors that the precise meaning and application of the phrase 'wrongdoer' in control' remains unsettled.[131]

2.2.2.3 Other Barriers to the Common Law Derivative Action

2.2.2.3.1 *Shareholder Dominance*

Another notable limitation or restriction of the common law derivative action is the fact that only a shareholder can bring an action to redress any breach of corporate duties.[132] This agrees with the Shareholders' primacy model,[133] which posits that the company exists primarily for the benefit of the shareholders.[134]The implication of this position is that other participants in the corporate set up such as officers of the company, employees, customers and even government agencies are unable to participate in enforcing breach of corporate duties. [135]This thesis maintains that shareholders dominance is unjustifiable in the light of the questionable ability of shareholders to properly monitor the directors due to lack of

[129][1988] Ch. 114 at 185.

[130]Alan Dignam, John Lowry, above n 118 at 200. The liberal interpretation of de-facto control appears to be more acceptable because the stricter approach may make derivative actions extremely difficult to institute except in the smallest private companies. See A.J Boyle, above n 48 at 29. See also the English case of Barrett *v Duckett* [1995] 1 BCLC 243, where a shareholder who held 50% of the company's shareholding was held to count as a minority shareholder. In such situations the 'majority of the minority' or' corporate independent organ' might be impossible to find. See also the Nigerian case of *Omisade v Akande* [1987] 2 NWLR (Pt.55) 158, where a derivative action was allowed even though the two shareholders of the company held shares in equal proportion. See Joseph E.O.Abugu, above n 41 at 599.

[131]Robert Pennington, above, n 126 at 884.

[132]Paul von Nessen *et al*, above n 63 at 658, where the author alluded to the fact that since the cause of action in a derivative action belonged to the company, it is reasonable to limit the applicants to members of the company.

[133]William Lazonick, Mary O'Sullivan, 'Maximising Shareholder Value: A New Ideology for Corporate Governance' in Thomas Clarke(ed), *Theories of Corporate Governance* (Routeledge, Oxon 2004)290.

[134]Shuangge Wen, *Shareholder Primacy and Corporate Governance* (Routledge, Oxfordshire 2013)11.

[135]Andrew Keay 'Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?' [2010] 3 *European Company and Financial Law Review* 369 at 408.

incentives to do so.[136]This is because, in the first instance, owing to the nature of derivative actions, a shareholder cannot benefit from any compensation obtained from a judgment of the court since the suit was brought on behalf of the company.[137] The only benefit derivable from the action is most probably an increase in share value which may amount to nothing, especially in companies with widely dispersed shareholding, where typically, each shareholder owns only a small shareholding. [138]Besides, the benefit from a derivative action, if any, does not accrue to the applicant alone since other shareholders must free ride on his efforts.[139] Secondly, apart from the problem of limited access to information to prosecute the derivative action,[140] the shareholder is faced with the big challenge of having to personally fund the action.[141]

2.2.2.3.2 The Problem of Ratification.

One of the problems of the common law derivative action is that ratification or ratifiability of an infringement of corporate duties by the members of a company constitutes a complete bar to the bringing of derivative actions under the common law. [142] This flows naturally from the principle in Majority rule whereby any irregularity committed in the course of corporate administration may be waived by the majority of the shareholders. [143] Thus, a minority shareholder is prevented from bringing a derivative action because he has to abide by the rule of corporate democracy.[144]Nevertheless, the concept of ratification constitutes a serious disincentive to the enforcement of breaches of corporate duties since it completely bars a shareholder from enforcing the rights of the company.[145] In addition, the fact that the mere probability of a breach being ratified precludes a minority action is particularly worrisome. [146]What is perhaps more worrisome is the fact that the directors who are themselves the

[136]Arad Reisberg, above n 8 at 87. See Janet Dine, above n 18 at 31, where the author posits that shareholders are ineffective in controlling management because their focus is solely profit maximisation.
[137]Andrew Keay, above n 12 at 44. See Ramani Naidoo, Corporate *Governance* (2nd edn, Lexis Nexis, Durban 2009) 96.
[138]Andrew Keay, above n 12 at 44.
[139]*Ibid*.
[140]Maleka Femida Cassim, above n 12 at 132.
[141]Arad Reisberg 'Derivative Actions and the Funding Problem: the Way Forward' {2006] *Journal of Business Law* 445.
[142]*MacDougall v Gardiner*, above n 35. See Maleka Femida Cassim, above n 12 at 167.
[143]Paul von Nessen *et al*, above n 63 at 630. See Daniel Lightman, above n 29 at 34.
[144]Motunrayo. O.Egbe, above n 97 at 53.
[145]A.J Boyle, above n 48 at 47.
[146]*Ibid*.

culprits are not prevented from using their shareholding to thwart or frustrate their being brought to book.[147] While the assurance that ratification will not apply in cases of fraudulent wrongdoing may serve the purpose of dousing the problem,[148] the uncertainty about which cause of action is ratifiable or not ratifiable as demonstrated by conflicting cases[149] renders not only the prospects of instituting derivative actions unpredictable but in actual fact obliterates the assurance.[150]

2.3 THE STATUTORY DERIVATIVE ACTION

The need for a statutory derivative action arose from dissatisfaction with the common law derivative action as demonstrated above; and the necessity of providing remedial action.[151]Thus, it has been said that statutory derivative action aims at enhancing the protection of minority shareholders, and increasing the responsiveness of corporate management to the concerns of corporate members, thereby improving corporate governance.[152]Consequently, the United Kingdom statutory derivative action as stipulated in the UK Companies Act 2006, is coded upon the simplification and modernisation of the law in order to improve its accessibility.[153]Accordingly, the United Kingdom sought to use the statutory derivative action mechanism as a means of providing speedy, fair and cost effective mechanism for resolving disputes between minority shareholders and directors.[154] Likewise, in accordance with the underlining philosophy of promoting efficiency of companies and their management, South Africa, in 2008, enacted a new Companies Act which aims at enhancing derivative actions.[155]In the case of Nigeria, the recently promulgated CAMA is hinged on enhancing the ease of doing business in Nigeria through the liberalisation of the corporate

[147]*Regal (Hastings) Ltd v Gulliver,* above n 104. See Jennifer Payne, above n 112 at 611.
[148]*Cook v Deeks*, above n 70. See John H Farrar, above n 98 at 387.
[149]Above ns 103 &104.
[150]Jennifer Payne, above n 11 2 at 611.
[151]Paul Davies, 'Enforcement of Management Duties and the Protection of Minorities' in Geoffrey Morse *et al* (eds), *Palmer's Company Law* (vol. 1, Thomas Reuters, London 2009) 8231 at 8233.
[152]Paul von Nessen *et al*, above n 63 at 632-633.
[153]UK Consultation Paper, above n 115 at para.1.4. See also Andrew Keay, above n 12 at 40.
[154]UK Law Commission, *Shareholders Remedies* ('Report')Law Com. No.246, Cm.3769, para. 1.9. See Brenda Hannigan, *Company Law* (4th edn, Oxford University Press, Oxford 2015) 528.
[155]SA Companies Act 2008, s.7. See Maleka Femida Cassim, above n 12 at 10. See also Carl Stein, above n 17 at 270, who posits that more than ever before, directors in South Africa, are now under the threat of derivative actions and personal liabilities.

governance framework.[156]However, as will be seen later, it appears that very little legislative improvement has been made in the area of minority protection. Thus, like the Old CAMA, the recently promulgated statutory derivative action in Nigeria is premised on the codification of the rule in *Foss v Harbottle*, and the expansion of its exceptions but with emphasis on judicial control.[157]

In furtherance of the objectives stated earlier, statutory derivative action framework has generally tended to focus on expanding the cause of action beyond what is prescribed under the common law, [158]widening the list of those who can bring derivative actions beyond shareholders only,[159] expanding breach of corporate duties beyond directorial wrongdoing, [160]neutralising the ratification principle, [161]and enhancing the procedural rules for instituting derivative actions, etc.[162]It is important to state that one of the prominent features of the statutory derivative action framework is the express abrogation of the common law derivative action.[163] This has been necessitated by the need to do away with the problems of the common law derivative action as will be further discussed.[164] However, some countries like Nigeria have adopted a milder approach whereby the common law derivative action framework is allowed to exist side by side the statutory derivative action law.[165]

2.3.1 THE ABROGATION OF THE COMMON LAW DERIVATIVE ACTION.

A combination of the drawbacks of the common law regime which constrained derivative actions in terms of cause of action, procedural irregularities, scope of applicants and

[156]Oluwakemi Odeyinde' Appraisal of the Companies and Allied Matters Act 2020' [2021] 1 *Bells University of Technology Journal of Management Sciences* 116.
[157]Nigerian Law Reform Commission, *Working Papers*, above n 28 at 239.
[158]Maleka Femida Cassim, above n 47 at 1056.See Ramani Naidoo, above n 137 at 95.
[159]Andrew Keay, above n 12 at 45.See Joseph E.O. Abugu, above n 41 at 380. See also Carl Stein, above n 17 at 24.
[160]Maleka Femida Cassim, above n 47 at 1056. See Brenda Hannigan, above n 154 at 534.
[161]CAMA, s.348. See Paul von Nessen *et al*, above n 63 at 645.
[162]Daniel Lightman, above n 29 at 40.
[163]SA Companies Act 2008, s. 165(1).
[164]Daniel Lightman, above n 29 at 34.
[165]Paul von Nessen *et al*, above n 63 at 655. See Joseph E.O. Abugu, above n 41 at 598.

ratification etc. [166]may have resulted in the rejection of the common law derivative action framework[167] and the consequent embrace of the statutory derivative action regime in many Commonwealth countries.[168] South Africa[169] and the United Kingdom[170] have followed this trend by abrogating the common law derivative action. Nonetheless, the abrogation of the common law derivative action has been described as incomplete since it is only the application of the exceptions to the common law rule in *Foss v Harbottle* and not the rule itself that is abrogated.[171] Meanwhile, the retention of the rule in *Foss v Harbottle* implies that the Proper Plaintiff rule, the Majority rule; and the resultant difficulties of constraining the right to enforce breach of corporate responsibilities to the directors and officers of the company who might also be the wrongdoers or culprits, are still retained in those jurisdictions.[172] For instance, the Proper Plaintiff rule forms the basis for the Notice which a shareholder or any other applicant who is interested in bringing a derivative action is required to give to the company, demanding that an action be taken by the company against those in breach of corporate duties.[173]The Proper Plaintiff rule also forms the basis for the procedural obstacle arising from the requirement that an applicant must obtain leave before a derivative action can be instituted.[174] It is therefore posited that since these common law requirements have found their way into the statutory derivative action, it is difficult to maintain that there has been a complete abrogation of the common law derivative action.[175] This position is further buttressed by the fact that recourse must be made to the common law in order to explain some ingredients of the statutory derivative action framework such as the

[166]Maleka Femida Cassim, above n 12 at 9-10.See Brenda Hannigan, above n 154 at 530.
[167]See Report of the South African Van Wyke De Vries Commission of Enquiry into the Companies Act,(Main Report RP/45/1970), para.42.10-18, where the common law derivative action was described as being narrow, limited and plagued by procedural hindrances. See also Anil Hargovan, above n 85 at 631, who referred to the rule in *Foss v Harbottle* as a multiple headed dragon.
[168]Paul von Nessen *et al*, above n 63 at 627.
[169]SA Companies Act 2008, s.165 (1).
[170]UK Companies Act 2006, s.260 (2). See Arad Reisberg, above n 8 at 129. See also Paul L.Davies, above n 52 at 615.See Derek French *et al*, *Mayson, French & Ryan Company Law*(28th edn, Oxford, United Kingdom 2011)560.
[171]Maleka Femida Cassim, above n 12 at 6.See Brenda Hannigan' Derivative Claims and Unfair Prejudice Petitions' [2009]6 *Journal of Business Law* 606 at 609. See also Joseph E.O.Abugu, above n 41 at 597.
[172]Brenda Hannigan, above n 154 at 533.
[173]CAMA, s.346 (2) (b); SA Companies Act 2008, s.165 (2); UK Companies Act 2006. See Ramani Naidoo, above n 137 at 95. See also Helena H. Stoop 'The Derivative Action Provisions In The Companies Act 71 of 2008' [2012] 29 *The South African Law Journal* 527 at 539, where the author posits that the requirement of demand serves the purpose of placing the Board in control.
[174]Brenda Hannigan, above n 171 at 610.
[175]Maleka Femida Cassim, above n 12 at 6.

requirements for applying for leave, like the concept of good faith,[176] and acting in the best interests of the company.[177] In the same vein, the principles laid down by Lord Denning MR with regards to indemnification under the English common law case of Wallersteiner *v Moir (No.2)*, [178]have often been recommended under the statutory regime as panacea to the problem of funding of derivative actions suits brought under the statutory derivative actions regime.[179]It is also posited that the Majority rule may account for the reason why for example, the common law principle of ratification[180]has found its way into the statutory derivative action framework, albeit in a modified form,in which ratification is no longer a complete bar to derivative actions.[181]

Nonetheless, in the case of the United Kingdom, there appears to be stronger reasons for maintaining that the abrogation of the common law derivative action is incomplete, since it has been argued that the common law derivative action can still be pursued in the United Kingdom, apart from under the UK Companies Act 2006, s.260, where it has been outlawed.[182] In any case, section 260 of the UK Companies Act 2006 does not appear to be the only source by which derivative actions can be instituted since the UK Companies Act 2006,s.370, empowers a group of authorised members to bring an action in the name of the company against erring directors who have made unauthorised donations or expenditure.[183]

2.3.2 THE CONCURRENCE OF THE COMMON LAW AND THE STATUTORY REGIME

Some Commonwealth countries have adopted a statutory derivative actions framework without abolishing the common law. This means that in these countries, the common law derivative action exists side by side the statutory derivative actions framework. For instance,

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[176]*Ibid* at 38.
[177]*Ibid* at 75.
[178]Above n 45 at 397.
[179]Maleka Femida Cassim, above n 12 at 152. See Vuyani R. Ngalwana 'Majority Rule And Minority Protection In South African Company Law: A Red Herring' [1996] 113 *South African Law Journal* 527 at 535.
[180]Andrew Keay and Joan Loughery, above n 116 at 162.
[181]CAMA, s.348.
[182]Daniel Lightman, above n 41 at 36- 37; Brenda Hannigan, above n 154 at 53 ,where the authors maintain that s.260 of the UK Companies Act 2006, does not expressly abolish the common law derivative action but only prescribes how derivative actions may be brought under the section. Consequently, the authors maintain that the common law derivative action is still applicable with respect to claims under multiple derivative actions and overseas companies which are not covered under s.260. See also David Kershaw, above n 61 at 275.
[183]Paul L, Davies, *Gower And Davies' Principles of Modern Company Law* (7th edn, Sweet & Maxwell, London 2003)447-448.

according to Yap,[184] the common law derivative action continues to exist side by side the statutory derivative action law in countries like Hong Kong[185]and Singapore.[186] Yap[187] explains that in the case of Hong Kong, where only a member of a company can bring a statutory derivative action,[188] the common law has been retained to enable multiple derivative actions to continue to exist, while in Singapore, it is said that the common law derivative action has been retained because the statutory derivative action is not available to listed companies.[189] Nonetheless, this thesis posits that the reasons adduced above are not enough to justify the retention of the common law derivative action in those jurisdictions, since multiple derivative actions and application of derivative actions to include listed companies can also be sustained under a statutory derivative action framework.[190]

In the case of Nigeria, the existing statutory framework is barely a codification of the common law derivative action framework in many regards.[191]Also, by virtue of the provisions of the received English law, the common law is generally applicable in Nigeria, subject to local legislations.[192] This means that the existence of common law derivative action in Nigeria may only be justified in terms of the common law being resorted to in order to fill any lacuna existing under the statutory derivative action regime.[193] However, this thesis maintains that this posture of having to rely on the common law will not enhance the development of a comprehensive statutory derivative action regime.[194] This argument is profoundly supported by the hurdles and difficulties, characteristic of the common law derivative action.[195] Moreover, the sensibleness of a concurrent regime has been under criticism especially because the common law derivative actions and the statutory derivative actions are mutually exclusive.[196] Thus, an applicant cannot bring any action under both regimes with respect to

[184]Ji Lian Yap, above n 30 at 197.
[185]Hong Kong Companies Ordinance, s.168 BC (4).
[186]Singapore Companies Act 1994, s.216 A (1).
[187]Ji Lian Yap, above n 30 at 199.
[188]Hong Kong Companies Ordinance, s.168 BC (1).
[189]Singapore Companies Ordinance, s.216 A (1).
[190]SA Companies Act 2008, s.165.
[191]Nigerian Law Reform Commission, *Working Papers,* above n 28 at 239. See Olakunle Orojo, *Company Law And Practice In Nigeria* (vol.1, Lexis Nexis, South Africa 2006)241.
[192]For example, High Court Law, Cap H5 Laws of Lagos State, Nigeria 2012, s.11.
[193]Joseph E.O. Abugu, above n 41 at 598.
[194]Andrew Keay & Joan Loughrey, above n 32.
[195]Maleka Femida Cassim, above n 47 at 1056.
[196]Paul von Nessen *et al*, above n 63 at 658.

the same cause of action because it would be considered to be vexatious and an abuse of the process of the court.[197] It is for this reason, that Paul Von Nessen *et al*[198] suggest that the interests of minority shareholders would be better served by discarding the common law derivative action regime.

Therefore, in line with the underlying philosophy of this thesis which is to make a case for a simpler and more comprehensive derivative action regime, this thesis argues for an outright abolition of common law derivative action in Nigeria, and its replacement with a new statutory derivative action that is self-sustaining; and without any necessity to recourse to the common law.

2.3.3 THE REPORT CARD OF THE STATUTORY DERIVATIVE ACTION.

Owing to the fact of it being an express enactment, the statutory derivative scheme has provided a little more certainty with regards to derivative actions, when compared to the position at common law when the law was embedded in diverse and sometimes conflicting court decisions.[199]Although, the Companies Proceedings Rules in Nigeria has actually not reflected this position, [200]there is proof that in some jurisdictions, there are comprehensive procedural rules detailing the mode of commencement, parties in derivative actions etc.[201] Therefore, this thesis agrees with the view that statutory derivative action is less complicated and unwieldy compared to the common law derivative action.[202] Also, while the observation that the procedural barriers and obstacles of the common law fame, such as the notorious concepts of fraud on the minority and wrongdoing control have been discarded by the statutory derivative action might not be correct in absolute terms because of the problem of incomplete abrogation,[203] it certainly represents a fair view of the performance of statutory derivative actions.[204] Be that as it may, there is sufficient evidence pointing to the fact that

[197]*Ibid.*
[198]*Ibid.*
[199]Tshepo Mongalo, above n 5 at 278. See Andrew Keay, above n 12 at 45.
[200]The Nigerian Companies Proceedings Rules, 2004.
[201]Daniel Lightman, above n 29 at 40.
[202]Bill Davies 'Codified Obstacles' [2008]158 *New Law Journal* 1409 -1410.
[203]Maleka Femida Cassim, above n 12 at 1.
[204]*Ibid*.

the statutory derivative action has not been able to achieve the expected optimal results due to certain constraints which are discussed below.[205]

2.3.3.1 Legislative Restraints

One of the consequences of the failure to discard the rule in *Foss v Harbottle* is the insistence of the legislature that the statutory derivative action is not intended to be a weapon of first resort but only a fail- safe mechanism.[206] This explains why the English Law Commission expressly stated that minority shareholders' derivative action should be exceptional[207] and subject to tight judicial control at all stages.[208] This also appears to be the posture in South Africa[209] and Nigeria[210] where there is a fettered access to derivative actions as typified by the judicial scrutiny of applications for leave to commence derivative actions. Accordingly, the legislature has maintained that an applicant can only succeed in a derivative action if he is able to show that the company is not willing to institute an action to redress the wrong done to it, that he has a good character or motive, and that the action is in the best interests of the company. [211] This scenario is further complicated by the fact that the precise meaning of the requirements established by the legislature for successful derivative actions applications remains elusive, [212]and so recourse has to be made to the common law for the determination of their exact meaning.[213]

In the case of the United States of America, the filtering of derivative action applications is not done by the courts. [214]However, the refusal of a company to institute an action after receipt of the Notice of demand appears to be protected under the Business Judgment rule in which the courts must defer to the litigation decisions of the company made in good faith

[205]Andrew Keay, above n 12 at 41.
[206]Arad Reisberg, above n 8 at 137.
[207]UK Consultation Paper, above n 115 at para. 4.6.
[208]Report of the Van Wyke De Vries Commission of Enquiry into the Companies Act, above n 167 at para. 6.6. See Daniel Lightman, above n 29 at 35.
[209]Maleka Femida Cassim, above n 12 at 27. See Ramani Naidoo, above n 137 at 96.
[210]CAMA, s.346 (2). See Kunle Aina, above n 37 at 62.
[211]Maleka Femida Cassim, above n 47 at 1071.See Ramani Naidoo, above n 137 at 96.
[212]Maleka Femida Cassim, above n 12 at 37.
[213]For instance, the meaning of the prima facie requirement at the initial stage of the application for derivative actions in the United Kingdom has been said to be elusive. See the English case of *American Cynamid Co. v Ethicon* [1975] AC 396 at 404.
[214]Maleka Femida Cassim, above n 12 at 122.

and in the best interests of the company while exercising due care and skill.[215] While the Business Judgment rule appears to be in tandem with the rule in *Foss v Harbottle*, [216]it does not however, appear to have hindered access to derivative actions in the United States.[217] As a matter of fact, the major problem of derivative actions in the American jurisdiction appears to be how to control the floodgate of derivative actions occasioned by strike suits and the like, instituted with improper motives.[218] On the other hand, the experience in other jurisdictions where derivative actions are hinged on judicial scrutiny appears to have resulted in the paucity of cases.[219] However, it is important to state that the success of derivative actions in the United States has been largely motivated by the liberated lawyers' fee arrangement which shifts the burden of funding derivative actions from the litigants to their solicitors.[220] Thus, the situation in the United States is a clear contrast with the position in other countries like Nigeria, South Africa, and the United Kingdom where the burden of funding of derivative actions is placed on the applicant,[221] but however relies on a system of indemnification as a form of relief.[222]

2.3.3.2. Judicial Scrutiny

The concept of judicial scrutiny implies that the judiciary has been empowered by the legislature to play an overriding role in determining the fate of derivative actions applications.[223] The performance of this function by the judiciary can either be done restrictively or liberally. [224]A restrictive approach appears to be rooted in the suggestion that the decisions of the Board are commercial or business verdicts, [225]which the judiciary is not

[215]The Delaware case of *Aronson v Lewis* 473 A.2d 805,813 (Del.1984).See Dennis J.Block & H.Adam Prussin' The Business Judgment Rule and Shareholder Derivative Actions: Viva Zapata?'[1981] 37(1) *The Business Lawyer* 27 at 32.
[216]SA Companies Act 2008, s.165 (7), stipulating that there is a rebuttable presumption that the company's decision to not sue is correct. See Ramani Naidoo, above n 137 at 96.
[217]A.J Boyle, above n 48 at 41.
[218]*Ibid*.
[219]Maleka Femida Cassim, above n 12 at 146.
[220]*Ibid* at 148. See Tshepo Mongalo, above n 5 at 278.
[221]Andrew Keay, above n 12 at 44.
[222]Vanessa Finch 'Personal Accountability and Corporate Control: The Role of Directors' and Officers' Liability Insurance' [1994] *Modern Law Review* 882. See Maleka Femida Cassim, above n 47 at 1088.
[223]Helena H. Stoop, above n 173 at 553, where the author posits that judicial interpretation would determine the worth of the provisions of SA Companies Act 2008, s.165, regarding derivative actions.
[224]Maleka Femida Cassim, above n 12 at 29.
[225]*Ibid* at 6, 104. See the English case of Howard *Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 at 832. See UK Consultation Paper, above n 115 at para. 14.11, to the effect that the courts should not interfere with commercial decisions of the board made in good faith.

properly equipped or competent to approach.[226] Be that as it may, it has been suggested that the judiciary must be bold enough to decide that it is competent to adjudicate in derivative actions even though this involves reviewing the decisions of the Board.[227] It is posited that if the courts assume a restrictive posture, then they will hardly arrive at decisions which will enable the minorities to enforce corporate rights.[228] This view finds support in the opinion of Andrew Keay and Joan Loughrey, who posit that judges do not have to be experts in corporate management in order to be able to review business decisions since the courts can always listen to evidence of experts to form their own opinion.[229] Unfortunately, it appears that the courts may have taken a restrictive or a less liberal approach to judicial activism with respect to derivative actions as will be shown later in this discourse.[230]

2.3.3.3. Poor Judicial Activism

In the practical field of derivative action litigation, it cannot be said that the impact of statutory derivative action has been significant,[231]as preliminary applications for leave appear to look like mini-trials,[232]while the decision whether or not to grant leave does not seem to follow a definite pattern.[233] The courts have also been accused of taking a conservative stance

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[226]Maleka Femida Cassim, above n 12 at 6.See the English case of *Iesini v Westrip Holdings Ltd* [2010] BCC 420 {86}, where the judge in an application for permission to proceed with a derivative claim said as follows' The weighing of these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case. 'See also Andrew Keay and Joan Loughrey, 'An Assessment of The Present State of Statutory Derivative Proceedings' in Joan Loughrey (ed), *Directors' Duties And Shareholder Litigation In The Wake of The Financial Crisis* (Edward Elgar Publishing Limited, United Kingdom 2013)187 at 200.

[227]Maleka Femida Cassim, above n 12 at 29.

[228]*Ibid.*

[229]Andrew Keay and Joan Loughrey, above n 226 at 202. See the American case of *Auerbach v Bennett* 393 NE 2d 994 (NYCA 1979), where the US court maintained that the courts are better qualified to handle matters relating to procedures and the determination of legal liability than corporate directors.

[230]The approach of the courts may be traced to the fear of flood gate of litigation syndrome. See Derek French *et al,* above n 170 at 557.See also Imitiaz Ahmed Khan 'The Unfair Prejudice and Investor Protection in Pakistan' [2014] 5 *Journal of Business Law* 388 at 395.

[231]Helena H. Stoop, above n 173 at 533.

[232]The English case of *Langley Ward v Trevor* [2011] EWHC 1893 CH.61. See the Nigerian case of *Agip Nig. Ltd v Agip Petroli International & Ors*. [2010] NWLR (Pt.1187) 348.See also Afolabi Odeleye 'Review of *Agip Nigeria Plc v Agip Petroli International &Ors*' (July 05, 2016, 1.52pm) https.www.yumpu.com/en/document/view/6351577. Odeleye argues that an interlocutory application on Notice would lead inevitably to several appeals, which would cause undue delay and hardship. He prefers the position in the United Kingdom, where the application for permission is required to be made *ex-parte* at the initial stage. See also Osaro Eghobamien' The Triumph of Form over Substance' https://greymile.perchstoneandgraeys.com/2012/03/21 July 05 3.04pm, who argues with respect to *Agip*, that the decision of the Nigerian Supreme Court to set aside the Writ of Summons and the Motion *ex-parte* brought in pursuance of the application for leave to institute a derivative action, is a Triumph of form over substance.

[233]In the English case of *Wishart* v *Stimpson*[2009] CSIH 65: 2009 SLT 812,the court held that no burden was placed on the applicant to satisfy the court that he or she had a prima facie case but that the court regardless

towards derivative actions applications.[234] According to Ngalwana,[235] all the applications for leave to institute derivative actions in respect of five reported cases under the South African Companies Act 1973 were lost. Little wonder then that Mongalo[236] observed that derivative litigation cases are few and far between in South Africa, notwithstanding the advent of statutory derivative actions.[237] Unfortunately, this scenario may reinforce the preference of litigants for unfair-prejudice applications.[238]

In the case of Nigeria, the paucity of derivative actions also appears to be the norm just like in South Africa, [239]although, it appears that South Africa is still far ahead of Nigeria.[240]For instance, the case of *Agip Nig. Ltd v Agip Petroli International BV &Ors*[241]appears to be one of the few reported cases so far decided under the statutory derivative action regime in Nigeria.[242] Unfortunately, the court did not even have the opportunity to determine the

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,will refuse to grant permission if in its opinion no prima facie case exists. See Daniel Lightman, above n 29 at 54. Compare with *Franbar Holdings Ltd v Patel*, [2008] BCC 885, where the English Court not only conflated the 1st and 2nd stages of the leave Application to continue a derivative claim into one stage but also held that the Applicant had failed to convince the court that he had a prima facie case. See Daniel Lightman, above n 29 at 46, 54. In the South African case of *Mbethe v United Manganese of Kalahari (Pty) Ltd* [2017]6 SA 409 at 414, the Supreme Court of Appeal held that the requirement for obtaining leave under SA Companies Act 2008, s.165 (5) (b), was conjunctive in the sense that an applicant is required to prove all the requirements, even though the requirements were not necessarily in isolation. However, with respect to the decision in an earlier South African case of *Mouritzen v Greystone Enterprises (Pty) Ltd*[2012] 5 SA 74, the court has been criticised for holding that once an applicant has good faith, he could be presumed to have fulfilled the requirement of acting in the best interest of the company. The court appeared to have interpreted the requirements for leave disjunctively. See Maleka Femida Cassim, above n 12 at 77.

[234]Andrew Keay, above n 12 at 45.

[235]Vuyani Ngalwana, above n 179 at 209. See Piet Delport, *Henochsberg on Companies Act71 of 2008* (Lexis Nexis, South Africa 1994) 515.

[236]Tshepo Mongalo, above n 5 at 276.

[237]The situation may have however improved under the SA Companies Act 2008. See Mouritzen *v Greystone Enterprises (Pty) Ltd*, above n 233 at 75, on the mode of service of demand. See *Mbethe v United Manganese of Kalahari (Pty) Ltd*, above n 233 at 427, on the independence of the Committee of Investigation. See also the South African cases of *Amdocs SA Joint Enterprise(Pty) Ltd v Kwezi Technologies(Pty) Ltd* [2014] (5) SA 532,on setting aside a demand ;*Lewis Group Ltd v Woollam* And Ors.[2017](2) SA 547, on the availability of an alternate remedy.

[238]Andrew Keay & Joan Loughrey, above n 226 at 228.

[239]Joseph E.O. Abugu, above n 41 at 376. See Motunrayo.O.Egbe, above n 97 at 67.

[240]Adeoye Amuda Afolabi 'Examining Corporate Governance Practices in Nigeria and South African Firms' [2015] 3 *European Journal of Accounting Auditing and Finance Research* 10 at 27.

[241]Above n 232.

[242]See also,the Nigerian case of *Ede v Central Bank of Nigeria*[2015] All FWLR 1113.There are however cases bordering on maintaining the rule in *Foss v Harbottle*. See for example the Nigerian case of *Solomon Tanimola &Ors. v. Surveys and Mapping Geodata Ltd & Ors,* [1995] 6 NWLR (Pt.403) 617. See also Nigerian cases of *Omisade v Akande,* above n 130; *Yalaju- Amaye v A.R.E.C* [1990] 4 NWLR (Pt.145)422, whichwere decided under the common law derivative action regime applicable under the Nigerian Companies Act 1968. It is however noted that the issue of preliminary hearing suggested in the case of *Prudential Assurance Co.Ltd v Newman Industries Ltd (No.2)*, above n 40 at 366, was not taken into consideration in any of these cases. The case of

substantive issues considering that the case was terminated at the interlocutory stage of the proceedings. What is perhaps quite disturbing in Nigeria is the abuse of derivative actions in an attempt to use them to sustain frivolous claims, whose substance, in some cases has no bearing on corporate law. For example, in the Nigerian case of *Ozueh v Ezeweputa & Ors*,[243]the applicants who were not parties to a proceeding,(not a Companies Proceeding),[244] at the trial court, sought to be allowed to appeal the judgment of the court as interested parties. They averred that they were members of the 2nd respondent, a corporate body registered under the Old CAMA. The Court of Appeal in wrongly dismissing their claim agreed with the submission of the respondents that the applicants ought to have commenced the case by applying for leave to institute a derivative action as stipulated under the Old CAMA, s.303.[245] However, in another Nigerian case of *Williams v Edu*[246] which devolved on the sublease of the property of the plaintiff/ respondent. The respondent, a sub lessee purportedly brought a derivative action against the defendant/appellant company and its officers with respect to the sublease, claiming *inter alia* that the directors/ trustees were not worthy to be directors/trustees of the company. The court rightly upheld the argument of the appellant, that the plaintiff/respondent was not competent to bring a derivative action with respect to the cause of action.

In the case of the United Kingdom, Andrew Keay and Joan Loughrey report that since the inception of the UK Companies Act 2006, only five cases of application for permission to institute derivative actions have been allowed, and that in two of these cases, very limited indemnity orders in respect of costs have been granted, thus suggesting tight judicial control and attitude.[247] The authors fear that by this attitude, the courts might inadvertently be pushing derivative actions litigants further towards the unfairly prejudicial remedy which appears to be more favoured by litigants because of its simpler procedural requirements and better remedial actions.[248]In the same vein, Keay's assessment of the statutory derivative

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Abubakri v Smith, above n 20, was also decided under the common law derivative action but before the *Prudential Assurance* case.

[243][2005]4 NWLR 321.

[244]Nigerian Companies Proceedings Rules, 2004.

[245]See also the Nigerian case of *Ohanenye v Ohanenye* [2016] LPELR 40458.

[246][2002]3 NWLR 401 at 414-415.

[247]Above n 226 at 226. See Andrew Keay, above n 12 at 43-44.

[248]Andrew Keay and Joan Loughrey, above n 226 at 228. See S H Goo, *Minority Shareholders' Protection* (Cavendish Publishing, Great Britain 1994) 1 .See also UK Companies Act 2006, s.263(3) (f), which gives the courts

action in the United Kingdom, eight years after inception, reveals the paucity of cases under the statutory regime.[249] The learned author reports that out of 22 derivative actions applications, only 8 were successful in obtaining permission to continue their claim. [250]Keay is of the opinion that unlike under the common law where judges did not want to be seen to stifle derivative actions and were thus, more disposed to granting leave applications, judges are now more reluctant to grant derivative action applications in view of the deluge of actions and proliferation of cases which the statutory derivative action was expected to convey.[251]However, Cassim posits that the floodgate of derivative actions litigation in Commonwealth countries expected under the new liberalised statutory derivative action is yet to materialise.[252]

2.3.3.3.1. Alternative Dispute Resolution/Administrative Mechanisms.

In the light of the poor judicial attitude to derivative actions and the dearth of derivative action litigation as maintained above,[253] this thesis posits that Alternative Dispute Resolution mechanisms[254] and administrative mechanisms[255] should be put in place to work side by side with litigation in order to improve the efficiency of statutory derivative action as a corporate governance tool. This position is buttressed by the fact that corporate disputes may be

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at the permission hearing stage in a derivative claim, power to consider if the action could be pursued by the member as a personal action. This invariably means that the courts are empowered to consider the possibility of an action under unfair prejudice remedy. See the English case of *Kiani v Cooper* [2010] EWHC 577, where the availability of an alternate remedy did not prevent the court from granting a permission application. See however, Maleka Femida Cassim, above n 12 at 147, to the effect that statutory derivative action in New Zealand appears to be as popular as the unfair prejudice remedy.

[249]Andrew Keay, above n 12 at 54.

[250]*Ibid*.

[251]*Ibid at* 55.See however, IM Ramsay & BJ Saunders' Litigation by Shareholders and Directors: An Empirical Study of Australian Statutory Derivative Action'[2006]6 (2) *Journal of Corporate Law Studies* 397,which reveals that the number of derivative actions instituted under common law are nearly the same as the number instituted under the statutory derivative action regime in Australia.

[252]Maleka Femida Cassim, above n 12 at 146. See Tshepo Mongalo, above n 5 at 276.

[253]Andrew Keay, above n 12 at 55.

[254]Arad Reisberg, above n 8 at 303, who argues for the use of arbitration in derivative actions in the United Kingdom. See The UK White Paper on Modernising Company Law (2003), para. 2.36, which suggests that there is an emphasis on the use of arbitration and other alternative dispute resolution to resolve shareholders' disputes. See also SA Companies Act 2008. s.166; King IV *Report on Corporate Governance for South Africa (*2016), part. 5.5: 71.

[255]Matthew Berkahn,*Regulatory And Enabling Approaches To Corporate Law Enforcement* (The Centre for Commercial & Corporate Law, University of Canterbury 2006)11.

classified into Mandatory/ Prohibitive[256] or Enabling / Facilitative.[257] However, while corporate disputes involving mandatory or prohibitive matters must be resolved in court, corporate disputes concerned with enabling or facilitative issues may well be suited for arbitration.[258] Meanwhile, Haiber argues that in the United States of America, arbitration is increasingly being used as a means of resolving corporate disputes.[259] Similarly, Cassim [260]posits that while the South Africa Companies Act 1973, extensively, used criminal sanctions, [261]as a tool for curbing corporate infraction, albeit,unsuccessfully, the South Africa Companies Act 2008, aims at the decriminalisation of corporate law, and shifts the enforcement procedure towards administrative[262] and alternative dispute resolution mechanisms.[263] Thus, it is possible for a person aggrieved by corporate wrongdoing in South Africa to apply to the Companies Tribunal, an Accredited Entity, or any other person for a resolution of the dispute either by mediation, conciliation or arbitration[264] or alternatively obtain redress administratively through the Complaints Procedure available under the South African Companies Act by filing a Complaint at the Companies and Intellectual Property

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[256]Iris H.Y. Chiu 'Contextualising Shareholders' Disputes- a way to Reconceptualise Minority Remedies' [2009] *Journal of Business Law* 312 at 330, where the author posits that this will include directors duties, shareholder disputes involving modulation of legal rights, mandatory requirement of disclosure in public offerings etc.

[257]*Ibid*, where the author posits that matters such as exit right, dividend policy and exercise of voting rights may be provided for in a Shareholders' Agreement.

[258] R.C. Nolan 'The Continuing Evolution of Shareholder Governance' [2006] *Cambridge Law Journal* 93. Nolan argues for continued adherence to the basic facilitative structure of company law, which allows shareholders to modify the Articles of Association innovatively to govern the company in accordance with changing needs. He argues that the facilitative structure should play a more prominent role in corporate law than regulatory intervention, which he posits should only apply in limited circumstances, after careful thought and justification. See Janet Dine, above n 18 at 21, where the author argues that in the United States where the Contractarian model of corporate governance is more acceptable, modification of derivative actions to allow derivative actions arbitration instead of derivative litigation is more plausible.

[259]Scott R. Haiber 'The Economics Of Arbitrating Shareholder Derivative Actions' [1991-92] 4 *DePaul Business Law Journal* 85. See Rita Cheung 'Shareholders' Agreements: Shareholders' Contractual Freedom in Company Law' [2012]6 *Journal of Business Law* 504 at 505.

[260]Maleka Femida Cassim, 'Enforcement And Regulatory Agencies' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3 rd edn, Juta, 2021) 1135 at 1136-1137.

[261]Dennis M.Davis, 'Dealing with Corporate Defaulters: Curbing the Unfettered Access of Criminal law ' in Tshepo H Mongalo (ed), *Modern Company Law for A Competitive South African Economy* (Juta, Claremont 2010) 411 at 412, where the author identifies some of the disadvantages of using criminal sanctions as follows: criminal measures are subject to stricter measures than civil measures, there is also the problem of requirement of proof of Mens Rea, criminal measures are not appropriate for infractions of a continuous nature, the attitude of the court towards corporate crime, the policy of judicial non –interference; and the fact that not all corporate crimes are criminal.

[262]The Complaints procedure available to a person aggrieved by a corporate wrongdoing under SA Companies Act 2008, ss.168- 171.

[263]Maleka Femida Cassim, above n 260. See Dennis M Davis, above n 261. See also John F Olson, above n 23 at 221.

[264]SA Companies Act 2008, s.166.

Commission.[265]It is remarkable that in Nigeria, in contrast with what was obtainable under the Old CAMA, CAMA 2020 avoids the application of criminal sanctions for non-compliance with regulatory issues and rather opts for administrative penalties.[266]It is important to note however, that administrative options alternative to derivative action litigation could also include the use of self -regulation through the application of the Codes of Corporate Governance.[267] Even though the Codes are regarded as 'soft law' because they are usually voluntary and thus, unenforceable by the regular courts,[268] their application to derivative actions may also help to highlight the important role of regulatory authorities in statutory derivative actions since they are usually coordinated by regulatory institutions.[269]

2.4 CONCLUSION

In view of its limitations and problems, this chapter advocates for the express abrogation of the common law derivative action in Nigeria.[270]Nonetheless, it is argued that the abrogation of the common law derivative action by the legislature can at best only be described as an incomplete abrogation so long as the rule in *Foss v Harbottle* still exists in the corporate law jurisprudence.[271]Consequently, it is maintained that for the purpose of entrenching good corporate governance, there is need to curtail the consequences of the retention of the rule in *Foss v Harbottle;*[272] and that what is required is a strong statutory derivative action framework.[273]It is also posited that while the abrogation of the common law will mainly procure the enablement or furtherance of a comprehensive statutory derivative action, [274] the quest for a stronger statutory derivative action framework cannot be achieved without simplifying, modifying and enhancing the existing framework especially in view of the growing

[265]*Ibid* at s.168.
[266]A.F.Afolayan *et al*' A Critical Examination of the Criminal and Quasi- Criminal Offences Created Under the New Companies and Allied Matters Act 2020' [2021] 1 *Legal Network Series* (A) lxxx 1 at 35.
[267]Matthew Berkahn, above n 255 at 11.
[268]Ramani Naidoo, above n 137 at 29.See however,The Central Bank of Nigeria(CBN) Code of Corporate Governance for Banks And Discount Houses in Nigeria 2014,para. 8.0, which stipulates sanctions for non-compliance.
[269]Fabian Ajogwu, *Corporate Governance & Group Dynamics* (Centre for Commercial Law Development, Lagos 2013) 173-174.
[270]Andrew Keay & Joan Loughrey, above n 32 at 469.
[271]Maleka Femida Cassim, above n 12 at 6.
[272]David Kershaw, above n 61 at 280-281.
[273]Andrew Keay, above n 12 at 45.
[274]Andrew Keay & Joan Loughrey, above n 32 at 469.

popularity of the unfair prejudice remedy option. [275]In addition, this thesis maintains that in view of poor judicial activism with respect to derivative actions,[276] it is important to lay more emphasis on regulatory and administrative enforcement.[277]

[275]Brenda Hannigan 'Drawing Boundaries between Derivative Claims and Unfairly Prejudicial Petitions' [2009] *Journal of Business Law* 606 at 614.
[276]Andrew Keay, above n 12 at 55.
[277]Dennis M Davis, above n 261 at 412.

CHAPTER THREE

COMMENCEMENT OF DERIVATIVE ACTIONS: PROCEDURAL STEPS AND MATTERS ARISING

3.1 INTRODUCTION

This chapter is concerned primarily with the preliminary steps to be taken and issues to be considered before bringing derivative actions or intervening in existing actions under the statutory derivative action regime prior to applying for leave,[1] having argued for the abrogation of the common law derivative action.[2]Considering that the first procedural step an applicant is required to take before instituting a derivative action is to demand that the directors take action to redress the wrong done against the company, this chapter shall revisit the requirement of demand under CAMA.[3] In the United Kingdom, there appears to be no requirement of demand;[4] therefore,the position in Nigeria shall be compared mainly with the position in South Africa.[5] However, references will sometimes be made to the position of the law in the United States of America, particularly in the State of Delaware.[6] It is also intended to give particular attention to the Independent and Impartial Committee of the Board to which the company must refer in South Africa after receiving a Notice of Demand;[7] the comparable Special Litigation Committee of the Board of the United States of America;[8] and the concept of futility of demand applicable in both the South African[9] and American jurisdictions.[10]

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[1]The English case of *Wallersteiner v. Moir (No.2)* [1975] QB 373 at 390, where the court opined that a derivative action was a procedural device for enabling the court to do justice to a company controlled by miscreant directors or shareholders. See Stephen Girvin *et al*, *Charlesworth's Company Law* (18th edn, Sweet & Maxwell, London 2010) 512.

[2]See Chapter Two. See also Daniel Lightman, ' Derivative Claims' in Victor Joffe *et al*(eds),*Minority Shareholders-Law Practice and Procedure* (4th edn, Oxford University Press, Oxford 2011)29 at 36.

[3]CAMA, s. 346(2) (b).

[4]UK Companies Act 2006, ss.260-269.

[5]SA Companies Act 2008, s.165 (2).

[6]Delaware Chancery Court rule 23.1.

[7]SA Companies Act 2008, s.165 (4).

[8]Patrick T.Clendenen *et al* (eds), 'Derivative Litigation: Fundamental Concepts and Recent Developments' in *Recent Developments in Business And Corporate Litigation* (vol.11, ABA Publishing, Chicago 2014)511 at 580. See the American case of *In re Oracle Corp. Deriv.Litig,* 808 A.2d 1206, 1210 (Del.Ch.2002).See also Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford University Press, Oxford 2007) 104.

[9]SA Companies Act 2008,s.165(6).See Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (2nd edn, Lexis Nexis, Durban 2009) 96.

[10]The Delaware case of Aronson *v Lewis* 73 A.2d 805(Del.1984). See Patrick T.Clendenen *et al*, above n 8 at 552.

In the event that the company fails to institute the action as requested in the Notice of Demand,[11] the next procedural step is for the giver of the demand to commence a derivative action. As a matter of course, an applicant who intends to bring a derivative action must consider issues relating to the cause of action-[12] including multiple derivative actions, [13]persons who may bring an action,[14] mode of commencement of action[15] and limitation of actions.[16] This chapter shall with respect to these issues, compare the position in Nigeria with the position in South Africa and in the United Kingdom. However, with regards to persons who may bring derivative actions, the concepts of Contemporaneous Shareholder rule,[17] Continuing Interests[18] and Continuous Wrong doctrine[19] of the United States would also be considered in the light of the fact that shareholders are one of the persons entitled to bring derivative actions.[20]

3.2 THE REQUIREMENT OF DEMAND

An applicant who intends to bring a derivative action in Nigeria is expected to give reasonable notice to the directors of the company of his intention to apply to court to institute, defend or discontinue a derivative action.[21] Although, the South African law provides that a Demand 'may' be served on the company, [22]the requirement of demand appears to be a prerequisite; and the foundational procedure for instituting derivative actions. [23]In Nigeria, the requirement of giving Notice of Demand is fundamental to derivative actions since the applicant's cause of action must be tied to the directors' refusal to take action.[24] It is also a

[11]SA Companies Act 2008, s.165 (5).
[12]*Ibid* at s.165 (2). See Robin Hollington, Hollington *On Shareholders' Rights* (7th edn, Sweet & Maxwell, London 2013)160.
[13]Arad Reisberg, above n 8 at 202.
[14]*Ibid* at 204. See SA Companies Act 2008, s.165 (2).
[15]Paul L .Davies, *Gower & Davies Principles of Modern Company Law* (7th edn, Sweet & Maxwell, London 2003) 653-654.
[16]*Ibid* at 639-640.
[17]Delaware Chancery Court rule 23.1, which maintains that an applicant must have been a shareholder at the time of the breach of duties or wrong done to the company. See Patrick T.Clendenen *et al*, above n 8 at 592.
[18] The case of *Aronson v Lewis*, above n 10, to the effect that the complainant in a derivative action must continue to own shares in the company throughout the course of litigation.
[19]The American case of *Re Bank of New York Derivative Litigation Bank of N.Y. II*, 320 F.3d at 298–99.
[20]Maleka Femida Cassim, *The New Derivative Action under the Companies Act – Guidelines for Judicial Discretion* (Juta, Claremont 2016) 14.
[21]CAMA, s.346 (2) (b).
[22]SA Companies Act 2008, s.165 (2).
[23]*Ibid* at s.165 (5), which stipulates that an applicant who has given Notice of Demand may apply for leave. See Maleka Femida Cassim, above n 20 at 16.
[24]CAMA, s.346 (2) (c). See Ramani Naidoo, above n 9 at 96.

consequence of the retention of the rule in *Foss v Harbottle* as expressed in the Proper Plaintiff rule,[25] since it gives room for the Board which is vested with power to initiate litigation to continue to exercise that power.[26] Thus, in the United States of America, it has been said that the requirement of demand is premised on the need to prevent abuse of derivative actions by discouraging strike suits i.e. meritless actions brought by shareholders to harass the company or to obtain private settlements or benefits.[27]More importantly, the requirement of demand also gives room for Alternative Dispute Resolution (ADR) of the complaints of the intended applicant because of the opportunity it gives the complainant and the company to settle their grievances outside the court.[28]This means that the requirement of demand allows for judicial economy since causes of action bordering on derivative actions can be resolved without resort to litigation.[29]

Although, the reasons adduced above may justify the allusion that the requirement of demand is a substantive requirement and not a mere procedural nicety,[30] this chapter is more concerned with the procedural problems arising from the requirement of demand. CAMA stipulates that an applicant must give reasonable notice of his intention to institute a derivative action to the directors of the company.[31] However, there are many procedural issues arising from the requirement which the law has failed to address, which shall be discussed in this chapter.

3.2.1 FORM OF DEMAND

CAMA does not explain the form of the reasonable notice a prospective applicant is required to give to the company,[32] neither does the South African law.[33] However, available evidence

[25]Maleka Femida Cassim, above n 20 at 16.
[26]R. Franklin Balotti and Jesse A. Finkelsten, *The Delaware Law of Corporations and Business Organisations* (vol.1, Law and Business Incorporated, New Jersey 1986) 638.
[27]*Ibid.*
[28]Maleka Femida Cassim, above n 20 at 17. See Helena H. Stoop 'The Derivative Action Provisions In The Companies Act 71 of 2008' [2012] 29 *The South African Law Journal* 527 at 537.
[29]Patrick T.Clendenen *et al,* above n 8 at 537. See Maleka Femida Cassim, above n 20 at 16.
[30]R. Franklin Balotti and Jesse A. Finkelsten, above n 26 at 639.
[31]CAMA, s.346 (2) (b).
[32]*Ibid*.
[33]SA Companies Act 2008, s.165 (2).

under the South African law shows that such demands are usually in writing and not oral. [34]It is suggested that this may be in the form of a letter or a formal Notice but preferably a Notice since the demand is actually a Notice of the intention of the applicant to institute an action if the directors would not do so.[35] Since it is not expressly stated that the demand or reasonable notice must be under the hand of the giver,[36] it is also suggested that the giver of the Notice or Demand may write personally or through his solicitor, or trustee if a beneficial owner; or any other person.

3.2.2 MODE OF SERVICE OF DEMAND

The mode of service of Demand is not expressly stated under the Companies Act of both the Nigerian law [37]and South African law.[38] The general mode of service of documents provided under CAMA is to the effect that a document may be served on a company by leaving it at or by sending it by post to the Registered Office or Head Office of the company.[39] However, in the South African case of *Mouritzen v Greystone Enterprises (Pty) Ltd*, [40]the court held that service of a demand via email was an effective service since there was no stipulation in the Companies Act regarding the mode of service.[41] This decision appears to be in tandem with the provisions of CAMA with regards to the service of notice of meetings on members, which in addition to notice given personally or by post also allows notice by electronic mail.[42] This thesis posits that since electronic and computer generated evidence is admissible in Nigeria under the Evidence Act, a Notice of demand may be served on a company via electronic mode.[43] Meanwhile, it is suggested that the general mode of service of documents as stipulated under Section 104 of CAMA, should be amended to include service by electronic means.

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[34]The *South African case of Mouritzen v Greystone Enterprises (Pty) Ltd* [2012] 5 SA 74. See Maleka Femida Cassim, above n 20 at 18.
[35]The requirement of' reasonable notice' under CAMA, s.346 (2) (b), does not appear to suggest that only a formal Notice is acceptable as against a letter.
[36]CAMA, s. 572 (a), to the effect that a creditor who wants to establish that a debtor is unable to pay his debt must give the debtor a demand under his hand.
[37]CAMA, s. 346(2) (b).
[38]*Mouritzen v Greystone Enterprises (Pty) Ltd,* above n 34.
[39]CAMA, s.104. See the Nigerian case of *MTN v Bolingo Hotels & Towers Ltd* [2004] 13 NWLR (Pt. 889) 117 at 125.
[40]Above n 34.
[41]Maleka Femida Cassim, above n 20 at 18.
[42]CAMA, s.244 (3).
[43]Nigerian Evidence Act, 2011,s.84.

3.2.3 CONTENT OF THE NOTICE / DEMAND

In South Africa, a demand served on a company must request that the company should commence or continue legal proceedings or take related steps to protect the legal interests of the company.[44] Thus, the law does not provide comprehensive information about how much information should be contained in the demand.[45]This is similar to the provisions under the Old CAMA which only required that the person giving notice must request the company to bring, diligently prosecute, defend or discontinue an action or else he will institute a derivative action.[46] However, under CAMA, the Notice of Demand is required to contain a factual basis for the claim and the actual or potential damage caused to the company.[47] This thesis posits that allowing an applicant to not only state a factual claim or damage but also a potential claim or damage in a Notice of demand will help to cushion the effect of lack of access to information, whereby the applicant may not at the time of making a demand have all the necessary information on his complaints.[48] Nonetheless, the concept of what constitutes a demand may appear better clarified in the Delaware jurisprudence, where the courts have maintained that the following factors must be taken into account in order to determine the adequacy of the demand as required under Chancery Court rules 23.1: the identity of the alleged wrongdoers; the alleged wrongdoing; and the legal action the shareholder wants the company to take.[49] It has also been said that what is important is that the demand must be exact and comprehensible such that the directors are given a fair chance to redress any wrong done to the company.[50] Therefore, a general complaint that the company was being run in a manner not favourable to the members and employees has been held by the Delaware Court not to be a demand.[51] Also, a purported letter of demand which did not explicitly require the company to take legal action to protect the interests of the company was held not to be a demand.[52] It has also been maintained by the Delaware courts

[44]SA Companies Act 2008, s.1652).
[45]Maleka Femida Cassim, above n 20 at 17.
[46]Old CAMA, s.303 (1).
[47]CAMA, s.346 (2) (d).
[48]Maleka Femida Cassim, above n 20 at 23.
[49]*Ibid* at 17.
[50]Patrick T.Clendenen *et al*, above n 8 at 538.
[51]*Ibid* at 539.
[52]The Delaware case of *Judicial Watch, Inc v Deutsche Bank*, A.G., 9 Fed. Appx.14 (D.C.Cir.May 20, 2001).

that the identity of the giver of the demand must also be known.[53]This is because a demand cannot be effective if the giver does not fall into the categories of persons qualified under the law to bring derivative actions.[54] In summary, this thesis posits that the courts in Nigeria should insist that the Notice of demand must clearly state the reason for the demand and the action the company is expected to take.[55] However, a rigid interpretation of the content of the Notice must be avoided in order to avoid a situation whereby the Notice of demand becomes another hurdle in the effectiveness of derivative actions as a tool of corporate governance. [56]

3.2.4 TIME FRAME

In South Africa, a company which has been served with a demand has several options. It may apply to set aside the demand within 15 business days of the receipt of the demand;[57] or either institute or continue the action within 60 business days of the receipt of the demand or notify the giver of the demand of its refusal to take any action within 60 business days.[58] This means that a prospective applicant cannot apply for leave to institute a derivative action until the expiration of the 60 business days, except otherwise the company gives Notice of Refusal to take action before the stipulated time, [59]or in exceptional circumstances, where the applicant is allowed to jettison the requirement for demand or allowed to apply for leave before the expiration of the 60 business days.[60] In contrast however, there is no time lag prescribed under the Nigerian law since a prospective applicant is expected only to give' reasonable notice'.[61] Unfortunately, there appears to be no case law in Nigeria, where what constitutes reasonable notice with respect to derivative actions, has been tested or defined. The position in Nigeria is comparable to the position in the United States of America where there is a preponderance of opinion that when an adequate demand has been made, the board of directors must be given sufficient time to conduct its investigation before a

[53]The Delaware case of Sachiko *v Birkelo*, 576 F.Supp.1493 (D.Del.1983).
[54]CAMA, s. 352;SA Companies Act 2008, s.165 (2).
[55]CAMA, s.346 (2) (d).
[56]Maleka Femida Cassim, above n 20 at 18, where the author argues that a Demand Notice must not be too technically construed.
[57]SA Companies Act 2008, s.165 (3).
[58]*Ibid* at s.165 (4) (b). See Maleka Femida Cassim, above n 20 at 20.
[59]SA Companies Act 2008, s.165 (4) (b) (ii).
[60]*Ibid* at s.165 (6).
[61]Emphasis mine.

derivative suit can be instituted.[62] In the case of Nigeria, where there is no express provision for the appointment of an independent and impartial committee to investigate the demand, unlike what obtains in South Africa,[63] the adequacy of the time might reasonably be expected to be shorter.[64] In any case, it appears that it is better for the legislature in Nigeria to prescribe a particular time frame like what obtains in South Africa so that the law can become more predictable in this regard.[65]

3.2.5 SETTING ASIDE OF DEMAND

While CAMA does not make any provisions for setting aside a demand, in South Africa, however, a company may within 15 days of being served with a demand, apply to the court to set aside the demand on the ground that it is frivolous, vexatious and without merit.[66] If the court sets aside a demand, a company which has taken this option will of course no longer be bound to initiate or continue any action or give a notice of refusal within 60 business days.[67]The intention of the legislature appears laudable on the surface, since the application to set aside the demand [68]would protect the company from meritless demands.[69] This is because where the court sets aside the demand, the company would not have to shoulder the unnecessary expense of having to appoint an independent and impartial person or committee to investigate the demand and report back to the board. [70]The same advantages ensue where a person who has given a demand decides to withdraw the demand. Thus, in the South African case of *Lewis Group Limited v Woollam*(3),[71]the court held that loss of reputation or fear that the giver of the demand who has withdrawn it may bring another demand is not sufficient reason for the company which has brought an application to set aside the demand to insist on continuing its application. The decision of the court appears to be laudable in view of the

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[62]Patrick T. Clendenen *et al*, above n 8 at 540. See In *re Smith & Wesson Holding Corp.Derivative Litigation*, 2010 WL 4119242(D.Mass. Oct.20, 2010), where the court in Delaware dismissed a derivative action instituted four months after a demand; and before completion of the investigation by the committee appointed.
[63]SA Companies Act 2008, s.165 (4).
[64]Fidy Xiangxing and S.H. Goo 'Derivative Actions in China: Problems and Prospects' [2009] 4 *Journal of Business Law* 376 at 390, to the effect that a 30 day period is what is applicable in China.
[65]SA Companies Act 2008, s.165 (3) & (4) (b).
[66]*Ibid* at s.165 (3). See the South African case of Amdoc *SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd* [2014] (5) SA 532.See also Maleka Femida Cassim, above n 20 at 18-19.
[67]SA Companies Act 2008, s.165 (4).
[68]*Ibid*.
[69]Maleka Femida Cassim, above n 20 at 18.
[70]SA Companies Act 2008, s.165 (4).
[71][2017] ZAWCHC 15.

fact that determining what is vexatious or frivolous[72] for the purpose of setting aside a demand as provided in section 165(4) of the South African Companies Act 2008, might entail a protracted and expensive litigation which might defeat the essence of the law. It is posited that the danger of importing the option of allowing the company to set aside a demand into the Nigerian jurisprudence is that an application to set aside a demand is likely to be contested and therefore, may suffer from several interlocutory appeals, which may end up frustrating an intending applicant, and thus, truncate the derivative claim entirely.[73]

3.2.6 APPOINTMENT OF AN INDEPENDENT AND IMPARTIAL COMMITTEE

In South Africa, the next procedural step the company must take if there is no application to strike out the demand[74] or if the application is not granted, is to appoint an independent and impartial person or committee to investigate the demand, and report back to the board.[75] In the United States of America, although the Board is required to investigate the demand on receipt of a Notice of demand by a shareholder, it is not mandated to constitute a committee or appoint an external person as obtains in South Africa.[76] The board of directors in the United States is however, like the committee or person appointed by the board in South Africa expected to act disinterestedly and independently.[77]There is however, no such requirement in Nigeria that the company should set up a committee or appoint a person to investigate the demand. The company may nonetheless, be reasonably expected to set up a committee of the board to investigate the demand since the board is empowered to delegate its powers to either a managing director or a committee.[78]

Be that as it may, the terms of reference of the independent and impartial committee or person stipulated under the South African law are as follows:[79]

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[72]Maleka Femida Cassim, above n 20 at 19.
[73]*The Nigerian case of Agip Nig. Ltd. v Agip Petroli International and others* [2010] NWLR (Pt.1187) 348.
[74]SA Companies Act 2008, s.165 (4). Maleka Femida Cassim, above n 20 at 19.
[75]SA Companies Act 2008, s.165 (4).
[76]*Aronson v Lewis*, above n 10. See Helena H.Stoop, above n 28 at 539.
[77]*Aronson v Lewis,* above n 10.
[78]CAMA, s.88 (b). See Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (3rd edn, Lexis Nexis, Durban 2016)177,to the effect that board committees can help to improve board performance.
[79]SA Companies Act 2008, s.165 (4) (a). See Helena H. Stoop, above n 28 at 544, where the author criticised the South African law for not stipulating the powers and authority of the independent and impartial committee. Compare with SA Companies Act 2008, ss.176-179, which provides for powers to support investigations and inspections of companies.

To identify facts and circumstances that may give rise to a cause of action contemplated in the demand or may relate to any proceedings contemplated in the demand; to estimate the costs implication of instituting an action; and to determine whether it is in the best interests of the company that the suit be instituted. The terms of reference can however, be compressed into requiring the committee to do a cost and benefit analysis of the likely cause of action.[80] While this might appear legitimate, nevertheless, one would have thought that the terms of reference ought to have included a report or finding, particularly on any breach of duty by any director or officer of the company; and recommendation(s) on the appropriate disciplinary actions the company should take. This is because complaints in the demand are likely to relate directly or indirectly to the directors and officers of the company. Even when complaints involve third parties, they may be as a result of a breach duty by an officer of the company.

In South Africa, the law specifically prescribes that the board after receipt of the investigation by the person or committee appointed, must either initiate or continue legal proceedings, or otherwise take related steps to protect the legal interests of the company as contemplated in the demand; or serve a notice of refusal of demand on the person who made the demand.[81] The company is under obligation to take a decision within 60 days of the receipt of the demand or within a longer period of time as the court, on application by the company may allow.[82]

This thesis posits that the position of the law in South Africa with respect to what the company must do on receipt of the report of the investigation, is too prescriptive in the sense that the company may only take legal proceedings or legal steps to protect the interests of the company in accordance with the demand.[83]It is maintained that the company ought to be able to protect any identified interests of the company and not be strictly bound by the contemplation of the demand since it is obliged to investigate the demand.[84]This suggestion, if accepted may imply that the terms of reference of the investigation would no longer be limited to what is contemplated in the demand. [85]

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[80]Maleka Femida Cassim, above n 20 at 82.
[81]SA Companies Act 2008, s.165 (4) (b).
[82]*Ibid*.
[83]*Ibid* at s.165 (4) (b) (I).
[84]*Ibid* at s.165 (4) (a).See Dennis J. Block and H.Adam Prussin 'The Business Judgment Rule and Shareholder Derivative Actions: Viva Zapata?' [1981] 37(1) *The Business Lawyer* 27 at 75.
[85]SA Companies Act 2008, s.165 (4) (a).

It is however remarkable that the options available to the company on the receipt of the Report of independent investigation is not limited to instituting legal proceedings, but that the company can take related legal steps to protect the legal interests of the company, even though this is limited to the cause of action contemplated in the demand.[86]

In South Africa, the law allows the company to apply to court for an extension of the time within which to take action beyond 60 days.[87] However, this provision might be used as a delaying tactics for inaction by the company in order to frustrate the demand. It is also observed that there is no indication in the law as to whether the person who made the demand would be made a party to the application for extension of time so that his interests might also be protected in the application.[88]

3.2.7 REFUSAL OF DEMAND

There is no express provision for Notice of Refusal of demand under CAMA. However, in South Africa, a company is entitled to serve a notice of refusal to comply with the terms of the demand on a person who has made a demand for the company to institute an action against a person who has wronged the company. [89] The concept of refusal of demand may be linked to the Proper Plaintiff rule in which the proper person to bring any action to protect the right of the company is the company itself. [90]The refusal of the company to initiate or continue legal proceedings may also be supported by the courts in South Africa on the basis of the application of the Business Judgment rule.[91] The Business Judgment rule maintains that the company is the person entitled to take decisions on matters of corporate governance and therefore, the courts would not interfere in the absence of bad faith.[92] Thus, in order to impugn the refusal, the giver of the demand is faced with the onerous task of showing that the directors did not act in good faith and are therefore, not entitled to the protection of the

[86]*Ibid* at.165 (4) (a) (i).
[87]*Ibid* at s.165 (5).
[88]*Ibid*.
[89]*Ibid* at s.165 (4) (b) (ii). See Maleka Femida Cassim, above n 20 at 20.
[90]James H.Shnell 'A Procedural Treatment of Derivative Suit Dismissals by Minority Shareholders' [1981] 69 *California Law Review* 885.
[91]SA Companies Act 2008, s.76 (4). See Ramani Naidoo, above n 9 at 171.
[92]James H.Shnell, above n 90. See Dennis J. Block and H.Adam Prussin, above n 84 at 32.

Business Judgment rule.[93] In addition, the giver of the demand may have to show proof that the majority of the directors were not disinterested or independent in order to discredit the refusal.[94]

The concept of refusal of demand however has its advantages. It allows the person who has given a demand to the company to immediately proceed to the next stage of application for leave to institute the derivative action.[95] This means that the idea of expecting the company to apply to set aside the demand may merely be academic, [96]particularly, because even though the law does not stipulate that the company should give reasons for refusing to comply with the demand, [97]the company should be reasonably expected to state the reasons for refusal in the Notice. Furthermore, the requirement of Notice of refusal will not only help to expedite the process of bringing derivative actions, but will also assist in diffusing the vagueness of the provision of CAMA, which mandates an intending applicant to give reasonable notice,[98] since an applicant will be able to proceed immediately to apply for leave.[99] In addition, provision for Notice of Refusal will enhance the ability of an applicant at the stage of applying for leave to discharge the onus of proving that the company has refused to take action.[100]This thesis therefore, advocates for an express provision in CAMA mandating the company to give Notice of Refusal where it does not intend to comply with the Notice of Demand.

The concept of refusal of demand in South Africa is not however limited to where the company has expressly given notice of refusal of demand.[101] A company would be deemed to have refused to accede to the demand; and the giver of the demand would be allowed to proceed to the next stage of applying for leave under the following circumstances:[102]where the company has refused to take any particular step required, once it has been given Notice of Demand e.g. if the company has refused to set up an independent or impartial committee

[93]R.L.M 'Zapata Corp.v. Maldonado: Restricting the Power of Special Litigation Committees to Terminate Derivative Suits' [1982] 68(5) *Virgina Law Review* 1197 at 1198.
[94]*Ibid.*
[95]SA Companies Act 2008, s.165 (4) (b) (ii); s.165 (5) (a) (v).
[96]*Ibid* at s.165 (3).
[97]*Ibid* at s.165 (5).
[98]CAMA, s.346 (2) (b).
[99]SA Companies Act 2008, s.165 (5)(a) (v).s
[100]CAMA, s.346 (2) (c).
[101]*Mouritzen v Greystone Enterprises (Pty) Ltd,* above n 34. See Maleka Femida Cassim, above n 20 at 18.
[102]SA Companies Act 2008.s.165 (5). See Maleka Femida Cassim, above n 20 at 20-21.

to investigate the demand[103] or refused to give a Notice of Refusal while not instituting or continuing an action ;[104] appointed an investigator or committee who was not independent or impartial;[105] accepted a report that was inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations;[106] acted in a manner that is inconsistent with the reasonable report of an independent, impartial investigator or committee.[107]

However, this thesis observes that there seems to be no stipulation that the giver of demand must have access to the report of the independent and impartial committee. [108]If that be the case, it may become increasingly difficult for the giver of the demand to be able to raise the issue of adequacy, irrationality or unreasonableness of the report[109] or the company acting inconsistently with an otherwise reasonable report.[110] Thankfully, the court in South Africa has held that section 165 (5) (a) of the Companies Act must be read disjunctively. Thus, in the South African case of *Mbethe v United Manganese of Kalahari (Pty) Ltd*, [111]it was held that the giver of the demand is entitled to proceed to apply for leave on the basis of any of the grounds mentioned in the subsection.

Although, the South African Companies Act mandates the company to appoint an independent and impartial person or committee to investigate the demand,[112] there appears to be no statutory meaning given to the concepts of independence and impartiality.[113] The courts have however provided some guidance. For instance, in the Delaware case of *Kahn v Portnoy*,[114] it was held that independence denotes a decision based on merit and impartiality without any form of divided loyalty. In addition, the case appears to have distinguished independence from financial disinterestedness when it held that independence does not focus on extraneous considerations or influences or inquiry on whether the directors will

[103]*Ibid* at s.165 (5) (a).
[104]*Ibid* at s.165 (4) (b) (ii).
[105]*Ibid* at s.165 (5) (a) (ii).
[106]*Ibid* at s.165 (5) (a) (iii). See Helena H Stoop, above n 28 at 544, where the author posits that allowing an inadequate report could be used as a delaying tactic to undermine the efficiency of the process.
[107]SA Companies Act 2008, s.165 (5) (a) (iv).
[108]CAMA, s.363 (4), whereby an Inspector's Report may be made available to specified persons including the persons who applied for the investigation; and may even be printed and published.
[109]SA Companies Act 2008, s.165 (5) (a) (iv).
[110]*Ibid* at s.165 (5) (a) (iii).
[111][2015] 5 SA 414 at 426.
[112]SA Companies Act 2008, s. 165(4) (a).
[113] Helena H Stoop, above n 28 at 542.See James H.Shnell, above n 90 at 894.See also Maleka Femida Cassim n 20 at 117.
[114]2008 WL 5197164 at 10 (Del.Ch.Dec.11, 2008).

benefit from the particular transaction or stood on both sides of the transaction.[115]Nonetheless, the question of independence may seem to be tied to the directors having financial interests in particular transactions or to the issue of business or social ties.[116] This assertion is supported by the Delaware case of *Harbor Finance Partners v Huizenga,*[117] where a director was held not to be independent because of the significant financial benefits he and his other business associations received. In *re Oracle Corp Derivative Litigation,*[118] where the committee of directors was reported to have had a long standing professional and academic relationship with the defendants, the Delaware Court held that the committee was not independent. Be that as it may, it also appears established that mere friendship, social or business relationships do not always result in lack of independence.[119]

3.2.8 FUTILITY OF DEMAND

In spite of the intrinsic worth of the requirement of demand as discussed above,[120] there are arguments against its efficiency. For instance, it has been maintained that the requirement of demand is a mere waste of time [121] considering that directors are not likely to be disposed to instituting or continuing any legal action, consequent upon the demand.[122] Critics of the demand ideology posit that even independent directors are not likely to approve of any suit against the executive directors who are usually the culprits in corporate misdeeds.[123]It has also been argued that the screening of demands by the Board even when the fiduciary duties of the Board to the company are intact is more likely to focus more on the returns the litigation will procure for the company.[124] Thus, it appears that both the biased board which rejects the demand to institute or continue a corporate suit unjustifiably and the unbiased

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[115]*Ibid*. See Maleka Femida Cassim 'When Companies Are Harmed by Their Own Directors: The Defects and the Cures' (Part 2) [2013] 25 *SA Mercantile Law Journal* 301 at 307, where the author maintains that the concept of Independence is wider than disinterestedness.
[116] Patrick T.Clendenen *et al*, above n 8 at 554.See Ramani Naidoo, above n 78 at 140.
[117]751 A. 2d 879 (Del.Ch.1999).
[118]Above n 8. See Maleka Femida Cassim, above n 20 at 118.
[119]Patrick T.Clendenen *et al*, above n 8 at 563. See Ramani Naidoo, above n 78 at 140.
[120]Maleka Femida Cassim, above n 20 at 17.
[121]Reinier Kraakman *et al*' When Are Shareholder Suits In Shareholder Interests?' [1994] 82 *Georgetown Law Journal* 1733 at 1753.
[122]*Ibid*.
[123]*Ibid.* See Simon Deakin, ' South Africa Moves to a Global Model of Corporate Governance but with Important National Variations' in Tshepo H Mongalo (ed), *Modern Company Law for A Competitive South African Economy* (Juta, Claremont 2010) 191 at 206, to the effect that the concept of independent director might be a myth.
[124]Reinier Kraakman *et al*, above n 121 at 1753. See SA Companies Act 2008, s.165 (4) (a) (ii) & (iii).

board are likely to arrive at the same conclusion of refusal to institute legal actions.[125] The arguments against the requirement of demand are in tandem with the right to excuse demand in certain circumstances which is available in South Africa and the United States of America, as shown below.

The South African law provides that demand may be excused and the applicant may be allowed to proceed to apply for leave to institute a derivative action as follows:[126]

If the delay required for the procedure involved in the requirement of demand may cause irreparable damage to the company; or substantial prejudice to the interests of the applicant or any other person; [127]if the applicant can show proof that there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the interests of the company which the applicant seeks to protect; [128]and if the requirements of application for leave have been satisfied.[129]

In the United States, the concept of futility of demand exists in some states like the State of New York, and Delaware. [130]In the State of Delaware, the decision in the case of *Aronson v Lewis,* [131]appears to be the benchmark for determining when demand would be excused. With respect to contested business decisions, the Court of Chancery in Delaware is guided by two principles which the plaintiff must prove; i.e. whether a reasonable doubt is created about the disinterestedness and independence of the directors; and whether the contested transaction is otherwise as a result of a valid exercise of the Business Judgment rule.[132] The first test involves questions about the independence and disinterestedness of the Board of Directors, which have been discussed earlier. [133]With regards to the second test which rests on the business decision of the company, the questions to ask in order to guide the court in allowing the plaintiff to proceed without making a demand are whether the directors acted in good faith and in the best interests of the company; whether the directors exercised a duty of care; and if there is any evidence of wastage of corporate assets.[134]It appears settled under

[125]Reinier Kraakman *et al*, above n 121 at 1753.
[126]SA Companies Act 2008, s.165 (6).
[127]*Ibid* at s.165 (6) (a).
[128]*Ibid* at s. 165 (6) (b).
[129]*Ibid* at s. 165 (6) (c).
[130]The Dennis J.Block & H.Adam Prussin, above n 84 at 32.
[131]Above n 10.
[132]Patrick T.Clendenen, above n 8 at 554.
[133]*Ibid* at 555.
[134]*Ibid* at 566.

Delaware law that a plaintiff who has given a demand notice is entitled to claim futility of demand.[135]This is similar to the case of South Africa where the giver of demand on a company has been specifically enabled to also request that his demand should be excused.[136]

This thesis observes that in most of the cases involving futility of demand in the United States, the plaintiff is not usually able to prove his claims specifically or in detail.[137] While it is generally accepted that the concept of futility should be applied where the majority of the directors are the defendants or control majority of the Board, [138]the courts in the United States generally insist on the plaintiff providing more details beyond showing the relationship of the board with the wrongdoing.[139] For instance, in the Delaware case of In *re Citigroup Inc. Shareholder Derivative Litigation, [140]*the court did not give the plaintiff the benefit of futility of demand because he did not show how the price of a stock bought at the market value could be questioned. It therefore appears that the courts in Delaware do not seem to be bothered by the problem of limited access to information which a plaintiff in a derivative action litigation is encumbered with.[141]

The divergence in the interpretation of the concept of futility of demand buttresses the point that reliance on the word' futile' does not seem to be helpful.[142] The suggestion of Shnell,[143] that guidelines should be put in place to determine when demand should be excused therefore appears to be compelling. In the absence of a universal definition of the concept of futility of demand, it also appears that the adoption of the concept in the Nigerian derivative action jurisprudence might be problematic. More importantly, an applicant who refuses to give Notice of Demand on grounds of futility is likely to be challenged by the company in court. This might not augur well for corporate governance because it will create room for unnecessary delay in the process of enforcement of breach of corporate duties.

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[135]*Ibid* at 540.
[136]SA Companies Act 2008, s. 165 (6)
[137]Franklin Balotti *et al*, above n 26 at 642.
[138]James H.Shnell, above n 90 at 889.
[139]Patrick T.Clendenen, above n 8 at 567.
[140]964 A 2d 106 (Del Ch 2009).
[141]Maleka Femida Cassim, above n 20 at 167-168.
[142]James H.Shnell, above n 90 at 889.
[143]*Ibid*.

3.2.8.1 Dismissal of Derivative Suits

Perhaps more worrisome in the aspect of futility of demand is the recommendation of the dismissal of derivative actions in the United States by the Special Litigation Committee appointed by the board in cases where demand has been excused.[144] It is noted that the Special Litigation Committee is different from the independent and impartial committee which a company is obliged to set up under the South African law, [145]or the committee of the board that may be set up by a company in the United States to investigate demand made on a company.[146] The Special Litigation Committee is only established where no demand has been made on the company in accordance with the concept of futility of demand.[147] The company is empowered to seek the summary dismissal of such suits without the necessity of going through trial.[148] Thus, a Special Litigation Committee is usually set up by the board in order to make the decision to seek such a dismissal.[149] The similarity between the Special Litigation Committee and the committee of independent directors is that they are both expected to be composed of independent and disinterested directors.[150] Meanwhile, it has been maintained that the traditional approach of the court to the decision of the Special Litigation Committee to dismiss derivative suits is to accede to the request of the committee based on the standard of the Business Judgment rule.[151] However, recent decisions have opined that the decision of the Special Litigation Committee should not be entitled to such blanket approval. [152]For instance, the court in the Delaware case of *Zapata Corp.v Maldonado,* [153]held that it is entitled to review the decision of the committee both in form and in substance. [154]In line with this argument, Payson, makes the following suggestions with respect to review of the decision of the Special Litigation Committee as to form:[155] Firstly, the committee members should be experienced in both business and financial matters; and

[144]*Ibid* at 886. See R.L.M, above n 93 at 1200.
[145]SA Companies Act 2008, s.165 (4) (a).
[146]Helena H Stoop, above n 28 at 539.
[147]*Ibid* at 540.
[148]Dennis J.Block and H.Adam Prussin, above n 84 at 28.
[149]James H.Shnell, above n 90 at 886.
[150]*Ibid*. See Ramani Naidoo, above n 9 at 155, for suggestions with regards to the criteria for independence.
[151]James H.Shnell, above n 90 at 886.See The New York Court of Appeal case of *Auerbach v.Bennett* 47 N.Y.2d 619. See also R.L.M, above n 90 at 1201. See also See A.J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, United Kingdom 2002) 41.
[152]Dennis J.Block and H.Adam Prussin, above n 84 at 58-59.
[153]430, A.2d at 785-789.
[154]A.J. Boyle, above n 151 at 42.
[155]Robert K.Payson 'Dismissal of Derivative Suits' [1981] 6 *Delaware Journal Of Corporate Law* 522 at 525-526.

neither they nor their family members should have any financial interests in the matter at stake, let alone being the defendants.[156] Secondly, a special counsel for the committee should be retained since this has been used by the court as a factor to determine the independence of the committee. However, the counsel should not come from law firms or institutions that have business or social relationships with the company and its directors. Thirdly, membership of the committee should not be tainted by friendship, social or other relationships with the defendant directors.[157] Thus, a member of the Committee should not have been previously charged with the same offence as the defendant directors. Fourthly, a special Nomination Committee should be constituted to nominate members of the Special Litigation Committee to forestall a situation, like the situation in *Zapata Corp. v Maldonado,*[158] where the same defendant directors nominated members of the Special Litigation Committee.[159]

With regards to substance, the following guidelines have been suggested to assist the Special Litigation Committees in arriving at proper decisions:[160]consideration of the merits of the claim; the degree of injury to the corporation; the costs of prosecution; the effect on the operations of the company; the costs/ benefit analysis of the action; the knowledge and motivation of the defendant directors with respect to the alleged breach; the action(if any) , taken by the company to remedy the breach; and the effect of any remedial action taken. Shnell, however, doubts the possibility or practicality of having a Special Litigation Committee that is independent of an interested board.[161] He argues that the Business Judgment rule should not be applied to applications brought to dismiss derivative suits by the Special Litigation Committee, as it is being applied to decisions of a disinterested Board at the demand stage.[162] He suggests that although the court should not completely disregard the opinion of the committee,[163] the application to dismiss derivative actions by the Special Litigation Committee should be treated in the same way as contained in the procedure for

[156]James H.Shnell, above n 90 at 894.
[157]*In re Oracle Corp. Derivative Litigation*, above n 8.
[158]Above n 150.
[159]James H.Shnell, above n 90 at 893.
[160]Patrick T.Clendenen *et al*, above n 8 at 583-586.
[161]James H.Shnell, above n 90 at 910, where the following factors were adduced as being responsible for the lack of independence: the control of the proxy machinery by the insider directors, ties of the outsider directors with the insider directors, problem inherent in the selection of the outside directors and limitation on outside directors' time and access to information.
[162]*Ibid* at 893.
[163]*Ibid* at 902.

settlements of derivative actions.[164]Meanwhile, the procedure for settlements requires that in the event of voluntary dismissal or settlement of suits,[165] the shareholders should be notified.[166] This will give the shareholders an opportunity to investigate the merit of the case and object to the action where they deem fit, thereby, providing a fair and more flexible way of handling the application.[167] This viewpoint appears to be in consonance with the case of *Zapata Corp. v Maldonado*[168] where the court insisted on reviewing an application to dismiss a derivative action by a Special Litigation Committee on the premise of a two-sided evaluation as follows:[169]

Whether the Special Litigation Committee was able to show that it acted independently, in good faith; and demonstrated a reasonable basis for the dismissal of the action;[170]

Whether the court on its own independent Business Judgment (similar to the tests used in approval of settlements) is convinced that the action should not continue.

However, since this thesis maintains that the concept of futility of demand should not be applicable to Nigeria, it therefore follows that the concept of dismissal of derivative suits by the Special Litigation Committee, appointed only when the principle of futility of demand has been relied on, would not be recommended for Nigeria.

3.3 COMMENCEMENT OF DERIVATIVE ACTIONS- MATTERS FOR CONSIDERATION

The provisions of the law as discussed above are to the effect that an applicant is allowed to proceed to commence a derivative action where the applicant has given Notice of Demand and the company has refused to take any action.[171] However, there are factors discussed below, which the applicant must consider before taking any action.

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[164]Delaware Chancery Court rule 23.1, which is analogous to US Federal Rules 23.1.
[165]In the case of involuntary dismissal, the plaintiff is forced to drop the suit, so there is no fear of collusion or compromising or sacrificing the interests of the other shareholders. In such cases, notice to the shareholders is not required under Delaware Chancery Court rule 23.1.
[166]James H. Shnell, above n 90 at 902- 903.
[167]*Ibid.*
[168]Above n 153.
[169]*Ibid*.
[170]This step applies the usual Business Judgment rule of deference to the decision of the Board.
[171]CAMA, s.346 (2) (b).

3.3.1 CAUSE OF ACTION

The issue of cause of action is fundamental in civil actions because it is one of the factors which determine whether or not a court has jurisdiction to entertain a matter.[172]Moreso, the courts have always maintained that jurisdictional issues are important and can therefore be raised at any time either during trial or after judgment i.e. on appeal.[173] In the Nigerian case of *Daily Times of Nigeria Plc v.D.S.V.Ltd,* [174]the court defined a cause of action as a cause of complaint or every fact which would be necessary for a plaintiff to prove if traversed in order to support his right to the judgment of the court. It is posited that an attempt to define the concept of cause of action is important because as a consequence of the contractual status of the Memorandum and Articles of Association as recognised by Statues, [175]there exist many different types of actions in the corporate setting.[176]

One of the actions available in the corporate set up is derivative actions which is so called because the right to bring the action does not belong to the person who is bringing the action, but arises from the rights of the company.[177]It is important to properly differentiate derivative actions from other actions; such as personal actions whereby a shareholder seeks to protect his own rights[178] and corporate actions whereby the company sues to protect its own interests.[179] This is particularly true in Nigeria where there appears to be not only confusion or misunderstanding as to what constitutes a derivative action but also deliberate attempts by litigants, from time to time to abuse the concept in order to protect their personal interests.[180] Although this point has already been made in Chapter Two of this thesis,[181] I shall attempt to further demonstrate it by examining two Nigerian cases. In the case of *Adenuga v*

[172]The Nigerian case of *Daily Times of Nigeria Plc v.D.S.V.Ltd* [2014] All FWLR 1978 at 2002.
[173]*Ibid* at 2005.
[174]*Ibid* at 2002.
[175]For instance CAMA, s. 46, in which the Memorandum and Articles of Association when registered constitute a contract between the company and its members and officers and between the officers themselves.
[176]L.S.Sealy, 'Problems of Standing, Pleading and Proof in Corporate Litigation' in B.G.Pettet(ed), *Company Law In Change* (Stevens & Sons, London 1987)1 at 6.
[177]*Wallersteiner v Moir(No.2)*, above n 1 at 395.See Derek French *et al*, *Mayson, French & Ryan, Company Law*(28th edn, Oxford, United Kingdom 2011)560.
[178]Alan Dignam, John Lowry, *Company Law* (7th edn, Oxford, London 2012)190.
[179] L.S.Sealy, above n 176, who describes a corporate action as an action brought in the name of the company as plaintiff, which may be authorised by a competent organ from the outset, or may be instituted by someone else e.g. a shareholder whose act in using the company name is later challenged or ratified.
[180]*Ibid*, where the author opined that because of poorly reasoned judicial pronouncements there appears to be uncertainty and imprecision in identifying the forms of corporate action.
[181]See Chapter Two.

Odumeru,[182] the appellants who were plaintiffs at the trial court brought an action against the 1st-3rddefendants viz: the president, vice-president and treasurer of the 8th defendant-Association of National Accountants (a body corporate created under Statute), claiming a declaration amongst others that the tenure of office of the 1st- 3rd defendants in the 8th defendant Association has expired by effusion of time. The appellants prayed the court *inter-alia* by an interlocutory motion for an order restraining the 1st -3rd defendants from acting in their respective capacities pending the determination of the suit. The appellants being dissatisfied with the judgment of the Court of Appeal, which upturned the interlocutory orders granted in their favour by the trial court, appealed to the Supreme Court. The Supreme Court in Nigeria agreed with the Court of Appeal that the appellants only alleged in their statement of claim that they were financial members of the company but that the claim to be financial members did not confer on them 'sufficient interest'[183] to sustain a *locus standi* and cause of action in the matter. The Supreme Court however, disagreed with the Court of Appeal on the point that lack of sufficient interests of the plaintiff in the case was hinged on the principles of *Foss v Harbottle* in which the proper plaintiff is the company itself as established in the English case of *Wallesteinier v Moir(No.2)*.[184]Contrary to the assertion of the appellants, the Supreme Court wrongly held that the case did not fall within the rule in *Foss v Harbottle* or its exceptions. This thesis is of the opinion that the case ought to have been instituted as a derivative action at the trial court. This is because an attempt by the appellants who were members of the association to remedy the alleged illegality or wrongdoing of the defendants who were in control of the association is a cause of action which falls within the exceptions to the rule in *Foss v Harbottle*. [185]Thus, the 8th defendant being an incorporated association under the law is subject to the codified rule in *Foss v Harbottle* and its exceptions.[186] The cause of action of the case clearly showed that the appellants who were members of the association were merely pursuing the protection of the interests of the association, which those in charge of it were not ready to pursue. [187]However,

[182][2002] 8 NWLR 163.
[183]Emphasis mine.
[184]Above n 1
[185]CAMA,s.346(1).
[186]*Ibid*.
[187]The English case of *Edwards v Halliwell* [1950] 2 All ER 1064. See the Nigerian case of *Abubakri v Smith* [1973] 1 All NLR (Pt.1) 730.

it is unfortunate that the appellants realised only at the Supreme Court that the case fell within the exceptions to the rule in *Foss v Harbottle*.

In another Nigerian case of *Ohanenye v Ohanenye,*[188] the plaintiffs/ respondents (comprising of the 1st plaintiff company; and the 2nd plaintiff, who was a shareholder and director of the company) brought an action against the defendants/ appellants claiming *inter alia* that the defendants/appellants were neither shareholders nor directors of the 1st plaintiff company. At the hearing of an interlocutory motion in the Court of Appeal, the defendants/ appellants contended that the cause of action was a derivative action and that the 2nd plaintiff instituted the action to protect the interests of the Ist plaintiff. They therefore argued that the plaintiff/ respondents ought to have obtained leave of the trial court to institute the action as required under section 303 of the Old CAMA. The Court of Appeal established that the cause of action in the matter suggested that it was a derivative action and that the case ought to have been struck out for failure to obtain leave. The court however curiously posited that a derivative action was just an alternative route in the protection of corporate rights but that there was another route by which the case could be pursued as contained in section 300 of the Old CAMA.[189]However, the aforementioned section only allowed any member of the company to obtain a declaration and injunction with regards to any breach of his personal rights and does not border on derivative actions since neither compensation nor damages was obtainable under the section. It appears therefore, that the Court of Appeal wrongly held that the 2nd Plaintiff brought the action to obtain redress for what he perceived to be the fraudulent activities taking place in the company as stipulated under section 300(d) of the Old CAMA, and that this would effectively save the defect in the derivative action which was instituted without obtaining leave of the court. In any case, this thesis argues that the cause of action of the plaintiffs/ respondents was a corporate action and not a derivative action since the 2nd plaintiff purportedly brought an action as a director of the company for a declaration that the defendants were neither shareholders nor directors of the company. Thus, the plaintiff brought a corporate action as the organ of the company and not a derivative action which is an exception to the rule in *Foss v Harbottle*.

As has already been pointed out in Chapter Two of this thesis, one of the peculiar problems of the common law derivative action is the narrow scope of the cause of action, whereby a

[188][2016] LPELR 40458.
[189]This is in spite of the attempts made by the court to distinguish personal rights from corporate rights.

derivative action could only be substantiated where a wrong has been done to the company and the wrongdoers are themselves in control.[190] In order to redress this problem, most Commonwealth countries have widened the cause of action under their statutory derivative action regime.[191]In the case of Nigeria, the Old CAMA failed to adequately define what statutory derivative action is, considering that the cause of action in respect of derivative actions was not also being expressly stated,[192] and could only be deduced from the requirement that leave may be granted only if the applicant is able to show that the wrongdoers are the directors who are in control.[193] Thus, it appears that the cause of action for derivative actions under the Old CAMA is limited to wrongdoing to the company by the directors, which implies that an act or omission of the directors involving negligence could only apply where the directors have profited or benefitted from the negligence as stipulated under the common law.[194]Also, although, the phrase 'fraud on the minority' appears to be absent in the statutory provisions in respect of derivative actions,[195] the relevance of common law derivative action to the Nigerian derivative action framework makes it applicable. [196]Thus, the cause of action for derivative actions under the Old CAMA could only be found by a combination of statutes and the common law as it were. [197]Curiously, the requirements for the cause of action under the common law derivative action[198]are also contained in section 300 of the Old CAMA, which provides for bringing an action for a declaration and injunction to enforce personal rights of minority shareholders.

Under CAMA, the cause of action in a derivative action must arise from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director or a former director of the company.[199] The cause of action under the CAMA is wider than the

[190]*Edwards's v Halliwell*, above n 187. See Joseph E.O. Abugu, *Principles of Corporate Law In Nigeria* (MIJ Professional Publishers Limited, 2014)375.
[191]SA Companies Act 2008, s.165 (2).
[192]Motunrayo. O.Egbe 'Global Trends In Statutory Derivative Actions: Lessons For Nigeria' [2013]12 *Nigerian Law & Practice Journal* 51 at 61.Compare with SA Companies Act, s.165 (2), where the cause of action has been widened to protect any legal interests of the company. See also UK Companies Act 2006, s.260 (3).
[193]Old CAMA, s.303 (2) (a).
[194]The English case of *Daniels v Daniels* [1978] Ch.406.*Contra* the English case of *Pavlides v Jensen* [1956] Ch. 565.
[195]Old CAMA, s.303.
[196]Nigerian Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law* [1988] vol. 1, p.238.
[197]*Edwards's v Halliwell*, above n 187.
[198]*Ibid.*
[199]CAMA, s.346 (2) (a).

cause of action under the Old CAMA in many respects. In the first instance, the cause of action under CAMA includes not only actual but also proposed acts or omissions. Secondly, negligence which is not limited to directors benefitting or likely to benefit from the negligence has been added to the scope of the cause of action for derivative actions.[200] Thirdly, the cause of action may arise from an act or omission of not only incumbent directors but also former directors. [201]

In the United Kingdom, the cause of action for derivative actions is in all fours with the provisions of CAMA. Thus, the cause of action involves negligence of a director whether or whether not the director benefitted from it.[202]This means that any breach or wrongdoing by any other person or third parties against the company must be related to an act or omission of the directors.[203] In practical terms this may be justified because any wrongdoing by a third party should normally result in the company taking redress against the erring third party except, in circumstances where taking an action is not in the best interests of the company or where the directors have an interest in protecting the third party, in breach of their fiduciary obligation to the company. However, a remarkable difference between CAMA and the United Kingdom provisions is that in the case of the latter, it is expressly stipulated that the cause of action may be against the director or another person or both.[204] This implies that a derivative action may be taken against either the directors or the directors and third parties. Although CAMA does not prohibit derivative actions from being taken against directors and third parties,[205] it is posited that an express provision in that direction will help to clarify the position of the Nigerian law with regards to third parties; and the concept parties in derivative actions generally as would be seen later in the discourse. Another remarkable difference between CAMA and the United Kingdom derivative action is that the term directors for the purpose of derivative actions under the latter has been extended to include not only former directors just like what obtains under CAMA but also shadow directors.[206]Under CAMA, the concept of directorship is generally defined to include any person in accordance with whose

[200]Paul von Nessen *et al* 'The Statutory Derivative Action: Now Showing Near You '[2008]7 *Journal of Business Law* 627 at 648.
[201]Maleka Femida Cassim 'Da Silva v CH Chemicals (Pty) Ltd: Fiduciary Duties of Resigning Directors' [2009] *South African Law Journal* 60.
[202]*Daniels v Daniels,* above n 194. See Arad Reisberg, above n 8 at 136.
[203]Arad Reisberg, above n 8 at 135.
[204]UK Companies Act 2006, s.260 (3).
[205]CAMA, s.346.
[206]UK Companies Act 2006, s.260 (5).

instructions the directors of the company are accustomed to act i.e. shadow directors.[207]However, the extension of the meaning of directors under CAMA to include shadow directors does not apply to derivative actions but is rather limited to restraints of insolvent persons acting as directors, register of director shareholding, restrictions in multiple directorship which are not in any way related to a cause of action for breach of directorial duties as contemplated under the United Kingdom provisions.[208] Consequently, this thesis argues for an extension of the scope of shadow directorship to include breach of director's duties to the company for the purpose of maintaining a cause of action for derivative actions. It is also posited that CAMA should be amended such that breach of duties by de-facto directors who may not have been duly appointed by the company but who have been performing directorial duties would become a cause of action in derivative actions.[209]

The provisions of the South African Companies Act 1973, S.266, which limited the cause of action in derivative actions to breach of duty or trust is similar to the provisions of the United Kingdom[210] and Nigeria. [211]However, the cause of action for derivative actions in South Africa has been widened such that an applicant is now allowed to bring a derivative action to protect any legal interests of the company.[212] This definition is wide enough to not only obliterate the restriction of the cause of action in derivative actions to either wrongdoing or negligence of the directors but also obviates the need to define who a director is, since the cause of action is not tied to any act or omission of the directors.[213] Thus, it has been argued that the cause of action in South Africa also covers duties owed to the company by its resigning directors.[214] Nevertheless, it is opined that a significant restriction to the cause of action for derivative actions under the South African law is the fact that it is restricted to protecting only

[207]CAMA, s.270.
[208]*Ibid*.
[209]The Nigerian case of Emmanuel *Iwuchukwu v David Nwizu* [1994] 7 NWLR 379.
[210]UK Companies Act 2006, s.260 (3). This section however allows a cause of action against a third party.
[211]CAMA, s.346.
[212]SA Companies Act 2008, s.165 (2). See Lindi Coetzee, 'A Comparative Analysis of the Derivative Litigation Proceedings under the Companies Act 61 of 1973 and the Companies Act 71 of 2008' in Tshepo H Mongalo(ed), *Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010)290 at 305, who argues that the cause of action for derivative actions under the South African Companies Act 2008, effectively covers the cause of action under the South African Companies Act 1973 and the abolished common law as well. See Ramani Naidoo, above n 9 at 95.
[213]Carl Stein, *The New Companies Act Unlocked* (Siber Ink, Cape- Town 2011) 371.
[214]Maleka Femida Cassim, above n 20 at 60. See Jan Louis van Tonder' An Analysis of Directors Duty To Act In The Best Interests of The Company, Through The Lens of The Business Judgment Rule' [2015] 36(3) *Obiter* 702 at 719-720. See also CAMA, s.306 (5).

the legal interests of the company, thus excluding equitable interests.[215] This thesis therefore suggests that the cause of action for derivative action in Nigeria should be amended to adopt a wider and more flexible approach than what obtains in South Africa by stipulating that the cause of action in derivative action shall border on any interest of the company be it legal or equitable .

3.3.2 PERSONS WHO MAY BRING DERIVATIVE ACTIONS

In civil actions, the concept of *locus standi* or right standing to bring an action is the right of a party to appear before a court and be heard when the issue is raised.[216] This means that if the person bringing an action is not a proper person or one who does not have the legal capacity to sue, the court has no jurisdiction and therefore, cannot adjudicate over the merit of the case.[217]

At common law, only a shareholder of a company may bring a derivative action.[218] This also is the situation under the statutory derivative action in the United Kingdom where only a shareholder may bring a derivative action.[219] In Nigeria, the provisions of CAMA stipulate that the following persons otherwise referred to as ' applicants' can bring derivative actions:[220] a registered holder or a beneficial owner of a security of a company and a former registered holder or beneficial owner of a security of a company ; a director or an officer or a former director or officer of a company; the Commission; or any other person who at the discretion of the court is a proper person to make an application for a derivative action. The provisions of the South African Companies Act are very similar to the Nigerian provisions in this respect,[221] although, there are some remarkable differences, as would be shown later.[222]

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[215]SA Companies Act 2008, s.165 (2).
[216]The Nigerian case of *Pam v Mohammed* [2008] All FWLR (Pt. 436) 1868.
[217] *Daily Times of Nigeria Plc v D.S.V. Ltd*, above n 169 at 2003.
[218]*Wallersteiner v Moir (No.2)*, above n 1 at 395.
[219]Arad Reisberg, above n 8 at 135. See Brenda Hannigan, *Company Law* (4th edn, Oxford University Press, Oxford 2015) 533.
[220]CAMA, s.352.
[221]SA Companies Act 2008, s.165 (2) .See Ramani Naidoo, above n 9 at 95.
[222]SA Companies Act 2008, s.157 (3), which allows legal proceedings to be brought on behalf of a person entitled to bring a derivative action. See Rehana Cassim, *The Removal of Directors and Delinquency Orders under The South African Companies Act*(Juta, Cape Town 2020) 252.See however, Justice Chris Jafta' Critical Analysis of the Extended Legal Standing Provisions Under Section 157(1) Of The Companies Act 71 Of 2008 To Apply For Legal Standing' [2015] *Journal of Corporate and Commercial Law & Practice* 35 at 42, where the author maintains that the categories of people with extended standing under s.157 might not always fit into the derivative action regime.

3.3.2.1 Shareholders

In line with common law derivative actions, members or shareholders, including holders of equitable rights to membership or shareholding[223] are allowed to bring derivative actions in the statutory derivative action regimes of the United Kingdom, [224]South Africa[225] and Nigeria.[226] However, while the United Kingdom maintains that a member[227] is entitled to bring derivative actions, the other jurisdictions refer to registered holders, beneficial owners or shareholders entitled to be registered.[228]The advantage of reference to shareholders, including unregistered shareholders is that it enables persons who hold shares in the company but who are yet to become members because their names have not been recorded in the Register of members to be able to sue to protect the rights of the company.[229] Thus, it would appear on the surface that conferring status to bring derivative actions on members alone excludes shareholders who are not yet members. Contrariwise, it is possible to extend the meaning of members to include those to whom shares have been transferred or transmitted by operation of law as has been done in the United Kingdom.[230] It is posited that the approach of conferring the status to bring derivative actions on only shareholders whether registered or otherwise, appears to be restrictive, [231]since it implies for instance, that members of companies limited by guarantee who typically may not be shareholders because companies limited by guarantee are not registered with a share capital would not be entitled

[223]Neels Kilian' Definition of a Member/Shareholder in the South African Companies Act: a Brief Comparison with Australian Legislation' [2021] 65(1) *Journal of African Law* 69 at 70.
[224]UK Companies Act 2006, s.260 (1).
[225]SA Companies Act 2008, s.165 (2) (a).
[226]CAMA, s. 352(a).
[227]UK Companies Act 2006, s.260 (1).
[228]CAMA, s. 352(a).
[229]Maleka Femida Cassim, 'Shareholder Remedies and Minority Protection' in Farouk Hl Cassim (ed), Contemporary *Company Law* (3rd edn, Juta, Cape Town 2021) 1015 at 1060. See Carl Stein, above n 213 at 151.
[230]UK Companies Act 2006, s.260 (5) (c). See Paul L.Davies And Sarah Worthington, *Gower Principle of Modern Company Law* (10th edn, Sweet & Maxwell, London 2016) 600.
[231]Peter Nta, *Shareholders' Rights Under the Nigerian Laws*(Tiger Press Ltd,Nigeria 2009)26, to the effect that while shareholders are only entitled to dividends and profits in the company, members are entitled to not only dividends and profits but also membership rights such as attendance and voting at meetings. See *contra* the Nigerian case of *Sparks Ltd v Ponmile* [1986] 2 NWLR (Pt.23)516 at 517, to the effect that the terms 'shareholders' and 'members' are synonyms.

to bring derivative actions.[232] This thesis therefore argues that the law in Nigeria should be amended to allow a member or a shareholder to institute derivative actions.

In Nigeria, apart from current shareholders, former shareholders are also allowed to bring derivative actions. [233] The idea behind the inclusion of former shareholders in the statutory derivative action regime in Nigeria may find justification in corporate law for some reasons. In the first instance, in the event of winding up of a company, a past member who has undertaken to be personally liable to making future payments in respect of shares i.e. a contributory,[234] shall be liable just like present members to contribute to the assets of the company.[235]Therefore, it appears reasonable that if a past member can be liable in the event of winding up, then such a member should be allowed to bring derivative actions in the event of corporate wrongdoing, if doing so will prevent the company from going into liquidation. Also, it appears that in cases involving fraud where for example a merger is merely used as a cloak to conceal breach of corporate duties, a former shareholder who ceases to be a shareholder as a result of the merger might be allowed to maintain a derivative action.[236]Furthermore, even where there is no fraud, if a shareholder still retains his shareholding after the merger, albeit, in another company, he may still be able to continue his derivative claims.[237]In contrasts however, in the United Kingdom just like in South Africa,[238] former shareholders are not allowed to bring derivative actions even with respect to matters that occurred during the pendency of their shareholding. [239]This is premised on the principle that a shareholder only has an interest in the assets of the company during the pendency of his shareholding.[240] This thesis however commends the position of Nigeria in allowing former shareholders to bring derivative actions for reasons earlier adduced.[241]

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[232]CAMA, s.26 (2). See Gogo G.Otuturu' Shareholders' Rights in Modern Companies: A Comparative Analysis' [2011] 2(2) *Nigerian Journal of Business and Corporate Law* 34.
[233]CAMA, s.352 (a).
[234]*Ibid* at s.117 (2).
[235]*Ibid* at s.565.
[236]The Delaware case of *Lewis v Anderson* 453 A.2d 474,480(Del.Ch.1982). This case is also an authority to the effect that as a general rule, a shareholder who ceases to be a shareholder as a result of a merger loses his right to maintain a derivative action. See Geoffrey G. Grivner *et al*, 'Corporate Law' in K.Tyler O'Connell, Danielle Gibbs (eds),*Recent Developments in Business Associations Law*(vol. 2 ABA Publishing, Chicago 2014)7 at 61.
[237]Patrick T.Clendenen *et al*, above n 8 at 595-596.
[238]SA Companies Act 2008, s.165 (2) (a).
[239]Brenda Hannigan, above n 219 at 534.
[240]Paul L.Davies And Sarah Worthington, *Gower Principles of Modern Company Law* (9th edn, Sweet & Maxwell, London 2012) 655.
[241]CAMA, s.352 (a).

In spite of the fact that there is no qualification stipulated in the law as to the category or type of shareholders or members that can bring derivative actions,[242] this thesis posits that only minority shareholders are contemplated since derivative actions is an exception to the Majority rule principle.[243]The courts however appear to not have been able to consistently maintain this posture in the strictest sense because shareholders have on some occasions been allowed to pursue derivative actions even though they were clearly not minority shareholders.[244] What is clear however, is that most Commonwealth countries do not require any minimum shareholding in order to institute derivative actions [245]as obtains in some civil law jurisdictions.[246] This is nonetheless not without contention since it has been argued that allowing a person with small shareholding, and thus, little financial incentive to sue on behalf of the company poses a threat to corporate governance because the shareholder's reward in the litigation (if any) would only be a proportional percentage of his shareholding .[247] This means that a minority shareholder may be motivated by other personal motives which automatically counters the interests of the company.[248]

In the United States, there appears to be some form of qualification of the shareholder to bring derivative actions. This is demonstrated by the concept of adequacy of representation, in which a plaintiff is required to serve in a fiduciary capacity as an adequate representative of other shareholders who have similar interests, and are dependent on him for the just prosecution of the case.[249] In order to determine the adequacy of the plaintiff's representation, the court would consider many factors[250] including the degree of support the plaintiff is receiving from the other shareholders he purports to represent.[251]

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[242]*Ibid.*

[243]Brenda Hannigan, above n 219 at 534. See Maleka Femida Cassim, above n 229 at 1060.

[244]The English case of *Barrett v Duckett* [1995] 1 BCLC 243. See the Nigerian case of *Omisade v Akande* [1987] 2 NWLR (Pt. 55) 158. See Neels Kilian, above n 223 at 82, where the author argues that a majority shareholder can bring an action under the oppression remedy.

[245]Brenda Hannigan, above n 219 at 534.

[246]Zhong Zhang' The Shareholder Derivative Action and Good Governance In China: Why The Excitement Is Actually For Nothing' [2011] 28 (2) *Pacific Basin Law Journal* 174 at 177. See Fidy Xiangxing and S.H.Goo, above n 64 at 388, to the effect that in China, shareholders must have at least 1% of the shareholding of the company in order to have standing to sue.

[247]Maleka Femida Cassim, above n 20 at 53.

[248] *Ibid*. See *contra* Brenda Hannigan, above n 219 at 534, to the effect that acquisition of minimal shares for the purpose of instituting derivative actions procures only a very small advantage since the benefit of the action accrues to the company.

[249]Patrick Clendenen *et al*, above n 8 at 605.

[250]*Ibid* at 606.

[251]This is similar to the requirement of 'majority of the minority' as laid down in the English case of *Smith v Croft (No.2)* [1988] Ch. 114 at 185.

Another factor which may inhibit a shareholder's right to bring derivative actions, is the linkage of shareholding or membership with the time the cause of action occurred.[252] It is significant that the UK provisions specifically stipulate that it is immaterial whether the cause of action arose before or after the shareholder became a member.[253] This appears to be the antithesis of the concept of contemporaneous ownership of shares principle[254] of the American jurisdiction in which the shareholder must have been a shareholder of the company when the cause of action arose; and an unequivocal rejection of the US concept. Perhaps, in a bid to ameliorate the consequences of the contemporaneous ownership rule, the Continuous Wrong doctrine was developed in America to allow a shareholder who purchased shares in a company after the cause of action occurred to bring a derivative action provided the wrongdoing continued when he became a shareholder. [255]However, in support of the contemporaneous ownership rule, it has been argued on the premise of the notion of unjust enrichment or windfall that a shareholder who buys shares in a company after a wrongdoing buys at a discounted price that takes account of the wrongdoing.[256] It is therefore reasoned that any recovery by the shareholder after he purchased the shares would amount to recovering part of the purchase price which has already been discounted. [257] It however appears that the theory of unjust enrichment negates the fundamental basis of derivative actions, which is focused on recovery for the company as opposed to personal actions whereby the shareholders can benefit from personal recoveries.[258]Nonetheless, in addition to the contemporaneous ownership concept there is also the Continuing Interest doctrine in the American jurisprudence in which a shareholder is not only required to have been a shareholder at the time of the cause of action but throughout the proceedings. [259] The continuing interest doctrine appears to be fashioned after the common law in which the

[252]Terrence L. Robinson Jr 'A New Interpretation of Contemporary Ownership Requirement In Shareholder Derivative Suits: In re Bank of New York Derivative Litigation and the Elimination of the Continuing Wrong Doctrine' [2005] *Brigham Young University Law Review* 229 at 230. See Maleka Femida Cassim, above n 229 at 1063, to the effect that the issue of the qualification of shareholders' standing to sue is yet to be addressed in South Africa.
[253]UK Companies Act 2008, s. 260 (4).
[254]Terrence L. Robinson Jr, above n 252.
[255]*Ibid*.
[256]The English case of Regal *(Hastings) Ltd v Gulliver* [1947] 1 All ER 378.
[257]Paul L. Davies, *Gower and Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell, London 2008)562.
[258]Arad Reisberg, above n 8 at 59.
[259]Delaware General Corporation Law 2013, s.327.

plaintiff is only qualified to bring a derivative action if he is a shareholder.[260] The continuing interest doctrine is also said to be targeted at preventing a prospective plaintiff from abusing the use of derivative actions by obtaining shares of the company for the sole purpose of being qualified to bring the application, only to 'dump' the shares once the suit is instituted.[261] The Continuous Interest rule also negates the notion of allowing former shareholders to institute derivative actions.[262] Nevertheless, it has been maintained that if a shareholder who has instituted a derivative action becomes a former shareholder in the course of the action as a result of any re-organisation of the company such as a merger, he may be allowed to continue the derivative action in spite of the Continuous Interests doctrine. [263]

The restrictions placed on the right of shareholders to bring derivative actions in the American jurisprudence have been premised on the need to prevent strike suits, in which derivative actions are instituted to obtain personal benefits or for ulterior motives such as a means of personal vendetta or giving the company negative publicity.[264] However, this scenario does not appear to be the situation in Nigeria, where derivative actions are still very unpopular and therefore need to be encouraged.[265]

3.3.2.1.1 *Multiple Derivative Actions*

Nigeria and South Africa allow for multiple derivative actions by stipulating that a shareholder may bring an action on behalf of a company or a company's subsidiary,[266] and that shareholders of a related company may bring derivative actions respectively.[267]Multiple derivative actions allow a shareholder of a holding company to bring a derivative action not only on behalf of its subsidiary [268]but also on behalf of a subsidiary of its subsidiary, and thus creating the concept of double and triple derivative actions.[269] Multiple derivative actions are

[260]Arad Reisberg, above n 8 at 140.
[261]The South African case of *Lewis Group Ltd v Woollam* [2017] ZAWHC 15, where it was discovered that a person bought minimal shares in a company for the purpose of bringing an action against the directors. See Maleka Femida Cassim, above n 229 at 1064.
[262]Delaware General Corporation Law 2013, s.327.
[263]R. Franklin Balotti and Jesse A. Finkelsten, above n 26 at 635.
[264]*Ibid* at 630.
[264]Maleka Femida Cassim, above n 20 at 25.
[265]Joseph E.O. Abugu, above n 190 at 376.
[266]CAMA, s.346 (1).
[267]SA Companies Act 2008, s.165 (2) (a).
[268]Pearlie Koh 'Derivative actions' 'Once Removed'' '[2010] *Journal of Business Law* 101.
[269]Robin Hollington, above, n 12 at 181. See CAMA, s.381(c); SA Companies Act 2008, s.2 (1) & (2) (a) (i).

said to have been created by the courts in order to ensure that wrongdoing is not allowed to go un -redressed.[270] It also supports the reality that shareholders of holding companies have vested interests in the well-being of their subsidiaries and must be allowed to protect them from corporate mismanagement.[271]

Multiple derivative actions do not appear to be in contemplation within the statutory derivation action regime of the United Kingdom.[272] This was also the situation in Nigeria under the Old CAMA. [273]However, since multiple derivative actions are said to be available under the common law derivative action,[274] it is argued that multiple derivative action has been applicable in Nigeria even before the promulgation of CAMA. Nonetheless, it is interesting to note that despite the abolition of the common law derivative actions in the United Kingdom, the courts have upheld the applicability of multiple derivative actions in spite of its absence under the UK Companies Act.[275] This posture may be attributed to the school of thought which says that the UK Companies Act 2006 has not abolished the common law derivative action.[276]

3.3.2.2 Directors

The second category of persons who can bring derivative actions under the Nigerian law are directors, officers or former directors or officers of the company.[277] Similarly, the South Africa Companies Act provides that directors or prescribed officers of a company may bring a derivative action.[278] It appears however strange that a director can be expected to bring derivative actions because the cause of action in derivative actions often arises as a result of breach of duties by the directors themselves or condonation of wrongdoing of third parties

[270]Robin Hollington, above n 12 at 181.See the Hong Kong case of *Waddington Ltd v Chan Chun Hoo Thomas* [2009] 2 BCLC 82.
[271]Maleka Femida Cassim, above n 20 at 15.See however, Carl Stein, above n 213 at 243, to the effect that the default rule is that each company within a group is a distinct legal personality.
[272]UK Companies Act 2008, s. 260 (1). See Paul L.Davies and Sarah Worthington, above n 230 at 606.See also Daniel Lightman, above n 2 at 83, who argues that the principle of corporate personality does not support the multiple derivative actions concept.
[273]Old CAMA, s.303.
[274]Robin Hollington, above n 12 at 181.
[275]The English case of *Abouraya v Sigmund* [2015] BCC 503. See however, Daniel Lightman, above n 2 at 84, who argues that most Commonwealth countries have introduced multiple derivative actions only through legislative enactments.
[276]David Kershaw' The Rule in *Foss v Harbottle* is Dead: Long Live the Rule in *Foss v Harbottle'* [2015] 3 *Journal of Business Law* 274 at 276. See Paul L.Davies and Sarah Worthington, above n 230 at 606.
[277]CAMA, s.352 (b).
[278]SA Companies Act 2008, s. 165(2) (b).

by the directors. [279]This may appear to explain why the United Kingdom does not provide for directors to institute derivative actions.[280] However, it is noted that what the legislations in Nigeria and South Africa stipulate is that 'a director 'and not the 'Board of directors 'may be allowed to bring derivative actions.[281] An action instituted by the Board would only qualify as a corporate action and not a derivative action.[282] It is also important to note that an action brought by a director as a derivative action may by all implication be brought against the wishes of his fellow directors. This type of action must be rare or exceptional given the reality of the politics of boardroom nominations, recommendations and appointments and also the camaraderie that usually exists within the Board.[283] However, it is possible that the modeled, theoretical non- executive independent director, which more often than not, exists in the Codes of Corporate Governance may not be concerned with those realities.[284]Nonetheless, in the South African case of *Mbethe v United Manganese of Kalahari (Pty) Ltd,* [285]a derivative action was instituted by a director. The court however, refused to grant leave to the director on grounds of absence of good faith.[286]

Be that as it may, allowing directors to institute derivative actions may help to minimise the problem of lack of access to information which applicants in derivative actions are accustomed to since a director is an insider in the company and is likely to possess all the information required to sustain an action. [287] This is in addition to the fact that directors are fiduciaries of the company and owe the company a duty to protect its best interests. [288] However, in practical terms, derivative actions by directors are more likely to be instituted by former directors who may have resigned from the company in order to institute the action. [289]It is posited that former directors, are not likely to encounter or be inhibited by boardroom

[279]UK Companies Act 2006, s.260 (3).
[280]*Ibid* at s.260 (1).
[281]Ramani Naidoo, above n 78 at 200, to the effect that the board is not a legal entity.
[282]CAMA, s.87 (5) (b).
[283]Maleka Femida Cassim' When Companies are Harmed by their own Directors: The Defects in the Statutory Derivative Actions and the Cures (Part 1)' [2013] 25 *SA Mercantile Law Journal* 168 at 180.
[284]The Nigerian Code of Corporate Governance for Public Companies 2011, para. 5.5. See The South African Code of Corporate Governanace King 111, which describes Independence as lack of undue influence or bias. See also Ramani Naidoo, above n 9 at 117, on the myth of the concept of Independent directors.
[285][2017]6 SA 409.
[286]*Ibid*.
[287]Maleka Femida Cassim, above n 229 at 1061, where the author argues that giving directors standing to sue in derivative actions may facilitate whistle blowing.
[288]*Ibid*. See Ramani Naidoo, above n 78 at 200.
[289]Paul L.Davies and Sarah Worthington, above n 229 at 477, to the effect that both at common law and under Statutes, the fiduciary duties of a director does not necessarily cease because he has disengaged from the

politics since they have ceased to be members of the Board. Moreover, former directors appear likely to procure the advantage of using the information they obtained while on the Board of the company to further the cause of derivative actions. Furthermore, in the case of former directors who are also resigning directors, it is posited that the fiduciary duties imposed on resigning directors should equally confer on them the right to institute derivative actions.[290] Be that as it may, it is remarkable that it is only the Nigerian legislation which allows former directors to institute derivative actions.[291]

Although the South African Companies Act, does not permit former directors to institute derivative actions, it however, allows directors of related companies to bring derivative actions.[292] The implication of this provision is that a director of a holding company may bring a derivative action with respect to a cause of action arising from a company which is a subsidiary of the company in which he is a director.[293] This appears similar to multiple derivative actions, but cannot be regarded as such since multiple derivative actions is defined in relation to shareholders.[294] Nonetheless, this thesis advocates for a similar provision in the Nigerian derivative action sphere so that directors and former directors of related companies can be entitled to bring derivative actions.

It is noteworthy that not only directors can institute derivative actions under this heading since officers such as managers, secretaries and[295]; prescribed officers[296] of the company are also included. While it is doubtful if the extension to this category of employees would practically be effective since a manager or secretary who institutes a derivative action to protect the rights of the company where the directors have refused to take any action is unlikely to retain his job. It is however salutary that former officers of the company are

company. See UK Companies Act 2006, s.170 (2). See the South African case of *Spite v Nagel* [1997] 3 All SA 316,where the court held that a director who had resigned from a company could not in breach of his fiduciary duties to the company,continue to use a commercial opportunity he became seissed of when he was a director of the company. See also Ramani Naidoo, above n 78 at 200.

[290]Jan Louis van Tonder, above n 214 at 719-720.

[291]CAMA, s.352 (b).

[292]SA Companies Act 2008, s.165 (2) (b). This appears to negate a fundamental principle in corporate law to the effect thata director owes fiduciary duties only to the company that appointed him and not to the holding company. See Carl Stein, above n 213 at 243.

[293]Maleka Femida Cassim, above n 20 at 14.

[294]*Ibid* at s.165 (2) (a).

[295]CAMA, s.868 (1).

[296]SA Companies Act 2008, ss. 1 & 66(10). See Rehana Cassim, 'Governance and the Board of Directors' in Farouk Hl Cassim (ed), Contemporary *Company Law* (3rd edn, Juta, Cape Town 2021) 535 at 541.

included in the list of those qualified to institute derivative actions in Nigeria.[297] More importantly, it is gratifying that under this route, the company secretary, who is the chief compliance officer of a company is also enabled to institute derivative actions. [298]This perhaps buttresses the point that the company secretary is no longer a servant in the corporate set up.[299]

3.3.2.3 The Corporate Affairs Commission

The Corporate Affairs Commission,' The Commission' is empowered to bring derivative actions under CAMA.[300] The functions of the Commission include the administration of the Act, and the performance of such functions as may be prescribed by CAMA.[301] This makes the Commission a major regulatory organ of corporate governance in Nigeria. [302]There are however other regulatory bodies connected with ensuring good corporate governance such as the Securities and Exchange Commission 'SEC'[303] and the Financial Reporting Council of Nigeria. [304]The advantage of a derivative suit being instituted by a regulatory body funded by the government such as the Commission, is that the suit is not likely to suffer from lack of funding[305] and lack of access to information, when compared to applications by minority shareholders and other applicants.[306]In addition, there is ample communal validation for the government bearing the cost of derivative suits even when the benefit is not going to accrue to it directly, but rather to the companies.[307] This is because good corporate governance is both a private and public concern.[308] Derivative actions instituted by public institutions may

[297]CAMA, s.352 (b).
[298]Ramani Naidoo, above n 78 at 235.See Rehana Cassim, above n 296 at 559.
[299]*Ibid*.
[300]CAMA, ss. 352(c), 364(1).
[301]*Ibid* at s.8.
[302]D.A.Guobadia 'The Rules of Good Corporate Governance and the Methods of Efficient Implementation: A Nigerian Perspective' [2001]22 *Company Lawyer International* 119 at 125.
[303]The Nigerian Investment and Securities Act (ISA) 2007,s.13 (1) (a),empowers the Nigerian Securities and Exchange Commission to regulate investments, while S.13 (1) (v) of the ISA, also empowers SEC to intervene in the management and control of capital market operators if it deems it necessary, for the purpose of the protection of investors. See CAMA, s.8 (2), which stipulates that the powers of the CAC does not affect the powers of SEC.
[304]The Financial Reporting Council of Nigeria Act 2011, s.11, empowers the Financial Reporting Council to protect the interests of investors and other stakeholders; and also ensure good corporate governance in the public and private sector.
[305]Maleka Femida Cassim, above n 20 at 170-171, where the author decried the lack of sufficient funding of public institutions to enable them perform efficiently.
[306]*Ibid*.
[307]*Ibid* at 3.
[308]CAMA, s.364, which allows the CAC to appoint Inspectors to investigate the affairs of a company in Nigeria.

eliminate the problem of free riding, since a public institution is not likely to be bothered by the fact that other disinterested stakeholders who have refused to take any action would eventually benefit from the derivative action in the event of its success.[309] Likewise, it is posited that a regulatory body is more likely to have the expertise required for the diligent prosecution of the action. [310]

On the other hand, the anticipated diligent prosecution of a derivative suit by a regulatory body may be hampered by bottleneck bureaucracy, impersonal attitude and other social ills such as corruption all of which are prevalent in public institutions.[311] One other major hindrance that the Commission may face in the discharge of its duty to institute derivative actions is that it is only likely to be informed of any breach of wrongdoing if there is an application for Investigation of the company by any of the other persons so other than itself empowered to do so.[312] The South African Companies Act does not stipulate that either the Companies and Intellectual Property Company, 'CIPC' or the Takeover Panel is entitled to institute a derivative action. However, the CIPC or Takeover Panel may institute proceedings after receiving the Report of an Investigation Panel which it commissioned.[313] The CIPC or Panel may also set up a Panel of Investigation upon receipt of a Complaint.[314] Unfortunately, in Nigeria, Investigations of companies are rare occurrences.[315] This may well account for the reason why there appears to be no reported cases of the Commission instituting any derivative action till date.[316]This scenario may also be attributed to the fact that the scope of the responsibilities given to the Commission is quite extensive, thus, resulting in some kind of inefficiency.[317] It is upon this premise that I argue for an amendment of the law such that regulatory institutions like the Securities and Exchange Commission[318] and the Financial

[309]Arad Reisberg, above n 8 at 87.
[310]Maleka Femida Cassim, above 20 at 171.
[311]Adeoye Amuda Afolabi 'Examining Corporate Governance Practices in Nigeria and South African Firms' [2015] 3 *European Journal of Accounting Auditing and Finance Research* 10.
[312]CAMA, ss.357&358.
[313]SA Companies Act 2008, s.170 (e).
[314]*Ibid* at s.168.
[315]Oserheimen.A.Osunbor, *The Bank Director And The Law* (2nd edn, FITC, Nigeria 2007) 178.
[316]See Oliver C. Schreiner ' The Shareholder's Derivative Action- A Comparative Study Of Procedures' [1979] 96 *The South African Law Journal* 203.
[317]D.A.Guobadia, above n 302.
[318]Above para. 3.3.2.3.

Reporting Council of Nigeria[319] may be included as persons who may institute derivative actions.[320] This point will be further stressed in Chapter Seven of this thesis.

3.3.2.4 Employees

The South African Companies Act allows a registered Trade Union which represents employees of a company to bring derivative actions.[321] It appears that a representative of the employees which is not a registered Trade Union may also bring an action.[322] There is no similar provision in either the Nigerian or United Kingdom legislations. However, this thesis observes that the rule in *Foss v. Harbottle* and its exceptions have been applied to Trade Unions and Associations in all afore mentioned jurisdictions.[323]Nonetheless, the latter route is somewhat restricted because it means that while individual members of Trade Unions in Nigeria and the United Kingdom, just like South Africa can seek to enforce rights belonging to their Unions via derivative actions, unlike what obtains in South Africa, [324]Trade Unions in Nigeria and the United Kingdom cannot seek to enforce any breach of the rights belonging to the company as per derivative actions.

It is worthy of note that CAMA stipulates that in the performance of their duties, directors must have regard for two principal matters; the interests of the employees in general and the interests of the members.[325] A similar provision exists in the United Kingdom in which the directors must have regard to the interests of the employees and other interests.[326] It however appears that employees may not be able to enforce the obligations which the directors owe to them since they are neither included in the list of those who may enforce

[319]*Ibid*.
[320]D.A.Guobadia, above n 302 at 126, where the author advocates for more regulatory institutions in the sphere of corporate governance in Nigeria in order to ensure better corporate compliance. See Arad Reisberg, above n 8 at 31.
[321]SA Companies Act 2008, s.165 (2) (c). See Maleka Femida Cassim, above n 229 at 1062.See also Michael M Katz, 'Governance under the Companies Act 2008: Flexibility is the Keyword' in Tshepo H Mongalo (ed), *Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010) 248 at 262.
[322]SA Companies Act 2008, s.165 (2) (c).
[323]*Edwards v Halliwell*, above n 187. See the Nigerian case of *Elufioye v Halilu* [1993] 6 NWLR (Pt. 301)570 at 597. See also the South African case of *Grundling v Beyers* [1967] 2 SA 131 at 139.See also Charles Wild &Stuart Weinstein, *Smith and Keenan's Company Law* (16th edn, Pearson Educational Limited, United Kingdom 2013)305.
[324]SA Companies Act 2008, s.165 (2) (c).
[325]CAMA, s. 305(4).
[326]UK Companies Act 2006,s.172(1) (b).See Dennis Keenan, *Smith & Keenan's Company Law*(12th edn, Pearson Education Limited, Essex 2002)341.

contractual status of the Memorandum and Articles of Association of the company,[327] nor in the list of persons who may sue to enforce corporate wrongdoing.[328] However, this point may not be absolutely correct in Nigeria, where certain categories of employees such as officers of the company viz managers and secretaries are enabled to bring derivative actions.[329] This thesis posits that the responsibility of directors to have regard to the interests of employees can only be activated by making employees generally or their representatives one of the persons qualified to bring derivative actions.[330] Although, the South African law allows a registered Trade Union or its representatives of employees to bring derivative actions,[331] it is not the same as allowing individual employees to bring derivative actions in their own rights. However, it is important to note that registered Trade Unions are corporate entities that are also likely to have problems of corporate governance just like incorporated companies.[332] It is posited that this may hinder the ability of Trade Unions to bring derivative actions.[333] The same problems can also be expected with respect to unincorporated bodies of employees. Be that as it may, I posit that the problems beleaguering derivative actions such as lack of access to information, [334] the feeling of free riding,[335] lack of co-ordination[336] and inadequate funding[337] may be better resolved by allowing employees to institute derivative actions as opposed to allowing trade unions. It is also important to note that individual employees have been known to' blow the whistle'thereby revealing facts that may be unknown to the public about erring companies.[338] This thesis therefore suggests that employees and former employees should independently be included in the list of applicants to bring derivative actions, as distinct from Trade Unions, in line with the global disposition of encouraging whistle blowing, as a tool of corporate governance.[339] In furtherance of good corporate

[327]CAMA, s.46 (1). See UK Companies Act 2006, s.33 (1).
[328]CAMA, s.352.
[329]*Ibid* at s.868 (1).
[330]Dennis Keenan, above n 326 at 341, to the effect that shareholders cannot enforce breach of corporate duties.
[331]SA Companies Act 2008, s.165 (2) (c).
[332]*Abubakri v Smith*, above n 187.
[333]*Edwards v Halliwell*, above n 187.
[334]Arad Reisberg, above n 8 at 28.
[335]*Ibid* at 28.
[336]*Ibid* at 87.
[337]*Ibid* at 20.
[338]*Ibid* at 86. See Dan Hackman 'Sharron Watkins Had Whistle, But Blew It' https://www.forbes.com/2002/02/140214watkins.html. See also Philip M Berkowitz 'Sarbanes- Oxley and Related Whistleblower Protection In the US' [2008] 9(3) *Business Law International* 200 at 201.
[339]SA Protected Disclosure Act 2000. See Nigerian Code of Corporate Governance for Banks, para.5.3. See 'An Appraisal of The Whistleblowing Policy in Nigeria'*NaijaLegalTalk* (May 09, 2017) www.naijalegaltalkng.com, to

governance, I also argue that Trade Unions of related companies and employee(s) of related companies, should be eligible to bring derivative actions applications.[340]

3.3.2.5 Creditors

Creditors are not included in the list of applicants in all the jurisdictions under consideration.[341] Arguments for the non- inclusion of creditors as one of the persons entitled to check mate corporate wrongdoing have often been predicated on the fact that the relationship between the creditors and the company is contractual.[342]That is to say the interests of the creditors are already protected under contract and need no further statutory protection.[343] This position appears to be fallacious, considering the fact that directors, employees and even shareholders often have contractual relationships with the company but are also included in the list of applicants for derivative actions.[344] Besides, a creditor who brings a derivative action does so to protect the interests of the company and not necessarily his personal interests, although, it is also in his personal interests that the company be properly managed because this will ensure that the company would be able to fulfill its obligation to him.[345] This is perhaps a plausible explanation for the inclusion of creditors as one of the persons that may institute actions on grounds of unfairly prejudicial conduct, [346]except in the United Kingdom where such actions may only be instituted by members as in the case of derivative actions.[347] The issue of personal interests is however not peculiar to creditors. It is also in the personal interests of directors, employees and shareholders that the company is properly managed as this will guarantee the performance of the obligations owed to them by the company.

In the United Kingdom, the Companies Act stipulates that a director is under a fiduciary duty to promote the success of the company under the Companies Act 2006, s.172 (1), for the

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the effect that the Whistle Blowing Policy of the Federal Government of Nigeria is yet to have any legal backing. See also Ibrahim Sule 'Whistleblowers' Protection Legislation: In Search for a Model for Nigeria'www.ippa.org/IPPC4/Proceedings/....Paper 18-8.pdf.

[340]SA Companies Act 2008, S.165 (2) (a), (b), makes shareholders and directors of a related company eligible applicants.

[341]See CAMA, s.352.

[342]R. Franklin Balotti& Jesse A. Finkelstein, above n 26 at 631.

[343]*Ibid*.

[344]CAMA, s.352; SA Companies Act 2008, s.165 (2).

[345]Maleka Femida Cassim, above n 20 at 90.

[346]CAMA, s.353 (1) (c).

[347]UK Companies Act 2006, s.994.

benefit of members as a whole, but in so doing, he must have regard to among other interests, the interests of non-members such as the employees, suppliers, customers and the community.[348] This thesis observes that creditors are not specifically mentioned under section 172(1). However, the directors are to have regard to the business relationship with their suppliers, customers; [349]and also the maintenance of high standard of business conduct.[350]It is posited that these provisions by implication require the directors to have regard to creditors who may be suppliers, customers and business partners. It has also been argued that the inclusion of the phrase –'other matters' in section 172(1), suggests that creditors can be accommodated.[351]However, section 172(3) of the United Kingdom Companies Act 2006, requires the director to consider the interests of the creditors or act in the interests of the creditors in certain circumstances. This means that while under section 172(1), directors are obliged to balance their duties to the shareholders with other interests, under section 172(3), the directors must discountenance their primary fiduciary responsibilities to shareholders in order to focus on the interests of the creditors.[352]Although, the law in the United Kingdom does not define the circumstances which can trigger the recognition of the interests of the creditors, the following circumstances have however been suggested: [353]when the company is insolvent;[354] when the company is on the verge of insolvency;[355] when the company is of doubtful insolvency;[356] when the company is subject to a risk of insolvency;[357] when the company is in a tight financial situation.[358] Apart from the circumstance of insolvency, the other circumstances identified above tend to overlap.[359]Also, there appears to be lack of precision and certainty as to when a company is insolvent or not insolvent.[360] In any case, it is established in the United Kingdom, that the directors are

[348]Andrew Keay ' Directors' Duties And Creditors' Interests' [2014] 130 *Law Quarterly Report* 443 at 448, where the author argues that the interests of creditors can be accommodated as part of the fiduciary responsibilities of directors because of the use of the phrase 'among other matters' under the UK Companies Act 2006,s.172.
[349]UK Companies Act 2008, s.172 (1) (c).
[350]*Ibid* at s.172 (1) (e).
[351]Andrew Keay, above n 348 at 448.
[352]The English case of *Brady v Brady* [1987] 3 BCC 315 at 354, where the court stated that where a company is insolvent, the interests of the company are equated with the interests of the creditors.
[353]Andrew Keay, above n 348 at 446-447.
[354]*Brady v Brady*, above n 352. See Denis Keenan, above n 326 at 345.
[355]The English case of *Colin Gwyer& Associates v London Wharf (Limehouse) Ltd* [2003] BCC 885 at 74.
[356]*Brady v Brady*, above n 352.
[357]The Australian case of *Kinsela v Russel Kinsela Pty Ltd* [1986]4 ACLC 215 at 223.
[358]The English case of *Facia Footwear Ltd (In Administration) v Hinchliffe* [1998]1 BCLC 218 at 228.
[359]Andrew Keay, above n 348 at 447.
[360]*Ibid.*

required, as obtains under the common law to take into account the interests of creditors or act in the interests of creditors, although the circumstances are far from being certain. [361] This does not however translate to creditors being able to bring derivative actions in the United Kingdom since derivative actions can only be brought by members both under the common law[362] and statutes.[363]It has however been argued that the lack of precision as to when the obligation of directors to act for the benefit of shareholders shifts to creditors, may precipitate the institution of derivative actions by shareholders since directors may not be aware of when their obligations is owed to shareholders .[364] This thesis argues that where the law stipulates that directors owe obligation to creditors, they ought to be allowed to bring derivative actions. Nonetheless, in jurisdictions such as Nigeria[365] and South Africa,[366] where there is provision for any other person appointed by the court to institute derivative actions, the existence of an obligation to attend to the interests of creditors under the common law can be used to accommodate creditors as one of the persons qualified to bring derivative actions. However, even in the absence of the common law, the courts can use their discretion to allow creditors to institute derivative actions since they have vested power to appoint any other person to bring a derivative action.[367]

Closely related to the question whether creditors' can institute a derivative action is the question whether a derivative action can be instituted when the company is in liquidation. [368]At common law, it is settled that when a company is in liquidation, a derivative action cannot be instituted by the minority shareholders because neither the Board nor the General Meeting is in control of the company.[369] It is argued under the common law that when the company is in liquidation, the control of the company is now in the hands of the liquidator and so the exception to the Proper Plaintiff rule in *Foss v Harbottle* which allows the shareholder to maintain the cause of the company is eliminated.[370] It appears that the situation may not be different under the statutory derivative action regime. [371]It has been

[361]*Ibid* at 446.
[362]*Wallesteinier v Moir (No.2),* above n 1.
[363]UK Companies Act 2006, s.260.
[364]Andrew Keay, above n 348 at 448.
[365]CAMA, s.352 (d).
[366]SA Companies Act 2008, s.165 (2) (d).
[367]Maleka Femida Cassim, above n 20 at 15.
[368]Daniel Lightman, above n 2 at 78-79.
[369]The English case of *Barrett v Duckett*, above n 244 at 250.See Maleka Femida Cassim, above n 20 at 90.
[370]Daniel Lightman, above n 2 at 78-79.
[371]Maleka Femida Cassim, above n 20 at 90.

said that neither the South African Companies Act nor the United Kingdom Companies Act contemplate that companies in liquidation would be included in derivative actions application.[372]Cassim[373] argues that many of the provisions with respect to insolvency in South Africa may not be readily adapted to derivative actions, e.g. investigation of demand[374] and response to the demand by the Board of Directors.[375]Meanwhile, Lightman[376] argues that if a derivative action cannot be brought under the UK Companies Act when a company is in liquidation, the following options are available to minority shareholders : Ask the liquidators to bring the proceedings; and where the liquidator refuses, apply to the court under the Insolvency Act 1986 for an order requesting the liquidator to bring the action in the name of the company or that the minority shareholder be permitted to bring an action in the name of the company. The argument of Lightman is to the effect that the minority shareholders of a company in liquidation can bring a derivative action under the UK Insolvency Act 1986.[377] If a derivative action is possible for companies in liquidation under the Insolvency Act, this thesis opines that derivative actions with regards to companies in liquidation are possible under the statutory derivative action law. This thesis would however toe the line of Cassim[378] and Lightman[379] that the laws in South Africa and the United Kingdom respectively should be amended to clarify the issue with respect to the availability of derivative actions when a company is in liquidation. It is also suggested that the law in Nigeria should be amended accordingly to allow derivative actions during insolvency. This thesis debunks the argument that derivative actions cannot be available to shareholders where the company is in liquidation because the position of the directors is now being occupied by the liquidator. [380]One of the powers of a liquidator, when appointed is to bring or defend any action or legal proceedings in the name and on behalf of the company.[381]If the liquidator has failed or has refused to perform his obligation, the minority shareholders should be able to apply to court to bring the action since the company though in liquidation, still exists as a legal person in

[372]*Ibid*.
[373]*Ibid.*
[374]SA Companies Act 2008, s.165 (4) (a).
[375]*Ibid at* s.165 (5) (a).
[376]Daniel Lightman, above n 2 at 79- 80.
[377]*Ibid.*
[378]Maleka Femida Cassim, above n 20 at 91.
[379]Daniel Lightman, above n 2 at 79.
[380]*Ibid*. See Derek French *et al*, above n 177 at 564.
[381]CAMA s.588 (1) (a).

law.[382] In the same vein, if the liquidator can institute an action, then he can appoint persons to investigate a demand and give a response.[383] This thesis posits that the reason why derivative actions have not been favoured in case of companies in liquidation is because once the company goes into liquidation, the interests of the creditors become dominant, and thus, supplanting the interests of the shareholders.[384] It is posited that the inclusion of creditors as persons who may bring derivative actions would help to resolve the controversy as to whether derivative actions should be available when a company is in liquidation.[385]

3.3.2.6 Any Other Person Appointed By the Court

The provisions of CAMA stipulate that the court at its discretion may allow any other person whom it considers a proper person to bring a derivative action.[386] This implies that persons who fall under this category must be persons who are neither shareholders nor beneficial owners of the security of the company nor directors or officers or former directors or officers of the company nor the Commission.[387] Also, since the powers of the courts in this regard is discretionary, the courts may be able to enable shareholders of related companies, creditors, Trade Unions, employees, directors, etc. to institute derivative actions.[388] Thus, assuming that CAMA makes no specific provision for multiple derivative actions,[389] it is possible to maintain such actions under this heading within the Nigerian jurisprudence, if the discretion of the courts so allows.[390] The merit of this blanket provision is that it allows some form of flexibility with regards to persons who may bring derivative actions, such that persons who do not belong to the category of persons specifically listed under the law can also be

[382]The English case of *Clarkson v Davies* [1923] AC 100, to the effect that derivative actions are available as long as a company has not been dissolved.
[383]CAMA, s.588 (1) (c), which gives the liquidator power to appoint a legal practitioner or any other relevant professional to assist him in the performance of his duties.
[384]Arad Reisberg, above n 8 at 102.
[385]Maleka Femida Cassim, above n 20 at 91, where the author maintains that in Australia, there are conflicting opinions as to whether derivative actions should apply to companies in liquidation. See Daniel Lightman, above n 2 at 91.
[386]CAMA, s.352 (d).
[387]*Ibid* at s.352 (a)-(d).
[388]Maleka Femida Cassim, above n 20 at 15, who posits that this provision could be used by a creditor who has sufficient financial interests in the company's affairs and outcome of a derivative action.
[389]CAMA, s.346 (1).
[390]*Ibid* at s.352 (d).

accommodated.[391] In addition, the broadness of the list of applicants may help to further the corporate governance objective of ensuring that corporate wrongdoing is always brought to book.[392] Nonetheless, this thesis argues that the blanket provision, in spite of its benefit(s), creates additional procedural hurdles, because a person who wants to rely on it, may be required to apply for leave twice in order to institute a derivative action. Thus, a person relying on the blanket provision would have to apply to the court in order to be conferred with the status of eligibility to institute a derivative action in the first instance,[393] before proceeding to obtain another leave to sue.[394]In addition, the fact that there no criterion is provided to aid the court in exercising its discretion creates an air of uncertainty with regards to those who may be granted the status of an applicant in derivative actions under this route. Apart from procedural difficulties, it can also be argued that the blanket provision is capable of inducing a floodgate of litigation.[395]However, it has also been maintained that there is no empirical evidence to support this viewpoint.[396]As obtains in Nigeria, persons who may bring derivate actions in South Africa include any other person granted leave by the court.[397] However, in the case of South Africa, the court is permitted to exercise its discretion if it is convinced it is necessary or expedient to do so in order to protect the legal right of the applicant.[398] However, except this provision is interpreted to imply that where a person has a legal right or duty to enforce breach of directors duties but is otherwise not included in the specific list of those entitled to bring derivative actions, the court should enable him to institute a derivative action, this provision appears to negate a fundamental objective of derivative actions, which is to protect the right or interests of the company.[399]Nonetheless, Keay, [400]in recommending that a similar provision be enacted in the United Kingdom, suggests that in the spirit of section 172(1) of the UK Companies Act 2006,[401] the courts should use

[391]Maleka Femida Cassim, above n 20 at 15.
[392]*Ibid* at 8.
[393]CAMA, s.352 (d).
[394]*Ibid* at s.346 (1).
[395]Andrew Keay 'Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act' [2016] 16(1) *Journal of Corporate Law Studies* 39 at 46.
[396]*Ibid.*
[397]SA Companies Act 2008, s.165 (2) (d).
[398]*Ibid*.
[399]Maleka Femida Cassim, above n 229 at 1062.
[400]Andrew Keay, above n 395 at 46.
[401]This section requires the directors to promote the success of the company for the benefit of the shareholders, while taking cognisance of the various interests listed therein.

their discretion only in favour of persons who have direct financial interests in the company in addition to those who have particular legitimate interests in the way the company is being run. [402]Although, this suggestion moves the law further away from the colourless provision, which merely stipulates that the courts should use their discretion to determine who can be an applicant through the blanket provision, [403]it is however, not without controversy. In Nigeria, it has been argued that the application of the Sufficient Interests rule to prevent an applicant from bringing an action in the case of *Adenuga v Odumeru*,[404] is flawed.[405] Thus, the application of the Sufficient Interests rule by the court in the case of *Adenuga* has been described as bringing in extraneous matters to inhibit derivative actions, contrary to the blanket provisions of CAMA.[406] Likewise, the Nigerian case of *Williams v Edu*[407]has been criticised for not allowing a non-member to bring a derivative action in spite of the blanket provision in which non- members can be accommodated.[408] The position of this thesis is that the blanket provision which allows any other person to be granted the status of an applicant at the discretion of the court does not guaranty that any person can be so allowed as is being indicated in some quarters.[409] Besides, it is argued that the cases referred to above were rightly decided by the courts. In the Nigerian case of *Williams v Edu,* [410]the court maintained that the plaintiff did not have *locus standi* to sue since it was not shown that he was a shareholder of the defendant company. There was also no suggestion that the plaintiff brought any application to be granted the status of an applicant under the blanket provision. In any case, as posited earlier in Chapter Two of this thesis, the action did not possess the nature of a derivative action. The plaintiff who was the owner of a property oddly thought he could prevent the sublease of his property by bringing a frivolous application; and also attempted to interfere in the management of the defendant company. The court was therefore right in holding that he had no locus standi to bring the action. Likewise in the Nigerian case of *Adenuga v Odumeru*,[411] the issue of Sufficient Interests did not arise in

[402]Maleka Femida Cassim, above n 229 at 1062.
[403]CAMA, s.352 (d).
[404]Above n 182.
[405]Kunle Aina 'Current Development In the law of Derivative Action in Nigerian Company Law' (2014) 1 *Babcock University Socio- Legal Journal* 49 at 60-61.
[406]*Ibid.*
[407] [2002]3 NWLR 401 at 414-415.
[408]Kunle Aina, above n 405 at 60.
[409]*Ibid*.
[410]Above n 407.
[411]Above n 182.

relation to derivative actions because the case was not instituted as such. In addition, the position of the court that it is not enough for a plaintiff to state in his statement of claim that he has an interest in a matter, but however, that he must also show that his interest is threatened, cannot be said to be contrary to the intention of the blanket provision in which any person may at the discretion of the court be allowed to bring a derivative action.[412]

3.3.3 PROCEDURE FOR THE COMMENCEMENT OF ACTIONS

Having discussed the persons qualified to bring derivative actions, it is important to detail the steps an applicant must take to commence an action.

3.3.3.1 Mode of Commencement of Proceedings

In the case of *Agip Nig. Ltd. v Agip Petroli International and others,*[413] the Supreme Court in Nigeria, set aside an application for leave to institute a derivative action, due to procedural defects in relation to commencement of the action, and the mode of application for leave. In this instant case, the Appellants commenced a derivative suit at the Federal High Court by a writ of summons.[414] A week later, the appellants filed a motion *ex parte* asking for leave to institute the action.[415] The Supreme Court maintained as follows with regards to the procedure for derivative actions in Nigeria:[416]

> ''A minority shareholder who intends to bring a derivative action in the name of the company must first and foremost apply for leave of court by way of originating summons on notice to the company. The shareholders will require the court's consent to sue. The derivative action must be commenced with the claim form referred to in Rule 2(2) of the Companies Proceedings Rules, 1992, and an application by the shareholder for the court's permission or leave to continue the claim……., The hearing of the shareholder's application will thereafter proceed in the manner of an ordinary interim application with both sides being afforded the opportunity to submit evidence and address. The company must be given notice of such hearing so that the company or the directors may be able to appear to present their view of the

[412]CAMA, s.352 (d).
[413]Above n 73.
[414]*Ibid* at 354.
[415]*Ibid.*
[416]*Ibid* at 393-394. See Joseph E.O.Abugu, above n 190 at 380.

> shareholder's case. In the instant case, the Court of Appeal was right when it he that the non-compliance with the requisite procedure for commencing a derivative action amounted to a breach of the principles of fair hearing and rendered null the writ of summons used to commence the suit.''[417]

The Supreme Court in the Nigerian case of *Agip Nig. Ltd. v Agip Petroli International and others*[418] refused to accept the arguments of the Appellants that failure to institute the suit by originating summons was a mere technical error.[419] The Supreme Court posited that compliance with the mode of commencement[420]of the derivative action was a condition precedent which goes to the root of the matter; and that non – compliance denied the Court of Appeal the jurisdiction to hear the matter.[421]

This decision has attracted the comments of not a few academic and professional writers, like Aina, [422]Odeleye, [423]Eghobamien,[424] all of who disagree with the judgment, perceiving it as essentially creating a procedural bottleneck in the way of derivative actions in Nigeria. It is posited that there is no doubt that the procedure used to commence the derivative action in *Agip* was wrong since the Nigerian Companies Proceedings rules expressly provide that the action must be commenced by originating summons and not by writ of summons.[425] What is however, not clear is whether the originating summons and application for leave to bring a

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[417]The Nigerian case of *Ede v Central Bank of Nigeria* [2015] All FWLR 1113, where the same principle was adopted by the Court of Appeal in Nigeria. It appears that a Motion *ex parte* would also not be accepted in South Africa. See Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003) 274.

[418]Above n 73.

[419]The Nigerian case of Papersack *Nigeria Ltd v Alhaji J.A. Odutola& Anor* [2010] LPELR 4829, where the Court of Appeal in Nigeria maintained that failure to follow the procedure for commencement of an action renders a suit incompetent.

[420]Nigerian Companies Proceedings Rules 2004, rule 2(1).

[421]*Agip Nig. Ltd. v Agip Petroli International and others*, above n 73 at 394-395.

[422]Kunle Aina, above n 405 at 64, argues that since The Companies Proceedings Rules is silent as to the mode of commencement of derivative actions i.e. the rules only stipulate that the action must be brought by Originating Summons, therefore the Supreme Court was wrong to have insisted that the application ought to have been brought by Originating Summons inter-parties.

[423]Afolabi Odeleye 'Review of Agip Nigeria Ltd v Agip Petroli International &Ors' (July 05, 2016, 1.52pm) https.www.yumpu.com/en/document/view/6351577. Odeleye argues that an interlocutory application on notice would lead inevitably to several appeals, which would cause undue delay and hardship. He prefers the position in the United Kingdom, where the application for permission is required to be made *ex-parte* at the initial stage.

[424]Osaro Eghobamien' The Triumph of Form over Substance' https://greymile.perchstoneand graeys.com/2012/03/21 July 05 3.04pm,argues that the decision of the Supreme Court to set aside the Writ of Summons and the Motion *Ex-parte* brought in pursuance of the application for leave to institute a derivative action, is a triumph of form over substance. See also Omolola Coker' Bringing a Derivative Action' www.internationallawoffice.com

[425]Nigerian Companies Proceedings Rules 2004, rule 2(1).

derivative action must be *ex- parte* or on Notice. Although, the Companies Proceedings rules is silent on the matter[426] the Supreme Court in Nigeria hinged its decision that the originating summons and application for leave should be on notice, on the principle of fair hearing applicable under the Nigerian law in accordance with the common law and the Constitution.[427] The court further justified its position on the fact that the rule in *Foss v Harbottle* raises the issue of locus standi which should be decided at a pre-hearing stage in which all parties are present, prior to the substantive trial of the action.[428] Thus, the argument that interlocutory applications on Notice would lead to several appeals thereby causing hardship was rightly not accepted by the court.[429]

It is important to state at this juncture that the pre- hearing stage of applying for leave was only introduced to the common law jurisprudence in the relatively recent English case of *Prudential Assurance Co.Ltd v Newman Industries Ltd (No.2)*.[430] This thesis however, observes that it was the defendant in that case who applied for a determination as a preliminary issue, the question being whether the plaintiff as a minority shareholder was entitled to institute the action.[431] Although, the defendant's application was dismissed at the trial court, the Court of Appeal maintained that the plaintiff ought to have established his case- prima facie before being allowed to proceed in his claim. [432] Therefore, it is difficult to suggest under the circumstances of the *Prudential*[433]case that an application for leave under the common law can be made *ex-parte*. On the other hand, there is nothing in CAMA or in the Nigerian Companies Proceedings rules which suggest that an application for leave to bring a derivative action must be on Notice.[434]It appears therefore, that the court in *Agip Nig. Ltd. v Agip Petroli International and others,* [435]merely applied the common law principle of fair hearing, which is also entrenched in the Nigerian Constitution to fill a lacuna in the procedural regulations in Nigeria, as to whether application for leave is by motion *ex parte* or by Notice.[436] This scenario is different from what obtains in the United Kingdom, which expressly provides that the

[426]*Ibid* at rule 2.
[427]The Constitution of The Federal Republic of Nigeria 1999 (as Amended), s.36 (1).
[428]*Agip Nig Ltd v Agip Petroli International, above* n 73 at 395.
[429]See however, Afolabi Odeleye, above n 423.
[430] [1982] 1 All ER 354 at 366.
[431]*Ibid* at 356.
[432]*Ibid* at 366.
[433]Above, n 430.
[434]CAMA, s.346.
[435]Above n 73.
[436]*Ibid* at 395.

claimant in a derivative claim must not make the company a respondent to the permission application at the first stage of the application.[437] The claimant is nevertheless obliged to notify the company of the derivative claim and the permission application before proceeding to the second stage which is the hearing of the application.[438]However, for the avoidance of delay and costs, some claimants have brought applications for permission while making the defendants to the claim respondents, and thus, by passing the first stage of the permission application.[439]

In view of the above, it is hereby suggested that there should be an express amendment of the Companies Proceedings rules in Nigeria to the effect that originating summons in respect of derivative actions and application for leave must be brought by motion on notice. It is also recommended that Nigeria should toe the line of the United Kingdom where the procedure in respect of all derivative claims is set out under the Civil Procedure Rules 1998;[440] and in Practice Directions.[441] The need for an amendment of the law also appears to be very significant in view of what happened in the recent Nigerian case of *Ede v Central Bank of Nigeria,*[442] where the appellants brought an application for leave to bring a derivative action by way of a motion *ex- parte* supported by affidavit. The plaintiff/ appellant did not file any originating summons. The plaintiff/appellant contended that Old CAMA, s.303, provides that a derivative action application must be instituted by applying for leave and that the leave application does not need to be on Notice since it is a preliminary application which does not determine the rights of the parties.[443] It was further argued on behalf of the plaintiff/applicant that the Nigerian Companies Proceedings Rules 2004, does not state that application for leave must be by way of originating summons since originating summons is concerned with

[437]UK CPR 19.9. See Daniel Lightman, above n 2 at 45. See Paul Davies, 'Enforcement of Management Duties and the Protection of Minorities' in Geoffrey Morse *et.al* (eds), *Palmer's Company Law* (vol. 1, Sweet & Maxwell, London 2009) 8231 at 8237, to the effect that exclusion of the company from being notified at the 1st stage is aimed at protecting the company from incurring costs until when the reasonability of the claim has been established.

[438]UK CPR 19.9.

[439]Daniel Lightman, above n 2 at 46.

[440]UK (CPR) Parts 19.9- 19.9F.

[441] UK PD 19C. See UK Practice-Direction-Pre Action Conduct (PD PAC), which gives directions as to the conduct of the parties before the action. The conduct of the parties may be used in exercising the court's wide discretion as to costs and may be taken into account when giving directions for the management of claims. See UK CPR 1998, Pt. 44 & Pt. 3 respectively. See also Daniel Lightman, above n 2 at 41.

[442]Above n 417.

[443]*Ibid* at 1123.

substantive issues and not preliminary matters.[444]The Court of Appeal, following the principles laid down in the Nigerian case of *Agip Nig. Ltd v Agip Petroli International & Others*; [445]and in line with the decision of the trial court, dismissed the appeal on the grounds that the suit was not properly commenced. The Appellant's attempt to rely on rule 18 of the Nigerian Companies Proceedings Rules 2004, which is to the effect that no proceedings under CAMA should be invalidated for reasons of non-compliance with the rules or with respect to any irregularity was not accepted by the Court.[446] This thesis posits that the argument of the plaintiff/appellant that an application for leave in a derivative action must be by way of a Motion ex *parte* follows from the literal interpretation of the provisions of the Old CAMA with regards to commencement of derivative actions.[447] This is because on the surface, the Old CAMA appears to give the impression that leave by motion *ex-parte* must first be obtained before the institution of the substantive derivative action, while judicial decisions maintain that derivative actions can only be commenced by the filing of the substantive application alongside the application for leave. [448] Unfortunately, the provisions of CAMA is on all fours with the provisions of the Old CAMA with regards to the mode of application for leave.[449] It is posited that this problem may be resolved by taking a clue from what obtain in the United Kingdom. In Scotland, the leave of the court must be sought and obtained before a substantive derivative claim can be instituted.[450]On the other hand in England, the claimant does not require the permission of the court to file a derivative claim because the claimant brings the application for permission within the derivative claim already instituted. [451]This possibly explains why the application for leave in the United Kingdom is called 'Application for permission to continue.'[452] Interestingly, the different positions taken by the Appellants and the Court of Appeal in the Nigerian case of *Ede v Central Bank of Nigeria*,[453] may be likened to the positions in Scotland and England respectively.[454] Nevertheless, the courts in

[444]*Ibid.*
[445]Above n 73.
[446]*Ibid*. However, rule 18 also contains a proviso that the non- compliance with the rules may invalidate a proceeding where the court is convinced that the injustice cannot be remedied by any order of the court.
[447]Old CAMA, s.303 (1).
[448]*Agip v Agip Petroli International and others,* above n 73.
[449]Old CAMA, s.346.
[450]Daniel Lightman, above n 2 at 69.
[451]*Ibid*.
[452]*Ibid*.
[453]Above n 417.
[454]Daniel Lightman, above n 2 at 69. See Arad Resiberg, above n 8 at 133.

Nigeria have maintained that originating applications and leave applications must be brought together as obtains in England.[455] However, contrary to the position in England, under CAMA, the requirement that an applicant in a derivative action must apply for leave does not suggest that the application is brought to continue a matter that has already been instituted. [456] It therefore appears that the courts in Nigeria are applying the position of the law with regards to commencement of derivative actions in England without taking into consideration the differences between Nigerian Law and the English law. Therefore, in view of the decision of the Supreme Court in Nigeria that derivative actions must be commenced by filing the substantive suit, [457]it is suggested that there should be an amendment of section 346(1) CAMA, to the effect that the applicant must apply for' leave or permission to continue the action' as opposed to applying for' leave to bring an action' as currently stated in the law.[458]

3.3.3.2 Parties to an Action

It has been maintained in this thesis that derivative action is a form of civil litigation, in which an applicant may be allowed to enforce a cause of action belonging to the company.[459] The fact that the person who is in control of a derivative action litigation is different from the owner of the cause of action makes derivative litigation different from the usual civil actions in which the plaintiff brings an action to enforce his own cause. [460]Thus, derivative action is a unique procedure, i.e. it is not just another form of litigation, since the plaintiff is not the company who has been wronged but some other person. Meanwhile, the company is made the defendant in the action.[461]

At common law, specifically in the case of *Foss v. Harbottle,* [462]it was suggested by the court that a suit could be brought ''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.''[463]Therefore, the form of derivative action is always '' A B (a minority

[455]*Agip Nig. Ltd. v Agip Petroli and others*, above n 73 at 394-395.
[456]CAMA, s.346 (1).
[457]*Agip v Agip Petroli International and others*, above n 73.
[458]CAMA, s.346 (1).
[459]Daniel Lightman, above n 2 at 35.
[460]*Ibid* at 43.
[461]Arad Reisberg, above n 8 at 5.
[462][1843] 2 Hare 461.
[463]*East Pant Du United Lead Mining Co. Ltd v. Merryweather* [1864] 2 Hem.& M.254, where the English Court held that the minority shareholders themselves could bring an action in their own names(but in truth on behalf of the company) against the wrong doing directors.

shareholder) on behalf of himself and all other shareholders of the company'' against the wrongdoing directors, and the company.[464] This form of action seems to suggest that derivative action is a form of representative action.[465] However, the plaintiff or applicant in a derivative action has been likened only to a litigation representative for the company since he is not representing the interests of other shareholders as obtains in the usual representative action but rather representing the interests of the company.[466]Thus, in the English case of *Wallersteiner v. Moir (No.2)*, [467]the plaintiff brought an action in his own name against the erring directors and the affected companies. However, Lord Denning MR accepted the form in which the action was instituted even though the plaintiff in the counterclaim had not sued ''on behalf of himself and all the other shareholders.'' The learned Judge was of the view that although the plaintiff on the counter claim sued in his own name but in reality, he had sued on behalf of the company: just as an agent may contract in his own name but in reality, on behalf of his principal.''[468]

Schreiner,[469] however argues that the rebuff of the representative nature of derivative action is unrealistic. He posits that in a representative action, the judgment will be binding on all the shareholders, thereby precluding subsequent suits on the same matter by other shareholders. [470]Nevertheless, Schreiner's argument is also not without fault for the following reasons: In the first instance, an applicant is required to obtain leave and show good cause why he must be allowed to prosecute a derivative action.[471] This means that subsequent derivative suits on the same cause of action that have already been decided by a court are not likely to sail through since they may not fulfill the requirement of the claim being brought for a good cause.[472]Secondly, even where there is an existing derivative action, there are provisions to the effect that another applicant who is interested in taking over the action must apply for leave to do so.[473] Thirdly, the fact that the cause of action belongs to the

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[464]*The English case of Menier v. Hooper's Telegraph* (1874) 9 Ch.App 350.See Stephen Girvin *et al*, above n 1. See Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003) 271.
[465]Daniel Lightman, above n 2 at 45.
[466]Robert W. Thompson, Scott T. Jeffers, Codie L. Chisholm 'The Limits of Derivative Actions: The Application of Limitation Periods to Derivative Actions' [2012] 49 (3) *Alberta Law Review* 603 at 608.
[467]Above n 1.
[468]*Ibid* at 396.
[469]Oliver C. Schreiner, above n 316 at 214.
[470]Alan Dignam & John Lowry, *Company Law*, above n 178 at 194.
[471]CAMA, s.346 (2).
[472]*Ibid* at s.346 (2) (e).
[473]SA Companies Act 2008, s.165 (12).

company, and thus, any remedy given by the court belongs to the company and not to the individual shareholder, should serve as sufficient disincentive for multiplicity of actions.[474] Nevertheless, the common law position on the concept of parties has been carried over to the statutory derivative action. Thus, the United Kingdom Companies Act 2006, defines a derivative claim as a claim brought by a member of a company in respect of a cause of action vested in the company and seeking relief on behalf of the company.[475] This implies that the statutory derivative action in the UK, follows the common law position that a derivative action is essentially a representative action in which a member of the company institutes an action in his own name to pursue a cause of action vested in the company.[476] The Act further provides that the cause of action may be against the director or another person or both.[477] This indicates that a recalcitrant director and or any other person against whom a claim in respect of a cause of action vested in the company must be made a defendant in the action.[478]

In the same vein, the UK Civil Procedure Rules stipulates that a derivative action may be instituted as follows:

''Where a company, other incorporated body or trade union is alleged to be entitled to claim a remedy and a claim is made by one or more members of the company, body or trade union for it to be given that remedy, (a derivative claim).''[479]

The above implies that a shareholder is required to be the plaintiff or claimant in every derivative action. However, it is quite remarkable that it is not in all cases that a derivative action must appear in a representative form, in the sense that a claim may be made by one member for himself alone and not necessarily for himself and other members of the company.[480]

The UK Civil Procedure Rules 19.9(2) further provides as follows:

''The company, body or trade union for whose benefit a remedy is sought must be a defendant to the claim.''

[474]Maleka Femida Cassim, above n 20 at 148.
[475]Emphasis Mine.
[476]UK Companies Act2006, s.260 (1). See Alan Dignam & John Lowry, above n 178 at 194.
[477]UK Companies Act 2006, s.260 (3).
[478]*Ibid*.
[479]Rule.19.9 (1).
[480]*Wallersteiner v.Moir* (No.2), above n 1. See Paul L .Davies, above n 15 at 454.

It is therefore settled under the UK Civil Procedure Rules that the company must in all cases be made a defendant.[481] If this stance is read alongside the UK Companies Act which maintains that the company must be made a defendant in the suit, [482]it follows logically therefore that the position in the UK under the abolished common law derivative action and statutory derivative action are in tandem. However, this position is not peculiar to the United Kingdom. It appears to have been accepted by other Commonwealth jurisdictions such as Nigeria[483] and South Africa[484] either through legislation or by judicial interpretation.

In Nigeria, CAMA allows an applicant to bring a derivative action 'in the name or on behalf'[485] of the company.[486] This appears to suggest that the applicant has the choice of either bringing a derivative action in the name of the company or in his own name on behalf of the company .This provision is also different from the stipulation at common law and in the United Kingdom where it is stipulated that a complainant or applicant may bring a derivative action' in the name and on behalf of the company'.[487] This thesis suggests that the phrase 'in the name or on behalf of the company 'as provided in CAMA must be read conjunctively, and that the phrase indicates that the applicant must bring a representative action on behalf of the company but however in his own name. [488] The courts in Nigeria have appeared to maintain the position as expressed above with respect to parties to a derivative action. In the case of *Agip v Agip Petroli International and others,*[489]the Supreme Court in held that the combined effect of section 303(1) of the Old CAMA, and other relevant provisions of the Old CAMA, is that an applicant must first obtain leave of the court by Originating Summons of which Notice is given to the company. Thus, the company must be made a defendant to the claim, for the technical requirement of ensuring that the company is bound by any given judgment. [490]It is however proposed that CAMA, s.346 (1), should be expressly amended to the effect that when commencing a derivative action, an applicant must institute the proceedings in the name and on behalf of the company as opposed to in the name or on behalf of the company.

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[481]Daniel Lightman, above n 2 at 43.
[482]UK Companies Act, 2006, S.260 (3).
[483]Joseph E.O. Abugu, above n 190 at375.
[484]Oliver C. Schreiner, above n 316 at 234, where the author maintains that it is certain that in South Africa, the company is a nominal defendant in every derivative action.
[485]Emphasis mine.
[486]CAMA, s.346 (1).
[487]Canada Business Corporation Act 1985, s.239 (1); Ontario Business Corporation Act 1990, s.246 (1).
[488]CAMA, s.346 (1).
[489]Above, n 73 at 393.
[490]Stephen Girvin *et al*, above n 1 at 512.

It is also observed that neither The Federal High Court (Civil Procedure Rules) 2009, nor the Companies Proceeding Rules 2004, give any clue as to the parties in derivative actions in Nigeria. It is therefore suggested that the Nigerian Companies Proceedings Rules 2004, should be amended to address the issue of parties in a derivative action as stipulated by the courts in Nigeria and as obtainable in the United Kingdom.[491] The proposed amendment appears to tally with the position of the law in South Africa, which allows a person to bring a derivative action on behalf of the company. [492]

Nevertheless, the concept of parties in derivative actions is not without its problems; the most significant being that it appears odd, circuitous, confusing or misleading that the company who has been wronged is made a defendant instead of the plaintiff.[493] However, it should be noted that the company is only a nominal defendant since the real culprits with whom the shareholder is crossed are the directors who have committed infractions against the company.[494] Therefore, it has been maintained that making the company a defendant in the action has always been hinged on the fact that it is only a procedural device used for the purpose of convenience in order to ensure that the defendant company would be bound by, or benefit from the judgment or order made in the derivative action.[495]

On the other hand, it has also been maintained quite correctly that making the company the plaintiff rather than the defendant clarifies the true status of the shareholder bringing the action[496] and may also prevent settlements of the disputes contrary to the interests of the company.[497] However, making the company a plaintiff in a derivative action is not also without its own problems. It is trite that derivative actions arise because the company does not want to sue. It is also trite that the company has factual control over the information and documents required by the court as proof of the cause of action.[498] This means that if the company sues as a co-plaintiff, it would be procedurally difficult or clumsy for the shareholder to request the company to produce documents in its custody. It therefore appears that the

[491] *Ibid.*
[492] SA Companies Act 2008, s.165.
[493] *Wallersteiner v Moir (No.2)*, above n 1 at 395. See Arad Reisberg, above n 8 at 5.
[494] Arad Reisberg, above n 8 at 5.
[495] Paul L. Davies, above n 257 at 615.
[496] Oliver C.Shreiner, above n 316 at 234.
[497] *Ibid*.
[498] Maleka Femida Cassim, above n 20 at 167-168.

procedure whereby the company is made a nominal defendant in a derivative suit, enables the shareholder who is the plaintiff to obtain information from the company who is a defendant in the suit by serving on the company, Notice to produce the documents he requires to prove his case.[499]More importantly, it has been argued that the company cannot be made a plaintiff without its consent.[500] This reverberates from the fact that a company being an artificial entity can only litigate if the board or the general meeting assents.[501] Therefore, if neither the board nor the general meeting has agreed to bring the action, it follows consequently that the company cannot be made the plaintiff in the suit.[502]

The impracticality of the company being the plaintiff in a derivative action implies that the derivative action jurisprudence is stuck with an anomalous situation in which the applicant is the plaintiff while the real and nominal defendants are the culprits and the company respectively. [503] However, the anomaly is not without consequence. Thus, it has been posited that given the atypical position of parties in derivative actions, the party who has to bear the usual risks under the normal rule as to costs is not the beneficiary of the judgment. [504]Furthermore, in jurisdictions where the real defendants and the nominal defendants are located in different jurisdictions, being that it is not lawful to serve a writ of summons on a company outside jurisdiction, difficulties may arise as to how to serve the nominal defendant.[505] However, the latter problem does not appear to arise in countries like Nigeria where the rules of court allow service outside jurisdiction.[506]

3.4 LIMITATION OF ACTIONS

As has been maintained earlier in this thesis, one of the major deterrents to the effectiveness of derivative actions as a corporate governance tool is the problem of limited access to information.[507] It would be seen later that the problem of limited access to information might be further exacerbated by the doctrine of limitation of actions, in which a claimant is expected

[499]D.I. Efevwerhan, *Principles of Civil Procedure In Nigeria* (2nd edn, Snaap Press Ltd, Enugu 2013)299. See High Court of Nigeria, FCT, Abuja (Civil Procedure) Rules 2005, Order 30 rule 34(1).
[500]Paul L. Davies, *Gower's Principles of Modern Company Law (*6th edn, Sweet & Maxwell, London 1997) 666.
[501]*Ibid*.
[502]*Ibid*.
[503]*Ibid*.
[504]Oliver C. Schreiner, above n 316 at 234.
[505]*Ibid*.
[506]The Nigerian Federal High Court Civil Procedure Rules 2009, Order 6 rule 13. See the Nigerian case of *Agip Nig. Ltd. v Agip Petroli International and others*, above n 73.
[507]J.H.Farrar *et al*, *Farrar's Company Law* (2nd edn, Butterworths, London 1998) 381.

to institute an action to protect his rights or interests within a specific period.[508]Meantime, the concept of limitation of actions is considered to be a matter of substantive law.[509]The concept implies that failure by a potential claimant to exercise his right within a stipulated time or his inability to commence the derivative action would result in his cause of action becoming unenforceable or his inability to commence the derivative action.[510] Thus, it is imperative that the issue of limitation of action be considered at the point of commencement of an action. The rationale for limiting the period during which a cause of action may be ventilated has often been pitched on the following grounds: [511]the need to prevent stale or dormant claims by bringing finality to causes of actions; the fact that a defendant may have lost the evidence required to defend himself; the fact that a person with a good cause of action should pursue them with reasonable diligence and should not be allowed to sleep on his rights. These arguments appear to be stronger than the argument that the court should not shut its doors against valid claims.[512]

In the United Kingdom, the analogy between a director and a trustee has been used to bring breaches of fiduciary duties by directors within the confines of the Limitation Law.[513] The Limitation Law provides that an action by a beneficiary to recover trust property or in breach of trust, not being an action for which a period of limitation is prescribed by any other provision of the Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.[514] Thus, an action against a director to recover profit made in breach of his fiduciary duties or for equitable compensation must be instituted within six years of the breach.[515] There are however peculiar situations where no period of limitation

[508] The Nigerian Limitation Act 2004, s.7 (1) (a), which stipulates that an action founded on contract or quasi-contract must be commenced before the expiration of six years from the date in which the cause of action arose or accrued. See the Nigerian case of *Eboigbe v N.N.P.C* [1994] 5 NWLR (Pt.347) 649 at 659.See also UK Limitation Act 1980,s.21(3), which stipulates a six year limitation period for actions by a beneficiary to recover trust property or in respect of any breach of trust. See also The South African case of *Brummer v Minister of Social Development 2009(6) SA 323*.

[509]Robert W. Thompson, Scott T. Jeffers, Codie L. Chisholm, above n 466 at 609.

[510]*The Nigerian case of Nigerian Railway Corporation v Nwanze* [2008] 4 NWLR (Pt. 1076) 92 at 108.

[511]Jerry Amadi, *Limitation of Action- Statutory & Equitable Principles* (vol. 1, Pearl Publishers, Port Harcourt 2011) 41.

[512]Columbia Law Review Association' Statute of Limitation and Shareholders' Derivative Actions' [1956] 56(1) *Columbia Law Review* 106 at 107.

[513]Paul L.Davies and Sarah Worthington, above n 240 at 639. See also Robin Hollington, above n 12 at 114.

[514]UK Limitation Act 1980, s.21. See Limitation Law of Lagos State, Nigeria, s.32 (1), which contains a similar provision.

[515]See James Mathew' Fiduciaries and the Law of Limitation' [2008] 4 *Journal of Business Law* 344.

would apply: e.g. [516] (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; (b) to recover from the trustee, trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his personal use.[517] Thus, where a director acted intentionally, knowingly or recklessly in breach of his fiduciary duty, his action would be construed to be fraudulent[518] since fraud is being interpreted in the equitable sense and not in the ordinary common law sense.[519] In addition, limitation period would not arise where a director has misappropriated company property and the company has brought an action to recover.[520]

In the United States, the equitable concepts of fraudulent concealment[521] and discoverability[522] have been used to counter the defense of limitation of actions with respect to derivatives actions.[523] Fraudulent concealment suspends the limitation period during the period the defendant fraudulently conceals the claim or wrongdoing, [524]while the discoverability principle maintains that the limitation period will not start to run until the claimant knows or ought to have known of the cause of action.[525]

With respect to the rule of discoverability in derivative actions, it is very important to determine who the claimant is, i.e. if it is the company or the shareholder/stakeholder who is bringing the action. It is trite that in derivative actions, the shareholder is suing to protect the right of the company who is therefore the *de-jure* plaintiff. Nevertheless, since the action is being brought and conducted by a person other than the company, the person who is bringing the action is the *de-facto* plaintiff. [526] It appears that in the State of Delaware[527] and Canada, [528]for the purpose of derivative actions, the knowledge of the complainant or the *de-facto* plaintiff is recognised as the knowledge of the company. However, this position has been criticised as being defiant of the principle of corporate personality in which the cause of action

[516]Columbia Law Review Association, above n 512 at 119.
[517]Limitation Law of Lagos State, Nigeria, above n 514 at s.32 (4), which is in all fours with the United Kingdom provisions.
[518]Paul L.Davies and Sarah Worthington, above n 240 at 640.
[519] *Ibid.*
[520]James Mathew, above n 515 at 345.
[521]Alberta Limitation Act 2000, s.3 (1).
[522]*Ibid*.
[523]Robert W. Thompson *et al*, above n 466 at 611.
[524]Columbia Law Review Association, above n 512 at 111.
[525]Alberta Limitation Act 2000, s.3 (1).
[526]Robert W. Thompson *et al*, above n 466 at 612.
[527]The Delaware case of *Kahn v Seaboard Corp* 625 A (2d) 269 (Del Ch 1993).
[528]Robert W. Thompson *et al*, above n 466 at 613.

belongs to the company and not to the applicant or complainant.[529] Be that as it may, recognising the knowledge of the company for determining when the limitation period would commence is not without problems. This is because since the company is an artificial entity, it is the knowledge of its directors and officers that would be imputed unto the company.[530] It is noteworthy that the equitable doctrine of adverse domination of the American jurisprudence maintains that the period of limitation of actions will be tolled in claims by the corporation against its directors and officers for as long as those acting against the interests of the company are the majority in control of the company[531] This position stems from the fact that where the wrongdoers themselves are in control, they are not likely to take any action in the interests of the company.[532] It is therefore, pointless in that situation to insist that the company has knowledge of the wrongdoing, and as such the limitation period should begin to run. This is in tandem with the exception to the agency principle whereby the company as principal cannot be imputed with the knowledge of the agents (directors and officers) who are acting against its interests. [533]Nonetheless, the problem with the Adverse Domination doctrine is that it appears to bring back the ghost of the common law 'wrongdoer control'.[534] The doctrine also appears to be controversial even within the American legal space. For instance, in Delaware, the courts opine that in determining the knowledge of the company under the Adverse Domination doctrine, the knowledge of the shareholders of the cause of action should be imputed as knowledge of the company.[535] Delaware's position resonates from the fact that reliance on the knowledge of the shareholders provides a better alternative to the Adverse Domination doctrine since it side- tracks the problems of 'majority' or 'complete control' tests and also achieves the goal of defining when the period of limitation shall begin to count for the purpose of enforcing any cause of action belonging

[529] *Ibid*.
[530]CAMA, s.87 (3), to the effect that the Board is in charge of the management of the company.
[531]Robert W. Thompson *et al*, above n 466 at 613 at 616. This is called the majority test under the adverse domination doctrine. There is however, another viewpoint to the effect that there must be complete control of the corporation by those acting against its interests for the doctrine of adverse domination to apply. Thus, the presence of a disinterested director will not toll the limitation period.
[532]The company is said to be under a decisional disability in the circumstances.it is argued that since time does not run against an individual who is under disability, it should not also run against the company where the information it may require to proof its case would have been concealed by the defendants. See Robert W. Thompson *et al*, above n 466 at 616-617.
[533]*Ibid* at 617.
[534]*Ibid* at 616-617, to the effect that the doctrine of adverse domination should be applicable to all claims including fraud and negligence.
[535]*Ibid* at 620.

to the company.[536] Nevertheless, imputing knowledge of the shareholders as the knowledge of the company is not also without legal controversy. It is trite that shareholders are not agents of the company like directors and officers of the company.[537] Consequently, shareholders do not owe fiduciary duties to the company and therefore cannot be under any obligation to institute actions to enforce any cause of action belonging to the company.[538] The concept of discoverability or knowledge of the applicant does not appear to be profound in Nigeria since most of the provisions prescribing the limitation period for instituting actions do not require the knowledge of applicant before the time starts to count.[539] However, due to the intrinsic nature of derivative actions in which the company; – the de-*jure* plaintiff who is entitled to the cause of action is not the *de-facto* plaintiff pursuing the cause of action, it is important to import the concept of discoverability into the derivative action framework in Nigeria. It is posited that this would help to ensure that the limitation period does not start to count until the *de-facto* plaintiff becomes aware or ought to have become aware of the cause of action. [540]It is common knowledge that due to the problem of information asymmetry, the directors and officers of the company who are involved in the management of the company are in possession of the information required to pursue the cause of action.[541] It is therefore important to protect the *de-facto* plaintiff. In short, this thesis argues that the concept of discoverability should be used to modulate the problem of information asymmetry in derivative actions.[542] It is posited that the protection of the interests of the plaintiff in derivative actions is quite germane, considering the fact that limitation periods compete with the rights of access to court and access to information.[543] Consequently, it is maintained that

[536]*Ibid*.
[537]CAMA, s.305. See Paul L. Davies and Sarah Worthington, above n 240 at 622.
[538]Paul L.Davies and Sarah Worthington, above n 240 at 622, where the authors maintain that shareholding is a piece of property which every shareholder has a right to use to further his own interest. See however, CAMA, s.87 (5), which enables shareholders in a general meeting to institute actions on behalf of the company.
[539]Limitation Law of Lagos State, Nigeria, above n 514. See The Nigerian case of *Ajibona v Kolawole* [1996] 10 NWLR(Pt.476) 22 at 36, where the Supreme Court in Nigeria held that knowledge of trespass or adverse possession is not a precondition to a successful plea of the Limitation Law of Lagos State. *Contra* the case of *Brummer v Minister of Social Development*, above n 508 at 342-343, where the South African Constitutional Court held that a time bar limit must allow sufficient and adequate time between the cause of action coming to the knowledge of the claimant and the time during which the litigation may be launched, otherwise the bar limit becomes unconstitutional,- in contravention of the constitutional guarantee of access to courts as obtained in s.34 of the South African Constitution.
[540]Fidy Xiangxing Hong and S.H.Goo, above n 64 at 393.
[541]Maleka Femida Cassim, above n 20 at 167.
[542]Robert W.Thompson *et al*, above n 466 at 610, where the author posited that in recent times the focus of limitation periods has been to not only protect the interests of the defendants but also that of the plaintiff.
[543]*Brummer v Minister of Social Development*, above n 508 at 344.

the knowledge of the applicant, be it a shareholder or any other person qualified to bring a derivative action,should be preferred for the purpose of determining when the period of limitation of actions will commence. It is argued that this approach will help to eliminate the concept of adverse domination with its attendant problems.[544]

Another question that is germane with respect to period of limitation of actions and derivative actions is what action must be taken by an applicant for him to be deemed to have commenced derivative action proceedings? This is a cause of great concern considering the fact that derivative actions involve a two-stage proceeding of bringing a leave application before the substantive application. [545] It is therefore important to determine whether it is the filing of a leave application that signals the commencement of a derivative application or the filing of a statement of claim. The normal rule in civil procedure appears to be that it is the filing of the statement of claim that brings an action within the limitation period.[546] However, in the case of derivative actions in which an applicant must apply for leave or permission to be granted before instituting the action, it appears correct to maintain that the limitation period must fall within the time of application for leave.[547] This appears reasonable since the hearing of the leave application may be delayed; a situation over which the applicant has little or no control.[548] In order not to be unfair to the plaintiff, the date of filing the application for leave is taken as the date the plaintiff commenced the action.[549] However, some jurisdictions maintain that it is the filing of the statement of claim that determines whether a derivative action is within the limitation period.[550] Nevertheless, this argument may not be so relevant in jurisdictions like Nigeria[551] and the United Kingdom[552] where both the originating summons and the application for leave are required to be filed at the commencement of the suit. However in Scotland where a derivative action is commenced by an application for leave,[553]

[544]Above n 518.
[545]CAMA, s.346 (1).
[546]The American case of *Kemp v Metzner* [2000] BCCA 462, 190 DLR (4th) 388.
[547]The American case of *Potter v Banks* [1971] SJ no 92 (QL) (QB), where the court held that a Plaintiff who has filed an Application for leave cannot be said to be sleeping on his rights.
[548]Robert W. Thompson, *et al*, above n 466 at 627.
[549]*Ibid*.
[550]*Ibid* at 629.
[551]*Agip Nig.Ltd v Agip Petroli International and others,* above n 73 at 395.
[552]UK Companies Act 2006, s.261 (1); UK CPR 19.9(2).
[553]UK Companies Act 2006, s. 266(1).

a decision that it is the time of filing the originating summons that would determine whether an applicant comes within the limitation period might cause some problems.[554]

There appears to be no clear cut framework with respect to the limitation of actions and derivative actions in Nigeria. Although, CAMA stipulates that no period of limitation shall apply to any proceedings brought by the company to enforce any of its rights against promoters,[555] it is however, silent on the period of limitation on the enforcement of the rights of the company in respect of breach of duties by the directors and in respect of derivative actions. This thesis, argues for an amendment accordingly.[556]

3.5 CONCLUSION

This chapter has attempted to examine matters in relation to the commencement of derivative actions;[557] and interventions in respect of existing derivative actions. [558]

The inquiry into the requirement of demand [559]which is a fundamental step required to be taken before the commencement of any derivative action has shown that this aspect of the law in Nigeria is inadequate, in the sense that it leaves some crucial issues namely, form of demand, timing of the Notice of demand, steps that may be taken by the company etc. unattended to.[560] This chapter has therefore argued for a comprehensive and detailed framework with regards to the concept of the requirement of demand. In line with the objective of simplifying the law on derivative actions in Nigeria, the South African concept of the Independent Committee of the Board to which a demand must be referred, [561]and the United States concept of the futility of demand become unnecessary.[562] In addition, the Special Litigation Committee of the Board which usually recommends that derivative actions be dismissed, [563]has not been recommended for adoption into the Nigerian law. This is

[554]*Potter v Banks,* above n 547.
[555]CAMA, s.86 (4).
[556]Columbia Law Review Association, above n 512 at 122.
[557]Daniel Lightman, above n 20 at 44.
[558]*Ibid* at 61.
[559]CAMA, s.346 (2) (b).
[560]*Ibid*.
[561]SA Companies Act 2008, s.165 (4) (a).
[562]Above para.3.2.8.
[563]Above para.3.2.8.1.

because the adoption of these concepts, it is opined, is likely to be used by litigants to cause delay in the derivative action process. [564]

Furthermore, in spite of the omnibus provision which allows the court to appoint any person at its discretion to institute derivative actions,[565] I have argued for an expansion of the list of persons qualified to bring derivative actions to include creditors, employees, etc.[566] I have also argued that the Companies Proceedings rules be amended to stipulate expressly who the proper parties to a derivative action are;[567] and the mode of commencement of derivative actions,[568] in order to finally lay to rest the conflict between the literal reading or interpretation of CAMA[569] and the decisions of the court.[570]

It appears that the issue of limitation of actions with respect to derivative actions is yet to be addressed in Nigeria.[571] I have therefore, argued for its inclusion in the Companies Proceedings rules.[572] In view of the problem of limited access to information which may hinder an applicant from getting to know of corporate wrongdoing on time,[573] I have maintained that the period of limitation should begin to count from the time an applicant in a derivative action becomes aware of the corporate misdeed.[574]

[564]Reinier Kraakman *et al*, above n 121.
[565]CAMA, s.352.
[566]CAMA, s. 305(4).
[567]Motunrayo.O.Egbe, above n 192 at 66.
[568]*Ibid*.
[569]s.346.
[570]*Agip Nig.Ltd v Agip Petroli International and others,* above n 73.
[571]See however, CAMA, s.86 (4).
[572]James Mathew, above n 515 at 361.
[573]Vuyani R. Ngalwana 'Majority Rule And Minority Protection In South African Company Law: A Red Herring' [1996] 113 *South African Law Journal* 527 at 535.
[574]Above n 525.

CHAPTER FOUR

APPLICATION FOR LEAVE: REQUIREMENTS; AND OTHER ALLIED MATTERS FOR CONSIDERATION

4.1 INTRODUCTION

One of the fundamental themes of modern corporate law is the examination of the strain between ensuring that companies are run properly in accordance with corporate governance principles on the one hand; and the need to protect undue interference with corporate management by frivolous and vexatious actions,[1] such as strike suits and other actions that are meant to serve the interests of the applicant rather than the interests of the company on the other hand.[2]While, it may appear trite that derivative action is a very important tool of corporate governance,[3] in actual fact, the law has been more interested in the protection of the company from frivolous suits than in encouraging derivative suits.[4] Consequently, the law requires an applicant in a derivative suit to fulfill several requirements; [5]and to put into consideration some other factors before being allowed to proceed with the substantive suit. [6] These requirements and factors are intended to be discussed in this chapter with the exception of the requirement of demand[7] which has already been discussed in Chapter Three. This thesis also observes that an underlining condition that will ensure that an applicant is able to meet the requirements of leave is the issue of access to information.[8] Consequently, it is proposed to discuss the problems associated with access to information in derivative actions in this chapter.

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[1]Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford University Press, Oxford 2007) 111.
[2]Maleka Femida Cassim, *The New Derivative Action under the Companies Act – Guidelines for Judicial Discretion* (Juta, Claremont 2016) 25.
[3]*Ibid* at 1.
[4]Arad Reisberg, above n 1 at 122. See Carl Stein, *The New Companies Act Unlocked* (Siber Ink, Cape Town 2011) 374.
[5]Maleka Femida Cassim, above n 2 at 27.
[6]CAMA, s.346 (2).See Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (2nd edn, Lexis Nexis, Durban 2009) 96.
[7]Maleka Femida Cassim, above n 2 at 16.
[8]*Ibid* at 139.

4.1.1 OVERVIEW OF THE REQUIREMENTS FOR OBTAINING LEAVE

The requirements for leave to institute derivative actions in Nigeria,[9] South Africa[10] and the United Kingdom[11] have both similarities and dissimilarities as shall be seen in the course of this discourse. The South African derivative action law stipulates that there is a rebuttable presumption that granting leave is not in the best interests of the company where the proceedings involve a third party.[12] The presumption is also linked to the Business Judgment rule in which the decision of the Board to not litigate is presumed to be in the best interests of the company.[13] There are no similar provisions in the other jurisdictions.

Meanwhile, the procedure for application for leave to institute derivative actions in the United Kingdom is also unique in its own way.[14] In the first instance, the procedure entails a two-stage method.[15] At the preliminary stage, the company is not made a party to the application for leave to continue the derivative claim. [16]If the applicant fails to convince the court at that stage that he has a prima facie case, his case must be dismissed.[17] The application would proceed to the second stage, only if the application is not dismissed.[18] It is at the second stage that the company can be made a party to the application for permission or leave.[19] This is unlike what obtains in Nigeria and South Africa where the procedure for application for leave is a one-stage procedure.[20] There are however, suggestions to the effect that the United Kingdom two- stage procedure has been ignored, or in some cases sidelined.[21]

[9] CAMA, s.346 (2).
[10]SA Companies Act 2008, s.165 (5) (b).
[11]UK Companies Act 2006, s. 263.
[12]SA Companies Act 2008, s.165 (7).
[13]*Ibid* at s.165 (7) (c). See Maleka Femida Cassim, above n 2 at 105, where the author argues that the rebuttable presumption under s.165(7) is linked with the Business Judgment rule as stated in s.76(4).
[14]UK Companies Act 2006, s.262.
[15]Daniel Lightman, 'Derivative Claims' in Victor Joffe *et al* (eds), *Minority Shareholders- Law Practice and Procedure* (4th edn, Oxford University Press, Oxford 2011)29 at 46.
[16]*Ibid* at 48. See UK Companies Act 2006, s.262 (2).
[17]UK Companies Act 2006, s.262 (3).
[18]*Ibid*.
[19]*Ibid* at s.262 (4).
[20]CAMA, s.346 (1); SA Companies Act 2006, s.165 (5) (b).
[21]Daniel Lightman, above n 15 at 46.

Another distinctive feature of the of the United Kingdom derivative action procedure with regards to leave applications is that there are some requirements which make it mandatory for leave applications to be refused[22] while some other requirements can only be taken into account by the court in deciding whether or whether not to give permission- such as the decision of the Board,[23] the opinion of disinterested shareholders,[24] and the availability of other remedies.[25] In the case of Nigeria[26] and South Africa,[27] all the requirements stipulated by the law for granting of leave are mandatory i.e. an application would only be granted if all the requirements have been fulfilled.[28]

What however appears to be common among the jurisdictions under consideration is that an applicant seeking leave to bring a derivative action must show evidence of the following: That there is a cause of action;[29] that the action is brought in good faith;[30] that the action is in the best interests of the company.[31] Furthermore, although, the concept of ratification of the cause of action by the company is not a requirement for granting leave to institute derivative actions, it is however,a related factor; and is also common to the three jurisdictions.[32] Whereas, in Nigeria[33] and South Africa[34] ratification by the members is only a factor that the court must consider before granting leave, in the United Kingdom however, permission or leave to continue a claim must be refused where the cause of action has been ratified by the members.[35] The United Kingdom goes further to make ratifiability of the

[22]UK Companies Act 2006, s.263 (2).
[23]*Ibid* at, s.263 (3) (e).
[24]*Ibid* at s.263 (4).
[25]*Ibid* at s.263 (3) (f).
[26]CAMA, s.346.
[27]SA Companies Act 2006, s.165 (5) (b).
[28]The South African case of *Mbethe v United Manganese of Kalahari (Pty) Ltd* [2016] 5 SA 414 at para. 18, where the court maintained that the use of the word 'may' in s.165(5) of the SA Companies Act 2008, does not confer any discretion on the court with regards to granting leave but rather authorises the court to grant relief if the requirement of the subsection has been fulfilled. See c*ontra Mbethe v United Manganese of Kalahari (Pty) Ltd* [2017] ZASCA 67 at para.16,where the South African Supreme Court of Appeal opined that the court has discretionary powers under s.165(5), which is guided but not limited by the requirements of the Section. See also Brighton M. Mupangavanhu' Evolving Statutory Derivative Action Principles in South Africa: The Good Faith Criterion and Other Legal Grounds' [2021]65(2) *Journal of African Law* 293 at 302-303.
[29] CAMA, s.346 (2) (a); UK Companies Act 2006, s.261 (2; SA Companies Act 2008, s.165 (5) (b) (ii).
[30]*ibid* at s.346(2) (e); *ibid* at s.263(3)(a) ; *ibid* at s.165(5)(b)(i)respectively.
[31]*Ibid* at s.346 (2) (f); *Ibid* at s.263 (2) (a); *ibid* at s.165 (5) (b) (iii) respectively.
[32] The English case of *MacDougall v.Gardiner* [1875] 1 Ch.D 13.
[33] CAMA, s.348.
[34] SA Companies Act 2008, s.165 (14).
[35] UK Companies Act 2006, s.263 (2) (c).

cause of action, a factor which the court must consider before granting leave. [36] The concept of ratifiability of an action by members is also available in Nigeria[37] but however, does not exist in South Africa.[38] The problem of access to information however, appears to be present in all the jurisdictions. [39]

4.2 THE REQUIREMENT OF GOOD FAITH

4.2.1 STATUTORY PROVISIONS

An applicant who applies for leave to institute a derivative action in Nigeria is required to show that he is acting in good faith.[40] The position is the same in the South African jurisdiction.[41] In the case of the United Kingdom however, good faith is not a mandatory requirement but it is nonetheless, one of the factors the court must take into consideration in determining whether or not to grant permission to continue a derivative claim.[42]

4.2.2 MEANING & APPLICATION

4.2.2.1 The Fiduciary Concept

There appears to be no clear definition as to what constitutes good faith.[43] This perhaps can be attributed to the fact that it is assumed to be readily recognisable.[44]However, the notion of good faith in corporate law appears to have its root in the common law doctrine of fiduciary duties of directors which have now been codified; [45]and the common law derivative action.[46] The fiduciary doctrine is said to have been created at common law to disable persons who have been entrusted with the property of others from opportunistic self-

[36]*Ibid*.
[37]CAMA, s.348.
[38]SA Companies Act 2008, s.165.
[39]Maleka Femida Cassim, above n 2 at 139. See Arad Reisberg, above n 1 at 85.
[40]CAMA, s.346 (2) (e).
[41]SA Companies Act 2008, s.165 (5) (b). See Arad Reisberg, above n 1 at 115, to the effect that the requirement is almost universal.
[42]UK Companies Act 2006,s.263 (3) (a).See Andrew Keay and Joan Loughrey' Derivative Proceedings in a Brave New World for Company Management and Shareholders'[2010]3 *Journal of Business Law* 151 at 165.
[43]Maleka Femida Cassim, above n 2 at 37. See Brighton M. Mupangavanhu, above n 28 at 304.
[44]UK Law Commission, *Shareholders Remedies* No. 246 [1996], para. 6.76.
[45]Arad Reisberg, above n 1 at 116. See Maleka Femida Cassim, above n 2 at 38. See also CAMA, s.279 (1).
[46]Arad Reisberg, above n 1 at 101. See the English case of *Edwards v Halliwell* [1950] 2 All ER 1064, where it was maintained that a derivative action would be allowed where the wrongdoers who are perpetuating the fraud on the minority are the ones in control.

interests.[47] Thus, the fiduciary responsibility of the directors may be the plausible explanation for directors being regarded as trustees.[48]

4.2.2.2 Honesty, Reasonableness and Proper Purpose

Although, the fiduciary duty of good faith has been said to be practically indefinable,[49] attempts to describe it have often focused on the principles of honesty, reasonableness[50] and proper purpose.[51] It is therefore not surprising that the concept of good faith has sometimes been recognised as an action not made in bad faith.[52] The South African case of *Mbethe v United Manganese of Kalahari (Pty) Ltd*,[53] provides a good example of how bad faith can be used to demonstrate lack of good faith. In that case, the appellant was the chairman / director of the respondent company which was a major producer of manganese ore. The appellant introduced a company, Zastrospace- a mobile crushing and screening contractor to the respondent in order to boost its production and enable it to meet the demand of its customers. Later on, the Board of the respondent company cancelled the contract with Zastropace as a result of the decline in the demand for manganese ore. The appellant instituted an action against the respondent company seeking basically, to reinstate the contract with Zastropace. There was evidence before the trial court that Zastropace was a private investment vehicle of the appellant of which he was the main beneficiary; and exercised management control, contrary to his assertion that Zastropace was a company established to benefit the local community. The court did not hesitate in concluding that the action was not instituted in good faith owing to the bad faith of the appellant.

[47]Robert Flannigan 'The Adulteration of Fiduciary Doctrine In Corporate Law' [2006] 122 *Law Quarterly Review* 453.
[48]*Ibid*. See CAMA s. 309(1).See also James Edelman' When do Fiduciary Duties Arise?' [2010] 126 *Law Quarterly Review* 303 at 305, where the author maintains that the word 'fiduciary' means trust or confidence.
[49]Maleka Femida Cassim, above n 2 at 37. See Arad Reisberg, above n 1 at 116.
[50]Maleka Femida Cassim, above n 2 at 38. See Darren Subramanien 'Section 165(5) (b) of The Companies Act 71 of 2008: A Discussion of the Requirement of Good Faith' [2020] 6(2) *Journal of Corporate and Commercial Law & Practice* 212.
[51]Maleka Femida Cassim, above n 2 at 39. See James Edelman, above n 48 at 324.
[52]Maleka Femida Cassim, above n 2 at 41. See R.C Nolan 'Controlling Fiduciary Power' [2009] *Cambridge Law Journal* 293 at 296.
[53]Above n 28.

More importantly, the two principles for determining good faith which were established in the Australian case of *Swansson v R A Pratt Research Pty Ltd,* [54] the example of which was followed in the South African case of *Mouritzen v Greystone Enterprises (Pty) Ltd,* [55]formed the basis of the determination of the requirement of good faith in the decision of the case of *Mbethe v United Manganese of Kalahari (Pty) Ltd* at the trial court.[56]The first principle maintains that it must be established that the applicant has an honest and a reasonable belief that the company has a good cause of action; and that the case has a reasonable prospect of success. [57]Secondly, the applicant must be able to convince the court that he did not bring the action for any collateral purpose.[58] The requirement that the applicant must have an honest belief is an indication that good faith primarily resonates from a subjective state of mind or an honest conviction; and is therefore contextual.[59] The idea of the application of reasonableness is therefore welcomed in relation to good faith in order to infuse some objectivity into it since there must exist actions of the directors that cannot be said to be in good faith irrespective of the mind of the particular director involved or the context in which the action is taken.[60] It does appear however, that the objective test cannot be applied to the concept of good faith without recourse to an enquiry as to whether the director has acted in the best interests of the company.[61] This perhaps further compounds the problem of good faith as a distinct fiduciary duty.[62] In addition to this, it has been maintained that a reasonable person must also believe that the company has a valid cause of action in order to show that the derivative action is brought in good faith.[63] Accordingly,

[54][2002] 42 ACSR 13.
[55][2012] 5 SA 74. See Maleka Femida Cassim, above n 2 at 43.
[56]Above n 28. See Brighton M. Mupangavanhu, above n 28 at 305.
[57][2012] 5 SA 74.
[58]*Ibid*. See Andrew Keay and Joan Loughrey, above n 42 at 166. See Tshepo H Mongalo ' A Fair and Reasonable Proposal by The Board May Still Amount to Breach of Duty to Exercise Directors' Power for a Proper Purpose' [2019] 5(2) *Journal of Corporate & Commercial Law Practice* 29.
[59]Maleka Femida Cassim, above n 2 at 38. See Rosemary Teele Langford and Ian M.Ramsay 'Directors' Duty to Act in the Interests of the Company: Subjective or Objective?' [2015] *Cambridge Law Journal* 173 at 174.
[60]The English case of *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74. See the South African case of *R v Myers* [1948] 1 SA 375, where it was held that the absence of reasonable grounds for belief in the truth of what is stated may provide cogent evidence that there is no such belief.
[61]Farouk Hl Cassim,' The Duties And The Liability Of Directors' in Farouk Hl Cassim(ed), *Contemporary Company Law* (3rd edn, Juta, Cape Town 2021) 681 at 707. See Rosemary Teele Langford and Ian M.Ramsay, above n 59 at 174.
[62]Robert Flannigan, above n 47 at 453, where the author posits that directors have an agency duty to promote the interests of the corporation and a separate fiduciary duty to act without self- interests in the course of that agency.
[63]Maleka Femida Cassim, above n 2 at 38.

an applicant in a derivative action must be able to show that there is a serious question in issue to be tried in order to show that his action is brought in good faith.[64] These arguments appear to be on all fours with the first principle established in *Swanson's* case in which the applicant's honest belief must be based on the fact that there is a good cause of action and a good prospect of success.[65] Nevertheless, the existence of a triable cause of action with a reasonable prospect of success does not in any way mean that good faith will be presumed since good faith appears clearer in speech than in practical demonstration.[66]

Closely aligned to the objective test of reasonableness, is the concept of Proper Purpose which stipulates that a director must use his power for the purpose it was conferred and not for a collateral purpose.[67]Thus, a director who is exercising his duty of good faith by honestly doing what is in the best interests of the company but however, for a collateral purpose or ulterior motive will fall short of his fiduciary responsibility.[68] With regards to derivative actions, it has been argued that the proper purpose doctrine ensures that an application in a derivative action is aimed at protecting the legal interests of the company alone and not for any personal benefit or purpose, such as the typical 'strike suit.'[69]It should however be noted that lack of goodwill or the existence of malice may not necessarily mean that an applicant brought a derivative action for a collateral purpose.[70] In the same vein, the fact that an applicant has a personal interest or will receive a personal benefit from any relief that may be granted in respect of the action may not necessarily be interpreted to mean that the action has been brought for a collateral purpose. [71]Nonetheless, it is admitted that there is a close link between animosity, malice, self- interest and collateral purpose.[72] This means that each case would have to be decided on its merit.[73]

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[64]*Ibid* at 39.
[65]Above n 54.
[66]Arad Reisberg, above n 1 at 117.
[67]CAMA, s.279 (5). See Farouk Hl Cassim, above n 61 at 709. See also Maleka Femida Cassim, above n 2 at 40.
[68]R C Nolan, above n 52 at 298. See the English case of Hogg *v Cramphorn* Ltd [1967] Ch. 254, where the court maintained that an allotment of shares by the directors purporting to be an act in the best interests of the company in order to prevent a hostile Take Over bid, was an improper exercise of corporate power. See also Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003) 165.
[69]Maleka Femida Cassim, above n 2 at 39.
[70]*Ibid* at 45-46.
[71]*Ibid.*
[72]*Ibid* at 46.
[73]*Ibid*.

Meanwhile, the issue of collateral purpose was ably demonstrated in the English cases of *Konamaneni v Rolls –Royce Industrial Power (India) Ltd,*[74] and *Stimpson v Southern Landlords Association,*[75]where applications to institute derivative actions for the purpose of retaining control of the companies were held not to have been brought for proper purposes. The South African Supreme Court of Appeal in the case of *Mbethe v United Manganese of Kalahari (Pty) Ltd*[76]however, opined that unlike what obtains under Australian law as demonstrated by the case of *Swansson v R A Pratt Research Pty Ltd,* [77]there is no requirement under the South African law that an applicant in seeking to show that he acted in good faith must establish that there is no ulterior purpose.[78]The court therefore, maintained that proving the absence of an ulterior motive cannot be a self –standing requirement of the criterion of good faith.[79]

4.2.2.3 The Issue of Complicity

As a result of the complexity inherent in any attempt to determine what constitutes good faith, [80] other criteria have been applied other than honesty, reasonableness and proper purpose discussed above. Thus, in instances where an applicant has been found to be complicit or has acquiesced in the wrongdoing which culminated in the cause of action, he is deemed to not have acted in good faith.[81] However, this position may be altered where the action is seen to be in the best interests of the company.[82]Consequently, it has been argued that where an action is in the best interests of the company but in bad faith because the applicant participated in the wrongdoing or the action, the action should be deemed to have been brought for a collateral purpose; and the applicant should be denied leave but

[74][2002]1 BCLC 336.
[75][2010] BCC 387.
[76]Above n 28 at para. 11.
[77]Above n 54.
[78]Friedrich Hamadziripi 'Judicial Construction of The Requirement of Good Faith in Section 165(5) (b) of The Companies Act 71 of 2008: Mbethe v United Manganese of Kalahari' [2018] 4(2) *Journal of Corporate and Commercial Law & Practice* 74 at 84.
[79]*Ibid.*See Brighton M. Mupangavanhu, above n 28 at 305. See however, Maleka Femida Cassim, 'Shareholder Remedies and Minority Protection' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3rd edn, Juta, Cape Town 2021) 1015 at 1075, where the author argues that the decision of the High Court requiring honesty and lack of collateral purpose is preferable.
[80]Maleka Femida Cassim, above n 2 at 43.
[81]Arad Reisberg, above n 1 at 115.
[82]Andrew Keay and Joan Loughrey, above n 42 at 166.

that leave should be granted to another person who is qualified to bring the application.[83] This argument appears to be in line with the purpose of derivative actions, which is to protect the right of the company and not the personal interests of the applicant.[84] Thus, in those circumstances, the bad faith of an applicant should not be used to frustrate the interests of the company. [85]However, it is trite that denial of leave to an applicant only creates estoppel with regards to that particular applicant. The bad faith of a particular applicant cannot result in every application being deemed to have been brought in bad faith.[86] Every application for leave must therefore be considered on its own merit.[87] Nevertheless, denial of a leave application on grounds of the existence of a collateral purpose or participation in the wrongdoing may result in the company not being able to enforce a breach or wrongdoing since applications for leave are brought as a matter of right and not as a matter of duty.[88]Consequently, if no other applicant is willing and able financially to bring another application for leave, the court cannot make an order compelling any suitable applicant to do so.

4.2.2.4 The Doctrine of Clean Hands

In the common law derivative action, the equitable principle of clean hands was used to prevent an applicant with dirty hands from being able to sustain a derivative action.[89] The absence of clean hands appears to run counter to the honest motive required of a director under the common law concept of the fiduciary duties of directors.[90] This is because the concept is aimed primarily at preventing an applicant from benefitting from his dishonesty.[91] The doctrine of clean hands is adeptly illustrated in the famous English case of *Nurcombe v Nurcombe*[92] which followed the principle laid down in the earlier English case of Tower *v African Tug Company*.[93] In the case of *Tower*, two shareholders of the company who

[83]Maleka Femida Cassim, above n 2 at 44, 48.
[84]*Ibid*.
[85]*Ibid* at 48.
[86]*Ibid*.
[87]*Ibid*.
[88]CAMA, s.346 (1), where it is stipulated that an applicant 'may' apply for leave to bring an action in the name or on behalf of a company.
[89]Arad Reisberg, above n 1 at 101.
[90]The English case of *Cook v Deeks* [1916]1 AC 554.
[91]Maleka Femida Cassim, above n 2 at 50.
[92][1985] 1 WLR.
[93][1904] I Ch. 558.

received dividend illegally paid out of capital, sued on behalf of the company against the directors to recover the money illegally paid out as dividend. The court held that for as long as the shareholders were in possession of the money illegally paid as dividend, they could not sustain the action.[94] Meanwhile, Payne[95] argues that the behaviour of a plaintiff should only be relevant in a bipartite relationship such as between trustees and beneficiaries, where the plaintiff is enforcing his own personal rights and should not be relevant in a derivative action where the rights being enforced belong to the company.[96] Cassim however, maintains that the rejection of the doctrine of clean hands should not be interpreted to imply that applicants with dirty hands tainted as a result of collateral motives would be allowed to bring derivative actions.[97]

4.2.3 PROOF OF GOOD FAITH

Given the difficulty of arriving at a precise meaning of the concept of good faith as demonstrated earlier in this discourse, it appears that requiring an applicant to show proof of good faith would be an onerous task.[98] Therefore, it has been posited that good faith should be presumed except otherwise there is evidence of bad faith.[99] However, there are also suggestions that there should be no presumption of good faith under the law.[100] Be that as it may, the preponderance of opinions appears to be that the best way to prove good faith is to show that the application is meritorious and supportable.[101]

Another important issue is the threshold of the burden of proof placed on the applicant.[102] If the threshold of proof on the balance of probabilities is a low one, it means an applicant will not actually be required to prove the existence of good faith but will only be expected

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[94]*Ibid* at 558,567.
[95]Jennifer Payne ' ''Clean hands'' In Derivative Actions' [2002] 61 (1) *Cambridge Law Journal* 76.
[96]*Ibid* at 77.See Arad Reisberg, above n 1 at 215.
[97]Maleka Femida Cassim, above n 2 at 50. See Andrew Keay and Joan Loughrey, above n 42 at 168, to the effect that the doctrine of clean hands appears to be re-surfacing in statutory derivative actions.
[98]Maleka Femida Cassim, above n 2 at 51.
[99]*Ibid*. See Kunle Aina *'Current* Development In the law of Derivative Action In Nigerian Company Law' [2014] 1 *Babcock University Socio- Legal Journal* 49 at 67. See also Andrew Keay and Joan Loughrey, above n 42 at 169.
[100]Maleka Femida Cassim' Untangling The Requirement of Good Faith in the Derivative Action In Company Law (Part 2)' [2018] *Obiter* 602 at 614.
[101]*Ibid*. See Kunle Aina, above n 99 at 67. See also Arad Reisberg, above n 1 at 116.
[102]Maleka Femida Cassim, above n 2 at 51.

to demonstrate his good intention by circumstantial evidence. [103]This approach will give teeth to the provisions of the law with regards to derivative actions and make it less restrictive. [104] This appears to be the attitude of the South African Supreme Court of Appeal, in the case of *Mbethe v United Manganese of Kalahari (Pty) Ltd,* [105]where the court maintained that the absence of evidence showing that an action involves the trial of a serious question or that it is brought in the interests of the company is a strong proof of the absence of good faith by the plaintiff in a derivative action. [106]In Nigeria, however, it appears that the concept of the requirement of good faith has hardly been tested. This is because the few cases bordering on derivative suits have rarely been allowed to reach the stage of arguments on the requirements for application for leave as a result of controversies on technicalities regarding the mode of commencement of actions.[107]

4.2.4 PROBLEMS OF THE REQUIREMENT OF GOOD FAITH.

The most noticeable challenge of the requirement of good faith is that it is a concept that is hard to pin down.[108]For instance, although the decision of the South African Supreme Court of Appeal in the case of *Mbethe v United Manganese of Kalahari (Pty) Ltd,* [109]which maintained that the concept of good faith must be separated from the concept of ulterior purpose has been commended, it nonetheless failed to give any exact definition of the concept of good faith.[110]Consequently, in an attempt to define good faith, other issues such as malice, personal animosity; and the doctrine of Clean Hands have been put into consideration.[111] The indefinable quality of the requirement as maintained above has no doubt made it a complicated one.[112]

[103]*Ibid.*
[104]*Ibid*.
[105]Above n 28 at para. 22.
[106]Brighton M. Mupangavanhu, above n 28 at 307.
[107]The Nigerian case of *Agip Nig. Ltd v Agip Petroli International &Ors*. [2010] NWLR (Pt. 1187) 348. See the Nigerian case of *Ede v Central Bank of Nigeria* [2015] All FWLR 1113.
[108]Maleka Femida Cassim, above n 2 at 37.
[109]Above n 28.
[110]Friedrich Hamadziripi, above n 78 at 84.
[111]Arad Reisberg, above n 1 at 115.
[112]Maleka Femida Cassim, above n 2 at 37.

Secondly, by making the personal attributes of an applicant such as malice and financial interests[113] to be the determining factors in the decision whether or whether not to allow an applicant bring an action to protect the interests of the company, the requirement of good faith appears to be an affront to the corporate personality principle which maintains that a company is a legal entity distinct from its shareholders and by extension other stakeholders.[114] In particular, the recognition of the quantum of shareholding of the applicant in determining whether there is good faith,[115] appears to be a negation of the express requirement of the law which does not attach any quantum of shareholding to the right of a member of the company to bring a derivative action.[116] More importantly, it serves as a disincentive to the protection of the interests of minorities. And not only that, the inclusion of personal attributes to the requirements for granting leave has resulted in the process being construed at common law as being unpredictable and existing only at the pleasure of the courts.[117] It is posited that the retention of the requirement of good faith under the statutory derivative action regime can only help to reinforce that impression.

Thirdly, the common law fiduciary concept of the duties of directors has not only been codified under the various Companies Act in the Commonwealth jurisdictions but has also been used to unravel the concept of good faith under the statutory derivative action.[118]The implication of this is that despite the abolition of the common law derivative actions in countries like South Africa[119] and the United Kingdom,[120] recourse must be made to the common law in order to define the concept of good faith.[121]

Fourthly, there appears to be an overlap between the requirement of good faith and the other requirements of a serious question to be tried; and the best interests of the company. [122] Thus, it has been maintained that a serious cause of action is likely to be evidence of the

[113]The English case of *Harley Street Capital v Tchigirinsky (No 2)* [2005] EWHC 2471, where the court maintained that an applicant who had only 1 % of the shares of the company did not bring the action in good faith. See Brenda Hannigan, *Company Law* (4th edn, Oxford University Press, Oxford 2013)534.
[114]Andrew Keay & Joan Loughrey 'Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action under the Companies Act 2006' [2008]124 *Law Quarterly Review* 469 at 476.
[115]Kunle Aina, above n 99 at 64.
[116]CAMA, s.346.
[117]Andrew Keay & Joan Loughrey, above n 114 at 476.
[118]Maleka Femida Cassim, above n 2 at 38.
[119]*Ibid* at 6.
[120]Andrew Keay & Joan Loughrey, above n 114 at 469.
[121]Maleka Femida Cassim, above n 2 at 38.
[122]*Ibid* at 52.

existence of good faith.[123] This thesis maintains that while the South African Supreme Court of Appeal in the case of *Mbethe v United Manganese of Kalahari (Pty) Ltd* did not agree that an applicant was required to show that he had no ulterior motive in order to demonstrate that his action was brought in good faith, it nevertheless, accepted that the presence of ulterior motive is a pointer to the absence of the other criteria of serious question of material consequence to the company, and the best interests of the company[124]Also, in the English case of *Barrett v Duckett*,[125] the court posited that a derivative action instituted when no recovery could be made from the company was not in the best interests of the company and could not have been brought in good faith. In the South African case of *Mouritzen v Greystone Enterprises (Pty) Ltd,*[126] the court conflated the requirements of acting in good faith and acting in the best interests of the company.[127] However, in the South African case of *Mbethe v United Manganese of Kalahari (Pty) Ltd*,[128] the court opined that the requirements for obtaining leave in a derivative action was conjunctive, and as such, an applicant must prove each of the requirements. [129] Thus, it has been maintained that the requirements are not to be held in isolation.[130]

4.2.5 THE WAY FORWARD

Without doubt, if derivative actions in Nigeria are enabled to get to the stage of arguments on applications for leave, it is most likely to be fraught with arguments arising from the complexities regarding the definition of the concept of good faith and how to prove it.[131] Therefore, it does not appear that it is wise to retain the concept of good faith in the Nigerian jurisprudence against the backdrop of the need to encourage the institution of more derivative actions as a means of checkmating corporate governance infractions.[132] This

[123]Arad Reisberg, above n 1 at 126.
[124]Friedrich Hamadziripi, above n 78 at 79, 86.
[125][1995] 1 BCLC 243.
[126]Above n 55.
[127]Maleka Femida Cassim, above n 2 at 77, where the court was criticised for assuming that any action brought in good faith is automatically in the best interests of the company.
[128]Above n 28.
[129]Brighton M. Mupangavanhu, above n 28 at 301.
[130]*Ibid*.
[131]Arad Reisberg, above n 1 at 116.
[132]*Ibid* at 116-117, where the author maintains that the requirement of good faith is a theoretical device rather than a substantive standard.

position is supported by Aina,[133] who argues that the requirement of good faith constitutes an unnecessary clog in the wheel of derivative actions because the good faith of the applicant should not be material where an applicant is seeking to enforce a wrong done to the company, which the directors have refused to enforce. Aina[134] is also of the opinion that the requirement of good faith only creates an opportunity for the courts to shut out meritorious applications on mere grounds that they were not brought in good faith. This position is supported by the fact that it is not in all the Commonwealth jurisdictions that the requirement of good faith is mandatory.[135]

This thesis argues that since bad faith is much easier to prove than good faith as has been shown in this discourse,[136] the law in Nigeria should be amended to the effect that evidence of bad faith of the applicant shown by defendant should be taken into consideration in deciding whether or not to grant leave in derivative actions. [137]This approach will not only help to ensure that frivolous actions are discountenanced but will indirectly shift the burden of proof of good faith to the wrongdoers or the directors who have refused to take action against those who have wronged the company.[138]

4.3 THE REQUIREMENT OF BEST INTERESTS OF THE COMPANY

4.3.1 STATUTORY PROVISIONS

In Nigeria, in order to be granted leave, an applicant in a derivative action is required to show that the action appears to be in the best interest of the company.[139]However, in South Africa, in order to be granted leave, an applicant is required to show that the action is in the best interests of the company and not just that it appears to be in the best interests of the company. [140] These provisions are analogous to the provisions under the United Kingdom

[133]Kunle Aina, above n 99 at 67.
[134]*Ibid*.
[135]New Zealand Companies Act 1993, ss.165-168. See Ann.M.Scarlett 'Imitation or Improvement? The Evolution of Shareholder Derivative Litigation in the United States, United Kingdom, Canada and Australia' [2011] 28(3)*Arizona Journal of International & Comparative Law* 569,where it was observed that even though the term 'good faith ' appeared in early shareholder derivative cases, it has never served as basis for any reported court decision or finding.
[136]Maleka Femida Cassim, above n 2 at 51. See Derek French *et al*, *Mayson, French & Ryan on Company Law (*29th edn*,* Oxford, London 2012-2013)564.
[137]Andrew Keay & Joan Loughrey, above n 42 at 169.
[138]*Ibid*.
[139]CAMA, s.346 (2) (e).
[140]SA Companies Act 2008, s.165 (5) (b) (iii). See Maleka Femida Cassim, above n 2 at 78. See also Darren Subramanien ' A Discussion of the Requirements of a Trial of a Serious Question of Consequence and The Best

law, which stipulate that leave must be refused if the court is satisfied that a person whose duty it is to promote the success of the company under s.172 of the UK Companies Act 2006 would not take the action.[141] This is in addition to the fact that in the United Kingdom,even where the court is not obliged to refuse an application for leave, the court must take into account the importance that a person acting in accordance with s.172 of the UK Companies Act 2006, would attach to continuing the action.[142]

4.3.2 MEANING & APPLICATION

The term ' the best interests of the company' is traceable to the common law fiduciary duties of directors[143]which require that directors act in the best interests of the company as a whole.[144] The company in this context has been held to mean the shareholders as a whole including future shareholders, and not the company as a legal entity, distinct and separate from shareholders.[145] Reisberg argues that at common law, a derivative action is said to have been brought in the best interests of the company when the action has not been stage managed by a rival company to protect its own interests.[146] Since the company is a commercial enterprise whereby shareholders are investors, the directors are expected to protect not only the legal interests of the shareholders, but their commercial interests as well. Accordingly, directors acting in the best interests of the company are expected to preserve its assets, further its business and promote the purposes for which it was established.[147] This explains why with respect to derivative actions, an applicant can only be said to be acting in the best interests of the company if his claim is desirable on commercial grounds i.e. not a waste of the company's resources.[148] This position is confirmed by the United Kingdom provisions whereby acting in the best interests of the company is

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Interests of the Company as Contemplated in Section 165(5)(b) of the Companies Act 71 of 2008'[2020] 6(1) *Journal of Corporate and Commercial Law & Practice* 1.

[141]UK Companies Act 2006, s.263 (2) (a). See Andrew Keay & Joan Loughrey, above n 42 at 159.

[142]UK Companies Act 2006, s.263 (3) (b). See Brenda Hannigan, above n 113 at 546.

[143] It has however been argued that the fiduciary label which is a positive duty of directors propelled under the agency duty is only aimed at discouraging opportunism and ensuring that directors do not act in self –interest. See Robert Flanningan, above n 47 at 453.

[144]This duty has now been codified in different Statutes. See for example CAMA, s.305 (3).

[145]The English case of *Greenhalgh v Arderne Cinemas Ltd* [1950] 2 All ER 1120. See Jan Louis van Tonder' An Analysis of Directors Duty To Act In The Best Interests of The Company, Through The Lens of The Business Judgment Rule' [2015] 36(3) *Obiter* 702 at 721-722.

[146]Arad Resiberg, above n 1 at 118.

[147]CAMA, s.305 (3).

.[148]Maleka Femida Cassim, above n 2 at 75. See Derek French *et al*, above n 136 at 561.

concomitant with promoting the success of the company as stipulated under s.172 of the Companies Act 2006.[149]

Nevertheless, the term ' the best interests of the company' appears to be a very wide and open ended concept since it is a complete package aimed at ensuring that the total welfare of the company is preserved[150] by protecting it from any action which may be adverse to its legal, business and financial interests.[151]Cassim therefore, suggests significant factors that should be considered for the purpose of construing the term ' the best interest of the company' with respect to applications for leave to bring derivative actions as follows:[152]

The strength of the claim and its prospect of success; the costs of the proposed proceedings; the amount at stake, or the potential benefit to the company; the defendants' financial position and their ability to satisfy a judgment in favour of the company; the disruption of the company's business operations by having to focus on the litigation, including the diversion of the attention of the company's directors, management and employees; the potential damage to the reputation of the company with respect to its suppliers, customers and financiers; the adverse effect on the share price of the company; and the availability of alternative means of obtaining relief.

However, the factors enumerated above should not be interpreted to suggest that an applicant can only be granted leave where the benefits derivable from the litigation by the company outweigh the costs of the litigation.[153] This is because derivative actions are unarguably aimed at not only compensating the company for breach of duties but are also primarily a corporate governance tool for ensuring that companies are properly run and managed.[154]

[149]Andrew Keay & Joan Loughrey, above n 114 at 479. See Rosemary Teele Langford and Ian M.Ramsay, above n 59 at 175.
[150]Maleka Femida Cassim, above n 2 at 77.
[151]The English case of *Parke v Daily News* [1962] Ch.927.
[152]Maleka Femida Cassim, above n 2 at 76.
[153]*Ibid* at 82-83.
[154]*Ibid* at 83. See the Canadian case of *Richardson Greenshields of Canada Ltd v Kalmacoff* [1995]80 Ontario Appeal Cases 98.

4.3.3 PROOF OF THE REQUIREMENT OF BEST INTERESTS

Since the list of factors which constitute the best interests of the company is extensive and inclusive,[155] it appears that an applicant in a derivative action might be confronted with an uphill task of convincing the court that his application meets the requirements.[156]More importantly, it appears that an applicant would require insider information in order to be able to prove the material ingredients showing that the application is brought in the best interests of the company. For example, an applicant is able to sufficiently articulate the effect of the litigation on the business of the company or the defendants' financial position and ability to satisfy a judgment in favour of the company, if only he is a director or officer of the company.[157]This thesis argues that requiring an applicant to show proof of the material ingredients that an action is in the best interests of the company appears lopsided. This is because the information required is not likely to be at the disposal of the applicant.[158] Furthermore, even if it is argued that the company can be given Notice to produce the information, it is posited that the issues are better articulated by the company itself since the issues border more on the commerciality or welfare of the company.[159] Little wonder, the duty to act in the best interests of the company has been described as exceptionally vague, one-dimensional and disingenuous.[160]

The challenge of the requirement that a derivative action must be brought in the best interests of the company may have however,been whittled down in the United Kingdom, where the 'importance'[161] that a person e.g. a director, who has a duty to act in the best interests of the company would attach to the action is only required to be 'taken into account'[162] when making a decision as to whether or not to grant leave.[163] The UK provision is however without prejudice to the fact that the court is required to refuse leave if it is convinced that a person who has a duty to act in the best interests of the company would

[155]Maleka Femida Cassim, above n 2 at 76.
[156]For example, the Australian case of *Swanson v R A Pratt Research Pty Ltd*, above n 54, where the court maintained that in order to show that a derivative action application is in the best interests of the company, the applicants must give evidence of the character of the company; the business of the company; ability of the defendant to meet any judgment; and whether there are other alternative remedies.
[157]Maleka Femida Cassim, above n 2 at 76.
[158]*Ibid* at 23.
[159]*Ibid* at 77.
[160]James Edelman, above n 48 at 322.
[161]Emphasis mine.
[162]Emphasis mine.
[163]UK Companies Act 2006, s.263 (3) (b).

not pursue the action.[164] Nonetheless, the salient point is that it is what the director or officer of the company 'thinks'[165] is in the best interests of the company that is the focus of the court as opposed to the traditional approach of emphasis on the applicant showing that the application is brought in the best interests of the company.[166]

In Nigeria, the requirement of the law is that an applicant is required to show that it appears to be in the best interests of the company that the action be brought[167] as opposed to showing that the action is in the best interests of the company. [168] Cassim maintains that since in South Africa, an applicant in a derivative action is required to show that the action is in the best interest of the company, the standard of proof is that the applicant must show on a balance of probabilities that the application is in the best interests of the company as opposed to showing on a prima facie standard that the action is in the best interests of the company.[169] Cassim further argues that where the law requires the applicant to show that it appears to be in the best interests of the company, the standard of proof occasions a lower standard of proof.[170] This thesis argues based on Cassim's comment,[171] that the standard of proof required in Nigeria for an applicant to show that a derivative action is brought in the best interests of the company must be a lower threshold of proof since the law only requires an applicant to show that the action appears to be in the best interests of the company.[172]

4.3.4 PROBLEMS OF THE REQUIREMENT OF BEST INTERESTS

A fundamental problem of requiring an applicant to show that the action appears to be in the best interests of the company is the complex nature of the concept.[173]Thus, it has been maintained that the requirement should be that the applicant must show that it is in the best interests of the company that the action be instituted.[174] Unfortunately, the precise

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[164]*Ibid* at s. 263(2) (c).
[165]Emphasis mine.
[166]SA Companies Act 2008, s. 165(5) (b) (iii).
[167]CAMA, s.346 (2) (e).
[168]SA Companies Act 2008, s. 165(5) (b) (iii).
[169]Maleka Femida Cassim, above n 2 at 77. See Paul von Nessen *et al*'The Statutory Derivative Action: Now Showing Near You' [2008] *Journal of Business Law* 651.
[170]Maleka Femida Cassim, above n 2 at 78.
[171]*Ibid*.
[172]See CAMA, s. 346(2) (d).
[173]Paul L.Davies, Gower *And Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell, London 2008)609. See Joseph E.O.Abugu, *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers, Lagos 2014)601.
[174]Andrew Keay & Joan Loughrey above n 114 at 492.

meaning of the phrase 'interests of the company' is also not without problems since 'company' can mean shareholders, employees, creditors etc., depending on the circumstances[175] The intricacy of the requirement is even more profound considering the fact that it borders more on the commerciality or wellbeing of the company.[176] It therefore appears preposterous to reasonably expect an applicant to be able to discharge this obligation without difficulties.[177] It is posited that it would have been tidier for the law to have stipulated that a defendant company or defendant director is allowed in its or his defense respectively to show that pursuing the action is not in the best interests of the company.[178]

Another fundamental problem with regards to the requirement that the applicant must show that the action is in the best interests of the company is the overlap between this requirement ; the requirements of good faith;[179] and the requirement that there is a serious question to be tried. [180]Meanwhile, the problem associated with the overlap between the requirements of good faith and the best interests of the company may have resulted in the conflation of the two requirements in South Africa.[181] The conflation may be attributed to the adulteration of the fiduciary doctrine in corporate law due to the expansion of fiduciary obligations beyond the confines of controlling corporate opportunism.[182] Accordingly, all the duties of the directors are described as fiduciary obligations.[183] Flannigan, argues that fiduciary obligations were created under the common law in order to control the self-interests and opportunism of those charged with the control of other people's property.[184]Flannigan also maintains that the duty of directors to act in the best interests of the company is a responsibility which arises from the law of agency, which imposes a positive duty on agents to act in the best interests of their principals; and is therefore not a fiduciary duty.[185]Flanningan accepts that acting in self-interests without consent may resonate from

[175]Arad Reisberg, above n 1 at 119.
[176]A.J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, United Kingdom 2002)75.
[177]*Ibid*.
[178]*Ibid* at 76. See UK Law Commission, *Shareholder Remedies* (Report) No.246, [1997], para. 6. 77-6.79.
[179]Jan Louis van Tonder, above n 145 at 715. See SA Companies Act 2008, s.76 (3).
[180]*Swansson v R A Pratt Research Pty Ltd*, above n 54,where the court maintained that a good cause of action is required to prove good faith. See Maleka Femida Cassim, above n 2 at 41, 65.
[181]*Mouritzen v Greystone Enterprises (Pty) Ltd,* above n 55. See Maleka Femida Cassim, above n 2 at 75.
[182]Robert Flannigan, above n 47 at 449.
[183]*Ibid.*
[184]*Ibid* at 453.
[185]*Ibid.*

failure to act in the best interests of the company.[186] He however, posits that it is a fundamental error to conflate the duty not to act in self- interest (such as the fiduciary duty of good faith) with the agent's duty to act in the best interests of the company.[187]

Meanwhile, the problem of conflation of the requirement of good faith and the requirement of best interests of the company was vividly expressed in the South African case of Mouritzen *v Greystone Enterprises (Pty) Ltd*, [188]where the court pronounced that an applicant in a derivative action has the same fiduciary duties as the directors of the company, which entails acting in good faith and in the best interests of the company. However, the decision of the court in *Mouritzen* has been criticised for focusing only on the requirement of good faith to the detriment of the requirement of acting in the best interests of the company.[189] The court may have been misled into thinking that the requirement of good faith is synonymous with the requirement of best interests by assuming that where an applicant is seen to have acted in the best interests of the company, he should be deemed to have brought the derivative action application in good faith.[190] This thesis observes that this position does not seem to be applicable vice-versa, i.e. a person who is deemed to have brought an application in good faith cannot be deemed to have acted in the best interests of the company at all times. This is because while the requirement of good faith is primarily focused on the mind of the applicant, i.e. whether the intention is good or bad, [191]the requirement of acting in the best interests of the company is concerned with the effect of the litigation on the company. [192] In addition, since the company is the focus of derivative actions, where a claim is said to have been brought in the best interests of the company, it appears less innocuous to subsume the mind of an individual bringing the action, albeit on behalf of the company, into the interests of the company. On the other hand, it appears offensive to the corporate personality[193] principle if the good faith of an individual is deemed to be the best interests of a company.

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[186]*Ibid* at 454.
[187]*Ibid*.
[188]Above n 55.
[189]Maleka Femida Cassim, above n 2 at 77.
[190]Rosemary Teele Langford and Ian M.Ramsay, above n 59 at 173.
[191]Maleka Femida Cassim, above n 2 at 38.
[192]*Ibid* at 80. See Andrew Keay & Joan Loughrey, above n 114 at 492, to the effect that the personal qualities of the applicant is not relevant in determining whether an action was brought in the best interests of the company.
[193]See the South African case of *Sammel v President Brand Gold Mining* [1969] (3) SA 629 at 678.

Apart from the overlap between the requirements of good faith and the best interests of the company, the strength of the claim of the applicant or the requirement that there must be a serious question to be tried also overlaps with the requirement that the action should be in the best interests of the company, since it is impossible to argue that an action is in the best interests of a company in the absence of a serious cause of action.[194] It is also important to state that the qualification of the cause of action by the addition of the word 'serious'[195]appears to incorporate the non-legal components of the best interests requirement such as the benefit to be obtained from the litigation, the effect of the derivative action on the business of the company etc.[196] Consequently, every action that involves the trial of a serious question can be deemed to be in the best interests of the company and vice-versa. [197]

Another major problem associated with the requirement of acting in the best interests of the company is the rebuttable presumption available in some Commonwealth countries to the effect that where a company i.e. the Board of directors of a company has decided not to institute an action, the decision of the Board is presumed to be in the best interests of the company until the contrary is established.[198]This provision of the law clearly resounds from the principle of judicial non-interference, whereby the courts would not inquire into a validly made decision of the company, since the courts are not expected to be involved in the management of companies.[199] It is also parallel to the Business Judgment rule which protects directors from any liability arising from their reasonable and rational business decisions.[200] The Business Judgment rule also resonates from the position that directors are more competent in the making of commercial decisions than judges.[201]

Meanwhile, in South Africa, there is a rebuttable presumption in derivative proceedings involving third parties that the decision of the Board of directors to not bring, defend or discontinue an action was made in the best interests of the company.[202] However, not every

[194]Maleka Femida Cassim, above n 2 at 76.
[195]Emphasis mine.
[196]Maleka Femida Cassim, above n 2 at 76.
[197]*Ibid* at 75.
[198]SA Companies Act 2008, s.165 (7) (b). See Australian Corporations Act 2001,s. 236(3).See Lord Denning in *Wallersteiner v Moir*(*No.2)*[1975] 2 WLR 389 at 395, to the effect that the rule in *Foss v Harbottle* must be applied where a wrong has been done to third parties.
[199]The English case of *Burland v Earl* [1902] AC 83.
[200]SA Companies Act 2008, s.76 (4) (a) (iii).
[201]Maleka Femida Cassim, above n 2 at 104.
[202]SA Companies Act 2008, s.165 (7). See Ramani Naidoo, above n 6 at 96.

decision of the Board will create a rebuttable presumption. The South African Companies Act 2008 prescribes certain conditions that must be fulfilled with regards to participation in the decision of the Board in order for the rebuttable presumption provisions to apply. Accordingly, section 165(7) (c) stipulates that all the directors who participated in the decision must have acted in good faith for a proper purpose; did not have any personal financial interest in the decision or are not in any way related to any person who had any personal financial interest in the decision; informed themselves about the subject matter of the decision to the extent that they reasonably believed it to be appropriate; and reasonably believed that the decision was in the best interests of the company.

Meanwhile,the rebuttable presumption provisions have been linked with the Business Judgment rule as contained in section 76(4) (a) (iii) of the South African Companies Act 2008.[203] The inclusion of the element of good faith into the rebuttable presumption provisions in South Africa, appears therefore to be justified on the ground that good faith is a critical element of the Business Judgment rule in the United States, from where it originates.[204] Although, good faith and proper purpose are not specifically mentioned in the Business judgment rule in South Africa,[205] it is posited that the requirement that the director 'must have a rational basis for believing and did believe',[206] appears to suggest some element of good faith. [207]

Similarly, in the United Kingdom, the court must take into consideration whether the company has decided to not pursue the claim in deciding whether or not to grant permission to continue the claim.[208]The difference between the South African provisions[209] and the United Kingdom provisions is that the latter [210] appears on the surface to stand on its own, and thus, not directly linked with the requirement of acting in the best interests of the company since there is no rebuttable presumption stated in the law that a decision of the

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[203]Maleka Femida Cassim, above n 2 at 105. See Friedrich Hamadziripi, Patrick C.Osode 'The Nature and Revolution of The Business Judgment Rule and its Transplantation to South Africa under the Companies Act of 2008' [2019] 33(1) *Speculum Juris* 26 at 37. See also Jan Louis van Tonder, above n 145 at 711.

[204]Maleka Femida Cassim, above n 2 at 106. See however, SA Companies Act 2008, s.76 (4) (a) (3). See also Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003) 159.

[205]Maleka Femida Cassim, above n 2 at 105.

[206]Emphasis mine.

[207]Maleka Femida Cassim, above n 2 at 38.

[208]UK Companies Act 2006, s.263 (3) (e). See Derek French *et al*, above n 136 at 561.

[209]SA Companies Act 2008, s.165 (7) (b).

[210]UK Companies Act 2006, s.263 (3) (e).

company to not institute an action to remedy the wrongdoing is in the best interests of the company. However, inference can be drawn from the common law principle of judicial non-interference;[211] and the provisions of the Companies Act,[212] that a recognition of the decision of the company to not sue takes its root from the perspective of the law, of the need to defer to the decision of the persons who are charged with the responsibility of promoting the best interests of the company.[213] Although, the Business Judgment rule is not applicable in the United Kingdom,[214] and the court is not bound to agree with the decision of the company, the fact that the company is mandated to take into consideration the decision of the company to not sue, no doubt, bears a striking resemblance to the Business Judgment rule in which the honest and reasonable decision of the Board of directors are held to be sacrosanct; and in the best interests of the company.[215] In Nigeria, there appears to be no rebuttable presumption that the directors have acted in the best interests of the company. The Business Judgment rule also appears not to be applicable. However, CAMA provides that where the Board of directors is acting in good faith and with due diligence in accordance with the powers conferred on them under CAMA, or under the Articles, they shall not be bound to obey the instructions of members in the general meeting except otherwise provided by the Articles. [216]

What this means is that although the default organ of management is the Board of directors, [217]the members in the general meeting may be allowed to give directions for the management of the company in the absence of good faith and due diligence by the Board. Thus, the Board of directors is presumed to be acting in the best interests of the company if it exercises its powers under the law in good faith and due diligence. If this interpretation is correct, it can be argued that there is some semblance of the Business Judgment rule under CAMA. For instance, although, section 87(4) of CAMA does not border on derivative actions, it appears to give an indication that there is a connection between the concept of good faith and acting in the best interests of the company. More importantly, it is posited that it is more

[211]*Burland v Earl*, above n 199. See Alan Dignam, John Lowry, *Company Law* (7th edn, Oxford, London 2012)187.
[212]UK Companies Act 2006, s.263 (3) (b).
[213]*Ibid*. See Jennifer Payne 'A Re- Examination of Ratification' [1999] 58(3) *Cambridge Law Journal* 604 at 615.
[214]Farouk Hl Cassim, above n 61 at 759, where the author remarks that the US-style Business Judgment rule has been applied in the United States for over 160 years but rejected in Commonwealth countries like the United Kingdom.
[215]Maleka Femida Cassim, above n 2 at 105.
[216]CAMA.s.87 (4).
[217]*Ibid* at s.87 (3).

difficult for a derivative action to be sustained where the Board is presumed to be acting in the best interests of the company. There is no doubt that the rebuttable presumption in South Africa; [218]and deference to the decision of the company to not sue in the United Kingdom,[219] make it more difficult for an applicant to be granted leave to institute derivative actions in those jurisdictions. However,the case of South Africa is even more regrettable because directors are included in the definition of 'third party' since they are by definition not related parties.[220] This means that the rebuttable presumption will be applicable in proceedings by the company against its wrongdoing directors.[221] Furthermore, the rebuttable presumption and its patent link with the Business Judgment rule in South Africa re-affirms the problem of the overlap between the concept of good faith and best interests.[222] The semblances of the Business Judgment rule in the United Kingdom and Nigeria as maintained above also give credence to the allusion.

4.3.5 THE WAY FOWARD

There is ample evidence that in the United Kingdom[223] and South Africa[224] cases abound where the requirement that an applicant must act in the best interests of the company in derivative actions has been applied. However, it appears that the requirement of acting in the best interests of the company with regards to application for leave in derivative actions is yet to be tested in Nigeria. Nevertheless, this thesis postulates that because of the many problems associated with the requirement of acting in the best interests of the company as explained above, the best interest's requirement should be expunged from the requirements of applying for leave to institute derivative actions in Nigeria. Since the best interests requirement is one of the fiduciary duties of directors under the law;[225] and also involves good decisions to litigate which are evaluated on commercial basis, but which the applicants in derivative actions are unlikely to possess,[226] it is hereby suggested that the

[218]SA Companies Act 2008, s.165 (7).
[219]UK Companies Act 2006, s.263 (3) (b).
[220]SA Companies Act 2008,s.2(1).
[221]Maleka Femida Cassim, above n 2 at 109.
[222]*Ibid* at 51.
[223]The English cases of *Franbar Holdings Ltd v Patel* [2008] EWHC 1534; *Wishart v Castlecroft Securities Ltd* [2009] CSIH 65.
[224]*Mouritzen v Greystone Enterprises (Pty) Ltd*, above n 55.
[225]CAMA, s.305 (3).
[226]Maleka Femida Cassim, above n 2 at 104.

defendant directors and the company are better able to use the concept of acting in the best interests of the company as a defense to any claim against them.[227] It is therefore proposed that the law in Nigeria regarding the best interest's requirement in derivative actions should be amended such that the court must take into consideration the evidence given by the company to the effect that the decision of the company to not litigate is in the best interests of the company.[228] It is posited that this approach removes from the applicant in a derivative action the burden of having to prove that the derivative action litigation is in the best interests of the company and places the burden of showing to the court that the decision to not litigate is in the best interests of the company, on the company itself.[229] This thesis also observes that the requirement of an action being in the best interests of the company as a condition precedent for granting leave to institute derivative action is not universally applicable in the Commonwealth countries. For instance, in New Zealand, the issue of best interests of the company is only one of the factors the court is required to consider before granting leave to institute a derivative action.[230]

4.4 THE REQUIREMENT OF THE TRIAL OF A SERIOUS QUESTION

4.4.1 STATUTORY PROVISIONS

The requirement that there must be a serious question to be tried appears to cut across most of the Commonwealth countries. Its uniqueness is perhaps more evident by the fact that different captions are used for this requirement in the Companies legislations of those countries.[231]For instance in Australia[232] and South Africa[233] an applicant must show that the proposed or continuing proceedings involve respectively, a serious question to be tried; and the trial of a serious question of material consequence to the company before being allowed to bring or continue with any derivative action proceedings. However, a perfunctory look at the provisions of CAMA would appear to suggest that this requirement is not one of the

[227]CAMA, s.87 (4).
[228]Kunle Aina, above n 99 at 66.
[229]UK Companies Act 2006, s.261 (3) (a), which allows the court to give directions as to the evidence to be provided by a company in a derivative action litigation.
[230]New Zealand Companies Act 1993,s 165(3). See Maleka Femida Cassim, above n 2 at 78.
[231]Australia Corporations Act 2001, s. 237(2) (d), which stipulates that there must be a serious question to be tried. See New Zealand Companies Act 1993,s 165(2) (a), where the court is mandated to have regard to the likelihood of the proceedings succeeding.
[232]Australian Corporations Act 2001, s.237 (2) (d).
[233]SA Companies 2008, s.165 (5) (b) (ii). See Darren Subramanie, above n 140.

conditions for obtaining leave to institute derivative actions in Nigeria.[234] Nonetheless, it can be deduced from the requirement that the notice of demand to be given to the company by a prospective applicant must contain not only a factual basis for the claim but the actual or potential damage caused to the company, that the applicant must be able to demonstrate that there is a serious question to be tried in order to sustain the action.[235] It is regrettable that this appeared also to be the situation under the Old CAMA, where the existence of the requirement could only be deduced from section 303(2) (a), which mandated the court to not grant any leave to institute or intervene with respect to derivative actions except otherwise the court is satisfied that ''the wrongdoers are the directors who are in control, and will not take 'necessary action.' ''[236] This thesis posits that the fact that an applicant was required to show that there is a necessary action under the Old CAMA ,implies that he was expected to show that there is a serious question affecting the company which must be brought before the court. In spite of the fact that there are no express stipulations under both the Old CAMA and CAMA regarding the requirement of a serious question to be tried, it appears that the situation is better under CAMA going by the requirements regarding the content of the Notice of Demand which an applicant is required to give to the company which stipulates that the notice must contain a factual basis for the claim and the actual or potential damage caused to the company.[237]

However, Nigeria is not alone in not having an expressly stated requirement of a serious question to be tried. In Commonwealth countries like the United Kingdom,[238] New Zealand[239] and Canada[240] there are also no specific mention of the requirement of a serious question to be tried. [241]However, the courts in the United Kingdom,[242] relying on the stipulation that a person acting in accordance with section 172(duty to promote the success

[234]CAMA, s.347.The provisions of CAMA in relation to derivative actions appear to have been borrowed from Canadian legislations which have no separate requirement to the effect that an Applicant must show that there is a serious question to be tried. See Canada Business Corporations Act 1985, s.239 (2). See also Ontario Business Corporations Act 1990, s.246 (2).
[235]CAMA, s.346 (2) (d).
[236]Emphasis mine. See Joseph E.O.Abugu, above n 173 at 599.
[237]CAMA, s.346 (2) (d).
[238]UK Companies Act 2006, s.263.
[239]New Zealand Companies Act 1993, s.165 (2) (a).
[240]Ontario Business Corporations Act 1990, s.239 (2) (c).
[241]Maleka Femida Cassim, above n 2 at 68-69.
[242]The English cases of Iesini *v Westrip Holdings Ltd* [2010] BCC 420; *Stainer v Lee* [2010] EWHC 1539(Ch).

of the company) would not seek to continue the claim;[243] and the importance that a person acting in accordance with section 172(duty to promote the success of the company) would attach to continue the claim,[244] have maintained that they must at that stage enquire into the strength of the claim.[245] This thesis maintains that the requirement that an applicant must show that the claim is strong, is comparable to demonstrating that the claim is serious and not vexatious i.e. there is a serious question to be tried. [246] In New Zealand, where the court is required to consider the likelihood of the proceedings succeeding,[247] the courts have interpreted the phrase 'the likelihood of success' to be parallel to the requirement of a serious question to be tried.[248] The situation in New Zealand appears similar to the situation in Canada where the judges have used the statutory requirement that a derivative claim must be in the best interests of the company[249] to determine if there is any serious question to be tried.[250]

It appears therefore, that through judicial activism, it is possible for the courts in Nigeria to impute the requirement of evidence of a serious question to be tried as a condition for granting leave to institute derivative actions, since there is a clear provision in CAMA requiring an applicant in a derivative action to show that his application is in the best interests of the company. [251] However, it is difficult to be so optimistic given the fact that the concept of application for leave to institute derivative actions is yet to be developed in Nigeria. Moreover, it is posited that this approach if accepted would further compound the problem of the overlap of the requirements.[252] Thus, in line with the objective of seeking a clearer and more comprehensive derivative action framework in Nigeria, this thesis argues that the requirement of showing that there is a serious question to be tried should be expressly stipulated in CAMA.

[243]UK Companies Act 2006, s.263 (2).
[244]*Ibid* at s. 263(3).
[245]Daniel Lightman, above n 15 at 54.
[246]Andrew Keay and Joan Loughrey, above n 42 at 158.
[247]New Zealand Companies Act 1993, s.165 (2) (a).
[248]The New Zealand case of Vrij *v Boyle* [1995]3 NZLR 763.
[249]Canada Business Corporations Act 1985, s.239 (2) (b).
[250]Maleka Femida Cassim, above n 2 at 68-69.
[251]Canada Business Corporations Act 1985, s.239 (2) (c).
[252]Maleka Femida Cassim, above n 2 at 51.

4.4.2 MEANING AND APPLICATION

The requirement of a serious question to be tried is not peculiar to derivative actions. Interim and interlocutory applications in civil procedure in which applications are brought to maintain status quo, pending the determination of the facts at the trial,[253] are awash with interpretations of the meaning of the phrase' serious question to be tried'.[254] Be that as it may, it is posited that there can be only one meaning of the phrase 'question to be tried,' and which is that there is a cause of action to be tried. [255]The concept of the cause of action in derivative actions has been discussed earlier in Chapter Three. However, the fact that the cause of action' is to be tried' suggests that it is not 'actually being tried 'at the time of the application for leave.[256] Thus, it is suggested that the application for leave should not be turned into mini- trials where the applicant is required to give such evidence.[257] In support of this view, Cassim[258] argues that the South African Companies Act ought to have required that an applicant in a derivative action must show that there is a 'serious question to be tried 'as opposed to showing evidence that there is a 'trial of a serious question.' This argument rests upon the rational that the word' trial' at the beginning of the phrase.'- Trial of a serious question' appears to give the impression that the applicant, at the stage of applying for leave is required to show evidence as required in the substantive trial of the case.[259]

However, the restriction of the phrase 'question to be tried' by the addition of the word 'serious' also implies that it is not every cause of action that would meet the requirement for leave.[260] Thus, a derivative action application must not be frivolous or vexatious.[261] This

[253]The Nigerian cases of *Oduntan v General Oil Limited* [1995] 4 NWLR 1 at 13; *Kotoye v CBN* [1989] 1NWLR (Pt.98) 419. See the English case of *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396; the South African case of *Nchabeleng v Phasha*(3) SA 578. However, interim and interlocutory injunctions are temporary and discretionary. See American *Cyanamid v Ethicon Ltd*, above n 253 at 405.Applications for leave are on the other hand final applications and not interim applications. See also Andrew Keay and Joan Loughrey, above n 42 at 154.

[254]Maleka Femida Cassim, above n 2 at 64.

[255]*Ibid* at 67.

[256]*Oduntan v General Oil Limited*, above n 253, where the court maintained as follows: 'since the respondent had established that there is a substantial issue to be tried at the hearing, it is not necessary to determine his legal right to the claim since at that stage there can be no determination, because the case is yet to be tried on the merits.

[257]Daniel Lightman, above n 15 at 54.

[258]Maleka Femida Cassim, above n 2 at 64.

[259]*Ibid*.

[260]UK Companies Act 2008, s.266 (2), to the effect that in Scotland, an application for leave must specify the cause of action, and summarise the facts on which the derivative proceedings are to be based.

[261]Maleka Femida Cassim, above n 2 at 63.

also means that the application must not be speculative, but must allude to particular issues bordering on legal rights that have been breached by showing evidence to convince the court of the validity of the claim.[262]

In South Africa, the question to be tried is not only required to be serious, it must also be of 'material consequence' to the company.[263] This appears to be a surplus addition since the word 'material' seems to refer to the amount of recovery likely to be made from the action.[264] It is posited that the issue of the amount to be recovered properly belongs to the class of whether the action is in the best interests of the company.[265] However, it has been argued that the significance of the requirement that an application for leave in a derivative action must be of material consequence to the company, is that it will help to prevent frivolous actions being brought for a small amount of potential recovery, veiled in collateral motives[266] Nevertheless, while the inclusion of this requirement by the South African legislature may have been well intended, it is tainted with the challenge of limiting the requirement of a serious question to be tried by the amount to be recovered. [267] This argument is adroitly supported by the statement of Lewison J in the English case of Stainer *v Lee* as follows:[268]

> "If the case seems very strong, it may be appropriate to continue it even if the level of recovery is not so large, since such a claim stands a good chance of provoking an early settlement or may indeed qualify for a summary judgment. On the other hand, it may be in the interest of the company to continue even a less strong case if the amount of potential recovery is very large."[269]

More importantly, the stringent requirement that a leave application must be of material consequence may lead to the court having to conduct a trial 'within trial' in order to determine a preliminary issue. [270]In any case, this approach does not seem to augur well with the objective of this thesis which is the liberalising of derivative actions by removing

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[262]*Ibid* at 65. A similar condition exists with regards to making Demand on a Company as discussed earlier in Chapter Three.
[263]SA Companies Act 2008, s.165 (5) (b) (ii).
[264]Maleka Femida Cassim, above n 2 at 65.
[265]*Ibid*.
[266]*Ibid*. See Paul L.Davies, above n 173 at 609.
[267]Maleka Femida Cassim, above n 2 at 65.
[268]Above n 242 at 29.
[269]Daniel Lightman, above n 15 at 54.
[270]*Ibid.*

the obstacles or hindrances to its effectiveness.[271]Consequently,this thesis prefers the position in Australia where the law stipulates that the applicant in a derivative action must show that there is a serious question to be tried;[272] and accordingly, proposes an amendment of the law in Nigeria in that direction.

4.4.3 PROOF OF A SERIOUS QUESTION TO BE TRIED

As earlier stated, the requirement of a serious question to be tried is also required in interlocutory proceedings in civil actions.[273] Having said that, this thesis will apart from the decisions in derivative actions refer to the burden of proof in those proceedings. However, the problem with the burden of proof in interlocutory proceedings is the requirement of showing evidence that there is a prima facie case which is likely to entail a trial within a trial.[274] Meanwhile, in the case of *Prudential Assurance v Newman Industries Ltd &Ors. (No 2)*,[275]the English court, opined that in order for an applicant to maintain a prima facie case before proceeding with the action, he must show (i), that the company is entitled to the relief claimed and (ii),that the action falls within the proper boundaries of the exception to the rule in *Foss v Harbottle*. This clearly shows that the burden of proof under the common law derivative action may be lower than what is required at interlocutory proceedings, where the applicant is required to show the strength of the case with evidence of not less than 50% chance of success.[276] Nonetheless, there is evidence to the fact that the courts may have relaxed the burden of proof required in interlocutory proceedings. For instance, in the Nigerian case of Kotoye *v C.B.N,*[277] the Supreme Court in departing from earlier decisions which required the plaintiff to show a strong *prima facie case*[278]in interlocutory proceedings relied on the English case of *American Cyanamid Co. v Ethicon Ltd,*[279] and held that all that the applicant is required to show is that there is a real possibility and not a

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[271]*Ibid* at 55.See Maleka Femida Cassim, above n 2 at 71, where the author argues for a low and lenient threshold with respect to the requirement of the trial of a serious question in South Africa.
[272]Australian Corporations Act 2001, s.237 (2) (d).
[273]Maleka Femida Cassim, above n 2 at 63. See Helena H. Stoop 'The Derivative Action Provision in The Companies Act 71 of 2008' [2012] 129 *The South African Law Journal* 527 at 547.
[274]Andrew Keay and Joan Loughrey, above n 114 at 481. See Anil Hargovani 'Under Judicial and Legislative Attack: The Rule in *Foss v Harbottle*' [1996] 113 *The South African Law Journal* 631 at 645.
[275][1982] 1 All ER 355 at 366.
[276]Andrew Keay & Joan Loughrey, above n 114 at 481.
[277][1989] 1 NWLR (Pt. 98) 419 at 441.
[278]The English case of *Harman Pictures N.V v. Osborne* [1967]1 WLR 723.
[279]Above n 253.

probability of success at the trial.[280] Interestingly, the South African case of *Nchabeleng v Phasha*[281] in deciding that the requirement of a serious question to be tried does not necessitate a mini-trial also relied on the *American Cyanamid* case.[282]

In the United Kingdom, where the procedure for application for leave to institute a derivative action is divided into two stages, an applicant is required at the first stage to show that the cause of action discloses a prima facie case.[283] However, with regards to the second stage, it can be deduced from the provisions of the law that the applicant is required to only show evidence of a cause of action.[284] Thus, in the derivative action case of *Iesini v Westrip Holdings Ltd*,[285] although the English court held that at the second stage of the application to continue a derivative claim, the claimant needs to go beyond the first stage of establishing a prima facie case, it also maintained that the application at that stage must not be turned into a mini- trial.[286]

It is obvious from the pronouncements of the courts, that the burden of proof required from the court to show that there is a trial of a serious question to be tried is a lower threshold that is aimed at just ensuring that the application is not vexatious or frivolous.[287] More importantly, the threshold is lower than what is expected at the trial of the case. [288]Thus, the application stage should not be turned into a trial within a trial.[289] This position appears to be properly captured in Australia where it has been established that all that is required to show that there is a serious question to be tried, is a greater than zero percent chance of success.[290] This thesis maintains that this approach would be well suited for Nigeria, particularly because there is no express requirement that the applicant must show that there is a prima facie case.[291]

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[280]The English case of *Fanmailuk.com Ltd v Cooper* [2008] BCC 877.
[281][1998] (3) SA 578.
[282]Maleka Femida Cassim, above n 2 at 64.
[283]UK Companies Act 2006, s.261 (2).
[284]*Ibid* at s.263. See Andrew Keay & Joan Loughrey, above n 114 at 482.
[285][2010] BCC 420.
[286]Daniel Lightman, above n 15 at 54.
[287]Maleka Femida Cassim, above n 2 at 71.
[288]*Ibid*.
[289]Daniel Lightman, above n 15 at 71.
[290]Andrew Keay & Joan Loughrey, above n 114 at 481.
[291]Maleka Femida Cassim, above n 2 at 64.

4.4.4 PROBLEMS OF THE REQUIREMENT OF THE TRIAL OF A SERIOUS QUESTION

One of the problems of the test of a serious question to be tried is that it overlaps with the requirements of good faith[292] and best interests of the company. [293]This thesis has shown earlier that good faith is a concept incapable of precise definition but is however easier to demonstrate through evidence of bad faith.[294] However, evidence of the existence of a serious question to be tried is likely to negate the presence of bad faith in an application for leave.[295]It has also been shown in this chapter that one of the significant factors for demonstrating that the requirement of showing that an application is in the best interests of the company is the strength of the claim and its prospects of success.[296] This is synonymous with the requirement of a serious question to be tried.[297]

Another problem associated with the requirement of a serious question to be tried is that in the process of showing to the court that there is a serious cause of action, there is a tendency that the leave application may be turned into a full blown trial.[298] This concern has been expressed severally by judges in many cases.[299] The courts in the United Kingdom[300] have sometimes opined that an applicant in a derivative action does not have any burden to proof that any of the requirements exists since the court reserves the right to refuse an application if it is convinced that the requirements for obtaining leave are absent. Nonetheless, it appears that the ideal of being brief with regards to leave applications has been observed more in theory than in practice.[301] For instance, it is said that the English case of *Iesini v Westrip Holdings Ltd*[302]came close to a mini- trial despite the proclamation by the judge that leave applications in derivative actions should not delve into full details of the cases, as if to

[292]*Ibid* at 38.
[293]*Ibid* at 65.
[294]James Edelman, above n 48 at 323.
[295]*Mouritzen v Greystone Enterprises (Pty) Ltd*, above n 55.
[296]Maleka Femida Cassim, above n 2 at 70, 81.
[297]*Ibid*.
[298]*Ibid* at 71.See Andrew Keay & Joan Loughrey, above n 114 at 481.
[299]The English cases *Prudential Assurance v Newman Industries Ltd &Ors.(No 2),* above n 275;*Fanmailuk.com Ltd v Cooper,* above n 280. See the South African case of *Nchabeleng v Phasha*, above n 253.
[300]The Scottish case of *Wishart v Castlecroft Securities Ltd*, above n 223. See *Stainer v Lee*, above n 242, where the English court remarked that the UK Companies Act 2006,s.263(3) &(4), does not stipulate any standard of proof which an applicant must comply with but only sets out a range of factors which the court must consider before making a decision whether or not to grant leave. See also New Zealand Companies Act 1993,s.165(2), where the court is mandated to have regard to certain factors in deciding whether to grant applications for leave in derivative actions.
[301]Daniel Lightman, above n 15 at 54.
[302]Above n 242.

say the substantive suits were before the court. The judge admitted however, that there were several rounds of written evidence, several exhibits and days of legal arguments in the case.[303]Unfortunately, this scenario is not peculiar to the United Kingdom. It appears that in Canada, leave applications are far from being brief and economical.[304] As a matter of fact they have become quite complicated and require extensive and elaborate evidence.[305] Although, this requirement has not been tested in Nigeria, it is likely to be a cause of concern. Going by the history of leave applications in Nigeria, it is not unlikely that the determination of the requirement might be complicated by not only mini-trials but also appeals against the rulings of the courts.[306]

4.4.5 THE WAY FORWARD

This thesis maintains that the challenge of turning leave applications into mini- trials is not limited to the requirement of a serious question to be tried.[307] This position resonates from the fact that an applicant in a derivative action is also required to show proof of other requirements such as that the action is brought in good faith and is in the best interests of the company as earlier discussed. [308]However, it is admitted that the problem of turning leave applications into mini –trials may echo more in the requirement that there must be a serious question to be tried not only because the phrase refers to 'trial' but because the requirement is hinged on ensuring that there is a cause of action which is serious enough to merit the application being granted.[309] It is important to state that proof of whether the cause of action is serious may also entail the applicant demonstrating that the action is in good faith and in the best interests of the company as a result of the overlap between the requirements.[310]Nevertheless, since the requirements for obtaining leave are

[303]See Daniel Lightman, above n 15 at 54.
[304]Maleka Femida Cassim, above n 2 at 64.
[305]W.Kaplan & B Elwood' The Derivative Action: A Shareholder's'' Bleak House''?'[2003] 36 *University of British Columbia Law Review* 459 at 460- 461.
[306]Eghobamien O'*Agip Nig.Ltd v Agip Petrolii International & Ors- The Triumph of Form over Substance* available at http; // greymile.word press.
[307]Paul von Nessen *et al*, above n 169 at 647, to the effect that the requirement of good faith was dropped in Hong Kong at the Bills Committee stage in order to meet the need to set a meaningfully low requirement to prevent the application for leave from becoming 'a trial within a trial'.
[308]CAMA, s.346 (1).
[309]Maleka Femida Cassim, above n 2 at 71.
[310]*Ibid* at 51.

conjunctive,[311]proof of a serious question to be tried will not absolve the applicant of the burden of showing that the other requirements of good faith and best interests exist independently from the requirement that there is a serious question to be tried. [312] However, it would be unreasonable to insist that the requirements must be construed to be isolated from each other.[313] Be that as it may, it is posited that neither a conjunctive view nor a disjunctive view is sufficient to resolve the problem of leave applications being turned into mini- trials. Therefore, this thesis makes the following suggestions:

That in line with the position earlier maintained in this thesis, the requirements that an applicant in a derivative action must show that his action is brought in good faith and in the best interests of the company should be expunged from the law in Nigeria, but that the defendants should be allowed to defend a derivative action by showing lack of good faith by the applicant; and that the action was not instituted in the best interests of the company. [314]Consequently, it is argued that only the requirement that there is a serious question to be tried should be retained. This position is taken based on the fact that the requirement of a serious question to be tried appears less challenging since it focuses on the cause of action[315] as opposed to the requirement of good faith which delves into the intention or morality of the person bringing the action;[316] and the requirement of the best interests of the company which borders on assessing whether the application is well intended or profitable to the company.[317]

In any case, since there is an overlap between the requirements, an applicant who is burdened with the responsibility of demonstrating that his cause of action is serious may invariably have to show that the action has not been brought in bad faith; and also that the action will be beneficial to the company. [318]More importantly, this thesis opines that having the requirement of a serious question to be tried as the sole requirement will bring simplicity to the process of leave applications since the complexities inherent in the other

[311]*Ibid* at 77.
[312]Brighton M. Mupangavanhu, above n 28 at 301.
[313]*Ibid*.
[314]Maleka Femida Cassim, above n 2 at 51, where the author suggests for example, that good faith should be presumed unless there is evidence to the contrary.
[315]*Ibid* at 71.
[316]*Ibid* at 38.
[317]Helena H. Stoop, above n 273 at 547.
[318]Maleka Femida Cassim, above n 2 at 47.

requirements would have been avoided.[319] The resultant effect is likely to be that the challenge of leave applications becoming mini-trials will become past tense.[320]

It is important to state that the above proposition is given against the background as explained hereafter.Firstly,the issue of evaluating the case of an applicant before proceeding to the substantive derivative action arose as a consequence of the need for the applicant to be indemnified for the cost of the action.[321] Secondly, it was only in 1981 that the English case of *Prudential* [322] established that the issue of a shareholder's standing to sue had to be settled as a preliminary matter.[323] The advantage of reference to this background is that it clearly demonstrates that it is possible to have derivative actions without a preliminary stage proceeding. The position taken by this thesis in proposing that only the requirement of a serious question to be tried should be retained in leave applicationss, is therefore a middle course between abolishing the requirement for leave in its entirety and retaining its inherent complications.

4.5 REQUIREMENTS FOR APPLICATION FOR LEAVE FOR INTERVENTIONS IN EXISTING DERIVATIVE ACTIONS APPLICATIONS

Generally,there appears to be three instances whereby a derivative action may be commenced or intervened in with respect to existing applications. Firstly, a derivative action application may be made to enable an existing action instituted by the company to be continued as a derivative claim.[324] Secondly, a derivative action may be instituted to continue a derivative claim brought by another person.[325]Thirdly, an application may be made to intervene in a derivative action in order to discontinue or settle the action.[326]

4.5.1 PROSECUTING / DEFENDING A CORPORATE ACTION AS A DERIVATIVE ACTION

The provisions of the law allowing an applicant to intervene in existing actions instituted by the company is a useful tool in corporate governance for ensuring that directors pursue

[319]*Ibid* at 37.
[320]*Ibid* at 62.
[321]Daniel Lightman, above n 15 at 63. See Paul von Nessen *et al*, above n 169 at 657. It will be seen later in Chapter Six, that indemnification does not provide any incentive to institute derivative actions.
[322]Above n 275 at 221.
[323]Andrew Keay and Joan Loughrey, above n 114 at 476.
[324]UK Companies Act 2006, s.262 (1). See Paul. L.Davies, above n 173 at 621.
[325]SA Companies Act 2008, s.165 (12).
[326]*Ibid* at s.165 (15).

corporate claims correctly.[327] For instance, stakeholders may be granted leave to obtain a remedy for the benefit of the company where the directors have not adequately protected the interests of the company despite the fact that they have initiated an action in order to be presumed to be acting in its interests.[328]

In Nigeria, an applicant is required to apply for leave to intervene in existing applications. [329] Since there are no special conditions stipulated for interventions in derivative actions, it means that the applicant is only expected to meet the conditions for leave as stipulated in fresh applications.[330] However, the United Kingdom specifically provides that a member may apply to pursue a claim brought by the company as a derivative action in the following circumstances: if the manner in which the company commenced or continued the claim amounts to an abuse of the process of the court; if the company has failed to prosecute the claim diligently; if it is appropriate for the member to continue the claim as a derivative claim.[331] It is submitted that these requirements are commendable since they are specific and would therefore, likely to be more effective to filter the real motives of the applicant in order to ensure that they conform to good corporate governance. Nonetheless, it is equally provided in the United Kingdom that an applicant intending to take over a corporate action as a derivative action must also be subject to the general requirements applicable for leave to institute derivative actions. [332] It is submitted that while requiring an applicant to comply with the general requirements for leave may appear reasonable in the United Kingdom, it may not be quite plausible in Nigeria where there is a requirement that an applicant must give reasonable demand to the directors to institute a derivative action,[333] since in the instant case, the directors have already instituted the action. It is maintained that the existence of a litigation with respect to the cause of action, which the applicant only wants to take over, somewhat lends credence to the court's right to assume that all the

[327]Maleka Femida Cassim, above n 79 at 1091.
[328]Daniel Lightman, above n 15 at 61. See Maleka Femida Cassim, above n 2 at 17, 21.
[329]CAMA, s.346 (1).
[330]CAMA, s.346 (2).
[331]UK Companies Act 2006, s.262 (2). See P.L.Davies, above n 173 at 621.See also Robin Hollington, *Hollington on Shareholders' Right* (7th edn, Sweet and Maxwell, United Kingdom 2013)180, to the effect that a shareholder who sincerely desires to obtain remedy for the company will be refused leave to bring a fresh action if there is an existing action with respect to the cause of action.
[332]G.Morse, *Palmer's Company Law* (vol. 1 Thomas Reuters, London 2009) 8240/1.
[333]CAMA, s.346 (2) (b).

requirements for instituting a derivative action are likely to be in place i.e. that there is a serious cause of action.[334] This position is supported by the fact that one of the requirements stipulates that the court should only grant leave where it considers it appropriate for the member desiring to take over the case to so do.[335] Nonetheless, it is submitted that since interventions into existing derivative action applications have peculiar objectives they are supposed to achieve,[336]it is imperative to make specific provisions for them as is the practice in the United Kingdom.[337]Accordingly, this thesis argues that CAMA should be amended to provide for clear cut provisions for the taking over of corporate claims as derivative actions; and to also stipulate the conditions under which this type of derivative action may be instituted. It is suggested that takeover of a corporate action as a derivative action may be allowed by the court in any of the circumstances as follows: if the manner in which the company commenced or continued the claim amounts to an abuse of the process of the court; if the company has failed to prosecute the claim diligently; if it is appropriate for the member to continue the claim as a derivative claim.[338]

It is observed that CAMA not only stipulates that derivative actions can be instituted or intervened in, in order to not only prosecute but also to defend a corporate action being handled by the directors.[339] It is remarkable that the Nigerian provision appears to be broader than the English provision in this respect because the latter focuses solely on an applicant taking over or prosecuting a claim brought by the company.[340] Thus, the idea of bringing a derivative action in order to defend an action instituted against the company does not seem to be in the contemplation of the United Kingdom jurisprudence.[341] This position appears to be the same in South Africa where derivative actions are aimed at bringing or prosecuting legal proceedings on behalf of the company.[342] However, the South African Companies Act does not specifically make any provisions for the taking over of existing corporate actions by applicants in a derivative action. [343]Nonetheless, it cannot be denied

[334]G.Morse, above n 332.
[335]UK Companies Act 2006, s.262 (2).
[336]Maleka Femida Cassim, above n 79 at 1091.
[337]UK Companies Act 2006, s.262 (2).
[338]*Ibid*.
[339]CAMA, s. 346(2) (b).
[340]UK Companies Act 2006, s.262 (1).
[341]*Ibid*, where derivative action is defined with respect to a cause of action vested in the company which is being pursued by some other person on behalf of the company.
[342]SA Companies Act 2008, s.165.
[343]*Ibid*.

that it is not impossible for directors in breach of their fiduciary duties to not properly defend a claim against the company to protect their own interests.[344]Thus, the directors may file a defence to an action in court, in order to prevent a derivative action from being instituted; or to settle the matter on terms favourable to their interests.[345]

4.5.2 SUBSTITUTING AN APPLICANT IN A DERIVATIVE ACTION

The provision enabling an applicant in a derivative action to be substituted for another applicant who was originally granted leave to bring a derivative action is important in corporate governance [346] and can be used to prevent abuses of derivative actions in the following circumstances: Firstly, where wrong doing directors may use a person qualified to bring a derivative action to institute a spurious derivative action as a mere formality in order to frustrate the institution of a genuine derivative action that will check mate their wrong doing.[347] Secondly, to frustrate a ploy by any person who has no genuine intention to protect the interests of the company to prevent another person who is also qualified from bringing the derivative action. [348]Thirdly, to enable another person to take over a derivative action from a person who has become incapacitated either physically or legally.[349] Fourthly, to facilitate the diligent prosecution of derivative actions.[350]

The South African Companies Act[351] and the United Kingdom Companies Act [352] make clear provisions whereby an applicant in a derivative action may be substituted upon the application of another applicant who is also qualified.[353] Meanwhile, CAMA is not clear on the issue of derivative actions being brought through the substitution of an applicant.[354] However, since an applicant is allowed to intervene in an action in which the company is a

[344]Maleka Femida Cassim, above n 79 at 1091.
[345]Paul.L.Davies, above n 173 at 621, where the author admitted that allowing a person to take over a litigation instituted by a company in order to continue it as a derivative action may only resolve part of the problem.
[346]Maleka Femida Cassim, above n 79 at 1091.
[347]*Ibid* at 25.
[348]Daniel Lightman, above n 15 at 61.
[349]*Ibid* at 62.See A.J.Boyle, above n 176 at 82.
[350]Paul .L.Davies, above n 173 at 621. See Robin Hollington, above n 331 at 180.
[351]SA Companies Act 2008, s.165 (12).
[352]UK Companies Act 2006, s.264 (1).
[353]SA Companies Act 2008, s.165 (2); UK Companies Act 2006, s.264 (2).
[354]CAMA, s.346 (1).

party, it can be merely deduced that substituting an applicant in a derivative action exists in the Nigerian derivative action jurisprudence.[355]

The United Kingdom Companies Act identifies three situations where an application may be brought to continue a derivative claim brought by another member as follows: [356](a) where a derivative claim has been brought by a claimant; (b) where a claimant has continued as a derivative claim, a claim brought by the company; (c) where a claimant has continued a derivative claim i.e. where the claimant has continued a derivative claim brought by another person. The grounds upon which an application would be granted[357] are the same as obtains when an application is made to continue a claim brought by the company as a derivative claim.[358] In the case of South Africa, an applicant is required to show as follows:[359] that he is acting in good faith; [360]and that it is appropriate to make the order in all the circumstances.[361] However, while in the United Kingdom, the applicant is exempted from the general requirements for leave,[362] this does not appear to be the same in South Africa where the applicant can only apply to continue the proceedings after making a demand, and after compliance with the general requirements for obtaining leave to institute derivative actions.[363] Curiously, in the South African Companies Act, an order for substitution in a derivative action has a retroactive effect, and this appears to be contradicting the need to obtain fresh leave. This is because the grant of leave[364] is deemed to have been made in favour of the substituting person; and where proceedings have already been brought by the person originally granted leave, it also deems the substituted person as having brought the proceedings or made the intervention.[365]In any case, the requirements specifically stipulated for the substitution of an applicant are comparable with the requirements for a

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[355]*Ibid.*
[356]UK Companies Act 2006, s.264 (1).See Paul.L.Davies, above n 173 at 621.
[357]UK Companies Act 2006.s.264 (2).
[358]*Ibid* at s.262 (2).
[359]SA Companies Act 2008, s.165 (12).
[360]*Ibid* at s.165 (12) (a). This provision is analogous with the UK Companies Act 2006, s.264(2)(a)(b). It is posited that where the proceedings have been conducted in a manner that is an abuse of the process of the court or with lack of diligence, the Applicant can justify his application to take over the derivative proceedings as being in good faith.
[361]SA Companies Act 2008. s.165 (12) (b). This is on all fours with the UK Companies Act 2006, s.264 (2) (c).
[362]UK Companies Act 2006,s.263(1).See Paul L.Davies and Sarah Worthington, *Gower Principles of Modern Company Law* (10th edn, Sweet & Maxwell, London 2016) 605-606.
[363]SA Companies Act 2008, s.165 (5).
[364]In the context in which it is used, refers to grant of leave at the time of commencement of the derivative action.
[365]SA Companies Act 2008, s.165 (5), s165 (13).

fresh applications for leave.[366] It is submitted that the position in the UK is preferable to the position in South Africa because in the latter jurisdiction, the distinction between the conditions for fresh applications for leave and applications for the substitution of an applicant is partial, since the applicant is still expected to comply with the requirements applicable to fresh applications for leave. [367] It is therefore suggested that CAMA should be amended to make specific provisions for substituting an applicant in a derivative action in line with the United Kingdom provisions which do not require the applicant to meet the requirements for leave as applicable in fresh derivative action applications.[368] Thus, the suggestions made in this thesis with respect to conditions for substituting an applicant in a derivative action are on all fours with the suggestions proffered for taking over a corporate claim as a derivative action.[369]

More materially, it is posited that an amendment of the law streamlining the requirements for leave to only requiring the applicant to show that there is a serious question to be tried makes it unnecessary for a person applying to substitute an applicant in a derivative action, to fulfill the requirements of fresh applications for leave. This is because the requirement that there is a serious question to be tried[370] is an objective one, which is not personal to the person who was earlier granted leave.[371]

4.5.3 DISCONTINUANCE/ SETTLEMENT OF ACTIONS.

The idea of voluntary settlements of actions has always been welcomed in civil actions. [372]However, settlements of derivative actions appear to be an exception because of the requirement of judicial supervision.[373] On the surface, the requirement of judicial supervision may be linked with the fact that the initiation of derivative actions are done subject to judicial control and as such any discontinuance or settlement should be subject

[366]*Ibid* at s.165 (12).
[367]*Ibid*.
[368]Paul .L.Davies, above n 173 at 620-621.
[369]Above n 338.
[370]SA Companies Act 2008, s.165 (5) (b) (ii).
[371]Compare with the subjective requirement of good faith as stipulated under SA Companies Act 2008, s.165 (12) (a).
[372]Leo Herzel, Laura D. Richman,' Delaware's Preeminence by Design' in R. Franklin Balotti and Jesse A. Finkelstein (eds), *The Delaware Law of Corporations and Business Organisations* (vol.1 Law and Business Incorporated, New Jersey 1986) 666.
[373]*Ibid.*

to control in the same vein.[374] More importantly, the primary concern in discontinuance and settlement of actions has always been the control and prevention of frivolous and vexatious suits popularly known as 'strike suits' and 'green mail' which are instituted to not redress any wrong done to the company but to harass the management of the company for personal and opportunistic gains .[375] This scenario is parallel to the mischief which other interventions in derivative actions already discussed above are aimed at curbing.[376] In addition, because there is every likelihood that the opportunists may collude with the management of the company to settle or discontinue a derivative action to the detriment of the company, there is the need to also have judicial control of this kind of intervention because of its potential threat to proper corporate governance.[377] The problem of secret settlements or collusion is however not limited to 'strike suits' or 'green mail' because the wrongdoing directors may equally succeed in harassing or pressuring an applicant to not diligently pursue a derivative action brought or intervened in by him in exchange for a bribe or other personal gains that may form the background or motivation of a settlement or discontinuance.[378]

The reasons stated above may support the argument that judicial control of settlements of actions in derivative actions must be limited to situations where there is evidence of lack of diligent prosecution such as, that the claim does not proceed to trial[379] because to maintain otherwise would be tantamount to frustrating amicable resolution of disputes, particularly under the Alternative Dispute Resolution mechanism. Consequently, CAMA, s. 349 stipulates that an action brought or intervened in under CAMA, s. 346 shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court on such terms as the court deems fit for the purpose of discontinuing an action in which the company is a party.[380]It is interesting to note that judicial control of discontinuance of actions in derivative proceedings in Nigeria is not limited to fresh

[374]Maleka Femida Cassim, above n 2 at 33, where the author alluded to the fact that derivative actions in South Africa are subject to a dual screening mechanism by the Committee of Independent Directors and the Courts, in accordance with US and Commonwealth Model respectively. See Ramani Naidoo, above n 6 at 96.
[375]Maleka Femida Cassim, above n 79 at 1093. See Paul L.Davies and Sarah Worthington, above n 362 at 608.
[376]Above n 331.
[377]A.J. Boyle, above n 176 at 41, 82.See Carsten A.Paul 'Derivative Actions under English and German Corporate Law' [2010] *European Company and Financial Law Review* 81 at 91.
[378]Daniel Lightman, above n 15 at 59. See James H.Shnell 'A Procedural Treatment of Derivative Suit Dismissals by Minority Directors' [1981] 69 C*alifornia Law Review* 885 at 903.
[379]Maleka Femida Cassim, above n 79 at 1094.
[380]CAMA, s.346 (1).

applications but also extends to cases where there have been interventions.[381] However, it is regrettable that there are no specific conditions stipulated for discontinuance of actions. Nonetheless, by a combined reading of CAMA, ss.346 (1) & 346(2), discontinuance or settlement of derivative actions is subject to the general conditions attached to applications for leave as applicable during commencement. It is however submitted that only two of the criteria of application for leave are compatible with respect to applications for discontinuance. These criteria are the requirements of good faith;[382] and best interests of the company.[383] The criterion which require the applicant to give reasonable notice to the directors [384] does not appear to match the concept of discontinuance. This criterion seems to aim primarily at motivating the directors to exercise their statutory duties of protecting the interests of the company so that there may be no need for instituting a derivative action by any other person.[385] Therefore, the idea of the requirement of giving reasonable notice to the directors for the purpose of discontinuance of derivative actions on grounds of lack of diligent prosecution may appear faulty particularly since the directors are not in control of the litigation. [386] It is also posited that the requirement of a serious question to be tried i.e. that there must be a factual basis for the claim and actual or potential damage caused to the company, [387]is only applicable in order for a derivative action to continue and therefore, not appropriate for settlement and discontinuance. More importantly, it is posited that for the purpose of lucidity, it is important for CAMA to separate the concept of stay, discontinuance and settlement of derivative actions from the provisions of CAMA, s.346, which border on the requirements for obtaining leave to institute derivative actions because they are particularly more concerned with the commencement of derivative actions.[388]This argument is ably supported by the South African Companies Act which simplifies the concept of control of settlement of derivative actions as follows: [389]

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[381]*Ibid*.
[382]*Ibid* at s.346 (2) (e).
[383]*Ibid* at s.346 (2) (f).
[384]*Ibid* at s.346 (2) (b).
[385]Motunrayo.O.Egbe' Global Trends in Statutory Derivative Actions: Lessons For Nigeria' [2013] 12 *Nigerian Law & Practice Journal* 51 at 63.
[386]CAMA, s.349.
[387]*Ibid*.
[388]In addition, CAMA, s.346, differs from CAMA, s.349, in the sense that while the former is concerned about discontinuance of actions, the latter refers to stay, discontinuance or settlement.
[389]SA Companies Act 2008, s. 165(15).

''Proceedings brought or intervened in with leave under this section must not be discontinued, compromised or settled without the leave of court.''

There is no similar provision under the United Kingdom Law with respect to derivative claims brought under Part 11 of the Companies Act 2006. [390]However, there is provision for discontinuance or settlement of actions for the purpose of derivative claims brought in respect of unauthorised donations or expenditure.[391]

In the case of Delaware, several guidelines have been used by the courts to determine judicial approval of settlements of derivative actions.[392]The focal point of the Delaware courts in exercising their oversight functions has been to determine whether the terms of settlement are fair, reasonable, and adequate when compared with the probable recovery at the trial.[393] This thesis suggests that these requirements should be incorporated into the Companies Proceedings rules in Nigeria, [394]as guidelines to be followed by the courts for the purpose of discontinuance of derivative actions.

In addition to control of discontinuance of derivative actions by judicial approval, it is also required in Delaware that notice must be given to shareholders. [395] Notice to shareholders may however be waived where dismissal or compromise is without prejudice or is with prejudice to the plaintiff alone.[396] Thus, notice to shareholders will be waived where there is evidence that no compensation in any form has passed directly or indirectly to the plaintiff or his attorney; and that no such promise has been made.[397] This thesis observes that the requirement in Delaware that notice be given to shareholders before judicial approval can be obtained is justified on the premise that only shareholders can bring derivative actions in that jurisdiction.[398] In view of the fact that parties to derivative actions are not limited to shareholders under CAMA,[399] this thesis argues that Notice to shareholders should only be required when a shareholder brings a derivative action on behalf of himself and other

[390]Daniel Lightman, above n 15 at 59.
[391]UK Companies Act 2006, s.371 (5).
[392]Leo Herzel, Laura D. Richman, above n 372 at 667. See James H.Shnell, above n 378 at 393.
[393]Leo Herzel, Laura D. Richman, above n 372 at 666.
[394]Old CAMA, Chapter C 20.
[395]Delaware Chancery Court, rule 23.1.
[396]*Ibid*.
[397]*Ibid*.
[398]James H.Shnell, above n 378 at 903-904.
[399]CAMA, s.352.

shareholders. Thus, where the applicant is a director or any other applicant, notice to shareholders should not be required.

4.6. OTHER FACTORS TO BE CONSIDERED

4.6.1 AUTHORISATION BY THE COMPANY

In the United Kingdom, there is a provision that the court must refuse an application to institute a derivative action, where the cause of action arises from an act or omission that is yet to occur and the act or omission has been authorised by the company. [400] In addition, even where the court is not required to refuse an application, the court must consider or rather take into account, where the cause of action involves an act or omission that is yet to occur, whether the action could be authorised by the company;[401] and the likelihood of the action[402] being authorised by the company.[403] These conditions strongly suggest deference to the opinion of the management of the company in the course of derivative actions.[404] It is therefore suggested that the provisions should not be left unqualified or unchecked since that would mean that derivative actions would not be sustained where the court is mandated to refuse an application for permission to continue a claim[405] and might be jeopardised where the court is mandated to have regard to certain circumstances before granting permission.[406] The court should therefore inquire into whether the decisions of the directors to authorise the action or the likelihood of the directors authorising what the plaintiff is complaining about is in breach of the directors' fiduciary duties to the company. [407]Furthermore, the court must evaluate the reasons adduced by the company for authorising the wrongdoing.[408]

It is observed that the requirement of authorisation by the company is not available in both the Nigerian[409] and South African[410] Companies legislations, and other Commonwealth

[400]UK Companies Act 2006, s.263 (2) (b).See Derek French *et.al*, above n 136 at 562.
[401]See *Cook v Deeks*, above n 90, where the directors diverted the company's contract to themselves, and it was held to be illegal.
[402]Emphasis mine.
[403]UK Companies Act 2006, s.263 (3) (c).
[404]Derek French *et.al*, above n 136 at 562.
[405]UK Companies Act 2006, s.263 (2) (b).
[406]*Ibid* at s.263 (3) (c).
[407]Maleka Femida Cassim, above n 2 at 118.
[408]Daniel Lightman, above n 15 at 57.
[409]CAMA, s.346.
[410]SA Companies Act 2008, s.165.

Companies Legislations.[411] Likewise,this thesis will not advocate the adoption of this requirement into the Nigerian derivative action sphere because the issue of authorisation or its likelihood is largely going to be controversial as currently obtains in the issue of ratification.[412] It is posited that the problem of what is authorisable or not authorisable is likely going to dominate the derivative action space resulting in uncertainty and increase in the length of time for derivative actions. [413]

4.6.2 DECISION BY THE COMPANY TO NOT PURSUE THE CLAIM

The issue of authorisation by the directors appears to be closely related to another issue of whether the company in a general meeting has decided to not pursue the claim.[414] The difference is that the requirement of authorisation is grounded on events or wrongdoing that are yet to occur[415] while the latter is likely to arise after the wrong has been done to the company. Also, there is no issue of speculation as to whether the company may or may not decide to pursue the claim in the latter case as obtains under the authorisation scenario where the likelihood of authorisation must be considered.[416] It is also observed that the effect of considering the decision of the company to not sue is greater than ratification since it places an embargo on any derivative action application whether ratifiable or not ratifiable.[417] This thesis maintains that since it may be very difficult to obtain the actual view of members of public companies with widespread shareholding, it is better that the courts should not take this factor into consideration in the case of public companies.[418] It is also posited that even in the case of private companies; and public companies which do not have widespread ownership, it is important for the sake of good corporate governance to ensure that self- interested members are not allowed to participate in the decision to not pursue the claim. [419]

[411]Australian Corporations Act 2001,s 238(2).
[412]The English case of *Pender v Lushington*[1877] 6 Ch.D 70.
[413]Jennifer Payne, above n 213 at 604. See Arad Reisberg, above n 1 at 155.
[414]UK Companies Act 2006, s.263 (2) (e).See Paul L.Davies, above n 173 at 619.
[415]UK Companies Act 2006, s.263 (2) (b) & (3) (c).
[416]Evidence of the likelihood of the company authorising a breach of the company's right might be subjective and is likely to be very controversial.
[417]A.J Boyle, above n 176 at 78.
[418]*Ibid*. See Maleka Femida Cassim, above n 2 at 133.
[419]UK Companies Act 2006, s.263 (4). See Maleka Femida Cassim,above n 2 at 133.

It is observed that there is no express provision under CAMA mandating the court to consider the issue of whether the company has decided to not pursue a claim in the process of leave applications. Nonetheless, the issue appears to fall within the scope of whether or not an action is in the best interests of the company, which is one of the requirements in leave applications.[420] However, since it has been posited in this thesis that the defendant company should be allowed to maintain that an action is not in the best interests of the company, [421]it appears that the defendant may be able to argue that the company has not been able to pursue the claim because it is not in the best interests of the company.

4.6.3 RATIFICATION

At common law, ratification or ratifiability of an action by the majority of the members precludes a derivative action from being sustained.[422] This means that the common law derivative action retains the majority rule principle, in which the courts would not interfere where an irregularity that has been condoned or approved by the majority of the members.[423] Apart from shutting out some breaches of corporate rights from being remedied, a major problem of the common law derivative action is being able to decipher the wrongs that are ratifiable from the wrongs that are not ratifiable.[424] What appears to be clear is that if the nature of the transaction involves fraud or misappropriation of property the action cannot be ratified.[425] However, in the seminal case of *Prudential Assurance Ltd v. Newman Industries Ltd (No.2)*, [426]the English court was persuaded that all fraud can be ratified provided the shareholders did not use their voting powers to ratify the

[420]Maleka Femida Cassim, above n 2 at 82.
[421]Kunle Aina, above n 99 at 66.
[422]*Cook v Deeks*,above n 90. See Maleka Femida Cassim, above n 2 at 132.
[423]*MacDougall v.Gardiner*,above n 32.
[424]*Ibid*, where the decision of a chairman to refuse a request for a poll in breach of the Articles, was held to be a mere irregularity which the company could ratify. Compare with *Pender v Lushington*,above n 412, where the refusal of the chairman to recognise the votes attached to shares was held to be illegal, being against the personal rights of the shareholder,and was therefore not capable of being ratified by the company. See Andrew Keay 'Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act' [2006] 16 (1) *Journal of Corporate Law Studies* 39 at 52.
[425]W' Derivative Actions and Foss v Harbottle' [1981] 44(2) *Modern Law Review* 202 at 206.See Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003) 169. It has also been maintained that ratification will not be permitted where it might lead to unfair prejudicial conduct by the majority. See Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (3rd edn, Lexis Nexis, Durban 2016) 209.
[426]Above n 275.

transaction.[427]It is however not settled whether ratification should be based on the nature of the transaction [428]or the nature of the ratification. [429]Unfortunately, the problem of the common law derivative action with regards to ratification has now been carried over to the statutory derivative action regime in Commonwealth countries like Nigeria,[430] South Africa[431] and the United Kingdom.[432]However, in Nigeria[433] and South Africa,[434] ratification or approval by the members is not a barrier to instituting a derivative action in the sense that it may only be taken into account in deciding whether or not to grant leave and in making other orders.[435]However, it is submitted that despite the use of the word 'May' in the legislations, the intention of the legislatures is that the opinion of the members must be considered by the court while deciding whether or not to grant leave.

In the United Kingdom, ratification by shareholders is a complete bar to derivative actions in the sense that an application for leave with respect to an action that has been ratified by the members must be refused by the court.[436] However, ratifiability of an action by the company in the United Kingdom may only be considered by the court in deciding to either grant or withhold leave and does not extend to final judgments.[437]In the case of Nigeria, while ratification of an act or wrongdoing does not prevent an applicant from instituting a derivative action, it may be taken into consideration both with respect to applications for leave and for final judgment and orders.[438] With regards to a breach of duty which may be

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[427]*Ibid*. See David Kershaw' The Rule in *Foss v Harbottle* is Dead: Long Live the Rule in *Foss v Harbottle'* [2015] 3 *Journal of Business Law* 274 at 287.

[428]K.W. Wedderburn' Shareholders' Rights and the Rule in Foss v. Harbottle' (continued) [1958] 16(1) *Cambridge Law Journal* 93 at 96.

[429]Derek French *et al*, above n 136 at 562.

[430]CAMA, s.348.

[431]SA Companies Act 2008, s.165 (14).

[432]UK Companies Act 2006, s.263 (2) (c).See A.J Boyle, above n 176 at 77.

[433]CAMA, s.348, to the effect that ratification by shareholders may be considered with respect to applications for leave under CAMA, s.346; and also when making final orders under CAMA, s.347.

[434]SA Companies Act 2008,s.165(14),to the effect that ratification by the members may be taken into account not only with respect to leave applications but with respect to final judgments and any order of the court.

[435]This posture finds justification in the idea that ratification does not preclude the company from suing the wrongdoer to obtain damages on account of any infraction. See Ramani Naidoo, above n 425 at 209. See also Maleka Femida Cassim,above n 2 at 133, where the author maintains that because of this provision there is no longer any need to rely on the obscure distinctions between ratifiable and non ratifiable actions or on the elusive concepts of fraud on the minority.

[436]UK Companies Act 2006, s.263 (2) (c). See Andrew Keay, above n 424 at 52, where the author maintains that the approach of removing ratification as a factor that may be considered in granting leave to institute derivative actions is better.

[437]UK Companies Act 2006, s.263 (3) (c). See Maleka Femida Cassim, above n 2 at 135.

[438]CAMA, s.348. There appears to be a typographical error in the CAMA, s.348, since reference is made in the section to s.6, instead of s.346, which deals with commencing derivative actions and applications for leave.

ratified by shareholders, ratifiability is not a bar to commencing a derivative action; and it is not to be taken into consideration when the court is taking any decision whether with regard to leave applications or final judgments.[439] The principle of ratifiablity is derived from the common law concept which takes into account the possibility of shareholders ratifying a breach or misconduct by wrongdoers. [440]This concept however creates uncertainties with regards to knowing what would be ratified by the company and more importantly brings into fore the difficulty of knowing what is ratifiable and what is not ratifiable.[441] Since the United Kingdom Companies Act recognises any rule of law as to acts that are capable of being ratified by a company, it means that the common law cases[442] with regards to what is ratifiable by the members have been incorporated into the statutory derivative regime in Nigeria. Thus, is in spite of the abolition of the common law derivative actions in the United Kingdom, [443]the common law cases on ratification are applicable in Nigeria since the common law derivative action has not been abrogated in Nigeria.[444] In view of the problems associated with ratifiability therefore, this thesis agrees with the provisions of CAMA to the effect that the concept of ratifiablity should not count with regards to derivative actions in Nigeria.[445] The position in South Africa is similar to what obtains in Nigeria, to the extent that ratification does not prevent a derivative action but the court may take into consideration the fact that an act or wrongdoing has been ratified by the shareholders in making any decision, whether at the stage of leave applications or final judgment. [446] However, it appears that the South African Companies Act is silent on the issue of acts that may be ratified by a company with respect to derivative actions.[447]

While this thesis salutes the modest attempts made so far by the statutory derivative action in Nigeria to re-formulate the common law modem of the concept of ratification, the following observations are hereby made in line with what obtains in the United Kingdom and other Commonwealth countries.[448] In the United Kingdom, it is stipulated that the votes of

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[439]*Ibid.*
[440]*Hogg v Cramphorn*, above n 68. See Harvey Mason 'Ratification of the Directors' Acts: An Anglo- Australian Comparison' [1978] *Modern Law Review* 41(2) 161.
[441]Maleka Femida Cassim, above n 2 at 135.
[442]*Cook v Deeks*, above n 90. See Pender *v Lushington*, above n 412.
[443]Daniel Lightman, above n 15 at 36.
[444]CAMA, s.346 (1).
[445]*Ibid* at s.348.
[446]SA Companies Act 2008, s.165 (14). See Maleka Femida Cassim, above n 2 at 132.
[447]SA Companies Act 2008, s.165 (14).
[448]Arad Reisberg, above n 1 at 163. See Paul von Nessen *et al*, above n 169 at 645.

the wrongdoing directors and persons connected with the directors[449] shall not be counted while passing any resolution to ratify breach of directorial conduct, even though their votes may be counted for the purpose of determining the quorum for the meeting, and they may participate in the proceedings.[450] In addition, in a situation where the resolution is passed by a written resolution, neither the director nor any person connected with him is eligible to vote.[451] It also appears that in cases where a resolution is required to be passed by a unanimous decision of the members; and where any power of the directors to agree to not sue, or to settle, or release a claim made by them on behalf of the company is in issue, the exclusion of the directors and persons connected with them will not affect the validity of the resolutions or any power of the directors. [452]Furthermore, it appears that the UK Companies Act is also prepared to accommodate the 'nature of transaction'[453] modem of modulating ratification,[454] since it does not frown at any rule of law imposing additional requirements for valid ratification or prescribing acts that are incapable of being ratified. [455] Nonetheless, it appears that the prohibition of self-interested members from participating in ratification is an affront to the concept that shareholding confers proprietary rights which the shareholder is at liberty to exercise as he pleases.[456] Thus, the prohibition imposes some form of fiduciary accountability on shareholders.[457]It has also been maintained that this is capable of creating another procedural hurdle at the stage of Applications for leave.[458] It is interesting to note that in Australia, the process of ratification is subject to judicial scrutiny. However,the court in Australia in taking into account the decision of the company to ratify a breach of the company's right must have regard to the following:[459]

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[449]UK Companies Act 2006, s.252.
[450]*Ibid* at s.239 (4).
[451]*Ibid* at s.239 (3).
[452]*Ibid* at s.239 (6).
[453]Emphasis mine.
[454]Above n 423.
[455]UK Companies Act 2006, s.239 (7). It is posited that the 'rule of law' referred to is the common law. See *Cook v Deeks*, above n 90. This means that common law has resurfaced in the statutory law on ratification. See David Kershaw, above n 427.
[456]The English case of *N.W Transportation v. Beatty* [1916] 1 AC.554. See Jennifer Payne, above n 213 at 611.There are however, authorities pointing to the fact that votes do not count where there is fraud. See K.W.Wedderburn, above n 428 at 102.
[457]Robert Flannigan 'Shareholder Fiduciary Accountability' [2014] 1 *Journal of Business Law* 1 at 10.
[458]Arad Reisberg, above n 1 at 163.
[459]Australian Corporations Act 2001, s.239 (2).See Maleka Femida Cassim, above n 2 at 135. See *contra* Jennifer Payne,above n 213 at 621, to the effect that ascertaining the independence of shareholders is far more complex than excluding wrongdoing shareholders because the remaining shareholders may even cast their votes in sympathy with the wrongdoers.

How well –informed the members were about the conduct, when deciding whether to ratify or approve the conduct; and whether the members who ratified or approved the conduct were acting for proper purposes.[460] This view point resonates from the fact that in companies where there is a separation between ownership and control, there is the likelihood that members might not be well informed about the breach of duties by the directors so as to cast their votes properly since they are not involved in the management of the company, [461]the resultant effect being that shareholders' lack of coordination and apathy.[462]Thus, it has been suggested that the concept of ratification should not be given consideration in public companies.[463]

Consequently, this thesis proposes a reformulation of the ratification principle in Nigeria as follows: Firstly, ratification should not count, not merely in the case of public companies, but should however, not count only with regards to companies with more than fifty members. In Nigeria, a private company is required to have at least 1 member and not more than 50 members,[464] while a public company is mandated to have a minimum of 2 members, without any maximum limit.[465] This means that it is possible to have private companies that are bigger in size in terms of membership than some public companies. The suggestion that ratification should not be considered where the membership is more than 50, automatically excludes private companies, and would also ensure that the public companies whose ratification will not be taken into consideration, are those companies that are large, and therefore more likely to have the problem of shareholder coordination. [466] Secondly, in cases where for instance, the wrong doers are the majority shareholders of the company who used their votes to ratify their misconduct, it cannot be maintained that the shareholders have acted for a proper purpose.[467] This is in line with the position in the United Kingdom, in which only the views of members who have no personal interests either directly or indirectly would be considered. [468]Therefore, it is suggested that only the votes of independent and

[460]This seems to suggest good faith or motive of the members.
[461]Arad Reisberg, above n 1 at 22-23.
[462]*Ibid*.
[463]Maleka Femida Cassim, above n 2 at 133, where the author proposed that in South Africa, public companies should not be subject to the requirement of ratification being taken into consideration.
[464]CAMA, ss.18 (2) &22(3).
[465]CAMA, s.24.
[466]Andrew Keay, above n 424 at 44.
[467]*Cook v Deeks*, above n 90.
[468]UK Companies Act 2006, s.239 (4).

disinterested shareholders who have no personal interests in the breach or wrongdoing done to the company should be considered for the purpose of ratification.[469]

Thirdly, in line with the UK Companies Act 2006, s.239 (7), it is proposed that CAMA should be amended to expressly stipulate that there can be no ratification where the transaction involves fraud.[470]

4.6.4 AVAILABILITY OF PERSONAL / ALTERNATIVE REMEDY

The courts in the United Kingdom are expected to consider whether the applicant could bring a personal action such as an action under the unfair prejudice remedy[471] or enforce a Shareholders' Agreement.[472] Although, the existence of a personal remedy may not foreclose the granting of an application for leave, the fact that it must be put into consideration implies that evidence of the existence of a personal remedy may be used to refuse an application for leave. [473]The rationale for this principle is in line with the attitude of judicial non-interference in which the courts are reluctant to re-visit the decisions of management.[474]However, this thesis is not able to come to terms with the necessity of this provision in view of the fact that drawing a clear distinction between a cause of action which borders on infringement of corporate rights and personal actions might be blurred in certain circumstances, especially with regards to the fiduciary duties of directors.[475] In addition, it is trite that derivative actions and personal actions may be sustained in one action, thus, making personal remedies incompatible with derivative actions appears unjustifiable.[476] Furthermore, the consideration of personal remedy as an alternative to derivative actions can be compared to the requirement of good faith in applications for leave that allows the court to impute the personal attributes of the applicant to an action brought to defend the rights of the company.[477]

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[469]Maleka Femida Cassim, above n 2 at 133.
[470]W, above n 425 at 206.
[471]CAMA, s.353.
[472]UK Companies Act 2006, s.263 (3) (f).See Daniel Lightman, above n 15 at 54.
[473]Andrew Keay and Joan Loughrey, above n 42 at 169.
[474]Maleka Femida Cassim, above n 2 at 85, where the author argues that the principle helps to avoid dragging the company into litigation against its will.
[475]*Ibid* at 179, where the author posits that a breach of fiduciary duties may also amount to a conduct that is unfairly prejudicial. See the English case of *Re a Company* (No 005287 of 1985) [1986] 1 WLR 281.
[476]*Prudential Assurance Co.Ltd v Newman Industries Ltd (No.2)*, above n 275 at 354.
[477]Andrew Keay and Joan Loughrey,above n 114 at 476.

Moreover, this thesis is of the opinion that the interests of corporate governance would not be properly served if actions bordering on corporate maladministration are turned down merely because they could also be instituted as personal actions.[478] At common law, it appears that the requirement that the availability of recourse to a personal action must be considered was extended beyond availability of personal actions to include the availability of any alternative remedy.[479]Thus, in the common law derivative actions regime, the availability of an alternative remedy might be used to prevent a derivative action from proceeding, in accordance with the English case of *Barrett v Duckett*.[480] There are however contrary opinions to the effect that the crux of the matter is whether an Independent Board would be disposed to taking the action and not the availability of an alternative remedy.[481]Nonetheless, the concept of alternative remedy has been interpreted to also include recourse to an arbitration clause in the Memorandum of Association.[482]

There is no provision for the consideration of any alternative remedy in the statutory derivative action framework in Nigeria. However, since the common law derivative action is applicable in Nigeria, the decisions in the English case of *Barrett v Duckett*[483]and other conflicting cases[484] automatically form part of the Nigerian jurisprudence. Nonetheless, in line with the position of this thesis calling for the abrogation of the common law derivative action in Nigeria,[485] the courts are enjoined to avoid the problems arising from the concepts of available personal actions or personal remedies. In any case, since it is suggested that one of the factors to be considered in determining whether an action is brought in the best interests of the company is the availability of an alternative remedy,[486] it is possible for the defendants to raise the issue of availability of an alternative remedy to demonstrate that an action is not in the best interests of the company as maintained above.[487]

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[478]Rehana Cassim, *The Removal of Directors And Delinquency Orders Under The South African Companies Act* (Juta, Cape Town 2020) 243.
[479]Daniel Lightman, above n 15 at 57-58.
[480]Above n 125 at 243,250.See Daniel Lightman, above n 15 at 58.
[481]The English cases of *Konamaneni v Rolls-Royce* Industrial *Power (India) Ltd*, above n 74 at 336. ; *Mumbray v Lapper [2005]* BCC 990.
[482]Maleka Femida Cassim, above n 2 at 85.
[483]Above n 125.
[484]Daniel Lightman, above n 15 at 58.
[485]See Chapter Two.
[486]Maleka Femida Cassim, above n 2 at 84-85, where the author posits that the alternate remedy must afford the applicants substantially the same redress as in derivative actions; and must have a real prospect of success.
[487]*Ibid*.

4.7 UNDERLINING FACTORS

4.7.1 ACCESS TO INFORMATION

One major disincentive to instituting derivative actions is the problem of limited access of the applicant to relevant information requisite to a sustained action.[488] Although, the problem of lack of access to information in derivative actions is not restricted to the stage of application for leave, this thesis argues that the effect of lack of access to information is likely to be felt more profoundly at this stage, particularly because the applicant is required to show that there is a serious question to be tried.[489] In order to curtail the problems of information asymmetry whereby the directors who are in charge of the management of the company are better informed about the wrongdoing in the company than the shareholders,[490] there exist provisions requiring the company to disclose certain information about the company as contained in statutory registers.[491] However, the disclosure regimes have proved to be inadequate with regards to access to information by applicants seeking to institute derivative actions.[492]Nonetheless, in accordance with the provisions of the law, every company is expected to maintain certain statutory registers and records,[493] which must be situated at the company's registered office and must be made available for inspection.[494] This suggests that an intending applicant in a derivative action may have to incur travel and accommodation expenses etc., in order to inspect the records, apart from

[488]*Ibid* at 139, where the author opines that minority shareholders lack of access to information constitutes the second major barrier to derivative actions,coming next after the problem of costs. See Tshepo Mongalo, above n 68 at 272. See also Paul L.Davies and Sarah Worthington,above n 362 at 607, where the authors maintain that when compared to general derivative actions,applicants bringing specific derivative actions to recover unauthorised donations from directors have better access to information rights. See UK Companies Act 2006, s.373.

[489]CAMA, s.346 (2) (d).

[490]Arad Reisberg, above n 1 at 86. See Deirde Ahern'Directors' Duties, Dry ink And The Accessibility Agenda' [2012]128 *Law Quarterly Review* 115 at 137.See also Andrew Keay 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders' [2007] *Journal of Business Law* 656 at 661.

[491]SA Companies Act 2008, s.26. See South African Promotion of Access to Information Act 2000.See UK Companies Act 2006, ss.116, 118-(register of members); s.877-(Register of Charges). See Carsten A.Paul, above n 377 at 92. See also Ramani Naidoo, above n 6 at 57.

[492]Arad Reisberg,above n 1 at 86.

[493]For instance, CAMA, s.267, provides for the inspection of the minutes book; and obtaining of certified copies of the minutes. See SA Companies Act 2008, s.24.

[494]SA Companies Act 2008, s.26. See Vela Madlela' The Unqualified Right of Access To Company's Records by Non- Holders of Company's Securities Under South African Company Law' [2016] 40(1) *Obiter* 173 at 176, to the intent that any member of the public or media has unqualified rights to inspect a company's securities register.

paying the prescribed fees.[495] In addition, some of the records or information such as Accounting Records and Financial Statements, which the company is statutorily obliged to give or disclose to shareholders, may not be easily understood by all the shareholders.[496] Moreover, the fact that an applicant is entitled to inspect all the statutory books of the company does not imply that he is allowed access to all the books and records of the company. [497]Consequently, the information which is required to sustain any action against the wrongdoing directors may not be contained in the information which the company is statutorily obliged to disclose.[498] There is no provision under the Old CAMA which particularly addressed the issue of access of information by applicants seeking to institute derivative actions. However, it is now stipulated in CAMA that in any derivative action, the plaintiff shall have the right to obtain any relevant documents from the defendant and the witnesses at trial, and may in pursuance of that right request categories of documents from such persons without identifying specific documents.[499] This implies that in a derivative action, the defendant's right to access information is not limited to statutory records. Furthermore, the defendant is entitled to access information even without stating the specific documents where they are contained as long as he is able to identify the subject matter.[500] This thesis observes that the lack of rigidity in the quest for information will enhance the process of prosecution of derivative actions. However, it appears that under section 346(4) of CAMA, the Plaintiff's right to access information arises only when the action has commenced. This thesis argues that section 346(4) CAMA is in line with section 347(1) of CAMA which enables the plaintiff to apply to court for an order to obtain access to information once a derivative action has been instituted.

In South Africa, it is expressly provided that a person who has been granted leave is entitled, on giving reasonable notice to the company, to inspect the books of the company for any purpose connected with the legal proceedings.[501] The import of this provision is that in similarity with the Nigerian provision,[502] an order to inspect the books of the company can

[495]CAMA, s.267.
[496]*Ibid* at s.392.
[497]Arad Reisberg, above n 1 at 86.
[498]*Ibid.*
[499]CAMA, s.346 (4).
[500]*Ibid*.
[501]SA Companies Act 2008, s.165 (9) (e). See Maleka Femida Cassim above n 2 at 168.
[502]CAMA, s.304 (1).

only be made after a derivative suit has been instituted.[503] This scenario does not encourage the development of derivative actions since it implies that the applicant may have to institute the action without adequate information regarding the cause of action.[504] However, the Nigerian provision may be better than the South African provision since an order to inspect the books of the company can be made once a derivative action has been instituted.[505]This is unlike in the case of South Africa for instance, where the court can make such orders only when the applicant has been granted leave.[506]Another major flaw in the South African provision which flows from the restriction of the right of access to information to an applicant who has been granted leave, is the fact that the law specifically stipulates that inspection of the books of the company can be requested by the applicants for the purpose of legal proceedings only. [507]The restriction of access to information to existing legal proceedings clearly forecloses an applicant who has been granted leave from having the opportunity to discover any facts relating to any other wrongdoing to the company apart from the breach relating to the present cause of action. [508]

It is submitted that it is imperative for the plaintiff to have access to information before instituting a derivative action since he needs the information to enable him to properly institute the action. In addition, access to information prior to instituting a derivative action can assist in preventing unnecessary litigation since the conflict can be resolved at the demand stage or at any other time prior to litigation.[509]

This thesis suggests that the restrictions and hurdles that exist with respect to access to information resonate from the principle of corporate personality in which information belonging to the company is the company's property which is distinct from the personal property of the shareholders and other stakeholders of the company.[510] Furthermore, it appears that in accordance with the principle of separation of ownership from

[503]Maleka Femida Cassim above n 2 at 168.
[504]*Ibid*.
[505]*Ibid.*
[506]SA Companies Act 2008, s.165 (9) (e).
[507]*Ibid* at s.165 (9) (e).
[508]Maleka Femida Cassim above n 2 at 168.
[509]Arad Reisberg, above n 1 at 217. See Lindi Coetzee,' A Comparative Analysis of the Derivative Litigation Proceedings under the Companies Act 61 of 1973 and the Companies Act 71 of 2008' in Tshepo H Mongalo(ed),*Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010)290 at 297.
[510]*The English case of Regal (Hastings) Ltd v Gulliver* [1947] 1 All ER 378 at 382.

management,[511] corporate information is more available to the directors and officers of the company as opposed to shareholders.[512] This is further exacerbated by the tradition of the courts which defers to the decisions of the management of companies and hesitates to interfere in its affairs.[513] However, since derivative actions are exceptions to these principles, there is need to reformulate the law in CAMA to facilitate access to information by the Plaintiff even before the institution of the action.[514]

4.7.1.1 The Concept of Freedom of Information

This thesis observes that aside from opening the window of judicial permission to access corporate information under the Companies Act, [515]other opportunities exist under other laws which may assist prospective applicants in derivative actions to gain access to corporate information such as the laws relating to Freedom of Information available in all the jurisdictions under the focus of this thesis.[516]In Nigeria, the Freedom of Information(FOI) Act 2011, similar to what obtains in other jurisdictions, is aimed at providing access to information to citizens with respect to information held by the State.[517] The FOI guarantees the right of unrestricted access to public information, but it is however limited to information held by all Federal Government institutions, private institutions or companies in which any Federal, State, or Local Government has controlling interests;[518] and private institutions performing public functions.[519] The high point is that members of the public can apply to inspect those records without having to show any specific interests or locus standi in the information while the applicants have the right to sue any agency that refuses to release such information on request.[520] However, the Nigerian experience with respect to

[511]CAMA, s. 87(3).
[512]Arad Reisberg, above n 1 at 164.
[513]*MacDougall v.Gardiner*, above n 32.
[514]Maleka Femida Cassim, above n 2 at 168.
[515]CAMA, s.346 (4).
[516]The Nigerian Freedom of Information Act 2011; The South African Promotion of Access to Information Act 2000; The United Kingdom Freedom of Information Act 2000. See SA Companies Act 2008, s.212, by virtue of which 'Regulatory Agency Information and Records,' declared to be confidential information may not be available to members of the public. See Carl Stein, above n 4 at 400-401.
[517]The Nigerian Freedom of Information Act 2011, s.1 (1).
[518]*Ibid* at s.2 (7). See The UK Freedom of Information Act 2000, s.6, which stipulates that such private companies must be wholly owned by the State.
[519] See exemptions under The Nigerian Freedom of Information Act 2011, ss.11-19.
[520]*Ibid* at s.1 (3). See Theresa Oby Ilegbune 'Freedom of Information Act, 2011: An Explanatory Commentary' [2011] *Nigerian Law and Practice Journal* 30 at 33.

the FOI Act reveals the following: most of the requests for information have been made by Human Rights agencies;[521] most government agencies holding such information have refused to release them except otherwise there is a court order compelling them to do so.[522] For example at the instance of Progressive Shareholders Association of Nigeria, the Central Bank of Nigeria was ordered by the court to release information on the assets forfeited by a former managing director of a defunct bank.[523]This thesis argues that if the FOI Act has to depend on judicial orders to be effective,[524] then it is not much better than what is obtainable under the Companies Act, [525]except otherwise that under the FOI Act, access to information is available to prospective applicants, and that by and large the scope of information is wider than the information usually contained in a Company's records.[526]

4.7.1.2 Whistleblowing

Another incentive with respect to access to information is the encouragement of whistleblowing, to the effect that insiders of the company who disclose official information are given protection under the law.[527]It is remarkable that both the South African Companies Act 2008[528] and CAMA provide for the protection of whistle blowers, although the Nigerian Companies' legislation appears to be limited to the protection of employees during Investigation of companies.[529]However, Nigeria is yet to have a specific legislation for the

[521]Funmilola Olubunmi Omotayo' The Nigerian Freedom of Information Law: Progress, Implementation, Challenges and Prospects' [2015].*Library Philosophy and Practice e-journal.*
[522]*Ibid.*
[523]*Ibid*.
[524]Theresa Oby Ilegbune, above n 520 at 41.
[525]CAMA, s.346 (4).
[526]Theresa Oby Ilegbune, above n 520 at 41, to the effect that there are however, several exemptions and protections for public officers under the Third and Fourth objectives of The Nigerian Freedom of Information Act 2011.
[527]Philip M Berkowitz' Sarbanes-Oxley and Related State Whistleblower Protections in the United States' [2008] *Business Law International* 200. See Arad Reisberg, above n 1 at 86. See also Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (3rd edn, Lexis Nexis, Durban 2016) 283-284.
[528]SA Companies Act 2008, s.159.See Etienne A Oliver 'Regulating Against False Corporate Accounting: Does The Companies Act 71 of 2008 Have Sufficient Teeth?' [2021] *SA Mercantile Law Journal* 1 at 19.
[529]CAMA, s. 357(4) & (5).

protection of whistleblowers[530] unlike South Africa[531] and the United Kingdom.[532] Nonetheless, in Nigeria, there are a couple of other legislations which offer some protection to whistleblowers.[533]It is however observed that the specific legislations for the protection of whistleblowers have been restricted to the protection of employees only, and not all stakeholders.[534] This is a serious limitation because the protection would not be available to other stakeholders in the company who may be encouraged to divulge insider information on account of the protection available to them under the law. [535]

4.8 CONCLUSION

I have attempted to demonstrate in this chapter that the requirements for obtaining leave under the statutory derivative actions constitute hurdles or obstacles in the path of ensuring good corporate governance. [536]In view of the difficulty of proving the requirement of good faith, I suggest the removal of good faith as a requirement for obtaining leave to pursue a derivative action.[537] Furthermore, I seek an amendment to CAMA to the effect that evidence by the respondent in a derivative action showing that an application for leave was brought in bad faith must be taken into consideration in determining whether or not to grant

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[530]'An Appraisal of The Whistle Blowing Policy in Nigeria'*NaijaLegalTalk* (May 09, 2017) www.naijalegaltalkng.com, to the effect that the Whistle Blowing Policy of the Federal Government of Nigeria is yet to have any legal backing. See also Ibrahim Sule 'Whistle Blowers' Protection Legislation: In Search for a Model for Nigeria' www.ippa.org/IPPC4/Proceedings/....Paper 18-8.pdf.

[531]SA Protected Disclosure Act 2000. See Lindi Coetze, above n 506 at 303.See Carl Stein, above n 4 at 364. See also Monray Marsellus Bortha 'The Protected Disclosure Act 26 of 2000, The Companies Act 71 of 2008 & The Competition Act 89 of 1998 With Regards To Whistle-Blowing Protection: Is There a Link?'[2014]*Journal of South African Law* 337 at 338-339.

[532]UK Public Interest Disclosure Act 1998.

[533] The Nigerian Freedom of Information Act 2011,s.27(2)(b), which protects a public officer from liability under the Criminal Code or Official Secret Act for disclosing without authorisation any information which he reasonably believes to show mismanagement, gross waste of funds and abuse of authority.

[534]SA Protected Disclosure Act 2000, s.1. See Maleka Femida Cassim, 'Enforcement And Regulatory Agencies' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3rd edn, Juta, 2021) 1135 at 1142. See Carl Stein, above n 4 at 387. See however, The Central Bank of Nigeria: Guideline For Whistleblowing For Banks and Other Financial Institutions in Nigeria 2014, which describes a whistleblower as any person including employees, management, directors, depositors, service providers and other stakeholder(s).

[535] Nigeria Code of Corporate Governance for Banks 2014, para. 5.3, which stipulates that banks shall have a whistleblowing policy made known to employees and other stakeholders; and that the policy shall contain mechanisms and assurance of confidentiality that encourage stakeholders to report any unethical activity to the banks and or the Central Bank. See SA Companies Act 2008, s.159 (4), which offers protection to a shareholder, director, company secretary etc. See also Monray Marsellus Bortha 'The Protection of Whistle-Blowers in The Fight Against Fraud and Corruption: A South African Perspective' [2012] *Obiter* 574 at 591.

[536]Maleka Femida Cassim, above n 2 at 27.

[537]CAMA, s.346 (2) (e).

leave.[538] In like manner, I recommend the removal of the requirement that an applicant must show that he is acting in the best interests of the company owing to the imprecise and vague nature of the requirement.[539] This position is justified by the preponderance of opinion that the determination of what is in the best interests of the company is tilted more towards the commercial viability or prospect of success of the application,[540] and it appears that the company is in a better position to prove it.[541] I therefore suggest that it is the defendants who should be burdened with maintaining that an action is not in the best interests of the company. Also, since it can only be presumed that there is a requirement of a serious question to be tried in Nigeria,[542] I argue for an amendment of the derivative action law in Nigeria, in which there is an express requirement that an applicant must show that there is a serious question to be tried. This thesis maintains that the requirement of a serious question to be tried cannot be proved if there is evidence of lack of good faith,[543] and that the application is not in the best interests of the company. [544]Therefore, the argument that only the requirement that a serious question to be tried should be retained as proposed by this thesis does not in any way completely jettison the existing order in which the requirements of good faith and acting in the best interests of the company are separate requirements.[545]It only means that if the suggestions in this chapter are implemented, the requirements of good faith and acting in the best interests of the company will be subsumed in the requirement of a serious question to be tried. Furthermore, the position of retaining only the requirement of a serious question to be tried offers the advantage of simplifying the proceedings for application for derivative actions in line with the underlying objective of this thesis,[546] particularly in view of the fact that it has been decided elsewhere that the requirements for obtaining leave for derivative actions are conjunctive i.e. requiring proof of each criterion.[547]

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[538]Andrew Keay & Joan Loughrey, above n 42 at 169. See Maleka Femida Cassim, above n 2 at 51.
[539]CAMA, s.346 (2) (f).
[540]Maleka Femida Cassim, above n 2 at 75.
[541]*Ibid*, where the author maintains that the concept of the 'best interests of the company' is situated in the duties of directors.
[542]CAMA, s.346 (2) (d).
[543]Maleka Femida Cassim, above n 2 at 38, to the effect that there is a link between good faith and the existence of a valid cause of action.
[544]*Ibid* at 65.
[545]*Ibid* at 75.
[546]*Ibid* at 29.
[547]*Mouritzen v Greystone Enterprises (Pty) Ltd*, above n 55 at 414.

I have considered other requirements that are subjects for consideration when deciding whether or not to grant leave for a derivative action as provided under the UK Companies Act such as authorisation by the company[548] and the decision of the company to not pursue the claim.[549] I posit that these considerations should not be adopted into the Nigerian derivative actions regime because they tilt more towards protection of the interests of the management of the company or the wrongdoers; and are therefore likely to constitute more hurdles for applicants in derivative actions. I however, observe that since those requirements are ingredients of the requirement that a derivative action must be in the best interests of the company,[550] they are still useful to a defendant as a defense, in line with the proposition of this thesis, to the effect, that it is the defendant in a derivative action who should be burdened with showing that a derivative action has not been instituted in the best interests of the company.[551]

I opine that the concept of ratification which is not a complete bar to derivative actions should be retained by CAMA[552] but modified such that ratification in public companies with a membership of more than 50 should be exempted from consideration. This is to ensure that the exemption is applicable to only companies where there is truly a separation of ownership from control.[553]I also recommend the re- consideration of the problem of lack of access to information[554] such that an applicant would prior, to the commencement of proceedings be able to apply to court for an order to obtain sufficient information to prosecute a derivative action.[555]

[548]UK Companies Act 2008, s.263 (3) (c).
[549]*Ibid* at s.263 (3) (e).
[550]Maleka Femida Cassim, above n 2 at 81.
[551]*Ibid* at 75.
[552]CAMA, s.348.
[553]Arad Reisberg, above n 1 at 82.
[554]Maleka Femida Cassim, above n 2 at 23.
[555]*Ibid* at 168.

CHAPTER FIVE

EXISTING REMEDIES AND FURTHER REMEDIES

5.1 INTRODUCTION

This thesis posits that one of the major deterrents to the popularity of derivative actions is the fact that the remedies available under it are limited.[1] This position is justified in the sphere of the operation of the remedies available under the unfairly prejudicial and oppressive conduct[2]which is said to be embraced more largely by litigants because of the span of its cause of action, [3]more liberal procedure; [4]and better remedies.[5] It is quite worrisome that the unfairly prejudicial remedy has been used to 'outflank' derivative actions on many occasions. [6]This is perhaps because where the same set of facts presents a corporate cause of action as well as a personal cause of action, litigants prefer to pursue such actions as personal actions under the unfairly prejudicial conduct remedy as opposed to seeking to redress the corporate malfeasance via derivative actions. [7]The courts even appear to encourage litigants by going a step further to grant corporate remedies in cases brought under the unfairly prejudicial actions which is a marked departure from the principles of corporate law, in which only personal remedies are available under the unfair prejudice action regime. [8]Be that as it may,

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[1]CAMA, s.347.

[2]*Ibid* at s.353.

[3]Nigerian Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law* [1988] vol. 1, p. 248. See Victor Joffe, 'Unfair Prejudice: The Statutory Remedy 'in Victor Joffe *et al* (eds), *Minority Shareholders-Law Practice and Procedure* (4th edn, Oxford University Press, Oxford 2011)273 at 284-285.

[4]Maleka Femida Cassim, *The New Derivative Action under the Companies Act – Guidelines for Judicial Discretion* (Juta, Claremont 2016) 204. See A.J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, United Kingdom 2002)2. See also Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford University Press, Oxford 2007) 274. See also Joseph E.O.Abugu, *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers Limited, 2014) at 395.

[5]Arad Reisberg, above n 4 at 274. See Carl Stein, *The New Companies Act Unlocked* (Siber Ink, Cape- Town 2011) 369, who describes some of the remedies available under relief from oppression or prejudicial conduct as extraordinary.

[6]The opinion Hoffmann L J in the English case of Re *Saul D.Harrison Plc* [1995] 1 BCLC 14, 18c-18 d, to the effect that one of the purposes of the unfair prejudice remedy is to outflank the rule in *Foss v Harbottle* in appropriate cases. It appears that under the unfair prejudice regime, a claimant can claim personal reliefs and damages for wrongful exercise of directorial power, which is the cause of action under the statutory derivative action, whereas, under the common law derivative action, he is not so entitled. See Carl Stein, above n 5 at 369.

[7]Arad Reisberg, above n 4 at 278.

[8]*Ibid* at 298. See *Clark v Cutland*[2003]EWCA civ 810, where the English Court established that the unfair prejudice remedy can be used to obtain corporate remedy without going through the requirement of notice of demand and obtaining leave. This case however contradicts the principle established in another English case of *Prudential Assurance Co.Ltd v Newman Industries Ltd* (*No.2)* [1982] 1 All ER 354 at 367, where the Court of Appeal held that the Articles of Association cannot be used to circumvent the rule in *Foss v Harbottle.* The *Cutland* case also contradicts the No-reflective loss principle in which a plaintiff is not allowed to maintain a personal claim such as diminution in the value of his shares, which is considered to be just a mere reflection of

this thesis maintains that derivative action has a unique purpose in corporate governance, and that is, to provide remedies for breach of corporate wrongdoing, and must therefore be encouraged.[9] The need to fortify the remedies available under derivative actions appears to be supported by the fact that other remedies available to redress corporate mal administration- such as removal of directors,[10] and disqualification of directors[11] have been scarcely utilised owing to the difficulties and barriers entailed in their utility by shareholders.[12]

This chapter is focused on the evaluation of the remedies available under derivative actions in Nigeria[13] by comparing them to the remedies available in South Africa,[14] the United Kingdom;[15] and possibly, other Commonwealth jurisdictions. Furthermore, the remedies available under derivative actions in the jurisdictions under focus will also be assessed *vis avis* the remedies available under the Unfairly Prejudicial Action, with a view to examining the possibility of enhancing of the remedies available under the former.[16] In furtherance of this objective, this chapter shall explore the possibility of extending the remedies available under derivative actions to include judicial removal of directors and disqualification of directors,

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his corporate rights. See also the English case of Johnson *v Gore Wood* [2001] 1All ER 481.See Stephen Griffin 'Shareholder Remedies and the No Reflective Loss Principle: Problems Surrounding the Identification of a Membership Interest' [2010] 6 *Journal of Business Law* 460 at 463. See also Arad Reisberg, above n 4 at 281,283-284, where the author argues against the principle established in the *Cutland* case on the same grounds. See however, Rehana Cassim 'A Critical Analysis On The Use Of The Oppression Remedy by Directors Removed From Office By The Board of Directors Under The Companies Act '[2019] 40(3) *Obiter* 154 at 162, where the author opines that removal of a director by other directors in breach of fiduciary duties may amount to a conduct that is oppressive or unfairly prejudicial.

[9]Maleka Femida Cassim, above n 4 at 8. See Arad Reisberg, above n 4 at 282, 285, where the author also maintains that derivative actions ensure that the company's cause of action is enforced without having to liquidate the company. The author also maintains that creditors are more likely to be treated better when relief is granted to the company than when granted to individuals. See also Andrew Keay 'Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act' [2016] 16(1) *Journal of Corporate Law Studies* 39 at 42.

[10]CAMA, s.288.

[11]*Ibid* at s.280.

[12]Andrew Keay ' Company Directors Behaving Poorly: Disciplinary Options for Shareholders' [2007] *Journal of Business Law* 656 at 679-680,where the author remarks that directors are often able to manipulate the resolutions at shareholders' meeting through the proxy votes machinery. See Ben Pettet, *Company Law* (2nd edn. Longman, England 2005) 156. See also Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003) 257.

[13]CAMA, s. 347(2).

[14]SA Companies Act 2008, s.165 (9).

[15]UK Companies Act 2006, s.260 (1).

[16]*Ibid* at s.996. See SA Companies Act 2008, s.163 (2); CAMA, s. 354.

[17]especially in view of the fact that the concept of judicial removal of directors is available in the United States of America.[18]

5.2 REMEDIES AVAILABLE UNDER DERIVATIVE ACTIONS

By virtue of the provisions of CAMA, the courts have the power to make one or more orders in favour of a successful applicant in a derivative action.[19] The powers of the court are however, discretionary and not mandatory since the court is only empowered to make orders as it deems fit.[20] Nevertheless, the discretionary nature of the remedies has the advantage of making room for flexibility. [21]This may however, imply that prospective applicants might be discouraged from instituting derivative actions since they are uncertain as to the reliefs they are entitled to, even when the action is successful.[22]

Nonetheless, the court may make one or more orders under CAMA as follows:[23]

Authorising the applicant or any other person to control the conduct of the action;

Giving directions for the conduct of the action;

Directing that any amount payable by a defendant in the action shall be paid directly in part or in whole to former and present security holders of the company instead of to the company;

Requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.

5.2.1 AUTHORISING /GIVING DIRECTION FOR THE CONDUCT OF A DERIVATIVE ACTION

The remedies whereby the court can authorise the applicant or any other person to control the conduct of the action[24] and giving directions for the conduct of the action[25] are by their very nature interlocutory, in the sense that the reliefs can only be granted during the pendency of the action. This is because an order to control the conduct of an action or to give

[17]CAMA, s.280.
[18]Olga N.Sirodoeva Paxson' Judicial Removal of Directors: Denial of Directors' License to Steal or Shareholders' Freedom to Vote?'[1998] 50(1) *Hastings Law Journal 97*.
[19]CAMA, s.346 (1).
[20]This discretionary powers of the court is analogous to the discretionary powers of the court as to costs under SA Companies Act 2008, s.165 (10). See Maleka Femida Cassim, above n 4 at 149.
[21]Maleka Femida Cassim, above n 4 at 149.
[22]*Ibid*.
[23]CAMA, s.347(2).
[24]*Ibid* at s.347 (2) (a).
[25]*Ibid* at s.347 (2) (b).

directions for the conduct of an action would be made more appropriately at the commencement of the action. Therefore, with respect to derivative actions, these reliefs or remedies appear to be applicable where an applicant is successful in his application for leave to institute a derivative action.[26] The court, after hearing an application for leave to institute a derivative action, may appropriately order the applicant or any other person to control the conduct of the action, or give directions for the conduct of the action.[27] It is however, uncertain if it is possible for the court to order that any person other than the applicant who has been granted leave to institute a derivative action should control the conduct of the action. This is because, as has been noted in Chapter Four of this thesis, leave to institute a derivative action can only be granted if the court is convinced that the applicant has met certain criteria prescribed under the law. [28] In any case, a derivative action would have been commenced, as maintained in Chapter Three of this thesis, in the name of the applicant.[29]How then is it possible for the court to give any other person, other than the applicant, power to control the conduct of the action? This thesis maintains that except in circumstances where it is possible to distinguish between granting a person leave to institute a derivative action, and controlling the conduct of an action, it might not be possible for the court to grant any person other than the applicant, the right to control the conduct of the action. It appears that a judicial interpretation is required to douse this uncertainty. Unfortunately, it seems that there is yet to be any case law in Nigeria throwing more light on the issue.

However, it appears that the remedy whereby the court may give directions for the conduct of the action is at least on the surface clearer than that of authorising the applicant or any other person to control the conduct of the action, since it is devoid of the controversy of granting any person other than the applicant control of the conduct of the action. In this instance, the court may upon granting leave to the applicant prescribe conditions under which he can proceed with the derivative action. Nevertheless, giving directions for the conduct of the action may also mean that the court may authorise the applicant or any other person to control the conduct of the action. Therefore, the remedy of giving directions for the conduct

[26]*Ibid* at s.346 (1).
[27]*Ibid* at s.347 (2) (a) & (b).
[28]*Ibid* at s.346 (2).
[29]*Prudential Assurance Co.Ltd v Newman Industries Ltd* (*No.2)*, above n 8.

of the action may appear wider than authorising the applicant or any other person to control the conduct of the action. Be that as it may, the remedy may remain a vague letter provision until the courts have the opportunity to give it an interpretation. To aggravate the situation, there are no comparable provisions under the South African[30] and the United Kingdom laws,[31]with respect to the provisions of section 347(2)(a)&(b) of CAMA. Thus, it is not possible to use the interpretation in the aforementioned jurisdictions to explain the meaning of the Nigerian provisions.

5.2.2 PAYMENT OF REASONABLE LEGAL FEES

Another remedy available under derivative actions in CAMA, is the power of the court to order the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.[32] A similar provision exists in the South African law in which the court may make an order stating who is liable for the remuneration and expenses of the person appointed after granting leave.[33] There is however, no similar provision under the United Kingdom jurisdiction.[34]This thesis posits that the remedy of reimbursing the applicant the cost of instituting a derivative action appears to sit more comfortably with regards to the issue of funding of derivative actions; and is therefore proposed to be discussed in Chapter Six of this thesis accordingly. This thesis further posits that the relief of payment of reasonable legal fees to an applicant in a derivative action is aimed only at facilitating or enabling the action,[35] and is therefore, not directed primarily at providing a solution to the breach of corporate duties the applicant is complaining about.

5.2.3 AWARD OF COMPENSATION/PERSONAL RECOVERY BY SHAREHOLDERS

The court is also empowered under section 347 of CAMA, to direct that any amount payable by a defendant in the action shall be paid directly in part or in whole to former and present security holders of the company instead of to the company.[36] This remedy can only be granted by the court at the conclusion of the substantive hearing of a derivative action; and thus,

[30]SA Companies Act 2008, s. 165.
[31]UK Companies Act 2006, ss.260-264.
[32]CAMA, s.347 (2) (d).
[33]SA Companies Act 2008, s.165 (9).
[34]UK Companies Act 2006, ss.260-264.
[35]Maleka Femida Cassim, above n 4 at 158.
[36]CAMA, s.347 (2) (c).

differs from the remedies of authorising a person to control the conduct of and giving directions for the conduct of a derivative action,[37] which are essentially interim or interlocutory in nature.[38]Furthermore, I argue that the remedy also establishes the fact that the court can award compensation or damages to the company in the event of a successful derivative action. [39]However, this remedy has been construed mainly in the sense that it affords personal recovery to shareholders or discretion to order payment to shareholders. [40]There can be no doubt that this remedy may be an incentive to shareholders to institute derivative actions, and that it is connected with the issue of funding. However, this remedy shall be discussed in this chapter since it is posited that it is primarily about the court being able to award compensation or damages to the company.Firstly,a cursory look at section 347(2) (c), appears to moot the idea that the court can only order compensation to be paid to shareholders. This thesis however, suggests that this remedy should not be interpreted to mean that the court cannot also order the wrongdoer to pay damages to the company. Thus, it is maintained that the phrase 'instead of the company' implies that the law already assumes that the court has a right to order compensation to be paid to the company. Alternatively, I suggest that there should be an amendment of the law expressly enacting a remedy of compensation for the company in the event that a derivative action is successful. I argue that the amendment is necessary in spite of the general powers of the court to make any order as it deems fit.[41] This is because an express legislation stating that the court can order the defendant to pay compensation to the company will, in line with the objective of this thesis, enhance the clarity of the law with respect to derivative actions.

Secondly, it is observed that the wordings of the provisions of section 347(2) (c) of CAMA, appear to limit the remedy payable to the applicant to monetary compensation because of the phrase 'directing that any amount adjudged payable.' However, it is trite that the rationale for derivative actions includes both compensation and deterrence.[42] This thesis

[37]*Ibid*, s.347 (2) (b).
[38]*Ibid* at s.347 (2) (a) & (b).
[39]Maleka Femida Cassim,above n 4 at 29. See the Canadian case of *Richardson Greenshields of Canada Ltd v Kalmacoff* [1955] BLR (2d) 197 at 205.
[40]Andrew Keay, above n 9 at 48. See Maleka Femida Cassim, above n 4 at 156.
[41]Arad Reisberg, above n 4 at 54-55.
[42]The American case of *Diamond v Oreamuno* 24 NY 2d 494,248 NE 2d 910,301 NYS 2d 78 (1969). See Maleka Femida Cassim, above n 4 at 8.

therefore suggests an amendment of the law such that the remedies available to applicants in derivative actions would capture the deterrent aspect of derivative actions.[43] It is in furtherance of this objective that it is hereby suggested that additional remedies such as removal of directors[44] and disqualification of directors [45] should be included in the remedies for derivative actions. In the meantime, this thesis proposes that the present law should not be interpreted in such a way as to preclude the court from making orders that are deterrent in nature,[46] in view of the fact that the law empowers the court to make any order as it deems fit.[47]

Meanwhile, it is argued that payment of compensation or damages to shareholders as provided under section 347(2) (c) of CAMA, amounts to personal recovery by shareholders and has the potential to obfuscate the distinction between personal actions and corporate actions.[48] This is because derivative actions border on the enforcement of the infringement of the rights of the company, therefore, any compensation emanating from the action should be as a matter of recourse, paid to the company and not to the shareholders. [49] These factors are plausible explanations for the absence of the remedy in the South African[50] and the United Kingdom[51] legislations. The remedy is however, available in Canada from where it was probably adopted into the Nigerian jurisprudence.[52]

The remedy of personal recovery by shareholders is founded on the argument that payment to shareholders would help to avoid an anomalous situation in which compensation awarded to the company would end up in the pockets of the wrongdoing directors of the company, given that the company is an artificial entity managed by the directors.[53] This argument buttresses the points that personal recovery by shareholders in derivative actions is premised

[43]Maleka Femida Cassim, above n 4 at 142.
[44]CAMA, s.288.
[45]*Ibid* at s.280.
[46]Maleka Femida Cassim, above n 4 at 8.
[47]CAMA, s.304 (1).
[48]Maleka Femida Cassim, above n 4 at 157.
[49]*Ibid* at 5.
[50]SA Companies Act 2008, s.165.
[51]UK Companies Act 2006, ss.260-264.
[52] Nigerian Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law*, above n 3 at 239. See Canada Business Corporation Act 1985, s.240(c). See also New Zealand Companies Act 1993, s.167 (d).
[53]Andrew Keay, above n 9 at 49.

on interest of justice since it links the stake with the reward;[54]and also, that the absence of this remedy may lead to the demise of derivative actions.[55] Therefore, it has also been posited that payment to former shareholders may help to prevent unjust enrichment of current shareholders, particularly where the latter are not the same shareholders who suffered from the injury inflicted by the wrongdoers on the company which resulted in their having to sell their shares at an undervalue. [56] It is however doubtful if the court can order that only shareholders who are not involved in the wrongdoing may partake in the recovery, in order to ensure that the wrongdoing directors or wrongdoing majority shareholders do not share in the compensation.[57] Nevertheless, on the one hand, it has been advocated that the remedy should be included in the United Kingdom jurisprudence because of the incentives it provides to shareholders.[58] Cassim however, cautions that if the remedy of granting personal recoveries to shareholders should be adopted in South Africa, it should be applied by the courts in exceptional cases only, not just because it offends the principle of corporate personality, but because it can potentially encourage strike suits.[59]Be that as it may, this thesis argues that since the mischief the remedy of granting personal recoveries to shareholders is intended to achieve is to avoid a situation whereby compensation due to the company will go to the wrongdoers, the addition of the remedies of removal and disqualification of directors to the regime of derivative actions as proposed earlier in this chapter, will negate the need for the remedy since it will enable the court in derivative actions to remove the wrongdoing directors. Thus, any compensation awarded to the company will not be hijacked by the wrongdoing directors who have been removed or otherwise disqualified by the courts. Consequently, it is suggested that if CAMA is amended to accommodate the remedies of removal and disqualification of directors in derivative actions, it should also be amended to remove the remedy of personal recovery by shareholders in derivative actions. The removal

[54]*Ibid*. See Frank H. Easterbrook and Daniel R. Fischel, *Economic Structure of Corporate Law* (Havard University Press, USA 1991) 101.
[55]Andrew Keay, above n 9 at 49.See Maleka Femida Cassim, above n 4 at 156.
[56]Maleka Femida Cassim, above n 4 at 156. See however, the English case of Regal *Hastings Ltd v Gulliver* [1942] 1 All ER 378. The decision in the case has been criticised for its resultant effect of enriching the new shareholders of the company who effectively were able to recover what has been termed as an undeserved portion of their purchase price See Paul L.Davies, *Gower And Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell, London 2008)562.
[57]Maleka Femida Cassim, above n 4 at 157, to the effect that payment to shareholders while excluding wrongdoing shareholders can be used to prevent wrongdoers from benefitting from their own wrongdoing.
[58]Andrew Keay, above n 9 at 49.
[59]Maleka Femida Cassim, above n 4 at 157.

of the remedy of personal recovery for shareholders in derivative actions in Nigeria will allow the Nigerian derivative actions jurisprudence to be in all fours with what currently obtains in South Africa and the United Kingdom.[60] This position, if adopted, will lay to rest the conflict between the remedy and the foundational principle that a company is a separate legal entity distinct from its shareholders.[61] Meanwhile, the issue of additional remedies of removal and disqualification of directors will be discussed in details later in this chapter.

5.3 PAUCITY OF SPECIFIC REMEDIES

From the foregoing, it has been ascertained that CAMA provides some specific remedies or powers (apart from remedies with regards to costs and funding), which the court can exercise in respect of derivative actions.[62] However, this does not appear to be the situation in every jurisdiction. For instance, under section 165 of the South African Companies Act, the remedies available to an applicant in a derivative action border on the costs and funding of derivative actions only.[63] In the same vein, there are no provisions in the Companies Act of the United Kingdom specifying the remedies that may be applied by the courts in the event that a derivative action is successful.[64] Moreover, in the case of Nigeria, it is possible to make reference to common law with regards to remedies available in derivative actions considering that the common law derivative action is applicable still.[65] However, it is doubtful if the courts in South Africa and the United Kingdom can rely on decided cases under the common law to determine the scope of the remedies available in derivative actions, in view of the abolition of the common law derivative action in both jurisdictions.[66] In any case, it can be implied that the courts in South Africa and the United Kingdom will grant compensation to a company in a derivative action if it is discovered that the company has been wronged, since the award of damages to the company forms the basis of derivative actions.[67]Meanwhile, this thesis opines that the rationale for the legislatures in South Africa and the United Kingdom, in not providing specific remedies for derivative actions is grounded on the fact that it is inherent under the

[60]*Ibid* at 156.
[61]The English case of *Salomon v Salomon* [1897] AC 22.
[62]CAMA, s.347.
[63]SA Companies Act 2008, s.165 (10).
[64]UK Companies Act 2006, ss.260-264.
[65]Motunrayo O.Egbe *'Global* Trends In Statutory Derivative Actions: Lessons For Nigeria' [2013]12 *Nigerian Law & Practice Journal* 51 at 60.
[66]SA Companies Act 2008, s.165 (1); UK Companies Act 2006, s.260 (2).
[67]Andrew Keay, above n 9 at 48.

law that any breach of duty to the company, either by the directors or third parties will attract compensation or damages in favour of the company under the ordinary rules of contract, common law and Statutes.[68] This argument appears to buttress the point that the derivative action is only a procedural device through which the law ensures that corporate malfeasance does not go without redress.[69]At any rate, the argument about the absence of specific remedies in South Africa and the United Kingdom may appear basically academic in view of the cases that have been decided under the statutory derivative action regimes in both jurisdictions. [70]Meanwhile, it appears that the enactment of specific remedies in the derivative action regime in Nigeria is an indication of the recognition of the existence of a substantive element in derivative actions.[71]Nevertheless, the remedies available under derivative actions in Nigeria, South Africa and the United Kingdom appear to be very narrow, compared to the wide discretionary remedies available to a petitioner who brings a minority right action under the Unfair Prejudice Remedy.[72]

5.4 THE UNFAIR PREJUDICE REMEDY

5.4.1 THE CONCEPT

Although, this chapter is concerned with comparing the remedies available to a litigant who brings an action under the Unfairly Prejudicial remedy *vis avis* the remedies available under derivative actions, it appears quite appropriate nonetheless, to discuss the concept of unfairly prejudicial actions. This is because a discussion on the concept of unfair prejudice may serve as a background to the understanding of the remedies available under it. Moreso, the concept of derivative actions, whose remedies are intended to be compared with the remedies under the unfairly prejudicial conduct, has been discussed extensively in the previous chapters of this thesis.

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[68]SA Companies Act 2008, s.77, which prescribes the liabilities of directors and prescribed officers for breach of their fiduciary duties to the company. See Farouk HI Cassim,' The Duties And The Liabilities of Directors' in Farouk Hl Cassim (ed), *Contemporary Company Law*(3rd edn,Juta, Cape Town 2021) 681 at 783. See the English case of Cook *v Deeks* [1906]1 AC 554.

[69]UK Companies Act 2006, s.261 (4), allows the court either to give permission to continue the claim, refuse permission and dismiss the claim or adjourn the proceedings. See A.J Boyle, above n 4 at 8.

[70]The South African case of *Mouritzen v Greystone Enterprises (Pty) Ltd* [2012] 5 SA 74. See the English cases of *Barrett v Duckett* [1995] 1 BCLC 243; *Franbar Holdings Ltd v Patel* [2008] EWHC 1534.

[71]A.J Boyle, above n 4 at 8.

[72]CAMA, s.353; SA Companies Act 2008, s.163; UK Companies Act 2006, s.994.

One of the distinctive characteristics of actions brought under the unfairly prejudicial conduct remedy is that it is aimed at protecting the personal interests of the applicant.[73] This type of action is however different from the ordinary personal actions because the cause of action must involve an act, omission, proposed act or omission or conduct in the affairs of the company which is oppressive, unfairly prejudicial or unfairly discriminatory against the petitioner.[74] The unfair prejudice remedy is perceived as a veritable tool for the protection of minorities because of its wide and flexible cause of action.[75]Generally, derivative actions are focused on protecting the rights of the company while the unfair prejudice remedy is concerned with the protection of not only the legal rights of the petitioner but his interests as well.[76] Thus, the unfair prejudice remedy was originally premised upon the legitimate expectation of the litigant, but later on, premised upon equitable considerations owing to its focus on the interests of the petitioner.[77]These observations may appear to be more pronounced in jurisdictions like South Africa where there are multiple unfair prejudicial actions, since the shareholders and directors of a company or a related person can apply for relief.[78]

Furthermore,while the concept of statutory derivative actions is still novel in corporate governance, the unfairly prejudicial conduct remedy has been controlled by statutory provisions for a very long time.[79]Perhaps, it is the early exposure to Statutes that is responsible for the unfair prejudice remedy being ahead of derivative actions in terms of wideness and flexibility.[80] For instance, the Oppression Remedy (now referred to as the Unfair Prejudice Remedy)under the United Kingdom Companies Act 1948, provided that a member

[73]Paul L.Davies, above n 56 at 684.
[74]S H Goo, *Minority Shareholders'* (Cavendish Publishing, Great Britain 1994)10. See Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003) 279.
[75]CAMA, s.355, which allows the court to make any order as it deems fit. See Arad Reisberg, above n 4 at 274, where the author described the unfair prejudice remedy as 'more flexible and useful.' See also Andrew Keay, above n 9 at 60.
[76]Paul L.Davies, above n 56.
[77] *Ibid* at 694. See the English case of *O'Neill v Phillips* 1999 1 WLR 1092.
[78] SA Companies Act 2008, s.163 (1). See Maleka Femida Cassim, 'Shareholder Remedies and Minority Protection' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3 rd edn, Juta, Cape Town 2021)1015 at 1023.
[79] UK Companies Act 1948, s.210; Nigerian Companies Decree 1968, s.201. Compare with Statutory derivative actions provisions like the UK Companies Act 2006, s.260; CAMA, s.346; SA Companies Act 2008, s.165. Derivative actions evolved from the common law and had remained under the common law jurisprudence until recent times. See Chapter Two.
[80]Joseph E.O.Abugu, above n 4 at 603.

of the company could petition the court if the affairs of the company are being conducted in a manner that is oppressive to some of its members including the petitioner. [81]The aggrieved member was also obliged to show that the cause of action could also substantiate the winding up of a company on just and equitable grounds.[82]However, this provision had many flaws. In a nutshell, only a member could bring a petition.[83]Furthermore, the oppression must be in respect of his membership of the company.[84] In addition, the alleged oppression must be of a continuous nature since it must be a reflection of the state of affairs of the company. This means that, one single act of oppression would not suffice.[85] Also, since oppression was described as what is burdensome, harsh and wrongful,[86] acts of negligence, mis- management or disharmony in corporate administration did not come under the scope of the Oppression Remedy.[87]

The reformation of the remedy of unfair prejudicial conduct resulted in the expansion of the cause of action from mere oppression to include unfair prejudicial conduct and unfair discrimination and disregard of interests.[88] In addition, the cause of action is not limited to the conduct of the affairs of the company but however, includes an act or omission or proposed act or omission of the company.[89] Also, the complaints of the petitioner may be with respect to what was being done against the interests of a member or members as a

[81]S.H Goo, above n 74 at 15.
[82]*Ibid*.
[83]*Ibid* at 17. It appears that the member must be able to show that he has some financial interests in the company e.g.that he is entitled to share part of the surplus fund of the company in the event of the winding up of the company. See the English case of *Re Bellador Silk Ltd* [1985] 1 All ER.667. See however, the Nigerian case of *Re Talcum (W.Nig) Ltd* [1972] NCLR 293, where the court allowed a petition brought under the Unfair Prejudice remedy even though the petitioner did not have any locus standi to proceed to wind up the company because there was no evidence of tangible interests to bring a petition under the Oppression remedy. See also E.O.Akanki,' Protection of the Minority in Companies' in E.O.Akanki (ed), *Essays on Company Law* (University of Lagos Press, Lagos 1992) 276 at 282-283.
[84]The English case of *Re Westbourne Galleries Ltd* [1970] 1 WLR 1378. See Maleka Femida Cassim, above n 78 at 1022, to the effect that majority shareholders may not be able to lay claim to being oppressed in the company.
[85] S H Goo, above n 74 at16.
[86]The English case of *Scottish Co-operative Wholesale Society Ltd* v Meyer [1958] 3 All ER 66 at 71.
[87] E.O.Akanki, above n 83 at 285-286.
[88]CAMA, s.355; SA Companies Act 2008; s.163 (1); UK Companies Act, s.994 (1). The UK provision substitutes the word 'oppression' for 'unfair prejudice' while the Nigerian and South African provisions retain the word 'oppression, in addition to unfair prejudice. See E.O.Akanki, above n 83 at 289. Meanwhile, whereas the Nigerian provision extends the remedy to what is unfairly prejudicial, unfairly discriminatory or in disregard of the interest of the petitioner, the South African provision does not include what is unfairly discriminatory. See Maleka Femida Cassim, above n 78 at 1018.
[89]CAMA,s.354(2)(a)(ii) ;UK Companies Act 2006,s.994(1)(b).

whole[90]or against the interests of a director, officer or former director or officer of the company, creditor, or any other person authorised by the court, or against public policy.[91]

The introduction of unfair prejudice as a remedy for the protection of minorities means that in situations where for instance, the directors had been paying excessive remuneration to themselves while proposing low dividend for the shareholders, the interests of the shareholders could be protected.[92] This kind of wrongdoing cannot be protected under derivative actions since the directors have the prerogative of proposing the amount of dividend to be declared, and since the shareholders are only entitled to dividend declared by the company as of right. [93] It appears also that the issue of mismanagement which does not come under the purview of derivative actions[94] could come within the compass of unfair prejudice in exceptional cases.[95]It has even been argued that the unfair prejudice remedy may allow actions based on the diminution in the value of the shares of a plaintiff minority, which is not available at common law,[96] and was therefore rejected in the *Prudential* case.[97] This position is hinged on the fact that where the court orders the shares of a petitioner to be purchased at a fair value as if the wrongdoing has not occurred, it enables the petitioner to sideline the reflective loss principle. [98]Furthermore, it has been said that breach of directors' duties which can be remedied through derivative actions could also fall under the unfair prejudice remedy on the premise that shareholders have a legitimate expectation that directors would perform their fiduciary duties as well as duties of care and skill to the company.[99] In addition, it has been submitted that where the majority ratify an act of the

[90]*Ibid* at s. 354 (2) (a) & (c); *Ibid* at, s.994 (1) respectively.
[91]CAMA, s.354 (2) (b).
[92]Brenda Hannigan, *Company Law* (4th edn, Oxford University Press, Oxford 2015) 504. See Rehana Cassim & Vela Madlela 'Disclosure of Directors' Remuneration under South African Company Law: Is it Adequate?' [2017] 134(2) *South African Law Journal* 383. See also Tshepo Mongalo 'Shareholder Activism in the United Kingdom Highlights the Failure of Remuneration Committees: Lessons for South Africa' [2003] *South African Law Journal* 756 at 757.
[93]The English case of Re *A Company* (No 004415 of 1996) [1996] 1BCLC 724.See CAMA, s.379.
[94]Arad Reisberg, above n 4 at 37.
[95]The English case of Re *Elgindata* [1991] BCLC 959.
[96]Simon Goulding, *Company Law* (2nd edn, Cavendish Publishing Limited, London 1999) 357.
[97]Above n 8.
[98]Brenda Hannigan 'Drawing Boundaries between Derivative Claims and Unfairly Prejudicial Petitions' [2009] *Journal of Business Law* 606 at 615-616.
[99]*Ibid* at 614.See S H Goo, above n 74 at 81.

directors, the minority can bring an action maintaining that the ratification by the majority has unfairly prejudiced their interests.[100]

However, it is important to state that unfair prejudice may not necessarily imply unfair discrimination, otherwise unfair discrimination would not have been separately provided for in some jurisdictions.[101] Unfair discrimination may appear to suggest that the minority shareholders are disadvantaged when compared with the majority shareholders, while unfair prejudice does not necessarily include elements of discrimination.[102] For instance, refusal to pay dividend to the shareholders generally cannot be said to be discriminatory against the minority and in favour of the majority, but could be the subject of unfair prejudice.[103]However, in the case of the United Kingdom where there is no provision for unfair discrimination,[104] it has been argued that the use of the phrase' unfairly prejudicial to the interests of its members generally' indicates that there is no need for the petitioner to show that there is any discrimination.[105] The unfair prejudice remedy has also been extended to unfair disregard of the interests of the petitioner in countries like Nigeria[106] and South Africa.[107]

Although, the use of the word 'interests' has been interpreted to imply equitable consideration or a concept wider than legal rights,[108]in the United Kingdom where there is only reference to unfair prejudice, the concept of 'interests'[109]is equally applied.[110]Nonetheless, the significance of the inclusion of the phrase 'unfairly disregard of interests' may lie in the fact that it reinforces the concept of equitable considerations as opposed to legal rights.[111] In addition, it detaches the interests of a shareholder from the interests of the company, and gives the courts by far greater powers to intervene in corporate

[100]S H Goo, above n 74 at 83.
[101]CAMA, s.353.
[102]E.O. Akanki, above n 83 at 292.
[103]*Ibid* at 293.
[104]UK Companies Act 2006, s.994 (1).
[105]Arad Reisberg, above n 4 at 277.
[106]CAMA, s. 354(2).
[107]SA Companies Act 2008, s. 163(1).See Maleka Femida Cassim, above n 78 at 1033.
[108]Paul L.Davies, above n 56 at 692.
[109]Emphasis mine.
[110]UK Companies Act 2006, s. 994(1) (a).
[111]Maleka Femida Cassim, above n 78 at 1018.

management since the conduct the petitioner is complaining about does not have to affect the interests of the company as a whole or that of the majority.[112]

5.4.2 AVAILABLE REMEDIES

In demonstration of the wider and flexible posture of the modern day concept of unfair prejudice as aforesaid, there are provisions for varied and elastic remedies under the law.[113] The court is also given a wide-range of powers as it may deem fit, which means that the power of the court is not dependent upon the prayers of the petitioner.[114]The remedies available to a petitioner under the unfair prejudice option in minority protection by which the court may make one or more of the following orders under CAMA are stated below: [115]

that the company be wound up;

for regulating the conduct of the affairs of the company in the future;

for the purchase of the shares of any member by other members of the company;

for the purchase of the shares of any member by the company and for the reduction of the company's capital accordingly;

directing the company to institute, prosecute, defend or discontinue specific proceedings, or authorising a member or members or the company to institute, prosecute, defend or discontinue specific proceedings in the name or on behalf of the company;

varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract;

directing an investigation to be made by the Commission;

appointing a receiver or receiver and manager of the property of the company;

restraining a person from engaging in specific conduct or from doing a specific act or thing.

The United Kingdom provisions are similar to what obtains under CAMA.[116]However,the United Kingdom legislation does not include the following: giving the court the power to order the winding up of the company; [117]varying or setting aside a transaction or contract to which

[112]E.O. Akanki, above n 83 at 294-295.
[113]Maleka Femida Cassim, above n 78 at 1044.
[114]CAMA, s.355 (1); SA Companies Act 2008, s.163 (2).
[115]CAMA, s.355 (2).
[116]UK Companies Act 2008, s. 996(2).
[117]CAMA, s.355 (2) (a).

the company is a party and compensating the company or any other party to the transaction or contract; [118]directing an investigation to be made by the Commission;[119] and appointing a receiver or receiver and manager of the property of the company.[120] It has been observed that in the United Kingdom, the court may require the company to not make any specified alterations in its Articles without the leave of court.[121] There is however, no such corresponding provision either in CAMA[122] or in the South African Companies Act.[123]

The South African provisions with regards to remedies under the unfair prejudice caption have some form of semblance with the Nigerian and United Kingdom provisions but however, differ from them in many respects. Thus, the court under the South African Company law has powers to make the following orders which may not be available in the provisions of the Nigerian and United Kingdom legislations:[124]

order the appointment of a liquidator[125] but, it may also order the company to be placed under supervision; and also commence business rescue proceedings;[126]

regulating the company's affairs by directing the company to amend its Memorandum of Incorporation[127] or to create or amend a unanimous shareholder agreement;

appointing directors in place of or in addition to all or any of the directors then in office; or declaring a person delinquent or under probation as contemplated in section 162; [128]

directing the company or any other person to restore to the shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value with or without conditions;[129]

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[118]*Ibid* at s.355 (2) (f).
[119]*Ibid* at s.355 (2) (g).
[120]*Ibid* at s.355 (2) (h).
[121]UK Companies Act 2006, s.996 (2) (d).
[122]CAMA, s.355.
[123]SA Companies Act 2008, s.163 (2).
[124]Maleka Femida Cassim, above n 78 at 1046-1047. See Carl Stein, above n 5 at 369, to the effect that some of these reliefs are corporate reliefs which should belong to the company as of right.
[125]SA Companies Act 2008, s.163 (2) (b).
[126]*Ibid* at s.163 (2) (c).
[127]CAMA, s. 355(4), which allows the court to alter or make additions to the Memorandum and Articles of Association.
[128]The South African case of *Grancy Property Ltd v Manala* [2015] (3) SA 313, where the court ordered the appointment of independent directors for the company. See Rehana Cassim, above n 8 at 154.
[129]This provision is similar to the order to purchase the shares of the company, which appears to be the most common order the court can make in Unfair Prejudice actions. It is suggested that the legislation ought to be more explicit about the order to purchase the shares of the petitioner in South Africa because it is a very important remedy under the unfair prejudice regime. Nevertheless, it appears that the wide and discretionary

requiring the company, within a time specified by the court to produce to the court or an interested person, financial statements in a form required by the Act, or an accounting in any other form the court may determine;[130]

directing rectification of the registers or other records of the company.[131]

The wide range of remedies available to a petitioner who seeks minority protection under the cover of the unfair prejudice remedy is significant. [132]The traditional view is that the petitioner may no longer be interested in retaining his membership of the company as a result of the unfair treatment that was meted out to him.[133] It is therefore believed that the interests of a petitioner should be separated from the interests of the respondents, who meted out the unfair treatment. [134] This argument is sound in the light of the fact that the premise on which the petitioner is asking for a remedy under the unfair prejudice caption is the breakdown in the inter- personal relationship upon which the business relationship was established.[135] Thus, the most common remedy is the discretionary powers of the court to order the purchase of the shares of the petitioner by other members of the company[136] or by the company.[137] This thesis argues that the need to utterly separate the petitioner from his oppressors may also be a plausible reason why the courts have been given discretionary powers with respect to the winding up of a company;[138] the power to vary or set aside any

powers of the court under SA Companies Act 2008, s.163 (2), will enable the court to be able to make an order for the purchase of the shares of the petitioner. See Maleka Femida Cassim, above n 4 at 201.

[130]SA Companies Act 2008, s.163 (2) (i).

[131]*Ibid* at s.163 (2) (k).

[132]Maleka Femida Cassim, above n 78 at 1049.

[133]Victor Joffe, above n 3 at 329.

[134]*Ibid.*

[135]Paul.L.Davies, above n 56 at 702.

[136]CAMA, s.355 (2) (c).

[137]*Ibid*. See CAMA, s.355 (2) (d). The issue of purchase of a member's shares by the company is ordinarily frowned at under the Maintenance of Capital principle. Purchase of a member's shares by the company under the unfair prejudice remedy may also allow a reduction in the share capital of the company without fulfilling the conditions contained in CAMA,s.131(1),such as having a provision in the company's articles authorising reduction of share capital. See Brenda Hannigan, above n 98 at 617. See also Robert R.Pennington, *Company Law* (8th edn, Butterworths 2001) 831, to the effect that the court may also order the majority shareholders to sell their shares to minority shareholders in order to reduce their control in the company. See the South African case of *Benjamin v Elysium Investments (Pty) Ltd* [1960] (3) SA 467.

[138]CAMA, s.355 (a).

contract or transaction involving the company; and compensation of the company or any other party.[139]

It is also the opinion of some academic writers that founding the remedies under unfair prejudice on allowing the petitioner to leave the company suggests that the unfair prejudice option is more suited for private companies where shares cannot be easily transferred unlike what obtains in public companies where shares can be easily transferred.[140] This view point is however, confounded by the fact that there are other remedies under the unfair prejudice option which do not support the argument of facilitating the exit of the company by the petitioner. Thus, while the injunctive[141] and mandatory remedy,[142] and the power to order the investigation of the company[143] available under the unfair prejudice action might be useful to any petitioner whether or not he wants to exit the company, the same cannot be said for instance,of the derivative action remedy available under the unfair prejudice remedy,[144] the order to place the company under supervision or commence business rescue proceedings,[145]the order to remove or appoint new directors,and declaring a person delinquent or placing him on probation,[146] or to rectify the company's register.[147] This is because these remedies appear suited for petitioners who are still interested in continuing with the company.

Because the remedy most commonly associated with the unfair prejudice action is the order to purchase the shares of the petitioner in order to facilitate his exit from the company,[148]it

[139] CAMA, s.355 (2) (f). This remedy has been opined to be very useful in checkmating promoters of the company who eventually become controllers of the company against abuses of overcharging the company for properties transferred to the company; and from making secret profits. See E.O.Akanki, above n 83 at 304.
[140]Arad Reisberg, above n 4 at 288.
[141]UK Companies Act 2006,s.996(2)(b)(i);CAMA;s.312(2)(i);SA Companies Act 2008,s.163 (2)(a).
[142]CAMA,s.355(2)(j);UK Companies Act 2006;s.996(2)(b)(ii). There appears to be no corresponding remedy requiring a petitioner to do a specific act or thing under the SA Companies Act 2008, s.163.
[143]This remedy is only available under the unfair prejudice action in Nigeria. See CAMA, s.355 (2)(g).In Nigeria, an investigation of the company may result in winding up petition, civil proceedings of the company being brought by the Commission; or criminal proceedings being instituted by the Attorney - General of the Federation. See CAMA, ss. 366,364 &365 respectively.
[144]CAMA,s.355(2)(e); SA Companies Act 2008,s.163 (2) (l);UK Companies Act 2006,s.996(2)(c).
[145] SA Companies Act 2008, s.163 (2) (c).
[146]*Ibid* at s.163 (2) (f).
[147]*Ibid* at s.163 (2) (k).
[148]Brenda Hannigan, above n 92 at 514. See the South African case of *Bayly v Knowles* [2010](4) SA 548, where the court maintained that an action hinged on relief from oppressive conduct cannot be sustained by a minority shareholder who is unwilling to exit the company by selling his shares at a reasonable price. See also Maleka Femida Cassim, above n 78 at 1045.

has often been said that a derivative action will only be desirable where the petitioner is interested in retaining his membership of the company and not otherwise.[149]However, this argument would perhaps,be more profound under the common law where only a member was qualified to bring a derivative action.[150] As has been stated earlier in this thesis, the list of applicants in a derivative action extends to former shareholders, former beneficial owners, directors, former directors, the Commission and any other person appointed at the discretion of the court.[151] Thus, even non-members of the company who are interested in the company being run properly may institute derivative actions. [152]Nevertheless, the point of view that a member who is not interested in continuing his membership of the company would prefer the court to order the sale of his shares than ordering that a derivative action be instituted remains valid.[153] Also, stakeholders other than shareholders who have instituted derivative actions may have done so because they are interested in retaining their relationship with the company or are interested in ensuring that the company remains a going concern.[154] However, the existence of the remedy of derivative action under the unfair prejudice action appears to complicate or confuse the argument.[155]

In summary, it appears that the unfair prejudice action is not poised to align with the doctrine of judicial non- interference in which the courts refrain from undue interference with the decision of companies.[156]This explains the inclusion of very wide and far reaching remedies such as alteration or addition to the Memorandum and Articles of the company, [157]removal and appointment of directors.[158]Perhaps, the unfair prejudice action is able to sustain this overstretching approach because the remedies are targeted at resolving disputes in private companies which have traditionally been shielded from strict and rigorous corporate law

[149]Arad Reisberg, above n 4 at 288.
[150]The English case of *Daniels v Daniels* [1978] Ch.406.
[151]CAMA, s.352.
[152]*Ibid*.
[153]Maleka Femida Cassim, above n 78 at 1048.
[154]For instance, a director who is still interested in being a director of the company may institute a derivative action. Also, the Nigerian Corporate Affairs Commission may institute a derivative action for the purpose of ensuring that the company remains a going concern. See CAMA, s.352.
[155]Victor Joffe, above n 3 at 312.
[156]E.O.Akanki, above n 83 at 305. See Joseph E.O. Abugu, above n 4 at 404.See also Maleka Femida Cassim, above n 78 at 1049.
[157]CAMA, s.355 (4).
[158]SA Companies Act 2008, s.163 (2) (f).

principles.[159] Another reason for the liberal approach may be because the remedies are focused on addressing the personal rights of the petitioner and not the rights of the company.[160]However, personal rights which are the focus of the unfair prejudice actions, more often than not, involve corporate rights.[161]

5.4.3 JUDICIAL DERIVATIVE ACTION-THE DERIVATIVE ACTION REMEDY UNDER THE UNFAIR PREJUDICE REMEDY

It has earlier been said that as part of the wide and liberal attitude of the legislature under the unfair prejudice action, the court may authorise the institution of a derivative action. [162] One advantage of this provision is that it helps to link together the major remedies available under minority protection i.e.derivative actions and the unfair prejudice actions, being exceptions to the rule in *Foss v Harbottle*, by enabling them to flow into each other. However, while the United Kingdom legislation allows the court to vest the power to institute a derivative action in an unfair prejudice application on any person or persons as it may deem fit,[163] the Nigerian provision restricts such powers to members alone.[164] It is observed that this provision does not tally with the provisions of CAMA with regards to persons who can bring derivative actions, which stipulate that persons other than members can bring such actions.[165] The implication of this could be that a derivative action brought as a result of an order of the court under the unfair prejudice application in Nigeria must be placed under a different category from the one instituted under section 346 of CAMA which deals directly with derivative actions. The restriction in Nigeria, on persons who can bring derivative actions under the unfair prejudice remedy to members alone, appears to be founded on the limitation placed on the unfair prejudice remedy at the stage of conception in which an action

[159]Arad Reisberg, above n 4 at 288. See S.H.Goo, above, n 74 at 31. See however,the English case of *Re Blue Arrow [*1987] BCLC 585, which has been described in Charles Wild &Stuart Weinstein, *Smith and Keenan's Company Law*(16th edn, Pearson Educational Limited, United Kingdom)334-335, as one of the rare cases in which the unfair prejudicial remedy was applied to a public company.
[160] Maleka Femida Cassim, above n 78 at 1018.
[161]Victor Joffe, above n 3 at 312.
[162]CAMA, s.355 (2) (e). See Arad Reisberg, above n 4 at 279. See also Paul L.Davies, above n 56 at 686.
[163]UK Companies Act 2006, s.996 (2) (c).
[164]CAMA, s.355 (2) (d).
[165]*Ibid* at s.352.

could only be instituted qua membership.[166] However, the restriction can no longer be sustained as a result of the removal of that barrier.[167]

It is not so clear whether the South African legislations provide for the court to order that a derivative action be instituted as a remedy under the unfair prejudice provisions. The South African Companies Act however, empowers the court to order the trial of any issue as determined by the court.[168] This provision might be sufficient to infer that derivative actions come under the purview of the remedies available under the South African unfair prejudice actions provisions.[169]

Nevertheless, it is doubtful if a petitioner who has sought solace under the far reaching provisions of the unfair prejudice remedy would find it convenient, if he is asked to commence another action, particularly a derivative action with all its complexities and limited remedies.[170]However, it safely can be argued that the presence of derivative actions as a remedy in unfair prejudice action may be justified by the importance of establishing the fundamental differences between a derivative action and the unfair prejudice remedy.[171] This is because while the former aims at redressing breach of duties owed to the company, [172]the latter is concerned with ensuring that the interest of the petitioner in the affairs of a company is protected.[173] The rationale for providing for derivative actions as a remedy in unfair prejudice action might therefore be to redirect breach of corporate wrongs erroneously brought under the unfair prejudice action.[174] In addition, this remedy might help to ameliorate the accusations that the unfair prejudice actions are being used to outflank the rule in *Foss v Harbottle*,[175] since causes of action transferred to the derivative action regime from the unfair prejudice action will not be viewed in that light.[176] Nevertheless, it has been argued that in order not to make the provision a redundant piece, it is better for the law to be amended to enable the court to grant a remedy for a wrong done to a company in an unfair

[166]S.H.Goo, above, n 74 at 31.
[167]CAMA, s.353 (1) (e).
[168]SA Companies Act 2008, s.163 (2) (f).
[169]E.O.Akanki, above n 83 at 303.
[170]Arad Reisberg, above n 4 at 279.
[171]Paul L.Davies, above n 56 at 686.
[172]E.O.Akanki, above n 83 at 303.
[173]Paul L.Davies, above n 56 at 686.
[174]*Ibid* at 687.
[175]*Re Saul D.Harrison Plc,* above n 6.
[176]Maleka Femida Cassim, above n 78 at 1051.

prejudice action i.e. consolidation of derivative actions with unfair prejudice actions.[177] This argument may be premised on the impracticability of expecting a litigant to expend time, energy and financial resources to institute two separate actions based on the same complaint.[178] This is beside the point that a petitioner who instituted an action seeking a remedy under the unfair prejudice action because he wants to exit the company might be unwilling to institute a derivative action.[179]

Be that as it may, it is unclear whether a petitioner who has been ordered by the court to institute a derivative action as a remedy under the unfair prejudice action will still be required to obtain leave of the court and give Notice of Demand as a prerequisite to instituting a derivative action. [180]Joffe appears to suggest that the aim of enabling the court to order that a derivative action be instituted in an Unfair Prejudice Petition is to enable the petitioner to bypass the complex requirements of bringing a derivative action.[181] Thus, all that the petitioner needs to establish is that there is Unfair Prejudice, no more, no less. [182] This position is supported by the argument that the court can use its discretionary powers in an action brought under unfair prejudice to determine if the conditions for instituting a derivative action have been met. [183] However, this thesis suggests that in order to revive the dead letter law that allows a court to order the institution of a derivative action in an unfair prejudice action, it becomes necessary to brand this type of derivative action as a special category in which the petitioner would neither be required to give a Notice of Demand,[184] nor apply to the court for leave[185] since the institution of the derivative action is at the instance of the court.[186] Succinctly put, it is posited that the court is only expected to consider whether the petitioner possesses the requirement for leave i.e. there is a serious question to be tried [187]as maintained in Chapter Four. This proposition appears analogous to the concept of futility of demand.[188] This thesis also argues that if the concept of futility of demand which has been

[177]Arad Reisberg, above n 4 at 279.
[178]*Ibid*.
[179]*Ibid.*
[180]CAMA, s.346 (2) (b).
[181]Victor Joffe, above n 3 at 328. See E.O. Akanki, above n 83 at 303.
[182]Victor Joffe, above n 3 at 328.
[183]Paul L.Davies, above n 56 at 686.
[184]CAMA, s.346 (2) (b).
[185]*Ibid* at s.346 (1) & (2).
[186]*Ibid* at s.355 (2) (e).
[187]*Ibid* at s.346 (2) (d).
[188]Maleka Femida Cassim, above n 4 at 21.

discussed in Chapter Three is to be adopted into the Nigerian derivative action jurisprudence, it might be better suited for the purpose of prescribing that a derivative action should be instituted as a remedy under the unfair prejudice action. This is because since an action has already been instituted, the directors of the company are already abreast of the cause of action, it will therefore be preposterous for the law to insist that the company must be given Notice of Demand. [189] It is suggested that jettisoning the requirement of demand [190]and application for leave[191]would make this hybrid of derivative actions more acceptable or practicable, and is preferable to the suggestion that the court be empowered to give a relief for corporate maladministration in an unfair prejudice action.[192] This is owing to the fact that the latter approach would be tantamount to outflanking[193] the rule in *Foss v Harbottle,* which maintains that a company is a different personality from its members; and thus personal actions must be separate and distinct from corporate actions. [194]

5.4.4 CONFLICT BETWEEN DERIVATIVE ACTIONS AND UNFAIR PREJUDICE ACTIONS

While it is possible that causes of action that are founded on derivative actions might be instituted wrongly under the unfair prejudice remedy, it also appears possible that causes of action that properly fit into the unfair prejudice actions might be suitable for derivative actions.[195] This arises where breaches of directors' duties which give rise to a cause of action in a derivative action, also occasion unfairness because it is a negation of the principles agreed upon by the stakeholders upon which the company should be run.[196] Thus, it has been said[197] that in spite of the earlier position of the English Court of Appeal in the *Prudential* case,[198] where the court held that it will not allow personal actions to be used to circumvent the rule in *Foss v Harbottle* because of the reflective loss principle,[199] the courts have allowed breaches of fiduciary duties, which are traditionally owed to the company to be adjudicated

[189]CAMA, s.346 (2) (b).
[190]*Ibid*.
[191]*Ibid* at s.346 (1).
[192]The UK case of *Clark v Cutland & Ors*, above n 8.
[193]Paul L.Davies, above n 56 at 685.
[194]Arad Reisberg, above n 8 at 280-281.
[195]Brenda Hannigan, above n 98 at 629.
[196]Arad Reisberg, above n 4 at 283.
[197]S H Goo, above n 74 at 41.
[198]Above n 8 at 367.
[199]The principle of No Reflective Loss is to the effect that a shareholder may only recover a personal loss which is separate and distinct from any loss suffered by the company. See Stephen Griffin, above n 8 at 463.

as being unfairly prejudicial conduct to minority shareholders.[200] Regardless, this thesis maintains that this problem resonates from the common law derivative action regime,[201] where personal claims and corporate claims are allowed in one action as established in the *Prudential* case;[202] and from the wide discretionary remedial powers given to the courts under the unfairly prejudicial action.[203]

Meanwhile, as a result of the mandatory screening of derivative actions, some actions have been barred from being instituted as derivative actions where personal remedies are involved, such as the unfair prejudice action[204] or declaring a director delinquent.[205] On the other hand, due to the liberal posture of the unfair prejudice action, litigants would prefer to bring actions that could fall under either derivative actions or the unfair prejudice actions, under the latter, for many reasons as follows.[206] In an application for remedy under the unfair prejudice action, it is trite that there is no need to apply for leave to proceed with the action since the applicant is seeking a personal remedy and not a corporate remedy.[207] In addition, the conducts which may constitute unfair prejudice are wider[208] and ratification or authorisation by the company is not a bar to taking an action.[209] Also, the remedy under unfairly prejudicial conduct can be used to provide long term solutions to conflicts between shareholders by enabling the aggrieved shareholder to exit the company, if the court orders the company or other shareholders to purchase his shares.[210] This is particularly very helpful in private companies where the shareholder cannot easily transfer his shares.[211] It has also

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[200]*Re- a Company* (No.005136 of 1986) [1986] 2 BCC 99, where an exercise of fiduciary power of the directors for an improper purpose was held to be a breach of the shareholders personal rights. See the English case of Re *Elgindata Ltd* {1991} BCLC 959 at 1001-1003. *Contra* The English case of *Hogg v Cramphorn Ltd* [1967] Ch. 254. See also Victor Joffe, above n 3 at 312. See also Carl Stein, above n 5 at 369, to the effect that SA Companies Act 2008, s.263, allows the court to make orders that relate to the company and not to the shareholders.

[201]Hoffmann L J in *O'Neill v Phillips*, above n 77, to the effect that there is the need for the courts to review their liberal attitude towards the unfairly prejudicial remedy. See Maleka Femida Cassim, above n 4 at 204.

[202]*Prudential Assurance Co.Ltd v Newman Industries Ltd (No.2),* above n 8.

[203]CAMA, s. 355.

[204]The English case of *Cooke v Cooke* [1997] 2 BCLC 28.See however, the English case of *Kiani v Cooper* [2010] EWHC 577, where the availability of an alternate remedy did not prevent the court from granting a permission application in a derivative action. See Daniel Lightman, ' Derivative Claim ' in Victor Joffe *et al*(eds),*Minority Shareholders- Law Practice and Procedure* (4th edn, Oxford University Press, Oxford 2011)29 at 58.

[205]The South African case of *Lewis Group v Woollam* [2017] (2) SA 547.

[206]Daniel Lightman, above n 204 at 76-77.

[207]*Ibid.*See however, Robert R.Pennington, above n 137 at 828-829, to the effect that a petition will be dismissed if there is evidence that there is lack of good faith and good conduct on the part of the petitioner.

[208]UK Companies Act 2006, s.994 (1).

[209]Compare with CAMA, s.348.

[210]Daniel Lightman, above n 204 at 77.

[211]Arad Reisberg, above n 4 at 292.

been said that where derivative claims are barred by limitation of actions in the United Kingdom, the problem may be averted by bringing an action under the unfair prejudice remedy.[212]

Nonetheless, it is suggested that the courts need to be mindful of the underlying principles of the rule in *Foss v Harbottle*, and the reflective loss principle[213] in deciding that a matter should be adjudicated under the unfair prejudice remedy.[214] This argument is supported by the provision which allows the court to order that a derivative action be instituted even where an action has been instituted under the Unfair Prejudice regime.[215] Therefore, there seems to be no basis for the court to award corporate remedies in an unfair prejudice action.[216]It has also been suggested that one practical way of achieving this is for the courts to make a list of the personal rights of shareholders that would be protected under the unfair prejudice remedy[217] Nonetheless, this thesis maintains that in spite of the procedural barriers and difficulties associated with it, derivative action remains a distinct remedy for the enforcement of corporate rights even in private companies where unfair prejudice has been taunted to be more effective in resolving corporate governance issues.[218] Indeed, it has been maintained that the outflanking[219] of derivative actions by the unfair prejudice remedy has resulted in making litigation under the unfair prejudice route, protracted, less certain and consequently more expensive.[220] These difficulties appear to arise from the courts thorough examination of the conduct of respondents in order to determine whether or not their actions have been unfair to the petitioner. [221]Consequently, considerable time and financial resources have to be expended by the courts in order to arrive at an appropriate conclusion.[222]

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[212]Daniel Lightman, above n 204 at 77.
[213]Stephen Griffin, above n 8.
[214]Andrew Keay, above n 9 at 67. See Brenda Hannigan, above n 98 at 626.
[215]CAMA, s.355 (2) (e).
[216]Victor Joffe, above n 3 at 329.
[217]Brenda Hannigan, above n 98 at 626.
[218]Arad Reisberg, above n 4 at 292, where the author maintains that in Canada & Australia, statutory derivative actions have been used in small private companies, which usually form the bulk of the majority of companies. See however,L.C.B Gower, *Gower's Principles of Modern Company Law*(5th edn, Sweet and Maxwell, London 1992)670, where the author expressed the view that the unfair prejudice action would in no distant future relegate derivative actions to a historical footnote due to the explosion of cases under it.
[219]*Re Saul D.Harrison Plc*, above n 6.
[220] Arad Reisberg, above n 4 at 278.
[221]*Ibid*.
[222]*Ibid* at 277.

5.5 FURTHER REMEDIES

The wider remedies available under the unfair prejudice regime appear to be premised on the fact that the unfair prejudice remedy is focused on the interests of the petitioner as opposed to compensating and deterring breach of corporate rights, which is the objective of derivative actions.[223] There is however evidence supporting the argument that derivative actions can also extend to matters of personal interests. For instance, the English common law attempted to broaden the exceptions to derivative actions by adding the interests of justice exception.[224]CAMA appears to have followed suit by codifying the interests of justice exception albeit, in personal/ representative actions only.[225] However, the South African corporate law jurisprudence may have gone a step further by making certain provisions under derivative actions to the effect that a person may serve a demand upon a company to commence or continue legal proceedings, or take related steps to protect the 'legal interests'[226] of the company.[227]

This thesis therefore, posits that derivative actions are suitable not only for the protection of the legal rights of the company but also for its legal interests, and should be available whenever the interest of justice demands.[228]Consequently, it is maintained that it is desirable to extend the remedies available for derivative actions[229]to include the powers to remove directors and declare a director disqualified to hold the office of a director.[230] Similar remedies are available under the South African Companies Act 2008, with respect to the Unfair Prejudice Action, which allows the court to appoint directors or to declare any director delinquent or under probation.[231] In the South African case of *Kukama v Lobelo*,[232] it was held that an order declaring a director delinquent was effectively an order to remove the

[223]Maleka Femida Cassim, above n 4 at 202.
[224]*Prudential Assurance Co.Ltd v Newman Industries Ltd (No.2)*, above n 8 at 354. See the Nigerian case of *Edokpolor v Sem-Edo Wire* [1984] 7 SC 119 at 144. See Kiser D. Barnes, *Cases and Materials on Nigerian Company Law* (Obafemi Awolowo University Press Limited, Ile-Ife 1992) 378.
[225]CAMA, s.343 (g).
[226]Emphasis mine.
[227]SA Companies Act 2008, s.165 (2).
[228]Kiser D. Barnes, above n 224.
[229]CAMA, s.347.
[230]Rehana Cassim, 'Governanace and the Board of Directors' in Farouk Hl Cassim (ed), *Contemporary Company Law*(3rd edn, Juta, Cape Town2021) 535 at 594, where the author described the right of shareholders to remove directors and to declare a director delinquent as a powerful weapon.
[231]SA Companies Act 2008, s.163 (2) (f). See Maleka Femida Cassim, above n 4 at 200.
[232][2012] JDR 0062 para. 21.

director.[233]It can therefore be deduced that the remedy of removal of directors exists under the South African unfair prejudice jurisprudence.[234] Also,availability of the remedies of appointment and removal of directors[235]under the South African unfair prejudice regime serves as an incentive for advocating for similar remedies under the derivative action regime. However, it is far from this thesis to advocate that the courts should be given the power to appoint directors for companies as one of the remedies available in successful derivative actions applications. The reason for this approach is hinged on the famous rule of judicial non –interference;[236] and the fact that the problems which surround the ability of shareholders to remove directors as will be demonstrated later in this discourse, do not seem to arise with regards to the appointment of directors. [237]Therefore, it is argued that the addition of the remedies of declaring a director delinquent and the removal of directors will help to make derivative actions more attractive to litigants. This thesis maintains that it is imperative to make derivative actions, a prime option to litigants given its unique significance in corporate governance, and so that it will not continue to be overshadowed by the unfair prejudice option.[238]This position appears to be further buttressed by the provisions of CAMA which stipulate that where a member brings a personal action, or a representative action to enforce a breach of his personal rights in the company, he is entitled to claim damages against an erring director.[239] It is argued that if directors can be made personally liable to a member for their wrongdoing in the course of their duties in the company, [240]there is no reason whatsoever why the mischief which that law is aimed to achieve, i.e. the discouragement of breach of corporate responsibility should not be extended to derivative actions. In other words, it is posited that the inclusion of Judicial removal of directors and declaring a director delinquent as remedies in derivative actions will ensure that directors and officers of the

[233]*Ibid*. See Caroline B Ncube' you are fired! The removal of directors under the Companies Act 71 of 2008' [2011] 128 *South African Law Journal* 33.
[234]SA Companies Act 2008, s.163 (2) (f).
[235]*Ibid*.
[236]Joseph E.O. Abugu, above n 4 at 404.
[237]Andrew Keay, above n 12.
[238]L.C.B Gower, above n 218 at 670.
[239]CAMA, s.344 (1) (a) & (2). Compare with Old CAMA, s.301 (1), which stipulates that a member shall not be entitled to damages in a personal/ representative action. See J.Olakunle Orojo, *Company Law and Practice in Nigeria* (vol. 1 Lexis Nexis, Durban 2016) 240. The position of the Old CAMA appears to be founded on the notion that damages cannot be obtained for a mere breach of the Memorandum and Articles of Association because of the doctrine of maintenance of capital, in which capital may not be returned to members. See also L.C.B Gower, *Principles of Modern Company Law* (4th edn, Sweet and Maxwell, London 1979)656.
[240]CAMA, s.344 (1) (a) & (2).

company also suffer personal harm for their wrongful actions just as is obtainable in personal actions. [241]

5.5.1 REMOVAL OF DIRECTORS

One of the collective inherent rights of shareholders in corporate law is the power to remove directors.[242]This power can be exercised by the shareholders even when there is an existing contract between the director and the company that the director will remain in office for a fixed term. [243]Thus, even a life director, a director named in the Articles of Association or a director appointed under a contract of service for a fixed term can be removed by the shareholders prior to the expiration of his tenure of office.[244]However, although, most jurisdictions empower shareholders to remove directors,[245] the power appears to be a myth for reasons which shall be discussed below.[246]

It has been said that the usual provision for rotation of directors at every annual general meeting as ordinary business of the company, provides opportunity for shareholders to remove erring directors.[247] There is however, evidence to the effect that rotation of directors is not considered as a serious matter by shareholders since directors retiring from office and offering themselves for re-election are usually able to obtain the approval of shareholders to remain in office.[248]In addition, even if shareholders have the will power to discipline errant directors via rotation of directors, they would be faced with a major limitation of their power

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[241]*Ibid*.

[242]Andrew Keay, above n 12 at 680. See Michael M Katz 'Governance under the Companies Act 2008: Flexibility is the Keyword' in Tshepo H Mongalo(ed), *Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010) 248 at 259.

[243]CAMA, s.288 (1). See however, SA Companies Act 2008, s.71 (1), which stipulates that a director is removable despite any agreement between a company and a director, or between shareholders and a director. See Rehana Cassim, above n 230 at 596, to the effect that a contract between shareholders and a director may enable the director to prevent his removal.

[244]CAMA, s.288 (1). This may not be the absolute position in South- Africa, where it has been posited that a shareholder agreement may be used to prevent the removal of a director since shareholder agreements are not included in the items that may not preclude the removal of directors under the SA Companies Act 2008,s.71(1). See Caroline B Ncube, above n 233 at 38.See *Contra* Rehana Cassim, *The Removal of Directors And Delinquency Orders Under The South African Companies Act*(Juta, Cape Town 2020) 52.

[245]SA Companies Act 2008, s.71; UK Companies Act 2006, s.168. See Rehana Cassim, above n 230 at 595.

[246]For Instance, SA Companies Act 2008, s.71 (1), appears to limit the power of shareholders to remove directors to only the directors appointed by those shareholders. See Caroline B Ncube, above n 233 at 38. See *contra* Rehana Cassim, above n 244 at 68.

[247]See Charles Wild and Stuart Weinstein, above n 159 at 366.See also Ramani Naidoo, *Corporate Governance-An Essential Guide for South African Companies* (2nd edn, Lexis Nexis, Durban 2009) 119.

[248]Andrew Keay, above n 12 at 663.

since they would only be able to remove directors who are retiring but are nonetheless eligible for re-election.[249]

Furthermore, in order to enhance shareholders power in corporate governance, the law enables members to requisition extra-ordinary general meetings of the company, in case the board of directors refuses to convene a general meeting of the company.[250] This approach is useful to the effect that it enables shareholders to convene a meeting of the company where a resolution to remove a director can be passed.[251]However, in spite of this legislative motivation, shareholders have rarely been able to harness this power to discipline directors.[252]

With respect to shareholders in a public company, it appears that where they are dissatisfied with the management of the company, the easiest solution might be for them to exit the company by trading off their shares.[253] This is because in public companies where there is dispersed shareholding, the problems of co-ordination of shareholders; and shareholder apathy are more pronounced.[254] The mechanics of meetings is such that enormous financial resources and time would be required in order to obtain the consent of a simple majority of shareholders to remove a director.[255] This is made more complex by the fact that institutional investors who are likely to possess the expertise, wherewithal, and information to be able to confront the obstacles to shareholder activism have often been said to be characteristically passive participants in corporate management.[256] In the case of private companies however, the typical scenario is that there is concentrated ownership such that the directors are also the holders of the majority shareholding of the company.[257] In this kind of set-up, the question

[249]*Ibid* at 664. See also L.C.B Gower, above n 239 at 149, where the author maintains that shareholders could refrain from voting for the reappointment of directors if and when they stand for re-election.
[250]CAMA, s. 239(2). See Rehana Cassim, 'Governance and Shareholders in Farouk Hl Cassim (ed), Contemporary *Company Law* (3rd edn, Juta, Cape Town 2021) 465 at 494- 495.
[251]Ben Pettet, above n 12 at 154.
[252]*Ibid* at 157.See SA Companies Act 2008,s.61(5), to the effect that on the application of a company or any shareholder, the court may set aside a requisition for a meeting by shareholders on grounds that it is frivolous or vexatious. See Rehana Cassim, above n 250 at 495.
[253]Paul L.Davies,above n 56 at 424.However, it has also been maintained that shareholders with large shareholdings may not always find a ready market for the dumping of their shares. See Ramani Naidoo, above n 247 at 102.
[254]Paul L.Davies, above n 56 at 424.
[255]*Ibid* at 425. See Rehana Cassim, above n 250.
[256]C.A. Riley 'Controlling Corporate Management: UK and US initiatives' [1994] 14(2) *Legal Studies* 244 at 258. See Andrew Keay, above n 12 at 665-666, where the author also maintains that there are contrary positions to the effect that institutional investors have been active in monitoring corporate administration.
[257]Arad Reisberg, above n 4 at 81.

of removal of directors would appear remote and farfetched since the directors would naturally utilise their majority shareholding to frustrate their removal from office.[258]

In Nigeria, the challenges of the reliance on the general meeting by corporate governance to control the board of directors appears quite profound in the attempt by CAMA to further protect the interests of minority shareholders by stipulating that any major asset transaction must be submitted to the general meeting by the board of directors for approval, of which can only be obtained by a special resolution of the company except where the Memorandum of Association provides otherwise. [259]However, since the effectiveness of the general meeting as discussed above is suspect, it is clear that the intention of the legislature in Nigeria to control one of the easiest routes by which directors can breach their fiduciary duties to the company[260] might not be achievable after all.

Nonetheless, it is important to state that in exceptional cases where the shareholders are able to surmount all the obstacles to their power to remove a director, it is imperative that the shareholders ensure that they follow the proper procedure established under the law in order to sustain the removal.[261] The Nigerian case of *Bernard Ojeifo Longe v First Bank of Nigeria Plc,* [262]clearly demonstrates that the challenge of the removal of directors by shareholders does not end with the challenge confronted by the shareholders due to their lack of coordination, but also with the fact that directors may resist their removal not only through the proxy machinery[263] but also through court actions. This means that judicial interpretation and attitude with respect to removal of directors is also a key factor. The facts of the *Longe's* case[264] are that the appellant was an executive director of the respondent bank prior to his appointment as the managing director. Following an alleged improper grant of loan to a customer of the respondent, the appellant was suspended by the board of directors of the

[258]*Ibid*. See Caroline B Ncube, above n 233 at 34, where the author posits that the powers of the board; and the Tribunal to remove directors under the South African Companies Act checkmate the powers of majority shareholders.
[259]CAMA, s.342.
[260]The English cases of *Daniels v Daniels* [1978] Ch.406; *Pavlides v Jensen* [1956] CH 565.
[261]Paul L.Davies, above n 56 at 391.See Rehana Cassim, above n 244 at 57. See also Olga N.Sirodoeva Paxson, above n 18 at 129.
[262][2010] 6 NWLR 1.See the Nigerian case of *Yalaju-Amaye v A.R.E.C* [1990] 4 NWLR (Pt.145)422.
[263]It is common for shareholders to appoint directors as their proxies to exercise their rights at meetings. However, proxy voting at meetings invariably waters down the power of shareholders to control decisions at meetings. See Ramani Naidoo, above n 247 at 90. See Ben Pettet, above n 12 at 156. See also Maleka Femida Cassim 'Enhancing Corporate Democracy by the Use of Shareholder Proxies' [2019] 40(1) *Obiter* 47 at 49.
[264]Above n 262. See J Olakunle Orojo, above n 239 at 262.

respondent bank. Consequently, the appellant was no longer invited to board meetings of the company including the board meeting in which the decision to terminate his appointment was made. The trial court's dismissal of the appellant's claim was upheld by the court of appeal. The Nigerian supreme court however, held that failure to give the appellant Notice of the board meeting in which he was removed invalidated his removal.[265] The Apex court went further to say that the appellant can only be removed by an ordinary resolution of which special notice has been given at a general meeting of the company as stipulated presently under section 288 of CAMA.[266] Although, the appellant was actually removed by the board, *Longe's* case is nevertheless, instructive in the sense that any attempt to remove a director by shareholders may become a titanic battle.

This decision has however been criticised because it implies that executive directors cannot be removed by the board of directors.[267] This is contrary to the common law concept of 'He who hires can fire.'[268] In addition, the decision appears to be a misconstruction of the provisions of section 288 of CAMA, which is aimed at ensuring that shareholders are able to checkmate the security of tenure for directors who have a fixed term of service with the company;[269] and is not intended to derogate from any power to remove a director apart from that provision of the law.[270]

Another problem with the issue of removal of directors is that even when shareholders are able to discipline an erring director by removing him from office, the implication of the removal may be that the dismissed director may be entitled to claim damages from the company if the removal is in breach of the Articles of Association or any contract of service

[265]CAMA, s.245 (1).
[266]Above n 262 at 42, 45.
[267]Motunrayo.O. Egbe 'Case Review- Bernard Ojeifo Longe v. First Bank of Nigeria Plc' [2013] 1 *Babcock University Socio-Legal Journal* 295. See S.A.Osamolu, 'The Supreme Court's Decision In Longe v. First Bank Of Nigeria Plc: A Case of The Apex Court Being Infallible Because It Is The Final Court?' in A.O.Adegoke and S.A.Osamolu(eds),*Topical Issues In Nigerian Law: Essays in Honour of Hon.Justice S,K.Otta*(Ben Oketola Publications, Abuja 2011) 417 at 443.See also Rehana Cassim, above n 244 at 78 .
[268]Motunrayo.O.Egbe, above n 267 at 303, where the author argues that the common law concept of he who hires can fire has been given statutory approval in section 11(1) of the Nigerian Interpretation Act 2003. See *contra* American Revised Model Business Corporation Act 1984, s.8.08 (a). See also Rehana Cassim, above n 244 at 82.
[269]Paul L.Davies, above n 56 at 390-391.
[270]*Ibid*. See CAMA, s.288 (6).

between the director and the company.[271] The director may also be entitled to compensation for loss of office if it is provided for in any contract between him and the company.[272] This point may discourage shareholders from taking any action against erring directors because the success of their action might result in incurring enormous costs to the company which may in turn affect shareholders' return on investment.[273] Nevertheless, the power of shareholders to remove directors is very important in corporate governance because it enables shareholders to not only exercise ultimate control in the company by getting rid of directors who fail to comply with the rules of governance, but also appoint others in their stead.[274]

It is important to state that Regulatory authorities like the Governor of the Central Bank in Nigeria and the Minister of State Owned Companies in South Africa, have been able to use their power of removal under the law to discipline errant directors. [275]For instance, in 2009, the Central Bank of Nigeria invoked the powers vested on it under the Nigerian Banks and Other Financial Institutions Act 1991,[276] to sack the managing directors and executive directors of five banks and replaced them with new directors.[277] This was done by the Governor of the Central Bank of Nigeria without recourse to the stringent requirements of having to give special notice, passing an ordinary resolution, allowing the directors to make

[271]See Paul L.Davies, above n 56 at 311-312. See also Rehana Cassim, above n 230 at 615.
[272]CAMA, s.297. See Brenda Hannigan, above n 92 at 260.
[273]Andrew Keay, above n 12 at 673.See Paul L.Davies, above n 56 at 391.
[274]L.C.B Gower, above n 239 at 148. See Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (3rd edn, Lexis Nexis, Durban 2016) 148.
[275]Okechukwu Nnodim, 'First Bank directors fired to protect customers, minority shareholders'-CBN' *The Punch* Nigeria (April, 30, 2021) 20.
See the South African case of *Molefe &Ors. V Minister of Transportation &Ors.* [2017] ZAGPPHC 120, bordering on the removal of members of the board of a State Owned Company by the Minister of Transportation for corporate governance failures by virtue of the powers vested on her under the South African Transport Services Ammendment Act 1989. However, it appears that the power of the Minister to remove directors, although not subject to the Companies Act is derived from her being the Shareholders' Representatives; and must be distinguished from the powers of the Central Bank Governor under the Nigerian law. See Tebello Thabane 'The Removal of Directors In State Owned Companies: Shareholders' Franchise in Jeopardy? Molefe & Ors. V Minister of Transportation & Ors.' [2018] 30 SA *Mercantile Law Journal* 155,163. See however, the South African case of *Minister of Defence and Military Veterans v Motau & Ors.*[2014](5) SA 69 at 98,where it was held that although the substantive power of the Minister of Defence to remove the directors of a State Owned Company was contained in a specific Statute, the procedure for removal is contained in SA Companies Act 2008,s.71(1) &(2), which requires her to give notice to the directors intended to be removed and allow them to make representations.See Ramani Naidoo, above n 274 at 356. See however, Rehana Cassim, above n 244 at 91, to the effect that with regards to the removal of directors, there are situations where a specific Statute governing the removal may prevail over the provisions of the Companies Act.
[276]ss.33 & 35.See J Olakunle Orojo, above n 239 at 254.
[277]Gabriel Omoh, Babajide Komolafe,' CBN sacks 5 Banks' CEOs, appoints Acting MD/CEOs' *Vanguard* Nigeria (August 14, 2009, 5.01pm) www.vanguardngr.com/2009/08/cbn-sacks-5-banks-directors.

representations ,etc.[278] This thesis argues that if the law could empower the executive arm of government to remove directors irrespective of the provisions of the Companies Act, there is no reason why the courts cannot be given authority to exercise such powers as well. I posit that giving the courts power to remove erring directors in derivative actions would not only help to avoid the difficulties entrenched in the removal of directors by shareholders but will also enable other stakeholders who are qualified to be applicants in a derivative action to be able to exercise the power of disciplining erring directors by ensuring their removal in cases of breach of corporate duties and corporate mal- administration.[279] This position appears profound in South Africa, where unlike in other jurisdictions like Nigeria and the United Kingdom,[280] directors are explicitly empowered by the Companies Act to remove fellow directors in certain prescribed circumstances.[281] Thus, in situations where a company has fewer than 3 directors, any director or shareholder may apply to the Companies Tribunal to remove a director. [282]In the same vein, in situations where a company has more than 2 directors, and the board has determined that a director has been alleged to be ineligible, disqualified or incompetent, any holder of voting rights entitled to be exercised in the election of that director or any director may bring an application to court.[283] The court may remove the director from office, if the court is satisfied that the director is ineligible, disqualified, incapacitated or has been negligent or derelict.[284]It is posited that these provisions are useful corporate governance tools in preventing majority shareholders from utilising their voting powers to entrench themselves in office as directors.[285] It appears however that directors might somewhat be constrained in getting involved in the removal of

[278]CAMA s.288. See Paul L.Davies, above n 56 at 391. However, the Central Bank Governor in Nigeria stated that he exercised the power to remove the bank directors having reviewed all the Reports of the examiners and comments of the directors and deputy governors of the Apex bank which showed that the banks were in grave situations; and that their managements have acted in a manner detrimental to the interest of their depositors and creditors.

[279]*Re Bellador Silk Ltd,* above n 83, where a member/director attempted (albeit unsuccessfully) to remove co-directors by an application under the oppression remedy.

[280]Rehana Cassim, above n 244 at 80. However, there is also no specific provision prohibiting removal of fellow directors by the Board. See CAMA, s. 288(6); UK Companies Act 2006, s.168 (5) (b) respectively. See however, Australian Corporations Act 2001, s.203E, which prohibits removal of directors of public companies by fellow directors.

[281]Unlike shareholders who may remove a director without cause, a director cannot be removed by a fellow director without cause. See SA Companies Act 2008, s.71 (3). See also Rehana Cassim, above n 244 at 59, 138. See also Ramani Naidoo, above n 274 at 148.

[282]Rehana Cassim, above n 244 at 78.

[283]SA Companies Act 2008, s.71 (6).

[284]*Ibid*.

[285]Caroline B Ncube, above n 233 at 34.

fellow directors because of their fiduciary obligation to the company.[286] Unfortunately, shareholders including majority shareholders are not under such fiduciary obligation.[287]

5.5.1.1 Disqualification Orders against Directors

Apart from the direct removal of directors as discussed above, one other way in which directors can be brought to order is by indirect removal through disqualification of directors' proceedings.[288] It is however important, to state that in some jurisdictions, statutory regulators are allowed to disqualify directors without court involvement.[289]Moreover, while the direct removal of a director takes away the director's right to be a director of a particular company, a disqualification order takes away the right of a director to partake in the management of any company.[290] Disqualification orders are said to be designed to protect the public from the harmful use of the corporate structure.[291]Thus,where for instance, a person has been convicted for an offence in connection with the promotion, formation or management of a company; or in the course of winding up of a company, it appears that a person has been guilty of any fraud in relation to the company or any breach of his duties, while being an officer of the company, the court in Nigeria may make an order that that person be disqualified from being a director of a company or disqualified from participating

[286]Rehana Cassim 'An Analysis of Directors' Fiduciary Duties in The Removal of a Director from Office' [2019] *Stellenbosch Law Review* 212 at 214.
[287]*Ibid*.
[288]Rehana Cassim, above n 244 at 230. See Jean Du Plessis & Piet Delport 'Delinquent Directors' and 'Directors under Probation': A Unique South African Approach Regarding Disqualification of Directors'[2017] 134(2) *South African Law Journal* 274 at 275, on the unique option of also placing a director under probation available under South African law on disqualification of directors. See also Tshepo Mongalo, above n 12 at 153.See also Carl Stein, above n 5 at 227.
[289]Jean Jacques du Plessis and Jeanne Nel de Koker, 'Analyses, Perspectives and Jurisdictional Overview' in Jean Jacques du Plessis and Jeanne Nel de Koker(eds),*Disqualification of Company Directors- A Comparative Analysis of the Law in the UK, Australia, South Africa, the US and Germany*'(Routledge, Oxfordshire 2017) 1 at 24- 25. See for example, US Sarbanes-Oxley Act 2002, s.1105.
[290]Rehana Cassim' A Comparative Discussion of the Judicial Disqualification of Directors under the South African Companies Act' [2021] 65(1) *Journal of African Law* 87.
[291]The South African case of *Gihwala v Grancy Property Ltd* [2016] ZASCA 35 at para. 40. See Emile Myburg 'Holding Delinquent Directors Personally liable' [2017] July De *Rebus* 29 at 31, to the effect that a director may be declared to be delinquent if the company fails to pay a creditor without cause. See Tshepo Mongalo, above n 12 at 227, on the register of delinquent directors recommended by the South African King 11 code. See also Stephen Griffin, *Company Law* (4th edn, Pearson, England 2006)350.

in the management of a company for a period not exceeding 10 years.[292] Similar provisions exist in South Africa[293] and the United Kingdom.[294] In South Africa, a company, shareholder, director, company secretary, prescribed officer of a company, a registered Trade Union which represents employees of the company or another representative of the employees of the company may apply to the court to declare a director delinquent or under probation for a period of time.[295] The order declaring a director delinquent or under probation may be made for instance, where a director grossly abused his position, took advantage of any information or opportunity belonging to the company, acted in a manner amounting to gross negligence or willful misconduct in the performance of his duties.[296]

In the South African case of *Lewis Group Ltd v Woollam,*[297] a minority, who was a beneficial owner of shares in the plaintiff company, in pursuing a derivative action remedy gave Notice to the company demanding that the company should commence delinquency proceedings against some of its directors. The company brought an action to set aside the demand on the grounds that it was frivolous and vexatious. The court however, held that the defendant failed to show that the actions of the directors warranted a disqualification order.[298] In particular, the court was of the view that the defendant could not use derivative proceedings to obtain an order of the court declaring the directors' delinquent or under probation for the following reasons:

Firstly, the right to bring delinquency proceedings is a public interest right[299] which the shareholder can enforce personally,[300] while derivative actions are only available to minority

[292]CAMA, s.280 (1).See Pereowei Subai' Disqualifying Unfit Directors: What Lessons Can Nigeria Learn from the Commonwealth Countries?'[2020] *Commonwealth Law Bulletin* 1 at 8, to the effect that the courts in Nigeria have been reluctant to apply disqualification proceedings against erring directors.
[293]UK Company Directors Disqualification Act 1986, ss.2-4.
[294]*Ibid* at .s.16.
[295]SA Companies Act 2008, s.162 (2). See Rehana Cassim, above n 230 at 585.
[296]SA Companies Act 2008, s.162 (5) (c).
[297]Above n 205. See Rehana Cassim 'Launching of Delinquency Proceedings under the Companies Act 71 of 2008 By Means of the Derivative Action- Lewis Group Limited v Woollam2017 (2) SA 547 (WCC) [2017]' 38(3) *Obiter* 673.
[298]Above n 205 at para.49.
[299]The Australian case of *ASIC v Adler* [2002] NSWSC 483, which maintains that the purpose of delinquency proceedings is to protect the public from the harmful use of the corporate structure. See SA Companies Act 2008, s.162 (3) & (4), which allows the Commission or Panel and any organ of the State to apply for disqualification Orders. In Nigeria, the Official Receiver is one of the persons allowed to institute delinquency proceedings. See CAMA, s. 280(5).
[300]*Lewis v Woollam*, above n 205 at para.40

shareholders when the cause of action is vested solely on the company. [301]Secondly, the procedures required to initiate derivative actions, such as requirement of Notice of Demand are not suited for delinquency proceedings.[302] According to the court, the procedure for investigation of the demand required in derivative action in South Africa,[303] may mean that the directors against whom the shareholder wants delinquency proceedings to be instituted might be required to absent themselves from the board meeting where the decision whether to institute proceedings against them would be taken. The court opined that this may result in the failure of the board to form the quorum required to take the decision whether or not to institute a corporate action as demanded by the giver of the Notice of Demand. [304] The court however, conceded that derivative actions could be instituted where the company has instituted delinquency proceedings against directors but nonetheless, a shareholder wants to take over the proceedings on behalf of the company for want of adequate prosecution.[305]

The decision of the case of the South African case of *Lewis v Woollam,*[306] can be faulted on several grounds. In the first instance, the court's attempt to vigorously defend its position on the need for the delinquency proceedings to be instituted as a personal action and not derivatively appears to have been misplaced. The position of the court is that since fiduciary duties under the South African Companies Act are owed not only to the company[307] but also to shareholders personally,[308] shareholders cannot be allowed to institute derivative actions for remedies that are available to them personally.[309] In other words, the court appears to

[301]*Ibid* at para.43.
[302]*Ibid* at paras.45-49.
[303]SA Companies Act 2008, s.165 (4).
[304]*Lewis v Woollam*, above n 205 at para.45. The argument of the court does not appear to be water tight as provisions are usually made in the Companies Act for failure of the board to form a quorum. See CAMA, s. 265(2); SA Companies Act 2008,s. 75(5)(f).See Rehana Cassim, above n 297 at 677. Another argument of the court is that while derivative actions contain filters such as investigation of the demand of an intending litigant, disqualification proceedings do not. Therefore the filters will be rendered redundant if the litigant has to eventually pursue his claim under delinquency proceedings. See however, *Lewis v Woollam*, above n 205 at para. 47, where it was argued that the Report of Investigation applicable in derivative actions might also be useful in defending or confirming the allegation made against the directors during delinquency proceedings. See Rehana Cassim, above n 297 at 682.
[305]*Lewis v Woollam*, above n 205 at para.50.
[306]Above n 205.
[307]South African Companies Act 2008, s.76.
[308]*Ibid* at s.218 (2).This is in contrast to what obtains at common law whereby directors owe fiduciary duties to the company primarily and can only owe fiduciary duties to an individual shareholder if there is a contract to that effect. See the English case of *Percival v Wright* [1902] 2 Ch.421 See also Ramani Naidoo, above n 247 at 81, to the effect that the shareholder's right to vote is a proprietary right and not a fiduciary right.
[309]*Lewis v Woollam*, above n 205 at para .49.

have maintained that where a claim can be instituted both as a personal action and as an action brought to protect the rights of the company, the court reserves the right to insist that the action be brought only as a personal action.[310] It however appears that the court misconstrued section 218 of the South African Companies Act 2008. This is because section 218(3) expressly provides that the provisions of the section do not affect the right to any remedy that a person may otherwise have. Furthermore, the position of the court seems to be contrary to the principle of derivative actions, whereby a shareholder can maintain an action on behalf of the company, the availability of a personal action not -withstanding. [311] It has also been said earlier in this chapter that some causes of action may give rise to personal actions and derivative actions in which a shareholder has the option of either seeking remedy under the unfairly prejudicial action or derivative action.[312]Moreso, it has been argued elsewhere, that a shareholder can only maintain a personal action under section 218(2) of the South African Companies Act 2008, if he can show proof that he suffered a personal loss as a result of the breach of fiduciary duties by the directors.[313] This requirement may be difficult to sustain by a shareholder since the personal loss suffered by the shareholder is more likely to be a diminution in value of his shares, which has been held not to be actionable, being a mere reflection of the loss suffered by the company. [314]Besides, contrary to the court's assertion that it is better in the interest of justice for a personal claim to be maintained by the shareholder instead of a derivative action,[315] it appears that a derivative action would be more advantageous than a delinquency proceeding brought as a personal action. In the first instance, in a derivative action, the costs and financial burden of the claim can be shifted to the company.[316] Secondly, although, delinquency proceedings are designed to ensure good corporate governance, if instituted in bad faith or brought for a collateral purpose, they have

[310]Rehana Cassim, above n 297 at 678-679.
[311]Arad Reisberg,above n 4 at 289, where the author opines that the court is allowed to grant relief in an application brought under derivative actions, inspite of the availability of an alternative remedy owing to the equitable character of derivative actions.
[312]Above n 99.
[313]Rehana Cassim above n 297 at 679.
[314]*Ibid*. the English case of *Prudential Assurance v Newman Industries Ltd (No.2)*, above n 8 at 366-367; See also *Johnson v Gorewood & Co,* above n 8 at 62.
[315]*Lewis v Woollam*, above n 205 at para .48.
[316] Rehana Cassim, above n 297 at 680-681. See SA Companies Act 2008, s.165 (10).However, SA Companies Act 2008, s.162, on Delinquency Proceedings does not have provisions for the company bearing any legal costs, since the claim is against the directors personally.

the potential to damage the reputation of the company, and consequently its market value.[317] It is therefore, posited that there is need to put some mechanisms in place to prevent its abuse.[318] Cassim has therefore rightly argued that bringing delinquency proceedings via a derivative action should not render redundant the filtering process of demand and investigation under derivative actions as maintained by the court.[319] Cassim also maintains that the requirement of good faith existing under derivative actions will help to filter and checkmate delinquency proceedings brought for collateral purposes if such actions are brought through a derivative action procedure.[320]

A fundamental observation about the S.162 of the South African Companies Act 2008, is that, unlike what obtains in other jurisdictions,[321] a company is one of the persons qualified to bring delinquency proceedings. [322] This may be sufficient justification for the argument that delinquency proceedings should be allowed to be instituted as derivative actions in South Africa, since derivative actions are aimed at protecting the rights and interests of the company.[323] Thus, in situations where the company ought to have brought delinquency proceedings against its directors and prescribed officers, but has however failed to do so, a shareholder and other persons qualified to bring derivative actions may do so on behalf of the company. Therefore, while the argument that delinquency proceedings are personal in character and are of a public nature, and thus, not suitable for derivative actions[324] might be plausible in jurisdictions where the company is not empowered to institute delinquency proceedings, the same cannot be said of South Africa, where the company is allowed to bring delinquency proceedings.[325]

[317]Rehana Cassim, above n 297 at 683.
[318]*Ibid*. Delinquency proceedings in South Africa do not appear to have any mechanism to filter any action brought under it.
[319]*Ibid* at 682.
[320]*Ibid* at 683-685.
[321]CAMA, s.280 (1); UK Company Directors Disqualification Act 1986, s.16.
[322]SA Companies Act 2008, s.162 (2). See Rehana Cassim, above n 244 at 239. See also Neels Kilian *et al*, 'South Africa' in Jean Jacques du Plessis and Jeanne Nel de Koker(eds),*Disqualification of Company Directors- A Comparative Analysis of the Law in the UK, Australia, South Africa, the US and Germany*'(Routledge, Oxfordshire 2017) 112 at 143.
[323]Maleka Femida Cassim, above n 4 at 5.
[324]Rehana Cassim, above n 244 at 241.
[325]SA Companies Act 2008, s.162 (2).

It has been said that misuse of the facility of limited liability, forms the core attention of disqualification proceedings. [326] This perhaps explains why criminal sanctions are applied in breach of disqualification orders.[327] Meanwhile, the focus on the abuse of the limited liability form is supported by the fact that the activities of a person with regards to the promotion, formation, management and winding up of a company are central to disqualification orders.[328] If this is true, then any legislation which does not include the company as one of the persons entitled to apply for disqualification orders may appear incomplete.

This thesis therefore, argues that the law with respect to disqualification orders in Nigeria should be amended to include a company as one of the persons entitled to apply for disqualification orders. [329]This will enable shareholders and other stakeholders to be able to bring derivative actions in order to press for disqualification of a director, where the company has refused to do so. More importantly, this thesis argues for the inclusion of disqualification of directors as one of the remedies available in derivative actions. [330]The import of this suggestion if implemented will not only broaden the remedies available under derivative actions but will also help to avoid the controversy as to whether or not derivative actions are compatible with disqualification proceedings.[331]

5.5.1.2 Judicial Removal of Directors

It has been established from the foregoing discourse that the power of the court to declare a director delinquent is a kind of judicial removal of directors, albeit, indirect judicial removal.[332] It has also been established that the court in South Africa in reviewing a board's decision not to remove a fellow director can remove a director.[333]Although this kind of removal can be

[326]Paul.L.Davies, above n 56 at 241. See Rehana Cassim, above n 244 at 232-233, to the effect that although the intention of disqualification proceedings appear civil in nature since it protects the company against mismanagement by directors, it nonetheless has a punitive effect due to its interference with the freedom of a director to engage in management of companies; and also due to reputational damage it inflicts on the director affected.
[327]Paul.L.Davies, above n 56 at 241.
[328]SA Companies Act 2008, s.162 (1) (a). See Rehana Cassim, above n 244 at 232.
[329]SA Companies Act 2008, s.162 (2).
[330]*Ibid* at s.163 (2) (f) (ii), which allows the court in South Africa, in granting a remedy under the unfair prejudice regime to make an order declaring a person delinquent or under probation.
[331]Rehana Cassim, above n 244 at 246.
[332]*Ibid* at 230.
[333]SA Companies Act 2008, s.71 (6).

categorised as a direct removal by the court, it is not available in the Nigerian and the United Kingdom jurisdictions. Besides, direct judicial removal of directors in South Africa is somewhat limited because no one is allowed to apply to the court to remove a director, except by an application for a review of a decision of the board not to remove a director.[334] Meanwhile, the concept of direct judicial removal of directors has been developed under the Revised Model Business Corporation Act, 2000(MBCA), of the United States of America. Section 8.09(a) MBCA on the Removal of directors by judicial proceedings provides as follows:

''A court may remove a director of the corporation from office in a proceeding commenced by or in the right of the corporation if the court finds that (1) the director engaged in fraudulent conduct with respect to the corporation or its shareholders, grossly abused the position of director, or intentionally inflicted harm on the corporation; and (2) considering the director's course of conduct and the inadequacy of other available remedies, removal would be in the best interests of the corporation.''

By providing that a director may be removed by the court in a proceeding commenced *by or in the right of the company,* the provisions of the MBCA as stated above, clearly envisage the removal of a director either by a direct action brought by the company or by a derivative action brought in the right of the company.[335] This means that if the court had in the South African case of *Lewis Group Limited v Woollam,*[336] in the light of its right under the South African law to consider foreign legislation,[337] considered the relevant provisions of the MBCA, it would have held that it is possible to institute a derivative action to declare a director delinquent.[338]

While it is generally provided under Statutes that a director may be removed by the shareholders without cause,[339] it is quite clear that under the provisions of the MBCA, a

[334]Rehana Cassim, above n 244 at 231. However, it appears that directors or shareholders of private companies and personal liability companies that have two directors may apply to the Companies Tribunal for the removal of a director from office. See SA Companies Act 2008, s.71 (8). See also Rehana Cassim, above n 244 at 151.
[335]Rehana Cassim, above n 297 at 685.
[336]Above n 205.
[337]SA Companies Act 2008, s.5 (2).
[338]Rehana Cassim, above n 297 at 685.
[339]SA Companies Act 2008, s.71; UK Companies Act 2006, s.168; CAMA, s.288. See Olga N.Sirodoeva Paxson, above n 18 at 101. See Tebello Thabane, above n 275 at 164. See also Rehana Cassim 'The Power to Remove Company Directors from Office: Historical and Philosophical Roots' [2019] 25(1) *Fundamina* 37 at 55. See SA Companies Act 2008,s.71(6) & (8), which empower the court to confirm the removal of a director by the board; and the removal of a company's director by the Companies Tribunal respectively based on certain established grounds. See also Rehana Cassim, above n 230 at 595, to the effect that the requirement under s.71 of the SA

director cannot be judicially removed without cause.[340] Thus, under the MBCA, a director can only be removed by the court if there is a cause of action bordering on fraud, abuse of office or intentional harm done to the corporation. [341]It is quite remarkable that this position tallies with the fact that a director can only be declared delinquent by the court in similar circumstances.[342]

However, the fact that the judicial removal of a director must not be without cause does not negate the argument that it hijacks the shareholders' inherent right in corporate law to remove directors. [343]Unfortunately, shareholders' inherent right to remove directors often times conflicts with the interests of the company because of what has been termed shareholders' 'impairments'.[344]Procedural difficulties such as coordination of shareholders, shareholder apathy that may be encountered by shareholders in any attempt to remove a director have already been discussed earlier in this chapter. [345] These difficulties may be termed 'Procedural Impairment.'[346] There are however situations where shareholders may be unwilling to remove erring directors because of 'divergence of interest impairment' owing to the conflict of the shareholders' personal interests with the removal.[347] For instance, shareholders' holding majority votes may use it to prevent their own removal[348] or the removal of their relatives, friends [349]and any director who is serving their interests.[350] Shareholders may also decide to condone or ignore directors' wrongdoing where the company has been doing well financially.[351]However, It should be noted that even where there is no divergence of interests, the fact that a shareholder has given the company special notice of an intention to remove a director does not mean that the matter will surface in the agenda of the company at the next general meeting since the agenda of a company's meeting

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Companies Act 2008, that a director should be given opportunity to defend himself before he can be removed, appears to suggest that a director cannot be removed without cause.

[340]s.8.09.

[341]*Ibid*.

[342]SA Companies Act, 2008, s.162 (4) (c).

[343]Olga N.Sirodoeva Paxson, above n 18 at 107.

[344]*Ibid* at 121.

[345]Tshepo Mongalo, above n 12 at 245.

[346]Olga N.Sirodoeva Paxson, above n 18 at 130.

[347]*Ibid* at 121.

[348]*Ibid.* See Ramani Naidoo, above n 247 at 81.

[349]Olga N.Sirodoeva Paxson, above n 18 at 124.

[350]*Ibid* at 123.

[351]*Ibid* at 115. See Rehana Cassim, above n 244 at 34.

is the prerogative of the board.[352]Nonetheless, the impairment faced by shareholders creates tension between the shareholders exercising their inherent right to remove directors and the duty of directors to act in the best interests of the company. [353]The problem is aggravated by the fact that in the case of divergence of interest impairment, the shareholders do not have a fiduciary duty with regards to the exercise of their votes.[354] Consequently, while the inherent right of shareholders to remove directors ensures that the court cannot remove a director without cause, the impairment of shareholders dictates that the court may remove directors in circumstances where it would be improper for the law to allow certain corporate misconducts to pass without penalty.[355] However, the overriding objective for the intervention of the court appears to be that the removal must be in the best interests of the company.[356]

There is however a problem with finding a universal definition to what is the best interests of the company. For shareholders, what is in the best interests of the company is likely to be in relation to maximisation of the company's profit. [357]This means that shareholders are likely to be more tolerant of directors who are involved in corporate misdeeds as long as the board is able to ensure that handsome dividends are paid to shareholders.[358] This may not go down well with protagonists of other theories of the corporation who maintain that the best interests of the company is not necessarily the best interests of shareholders.[359] Meanwhile, it has been posited that the primary role of the courts is to determine whether a particular misdeed requires any form of punishment.[360] Consequently, it can be maintained that the

[352]The English case of *Pedley v Inland Waterways Association Ltd* [1977] 1 All ER 209. However, members with requisite voting rights may make a special requisition mandating an item to be placed on the Agenda of a meeting. See Charles Wild &Stuart Weinstein, above n 159 at 435. See also CAMA, s.260.
[353]CAMA, s.305 (3).
[354]*Ibid* at s.305 (6), which provides that a director may not fetter his discretion to vote in a particular way. See Ramani Naidoo, above n 247 at 81.
[355]MBCA, s.8.09.
[356]*Ibid*.
[357]Olga N.Sirodoeva Paxson, above n 18 at 116-7.See Janet Dine, *The Governance of Corporate Groups*, (Cambridge University Press, United Kingdom 2000) 3. See also Tshepo Mongalo, above n 12 at 247.
[358]Ramani Naidoo, above n 247 at 99.
[359]Ben Pettet, above n 12 at 63. See Andrew Keay 'Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model' [2008] 71(5) *the Modern Law Review* 663 at 671.
[360]Olga N.Sirodoeva Paxson, above n 18 at 150.

courts possess more expertise to determine whether or not an erring director should be removed by the court.[361]

In spite of the argument justifying the intervention of the court in the inherent right of removal of directors, judicial removal of directors has been described as obstructing the internal structure of a company by altering the composition of the board and usurping the inherent right of shareholders to remove their elected representatives.[362] On the other hand, it appears that the usurpation of the democratic structure of the company through derivative actions is more tolerable in corporate governance since it merely bypasses the function of the elected representatives of the shareholders who have been reluctant to protect the interests of the company. [363]

Nonetheless, the inherent right of shareholders to remove directors is not absolute. [364]Indeed, despite the intrinsic right of shareholders to elect and remove directors, the board is often times vested with the right to appoint[365] and remove executive directors[366] either under the common law, Statutes, Articles of Association or even Directors' Service Contract.[367] This is supported by the fact that the inherent right of shareholders to remove directors as provided under Statutes does not derogate from any other right to remove a director which may exist under the law or under any agreement.[368] However, while shareholders may remove directors without cause, the law may stipulate that the board may not remove any directors without sufficient cause.[369]This implies that the validity of removal of directors by shareholders may only be subject to judicial review with respect to procedure

[361]*Ibid*.
[362]*Ibid* at 113.
[363]*Ibid*.
[364]In Australia, the exclusive right of shareholders to remove directors is limited to only public companies. See Rehana Cassim' The Removal of Directors by the Board of Directors under the Companies Act 71 of 2008: Should it be a Mandatory or an Alterable Provision?'[2019] *the Comparative and International Law Journal of Southern Africa* 389 at 393. See also James McCovey and Evan Holland' ''Pre-nuptial Agreements'' for Removing Directors in Australia- are they a valid Part of the Marriage between Shareholders and the Board?'[2006] *Journal of Business Law* 204, on the attempt to use pre-nuptial agreements to remove directors of public companies in Australia.
[365]CAMA, s.88 (b), which allows the board of directors to appoint one of the directors as the managing director.
[366]The Articles or contract of service may provide for the removal of a director. See Paul L.Davies, above n 56 at 390.
[367]Charles Wild and Stuart Weinstein, above n 159 at 434.See Rehana Cassim, above n 244 at 132, on the powers conferred on the board to remove directors of private and public companies in certain circumstances under s.71(3) of the South African Companies Act,2008.
[368]CAMA, s.288 (6).
[369]Rehana Cassim above n 244 at 136.

only.[370]It is important to state that the inherent right of shareholders to remove directors did not exist in common law jurisdictions until the promulgation of the UK Companies Act, 1948.[371] Prior to this time, the power of the shareholders to remove directors depended on the existence of such powers in the Articles of Association or the ability of the shareholders to alter the Articles to enable them to exercise such powers or their refusal to vote for the re-appointment of a director.[372] The power bestowed on shareholders to remove a director prior to the expiration of his tenure irrespective of any provisions in the Articles or any Agreement is aimed at checkmating or upsetting any arrangement by the directors for the purpose of ensuring the security of tenure for themselves.[373] It also serves a dual purpose of ensuring that any misconduct by any director of the company can be penalised even when other colleague directors are unwilling to take any action. [374]

If the attitude of the board towards the protection of their fellow directors from being removed from office as stated above is correct, the provisions of the MBCA in which the corporation is expected to bring an action for judicial removal of directors may appear impractical or rare. This is because directors will be reluctant to exercise their powers to apply for judicial removal or may not need to exercise such powers when they can lawfully remove the director themselves.[375] The consequence of this position is that in reality, judicial removal of directors can only be activated via derivative actions. The significance of this view point is that the application of the concept of judicial removal of directors via derivative actions may help to downplay the perception of the concept as an intrusion into the inherent rights of shareholders, considering that the intrusion of derivative actions into the affairs of the company is perceived as external. [376]This position reinforces the argument of this thesis that derivative actions and the removal of directors are allies in the enforcement of breach of corporate duties. In support of this position, section 8.09(b) of the MBCA prescribes that any shareholder bringing a derivative action for the judicial removal of a director must comply with all the requirements of Sub – Chapter 7D except section 7,41 (1). This means that the

[370]Charles Wild and Stuart Weinstein, above n 159 at 435.
[371]Paul L.Davies, *Gower's Principles of Modern Company Law* (6th edn, Sweet & Maxwell, London 1997) 188-189.
[372] *Ibid* at 188.
[373]Paul L.Davies, above n 12 at 390. See Tshepo Mongalo, above n 12 at 155.
[374]Rehana Cassim, above n 230 at 595.
[375]Olga N.Sirodoeva Paxson, above n 18 at 147, to the effect that removal by the board may be faster and cheaper than removal by the court. See however, Rehana Cassim, above n 244 at 136, to the effect that removal by the board may be subject to review by the court. See also SA Companies Act 2008, s.71 (5) & (6).
[376]Olga N.Sirodoeva Paxson, above n 18 at 113.

shareholder must give Notice of Demand to the company as required in derivative actions.[377] The company may also be expected to conduct an investigation into the demand,[378] and may ask the court to dismiss the derivative action on the grounds that it was not instituted in the best interests of the company.[379] Derivative proceedings under the MBCA have been said to be analogous to section 165 of the South African Companies Act.[380] However, one point of difference might be section 7.41(i) of the MBCA, which is an enactment of the US Contemporaneous rule, in which a shareholder bringing a derivative action is required to have been a shareholder at the time of the cause of action.[381] However, section 8.09(b) of the MBCA exempts a shareholder bringing an action for judicial removal of a director via a derivative action from the requirement of compliance with the Contemporaneous rule. Nevertheless, one clear distinction between derivative actions brought under section 8.09 of the MBCA and derivative actions brought under the South African and Nigerian jurisdictions , is that under the section 8.09 of the MBCA, only a shareholder may bring a derivative action, but in the latter jurisdictions, those eligible to institute derivative actions do not necessarily have to be shareholders.[382] However, the United Kingdom derivative action provision requiring only shareholders to institute derivative actions is congruent with the MBCA on this point. [383]

It is quite remarkable that section 8.09 of the MBCA makes provisions for other reliefs apart from the judicial removal of directors. Meanwhile, section 8.09 (c) allows the court to bar the errant director from re-election for a period as may be prescribed by the court. More importantly, section 8.09(d) grants the court the equitable powers to order other reliefs. These equitable powers of the court are comparable with the wide and equitable powers of the court under the unfair prejudice remedy.[384] Therefore, it can be maintained quite easily that an adoption of the concept of judicial removal of directors as adumbrated by the MBCA into the derivative action regime in Nigeria might just be the panacea for the problem of

[377]SA Companies Act 2008, s.165 (2).
[378]*Ibid* at s.165 (4).
[379]*Ibid* at s.165 (3).
[380]Rehana Cassim, above n 297 at 686.
[381]This rule is aimed at preventing collusive actions. See the US case of Hawes *v Oakland* 104 US 450 (1881) 460-1. See Oliver C. Schreiner 'The Shareholder's Derivative Action- a Comparative Study of Procedures' [1979] 96 *The South African Law Journal* 203 at 224. See *contra* UK Companies Act 2006, s.260 (4).
[382]SA Companies Act 2008, s.165 (2); CAMA, s.352.
[383]UK Companies Act 2006, s.260 (1).
[384]CAMA, s.355.

derivative actions being overshadowed by the unfair prejudice remedy in corporate governance. [385] Happily, following the MBCA template, several states in the United States of America like Columbia [386]and Delaware[387] have embraced the concept of judicial removal of directors. [388]

5.6 CONCLUSION

I have attempted in this chapter to evaluate the remedies available under the Companies and Allied Matters Act to an applicant who has instituted a derivative action in order to curb breach of corporate responsibilities.[389] I have come to the conclusion that although CAMA gives power to the court to exercise some specific powers, [390]the only remedy which readily ensues to the company is that it can be compensated or awarded damages in the event of a successful action.[391] Unfortunately, the remedy of compensation is not expressly provided for, although it can be deduced from CAMA, s.347 (2) (c). When this situation is compared to the remedies available under the Unfair Prejudice remedy, [392]it becomes relatively easier to understand why litigants whose cause of action fall under both derivative actions and unfairly prejudicial actions would rationally prefer to pursue their actions under the latter.[393]
Meanwhile, it is posited that due to its unique role of affording stakeholders the opportunity to pursue the vindication of breach of the rights of the company where the directors have failed to do so, derivative actions deserve some attention with regards to the remedies available under it.[394] In pursuance of the objective of this thesis of proffering solutions that

[385]L.C.B Gower, above n 218.
[386]District of Columbia Code 2018, s.29-306.09(a), which is in all fours with the MBCA.
[387]Delaware General Corporation Law 2013, s.225(c). However, this law is not exactly on all fours with the MBCA in the sense that judicial proceedings either by the corporation or by a derivative action can only be instituted where there has been a previous conviction or judgment of a competent court on merit against a director or directors. Nevertheless, like s.8.09 of the MBCA 2000, the director or directors can only be removed if there is evidence that the previous conviction or judgment was as a result of the director or directors not acting in good faith resulting in irreparable harm to the corporation.
[388]Rehana Cassim, above n 297 at 686.
[389]CAMA, s.347.
[390]*Ibid* at s.347 (2).
[391]Maleka Femida Cassim, above n 4 at 8.
[392]CAMA, s.355 (2).
[393]Arad Reisberg, above n 4 at 274.
[394]*Ibid* at 282, 285.

will ensure that derivative action retains its relevance as a corporate governance tool,[395] I advocate for additional remedies such as removal and disqualification of directors to be included among the remedies which the court can order if a derivative action is successful. [396] This suggestion stems from the fact that the remedies of removal and disqualification of directors in corporate governance need to be enhanced considering that their usage as penalties for corporate maladministration is rare and far in between. [397]It is also important to state that in view of the powers vested in regulatory authorities in Nigeria to interfere in corporate management through the removal of errant directors, there is no justification whatsoever for rejecting the idea of judicial removal of directors .[398]Fortunately, the concept of judicial removal of errant directors has been tailored to fit very well into the concept of derivative actions as I have tried to explain in this chapter.[399]

[395]Andrew Keay, above n 9 at 42.
[396]Rehana Cassim, above n 244 at 232.
[397]Ramani Naidoo, above n 247 at 99, where the author maintains that shareholders rarely exercise their statutory and common law powers in the company; and care less about how the company is being run as long as the company is profitable. See Olga N.Sirodoeva Paxson, above n 18 at 111.
[398]The Nigerian Banks and Other Financial Institutions Act 2004, ss.33 &35.
[399]US Model Business Corporation Act 2000, s.8.09. See Rehana Cassim, above n 244 at 243.

CHAPTER SIX

FUNDING OF DERIVATIVE ACTIONS: PROBLEMS AND OPTIONS

6.1 INTRODUCTION

It has been said that the problem of funding is the most critical impediment in derivative action litigation.[1] Therefore, it appears that no matter how laudable the objectives of this thesis may be, it will remain a myth for as long as persons who are qualified to bring derivative actions lack the wherewithal to sustain the actions.[2]Indeed, the odds are against the minority shareholder whose intention is to institute a derivative action against the wrongdoers of a company.[3] This is because the shareholder who is bringing an action against the wish of the directors who control the financial resources of the company cannot expect the company to be willing to fund the action.[4] This means that the minority shareholder must fund the action by expending his personal resources.[5] Unfortunately, the personal gain accruing to the minority shareholder from a derivative action is usually quite negligible.[6]Thus, if he is successful in his action, there is a possibility that there might be an increase in the capital value of the shares of the company but since his shares are few in number, the tangible benefit (if any), ensuing to him personally can only be a token.[7] More importantly, the minority shareholder and other persons qualified to bring derivative actions are only suing as agents or representatives of the company, therefore, any damage or property obtained from the litigation rightly belongs to the company and not to the person who initiated the action.[8]

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[1]Maleka Femida Cassim, *The New Derivative Action under the Companies Act – Guidelines for Judicial Discretion* (Juta, Claremont 2016) 139.
[2]Estelle Hurter 'Contingency Fees: The British Experience and Lessons for South Africa' [2001] 34(1) *Comparative and International Law Journal of South Africa* 71.
[3]Maleka Femida Cassim, above n 1 at 139.
[4]For Example, CAMA, s.87 (3), vests on the directors power to bring proceedings on behalf of the company.
[5]Andrew Keay 'Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act' [2016] 16(1) *Journal of Corporate Law Studies* 39 at 42.
[6]*Ibid*.
[7]Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford University Press, Oxford 2007)222.
[8]*Ibid*.

The Plaintiff in a derivative action cannot be expected to gloss over this point, in view of the fact that litigation, more particularly, derivative action litigation is quite complex and expensive. [9] Aside the fact that the two-stage procedure in which derivative action litigation is entrenched involves huge expenditure,[10]it is important to note that other persons in the company who have not expended their time and financial resources would free- ride on whatever advantages or benefits the Plaintiff is able to procure for the company.[11] This may further discourage the minority from taking any action that would involve expending his time and personal resources for the benefit of all.[12] In addition, the minority is burdened with the risk of having to pay the other party's costs in the event that he is not successful in the action.[13]

The above points were ably encapsulated by Lord Denning MR in the famous English case of *Wallersteiner v Moir (No.2)* as follows:[14]

> ''This case has brought to light a serious defect in the administration of justice. Mr. Moir is a shareholder in a public company…….. He has fought this case for over 10 years on his own. He has expended all his financial resources on it and all his time and labour…… Mr. Moir tells us--- and I have no doubt it is true – that he has no money left with which to pay the costs in further matters. He is fearful too, that, if he should lose on them or any of them, he may be ordered to pay personally the costs of Dr. Wallersteiner on them. Even if he wins all the way through

[9] Law Commission, *Shareholder Remedies,* Law Commission Report No.246,CM 3769(1997), para.6.6, where the Law Commission in the United Kingdom recommended that statutory derivative action must be subject to tight judicial control at all stages.
[10]CAMA.s.346 (1).
[11]Arad Reisberg, above n 7 at 85.
[12]*Ibid*.
[13]Andrew Keay, above n 5 at 55.See Maleka Femida Cassim 'Costs Order, Obstacles And Barriers To The Derivative Action Under Section 165 of the Companies Act 71 of 2008(Part 1)' [2014] *SA Mercantile Law Journal* 1.See Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003) 272.
[14][1975] 2 WLR 389 at 395.

> no part of it will redound to his own benefit……. His few shares may appreciate a little in value but that is all. In this situation he appeals to this court for help in respect of the future costs of this litigation. If no help is forthcoming all his help will have been in vain. The delaying tactics of Dr. Wallersteiner will have succeeded. Mr. Moir will have to give up the struggle exhausted in mind, body and estate.''

This observation helps to adumbrate the point that the economics of litigation is not in favour of the plaintiff in a derivative action.[15] In another English case of *Prudential Assurance v Newman (No.2)*,[16] the court overtly lamented the fact that although, the damages realised from the action was only 45,000 pounds, the total expenditure of the plaintiff and the defendants/ directors with respect to the case was likely to have run into six figures.[17]However, the court curiously took judicial notice of the fact that the defendants/ directors had expended their vast personal resources to defend themselves in the action, and thus, was prepared to consider how the liability of the action would be shared by the company and the directors, since the company benefited from the misbehavior of the directors.[18] The attitude of the court follows the usual posture whereby while the plaintiff in a derivative action litigation is burdened with funding the action, the defendant directors are likely to be indemnified by the company for any costs incurred in defending the action.[19] Most companies would even take out insurance policies to protect themselves in case of negligence of directors to third parties, and in circumstances where the company is unable to obtain any compensation from wrongdoing directors.[20] This scenario appears to show that the minority shareholder is handicapped with regards to financial support to prosecute his action. [21] Therefore, in order to address the problem of funding derivative action litigation, several

[15]Arad Reisberg, above n 7 at 223-224.
[16][1982] 1 All ER 354.
[17]*Ibid* at 375-376. See Arad Reisberg, above n 7 at 236.
[18]*Prudential Assurance v Newman (No.2)*, above n 16 at 376.
[19]Maleka Femida Cassim, above n 1 at 165-166.
[20]*Ibid* at 166.
[21]*Ibid* at 140.

incentives have been provided to encourage prospective applicants to institute such actions. The most notable incentive in most Commonwealth countries appears to be the indemnification of the applicant with respect to costs of the action and legal fees.[22] Other remedies include payment in part or in whole of the benefits obtained from the litigation to the shareholders instead of to the company,[23] and prohibition of the requirement of security for costs, etc.[24]

However, in the American jurisprudence, the problem of funding derivative actions may appear less critical because of its rejection of the fee-shifting rule, in which the loser pays the costs of the winning party. [25]Another significant difference between derivative actions in the United States of America and other Commonwealth countries is the application of the Common Fund and Contingency Fee Arrangement(CGFA) in derivative actions litigation, in which the fees of the attorney is paid out of the amount recovered in the litigation.[26] The United Kingdom had earlier rejected the CGFA on grounds of public policy[27] but has however, over the years adopted the Conditional Fee Arrangement (CFA) also known as 'No –Win –No-Fee' arrangement in which the attorney is paid an uplift on his fees if he wins the action.[28] In recent times, however, the United Kingdom has also embraced the CGFA.[29] It appears that the rules of Professional Ethics in Nigeria approve the application of the CGFA in civil proceedings but there is however, no evidence that it has ever been applied in derivative

[22]*Wallersteiner v Moir* (*No 2)*, above n 14 at 396-397. See Arad Reisberg, above n 7 at 231.
[23]CAMA, s.347 (2) (c).
[24]*Ibid* at s.350.
[25]Arad Reisberg, above n 7 at 226.
[26]*Ibid* at 226-227. See Tshepo Mongalo, above n 13 at 277-278.
[27]*Wallersteiner v Moir (No 2)*, above n 14 at 398.
[28]The UK Courts and Legal Services Act 1990, s.58. See Daniel Lightman, ' Derivative Claims' in Victor Joffe *et al* (eds),*Minority Shareholders- Law Practice and Procedure* (4th edn, Oxford University Press, Oxford 2011)29 at 7.See also A.J. Boyle,*Minority Shareholders' Remedies* (Cambridge University Press, Cambridge 2002)83.
[29]The United Kingdom Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.45.

actions. [30] The CGFA also appears to be in force in South Africa by virtue of the Contingency Fee Act 1999.[31] However, as would be seen later in this discourse, the Nigerian and the South African CGFA appear to be different from the US style CGFA.[32]

By and large, it seems that the funding regime in derivative actions in the United States provides more incentives for instituting derivative actions when compared to other Commonwealth countries.[33] This point is perhaps expressed more succinctly in the light of the fact that there exist serious disincentives to bringing derivative actions in Commonwealth jurisdictions as a result of the regime of costs and indemnification prevalent in those jurisdictions. [34]In the first instance, the principle that costs follow the event poses serious concerns to any prospective applicant.[35] Secondly, the award of costs and indemnification order is discretionary.[36] Although, the discretionary nature of the award of costs and indemnification ensures some measure of flexibility, nevertheless it creates a high degree of uncertainty in the minds of prospective derivative action litigants.[37]

This chapter will therefore examine the system of costs and indemnification under the common law derivative action since the issues of costs and indemnification under the current statutory derivative action regimes in the jurisdictions under consideration - (Nigeria, South Africa and the United Kingdom), can be traced to the famous English case of *Wallersteiner v Moir (No.2)*.[38] Secondly, the system of costs and indemnification and other fee arrangements under the statutory derivative action regimes in the countries under consideration would be

[30]Rules of Professional Conduct for Legal Practitioners in Nigeria 2007(as amended), rule 50(1).
[31]*Ibid*.
[32]Estelle Hurter,above n 2 at 84, to the effect that the South African Contingency Fee Regime bears a striking resemblance to the UK regime. See the South African case of Masango *v Road Accident Fund* (2016) (6) SA 508.
[33]Estelle Hurter, above n 2 at 72, where the author maintains that the US Contingency Fee Arrangement has been described by many- as the poor man's key to the court house. See Tshepo Mongalo, above n 13 at 277.
[34]Maleka Femida Cassim, above n 13 at 13.
[35]*Wallersteiner v Moir* (*No 2*), above n 14 at 394.
[36]Maleka Femida Cassim, above n 13 at 13.
[37]*Ibid*.
[38]Above n 14.

appraised but with occasional reference to other Commonwealth countries as may be deemed expedient with a view to upgrading the derivative action funding regime in Nigeria. This will be done alongside the concept of indemnification and Insurance of directors.[39]Thirdly, the CGFA of the United States and its Common Fund Doctrine [40]will be appraised with the aim of seeking the possibility of adopting them into the Nigerian derivative actions sphere.

6.2 COSTS ORDERS AND INDEMNIFICATION UNDER THE COMMON LAW DERIVATIVE ACTIONS REGIME

The problem of funding of derivative actions has its root in the English common law derivative action as demonstrated in the case of *Wallersteiner v Moir (No.2)*.[41]It is noticeable that in spite of the abolition of the common law derivative actions in most Commonwealth countries, the principles of cost orders and indemnification remain relevant under the statutory derivative action.[42]

6.2.1 COSTS ORDERS

One of the principles of law that was of a major concern to the minority shareholder in the case of *Wallersteiner v Moir (No.2)*, is that if he lost the case he would be liable for the costs incurred by the winning party.[43] This case, therefore, establishes the civil procedure principle of 'fee shifting' or 'costs following the event' in derivative actions.[44]This is particularly more burdensome for the minority shareholder since he is suing derivatively to secure a benefit for

[39]Paul L.Davies, *Gower And Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell, London 2008)592.
[40]Tshepo Mongalo, above n 13 at 277.
[41]*Ibid*.
[42]CAMA s.347 (1). See Maleka Femida Cassim, above n 1 at 1. See also Arad Reisberg, above n 7 at 230.
[43]Above n 14 at 394.See Maleka Femida Cassim, above n 1 at 8-9.
[44]Arad Reisberg, above n 7 at 226.

the company.[45] While the common law recognises that any benefit obtained from a derivative action accrues to the company only, the legal costs and expenses of the action have to be borne personally by the minority shareholder. [46]The scenario does not appear much better even if the plaintiff wins the action because the principle of' loser pays' simply means that he will be able to recover only a small fraction of his legal costs from the wrongdoing defendants who have harmed the company, considering that any award of costs is usually a negligible sum.[47]

6.2.2 INDEMNIFICATION

In the case of *Wallersteiner (No.2),* three ways were suggested by which a minority shareholder could be assisted to fund a derivative action: (i) Indemnity; (ii) Legal Aid; and (iii) Contingency Fee.[48]Whereas, Indemnity was accepted, Legal Aid and Contingency Fee were rejected by the court.[49] The court was of the opinion that Legal Aid was only available for a 'person' under the law.[50] Since the action was brought on behalf the company, the court thought otherwise that providing legal aid to the minority shareholder would be tantamount to the company which is not a 'person', indirectly obtaining legal aid.[51]

The Contingency Fee Arrangement which was defined to be 'any sum (whether fixed or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution of any action, suit or other contentious proceedings,[52]

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[45]*Ibid.*
[46]That was the position before the case of *Wallersteiner (No.2)*. See A.J. Boyle, above n 28 at 21.
[47]Maleka Femida Cassim, above n 1 at 149.
[48]Above n 14 at 404.
[49]I*bid* at 398.
[50]*Ibid* at 397, as per Lord Denning M.R. See A.J. Boyle, above n 28 at 37. See also Michael Zander 'Government's Plan on Legal Aid and Conditional Fees' [1998] 61(4) *Modern Law Review* 538 at 539, on the reform of Legal Aid in England, resulting in its availability in only few cases.
[51]*Wallersteiner v Moir (No.2)*, above n 14 at 397.
[52]UK Solicitor Practice Rules 1936-1972, rule 4(1).

was rejected by the court on the ground that it was contrary to public policy.[53] Originally, an arrangement to share fees in the event of success was considered to be an offence of Champerty under English Law. [54]Although, criminal and civil liabilities had been removed with respect to Champerty,[55] in order to preserve the dignity and integrity of the legal profession, it was considered unlawful for a solicitor to take up a case under a Contingency Fee Arrangement.[56]

Having jettisoned the possibility of Legal Aid and Contingency Fee Arrangement as means of funding derivative actions under the common law, the only principle that survived was the principle of Indemnification. [57] The Court in *Wallersteiner* (*No.2)*, noted that the plaintiff as a minority shareholder brought the action on behalf of the company and was therefore, an agent of the company.[58] Consequently, the court reasoned that it is equitable that the company as principal, should pay the reasonable costs and expenses of the agent, particularly because if the action succeeds, any benefit of the action will accrue to company.[59]With respect to the normal party costs in which costs follow the event, the court also reasoned that where the successful plaintiff is not able to recover the nominal costs of the action from the wrongdoer, the company should indemnify him.[60] Moreover, the court maintained that the company should reimburse the plaintiff the cost of litigation including any additional costs

[53]*Wallersteiner v Moir (No.2)*, above n 14 at 398.
[54]*Ibid*.
[55]Gary Chan Kok Yew' Champerty, Professional Legal Ethics and Access to Justice for Impecunious Clients' [2014] *Singapore Journal of Legal Studies* 206.
[56]*Ibid*. See the English case of *Pittman v Prudential Deposit Bank Ltd* 13 [1896] TLR 110,111. See also Winand Emons 'Conditional Versus Contingent Fees' [2007] 59 *Oxford Economic Papers* 89.
[57]*Wallersteiner v Moir (No.2)*, above n 14 at 396. See A.J. Boyle, above n 28 at 37, 83-84, where the author argues that it is difficult to justify a situation under derivative actions, where part of the proceeds of a successful judgment which accrues to the company is bargained away.
[58]*Wallersteiner v Moir* (*No.2)*, above n 14 at 396.
[59]*Ibid.*
[60]*Ibid.*

over and above party costs incurred from the common fund, i.e. money recovered from the action.[61]

In situations where the action fails, the court in *Wallersteiner* (*No.2),* opined that since the plaintiff instituted the action as an agent of the company, the company should indemnify him with respect to paying the costs of the defendant.[62] In addition, the company should also be liable for the costs and expenses of the plaintiff.[63]

The court however held that the grant of an indemnity to the plaintiff was contingent upon his applying to the court *ex parte*[64] immediately after filing the writ of summons, and that the application must be supported by opinion of counsel as to whether there was a reasonable case or not.[65] The court also held that it may however, require notice to be given to one or two minority shareholders as representatives of the shareholders in order to determine if there was any objection.[66]Furthermore, it was held that the proceedings at the preliminary hearing are designed to be a simple and inexpensive application.[67] This means that the initial hearing should not be turned into a mini-trial considering that the court is only required to determine if there was a reasonable case which necessitates the shareholder instituting an action at the expense of the company at that stage.[68]

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[61]*Ibid.*
[62]*Ibid* at 397.
[63]*Ibid*.
[64]*Ibid*. See however, Buckley LJ at 408, who maintained that the application may be made *ex parte* in the first instance but may be made on notice to the company, minority shareholder or other respondents in accordance with the direction of the court at a later stage. See also A.J.Boyle, above n 28 at 22.
[65]*Wallersteiner v Moir* (*No.2)*, above n 14 at 408.
[66]*Ibid*. See however, a later common law case of *Smith v Croft* [1986] 2 All ER 551 at 557, which expressly prescribed that the application should not be made *ex parte.*
[67]*Wallersteiner v Moir*(*No.2)*,above n 14 at 397,as per Lord Denning MR.
[68]*Ibid.* See *Prudential Assurance Co.Ltd v Newman Industries Ltd* (*No.2)*, above n 16 at 366. See also Paul von Nessen *et al'*The Statutory Derivative Action: Now Showing Near You '[2008] *Journal of Business Law 627* at 647.

The requirement of preliminary application may have been put in place as justification for indemnification of the plaintiff where the action fails. [69]The court having determined that the plaintiff's cause of action is reasonable would have enough valid reasons to grant the plaintiff, indemnification at the expense of the company, since a risk assessment of the cause of action at the beginning of the case was established.[70] However, the fact that the company is not put on notice with respect to the preliminary application appears to be unfair to the company.[71] Nevertheless, the non-involvement of the company may be justified on the premise of avoiding the application being turned into a mini –trial since the company would be reasonably expected to object to the application. [72]In any case, it may be incorrect to say that the company is not a party to the preliminary application since the plaintiff brings a derivative action as the agent of the company, at least at common law.[73]

Although the case of *Wallersteiner v Moir(No.2),*may have paved the way for the application of the indemnity principle with respect to derivative actions,[74]some cases decided after it have somewhat deviated from some of the guidelines under which the principle was established. [75]For instance, in the English case of *Smith v Croft,* [76]the court appeared to be reluctant to grant an indemnity order for lack of evidence that the minority shareholder did not have the means to prosecute the action. [77] The court premised its decision on the grounds that indemnification was granted in the case of *Wallersteiner* (*No.2),* because the plaintiff had

[69]Maleka Femida Cassim, above n 1 at 151.
[70]*Ibid*.
[71]Arad Reisberg, above n 7 at 231, where the author argues that the company might find itself paying for an action which it almost invariably did not wish to be brought, and which would put the whole management under pressure.
[72]*Wallersteiner v Moir (No.2)*, above n 14 at 396.
[73]*Ibid* at 397.
[74]Robin Hollington, *Hollington on Shareholders' Rights* (7th edn, Sweet & Maxwell, United Kingdom 2013)185.
[75]*Ibid* at 187-189.
[76]Above n 66 at 565. See the English case of *McDonald v Horn* [1995] 1 All ER 961.See *contra* the English case of *Trumann Investment Group v Societe General SA* [2003] EWHC 1316.
[77]Daniel Lightman, above n 28 at 64, where the author relying on the English case of *Iesini v Westrip Holdings Ltd* [2010]BCC 420,maintained that the court in the case of *Smith v Croft* did not hold that a claimant must show lack of financial capability in order to be granted an indemnity order.

exhausted his financial resources in bringing a derivative action.[78]The court in *Smith v Croft,* [79]however, failed to consider a fundamental point in *Wallersteiner* (*No.2),*[80] in which the court said the plaintiff was acting as an agent of the company and not for himself.[81] It was on this premise that the court ordered that the plaintiff should be indemnified from the common fund of the company as per Lord Denning MR,[82] while Buckley LJ opined that the company could be ordered to pay any costs for which the plaintiff becomes liable in the course and in consequence of his acting for the company.[83]The criterion for determining whether the plaintiff should be indemnified relied on by the court in *Smith v Croft*, [84]has been described as the Financial Need[85] or Means Test.[86]This is however different from the criteria of either the Common Fund or Indemnity postulated by Lord Denning MR[87] and Buckley LJ[88]respectively in *Wallersteiner* (*No.2)*. Meanwhile, the Financial Need Test as postulated in the case of *Smith v Croft*, has been criticised as being an irrelevant and narrow consideration for determining if a plaintiff is entitled to indemnity since the applicant did not bring a personal action but rather an action for the benefit of the company.[89]In addition, it has been argued that the application of the Financial Need Test in a derivative action can easily be

[78]*Ibid*. See *Smith v Croft*, above n 66 at 554. See also Robin Hollington, above n 74 at 189.
[79]Above n 66.
[80]Above n 14.
[81]*Ibid* at 396, as per Lord Denning MR. See the English case of *Mumbray v Lapper* [2000] BCC 990, where the court refused to grant an indemnity order because the minority shareholder could not be said to have brought the action for the benefit of the company.
[82]*Wallersteiner v Moir (No.2)*, above n 14 at 405.
[83]*Ibid* at 404.
[84]Above n 66.
[85]Arad Resiberg, above n 7 at 238.
[86]*Ibid* at 241.
[87]*Wallersteiner v Moir (No.2)*, above n 14 at 396.
[88]*Ibid* at 407.
[89]Maleka Femida Cassim, above n 1 at 151,161. See however, the Canadian case of *Turner v Mailhot*[1985]50 OR (2d) 561, and the English case of *Jaybird Group Ltd v Greenwood* [1986] BCLC 318,328, both of which refused to follow the financial need criterion established in the case of *Smith v Croft,* above n 66 .See also Daniel Lightman, above n 28 at 64, where the author appears to maintain that what is important for the purpose of the grant of an Indemnity Order is that the applicant must show that the action has been instituted for the benefit of the company.

defeated by an arrangement in which a minority shareholder 'fronts'[90] as an impecunious shareholder in order to ensure that an indemnity order is obtained.[91] The corollary being that where there are more than one indigent minority shareholders seeking to enforce a right belonging to the company, the court in refusing their application for an order of indemnity can rely on the fact that by the combination of their resources, the applicants cannot claim to not have sufficient resources to sustain the action.[92]Consequently, while one indigent shareholder might be able to obtain an order of indemnification, multiple indigent shareholders might not be able to obtain an indemnity order.[93] This means that the Financial Needs Test may indirectly work contrary to the corporate governance ideal of the need for coordination and cooperation amongst shareholders; [94]and also, the need to remove the disincentives arising from the problem of free-riding.[95]

Nevertheless, the issue of the financial means of the applicant may appear very profound where the applicant is a regulatory body constituted and funded by the government for the furtherance of corporate governance. [96] On the one hand, it might be argued that regulatory bodies who institute derivative actions need not be indemnified since they are merely carrying out their public duties of ensuring good corporate governance;[97]and are funded by the government accordingly.[98] However, it can also be maintained that since government resources are limited and not infinite, the problem of funding derivative actions also arises

[90]Emphasis mine.
[91]Arad Reisberg, above n 7 at 240.
[92]*Ibid.*
[93]*Ibid.*
[94]*Ibid* at 87.
[95]*Ibid* at 85.
[96]For example, The Nigerian Corporate Affairs Commission is established under CAMA, s.1, The South African Companies and Intellectual Property Commission is established under SA Companies Act 2008, s.185.
[97]CAMA, s.309(c); SA Companies Act 2008, s.165 (16).
[98]Maleka Femida Cassim, above n 1 at 171.

with regulatory bodies.[99] In any case, an indemnification order made against the company might serve as a deterrent to corporate maladministration[100] since it places the financial burden of the derivative action on the company. [101]

Be that as it may, the financial status of a company may be used to determine whether an applicant should be granted an indemnity order alongside the amount to be granted. [102]This is particularly significant in situations where the company may not have the financial means to indemnify the shareholder or stakeholder who has brought a derivative action. [103] Thus, Scarman L.J in the case of *Wallersteiner (No.2)*, was of the view that an indemnity order was of no use to the shareholder in the event that the company becomes insolvent.[104] Perhaps, in line with this position, in the English case of *Watts v Midland Bank Plc*,[105] an indemnity application was refused on the ground of insolvency since the plaintiff was unlikely to benefit from an indemnity order in that situation. [106]

6.3 COSTS ORDERS AND INDEMNIFICATION UNDER THE STATUTORY DERIVATIVE ACTIONS REGIME

Meanwhile, the principle of costs and indemnification established under the common law derivative action appears to have been passed on to the statutory derivative action regime. [107]In Nigeria, where the common law derivative action is yet to be abolished, the principles established in the case of Wallerstener *(No.2)*, [108]are directly applicable to the Nigerian

[99]*Ibid*.
[100]*Ibid* at 8.
[101]*Ibid* at 142.
[102]*Ibid* at 151.
[103]*Ibid*.
[104]*Wallersteiner v Moir (No.2)*, above n 14 at 412.
[105][1986] BCLC 15.See Daniel Lightman, above n 28 at 65.
[106]Arad Resiberg, above n 7 at 243.
[107]The UK Civil Procedure (Amendment) Rules 2007, rule 19.9 E. See Anil Hargovani' Under Judicial And Legislative Attack: The Rule in Foss v Harbottle' [1996]113 *The South African Law Journal* 631 at 647.
[108]Above n 14.

jurisdiction.[109] However, beyond the direct application of common law derivative action, traces of the common law principle of indemnification can also be found in the derivative action legislations of most Commonwealth countries.[110]

6.3.1 COSTS ORDERS UNDER STATUTORY DERIVATIVE ACTIONS

The South African provisions stipulate that a court may make any appropriate order about the costs of certain persons in relation to proceedings brought under a derivative action.[111] The persons referred to are the persons who applied for or were granted leave; the company or any other party to the proceedings or application.[112]The fact that the court in South Africa is empowered to make orders regarding costs with respect to all the parties in these proceedings perhaps supports the notion of the loser -pay -principle in which costs follow the event.[113] Thus, where the applicant succeeds in the derivative action litigation –whether in the application for leave or the substantive application, the company and any other party in the proceedings which are likely to be the erring directors would be ordered by the court to pay the costs of the plaintiff.[114] On the other hand, if the plaintiff loses the leave application or the substantive suit, he may be ordered by the court to pay the company and the defendant directors.[115]

While the South African law gives the court a general discretionary power with regard to costs in derivative actions,[116] the UK provisions merely give the court a blanket discretionary power. Thus, it can only be deduced from the provisions of section 261(4) of the UK Companies Act

[109]Motunrayo.O.Egbe 'Global Trends In Statutory Derivative Actions: Lessons For Nigeria' [2013] 12 *Nigerian Law and Practice Journal* 51 at 61.
[110]*Ibid*. See SA Companies Act 2008, s.165 (10).
[111]SA Companies Act 2008, s.165 (10).
[112]*Ibid*.
[113]Maleka Femida Cassim, above n 1 at 149.
[114]*Ibid*.
[115]*Ibid*.
[116]SA Companies Act 2008, s.165 (10). See Maleka Femida Cassim, above n 1 at 149.

2006, and other similar provisions[117] that the concept of costs and indemnification can be accommodated into the United Kingdom derivative actions regime.[118] Section 261(4) (a) of the UK Act provides as follows:

''On hearing the application, the court may – give permission (or leave) to continue the claim on such terms as it thinks fit.''

In the same vein, CAMA does not appear to have made any provisions for a specific order as to general costs. However, section 347(1) of CAMA allows the court at any time to make any order as it deems fit. This is in addition to the fact that Costs orders under the common law derivative actions are applicable in Nigeria since the common law derivative action has not been abolished. [119]

6.3.1.1 Interim Costs

The court in Nigeria is expressly authorised by CAMA to grant Interim Costs as follows:

''In an application made or an action brought or intervened in under section 346 of this Act, the court may at any time order the company to pay the applicant interim costs before the final disposition of the application or action.''[120]

There is no specific or direct provision made for Interim Costs under the South African[121] and United Kingdom Companies Acts.[122]However, from the general or blanket discretionary powers of the court in both the South African and the UK jurisdictions respectively, it appears that the courts have the power to grant orders as to costs before the final disposition of a derivative action.[123]It is quite remarkable that in the cases of Nigeria [124]and South Africa,[125]

[117]UK Companies Act 2006, s.262 (5), s.264 (5).
[118]Arad Reisberg, above n 7 at 231.
[119]CAMA, s.346 (1).
[120]*Ibid* at s. 351.
[121]Maleka Femida Cassim, above n 1 at 154.
[122]UK Companies Act 2008, s.260.
[123] SA Companies Act 2008, s.165 (10); UK Companies Act 2006,s 261(4) (a); UK Civil Procedure rules 2007, 19.9E.
[124]CAMA, s.347 (1).
[125]SA Companies Act 2008, s.165 (10).

Interim Costs orders can be made at any time during an application for leave and also at any time during the substantive derivative action proceedings. The South African provision in indirectly supporting interim costs stipulates as follows:

''At any time, a court may make any order it considers appropriate about the costs of the following persons in relation to proceedings brought or intervened in with leave under this section, or in respect of an application for leave under this section.''[126]

I posit that the use of the phrase 'at any time' indicates that the court may grant costs orders within the proceedings of the stage of application for leave or within the proceedings of the 2nd stage, where the substantive matter is to be determined and not necessarily at the conclusion of either the 1st or 2nd stage of the derivative action. It is remarkable that the courts in Nigeria and South Africa may be allowed to grant an applicant who has applied for leave, Interim Costs, before determining whether he is entitled to be granted leave to pursue the action. This can be justified on the ground that there is no doubt that the applicant who has applied for leave would have incurred personal legal expenses and other costs in the process of applying for leave to bring an action to defend the cause of the company. However, considering the fact that standing to sue is a major issue in derivative actions leave applications,[127] it is doubtful if any court would want to exercise its discretionary power to order Interim Costs in favour of an applicant whose standing to sue is yet to be determined.[128] Meanwhile, the phrase 'at any time' is evidently absent from the UK legislation with respect to costs.[129] This seems to imply that the court may only order interim costs at the time of granting or refusal to grant leave; and before the final judgment is given.[130] However, interim costs cannot be granted when an application for leave is refused since the law dictates that

[126]*Ibid.*
[127]Paul L.Davies, above n 39 at 614-615.
[128]*Ibid*. See *Smith v Croft*, above n 66 at 554.
[129]UK Companies Act 2006, s.261 (4) (a); UK Civil Procedure rules 2007, 19.9E.
[130]Maleka Femida Cassim, above n 1 at 150-151.

the court must dismiss the application in that instance. [131] The UK Civil Procedure (Amendment) Rules 2007, paragraph 19.9, prescribes that derivative actions must be commenced by the issue of a claim form; and that after the issuance of the claim form, the claimant must not take any further steps in the proceedings other than-a step permitted or required under rule 19.9A or 19.9 C, without the permission of the court; or make any urgent application for interim relief. Since the UK Civil Procedure rules 19.9A and 19.9C, have to do with seeking the permission of the court to continue a derivative action, it appears that the only step that may be taken by the claimant after obtaining the claim form and without taking permission of the court is to make an urgent application for interim relief. This may seem to suggest that a claimant can on grounds of urgency, apply for interim costs, after obtaining the claim form without seeking the permission of the court to continue the derivative action. However, in spite of this stipulation, it appears that in the United Kingdom, the grant of interim costs is intertwined with the grant of leave application or permission to continue the claim. [132]There are plausible explanations for this approach to the issue of interim costs in the United Kingdom. In the common law case of *Smith v Croft,* Walton, J frowned at the award of costs at the commencement of an action before the completion of discovery and inspection as follows:[133]

‘‘But I may observe that the justice of an order which may throw on a company, which in the event is proved to have no cause of action whatsoever against the other defendants ,who may prove to be completely blameless, the entire costs of the action which it did not wish to be prosecuted, is extremely difficult to comprehend. The real injustice of the situation lies in the encouragement which the Court of Appeal gave to the application for such an order being made at the commencement of the action, at a time when of necessity, the plaintiffs believe that they have a good case, and will with hand on heart swear that they have, and before the

[131]UK Companies Act 2006, s.261 (2).
[132]Arad Reisberg, above n 7 at 234.
[133]Above n 66 at 554. See Daniel Lightman, above n 28 at 64.

completion of discovery and inspection, which may well show that their beliefs, though honestly enough held, are not well founded''.

Walton J, was firm in the opinion, based on what happened in *Wallersteiner* (*No.2)*, that an order of indemnification should only be made by the court at a later stage of the proceedings when the standing of the plaintiff to sue has been determined. [134] Walton J. further remarked as follows:[135]

''It is to be observed that in *Wallersteiner v Moir(No.2)*, the application was made at a later stage in the proceedings after Mr. Moir(who was the plaintiff by counterclaim) had already substantially succeeded, but who had no powder and shot left to finish the battle. The manifest justice of such an order in favour of a person in such a position is plain enough.''

I opine that although it is factually correct that the indemnification order granted in *Wallersteiner* was made at a later stage of the proceedings, the case does not establish that indemnification should be granted at that stage only. This thesis submits that the court granted the indemnification order at a later stage because that was the time the plaintiff made the application. It is important to note that the Court in *Wallersteiner (No.2),* suggested that application for indemnity order should be made at the commencement of the action as follows:[136]

''In order to be entitled to this indemnity, the minority shareholder, soon after issuing his writ should apply for the sanction of the court in some-what the same way as a trustee does.''

It is note- worthy that the court in *Smith v Croft,*[137] accepted that interim payment could be made to a plaintiff in a derivative action in situations where he has no means of funding the

[134]Ben Pettet, *Company Law* (2nd edn, Pearson, England 2005)221.
[135]Above n 66 at 554
[136]Above n 14 at 397.
[137]Above n 66 at 565.

action, in order to ensure that the case proceeds.[138] This position appears to be comparable to the UK Civil Procedure rules, which allow a claimant to make an urgent application for interim relief even before seeking the permission of the court to continue the derivative action.[139]

It is possible that the courts in Nigeria would attach the granting of interim costs in derivative actions to the financial status of the applicant since the common law derivative action is still applicable in Nigeria.[140] It should be noted however, that the idea of tying the financial status of an applicant to the granting of interim costs is primarily aimed at ensuring that the applicant is able to institute the derivative action to address the wrong that has been done to the company; and should be so restricted accordingly.[141] Consequently, since interim costs can be granted at any time during the proceedings,[142] any application for interim costs not connected with the commencement of the action should not be hinged on the financial need of the applicant.[143] I posit that this approach will help to evade the problems associated with the Financial Need Test.[144] In Nigeria, an applicant is expected to apply for leave at the commencement of the derivative action. [145] I argue that the granting of leave to institute a derivative action confirms the applicant as an agent of the company and therefore, automatically entitles him to indemnification irrespective of his financial status. [146]Thus, an applicant who has been enabled through interim costs to commence a derivative action can be entitled to another interim costs once he has been granted leave. The difference between

[138]See Maleka Femida Cassim, above n 1 at 154.See however, Daniel Lightman, above n 28 at 64, who opines that Walton J was quoted out of context, maintaining that the statement on financial standing was directed at a second appeal in the case, bordering on taxing bills at intervals.
[139]UK Civil Procedure (Amendment) Rules 2007, para 19.9(4) (a).
[140]Joseph E.O.Abugu, *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers Limited, Lagos 2014)370.
[141]*Smith v Croft*, above n 66 at 565.
[142]CAMA, s.351.
[143]Maleka Femida Cassim, above n 1 at 151.
[144]*Ibid* at 153.
[145]CAMA, s.346 (1).
[146]Maleka Femida Cassim, above n 1 at 154.

the earlier interim costs and the latter interim costs is that while the latter does not depend on the financial status of the applicant, the former is hinged on his financial status.

6.3.1.2. Security for Costs

The concept of security for costs in Civil Procedure entails requiring the plaintiff to deposit some amount of money with the court as security for the legal costs of bringing the defendant to court.[147] This is particularly significant in jurisdictions where costs follow the event, in which the losing party bears the costs of the winning party.[148] In addition, the concept of security for costs appears to be valuable in corporate litigation, where the notions of corporate personality and limited liability may be used to prevent the winning party from realising the benefits of his success.[149]With regards to derivative actions, the idea of security for costs is premised on the need to protect the interests of the company and the directors since security for costs will ensure that they are reimbursed with respect to their legal costs in the event that the plaintiff is unsuccessful.[150] In the United States, the requirement of security for costs in derivative action is premised on the need to discourage strike suits and collusive settlements which are brought, not to protect the interests of the company, but for collateral purposes.[151] On the other hand, security for costs constitutes a disincentive to instituting derivative actions because of the extra financial burden it places on the applicant.[152] Since the applicant who has obtained leave in a derivative action is bringing an action not for himself but to protect the interests of the company, there can therefore be no justification for further requiring him to provide security for costs in order to protect the interests of the company. As for the directors, their interests, as will be discussed later, are

[147]M.M.Stanley- Idum & J.A.Agaba, *Civil Ligation in Nigeria* (2nd, Renaissance Law Publishers, Lagos 2018)1039.
[148]Maleka Femida Cassim, above n 1 at 149.
[149]See David Milman, 'Security for Costs: Principles and Pragmatism in Corporate Litigation' in Barry A K Rider (ed), *The Realm of Company Law* (Kluwer Law International, London 1998)167 at 170.
[150]*Ibid* at 168.
[151]Maleka Femida Cassim, above n 1 at 155.
[152]*Ibid*.

usually protected under Directors Indemnification and Insurance, and thus, there is also no basis for additional protection for them by means of security for costs.[153] Also, positive measures provided for under the law for the prevention and control of strike suits[154] or collusive settlements already exist.[155] Therefore, the use of security for costs to control strike suits and collusive settlements appears to be a negative approach with potential to frustrate honest efforts to curb corporate malfeasance.[156]

The argument against the requirement of security for costs is supported by the United Kingdom and Nigeria where there is no requirement for security for costs with respect to derivative actions. While the UK Companies Act is silent on the issue of security for costs, [157]CAMA specifically stipulates that an applicant shall not be required to give security for costs in any application made or action brought or intervened in with regards to derivative actions.[158] On the contrary, in South Africa, the court has discretionary powers to require security for costs in derivative actions.[159] However, this requirement has come under criticism in accordance with the arguments proffered above.[160]

6.3.2 INDEMNIFICATION

The UK Companies Act 2006, makes no specific provision for indemnification, however, the United Kingdom Civil Procedure rules expressly provide for indemnification as follows:[161]

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[153]*Ibid* at 165.
[154]For example. CAMA, s. 346(2), stipulates the requirements of Application for leave to commence derivative actions.
[155]*Ibid* at s.349, regulating discontinuance and settlement of derivative actions.
[156]Maleka Femida Cassim, above n 1 at 155.
[157]The UK Law Commission Consultative Document No.142 (1996), para.17, in which the Law Commission opposed the idea of security for costs. See also David Milman, above n 149 at 169.
[158]CAMA, s.350. See Canada Business Corporation Act 1985, s.242 (3).
[159]SA Companies Act 2008, s.165 (11).
[160]Maleka Femida Cassim, above n 1 at 155-156.
[161]The UK Civil Procedure (Amendment) Rules 2007, rule 19.9 E.

''The court may order the company, body corporate or Trade Union for the benefit of which a derivative claim is brought, to indemnify the claimant against liability for costs incurred in the application for permission or in the derivative claim or both.''[162]

The UK Civil Procedure rules on indemnification is to a large extent comparable to the common law, *Wallersteiner* principle, because it maintains that an applicant should be indemnified by the company since he brought the action for the benefit of the company and not for his own benefit.[163] It is remarkable that the indemnification which can be granted by the court covers costs incurred at the two stages of derivative actions, i.e. the leave stage and the substantive claim stage.[164] A notable difference between the UK Civil Procedure rules and the common law is that under the former, indemnification is hinged on judicial discretion, and is therefore, not mandatory.[165] Also, while the common law dictates that the plaintiff must be indemnified on the Common Fund basis,[166] the UK Civil Procedure rules is silent on the modality for indemnification. In addition, under the UK Civil Procedure rules, there is no laid down procedure for applying for indemnification unlike what is obtainable under the common law.[167]

In the cases of Nigeria and South Africa, the approach appears to be that some specific provisions have been made which may be intended to indemnify an applicant in a derivative action.[168] This thesis shall therefore endeavour to examine these specific provisions.

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[162]See Carsten A.Paul' Derivative Actions under English and German Corporate Law- Shareholder Participation between the Tension Filled Areas of Corporate Governance and Malicious Shareholder Interference' [2010] *European Company and Financial Law Review* 81 at 96.

[163]Daniel Lightman, above n 28 at 62.

[164]*Ibid*.

[165]The UK Civil Procedure (Amendment) Rules 2007, rule 19.9 E. Compare with *Wallersteiner v Moir (No.2)*, above n 14 at 396.

[166]*Wallersteiner v Moir (No.2)*, above n 14 at 396.

[167]*Ibid* at 397. See A.J. Boyle, above n 28 at 21.

[168]CAMA, s.347; SA Companies Act 2008, s.165 (9) & (10).

6.3.2.1 Giving Direction for the Conduct of a Case

Without prejudice to the general discretionary powers of the court, section 347(2) of CAMA empowers the court to make specific order(s). One of such orders which the court is empowered to make is giving directions for the conduct of the action.[169] Thus, the court in Nigeria may be enabled under this subsection to determine the procedure for obtaining indemnification from the court. Although, the court can make the same order by virtue of the general discretionary powers conferred on it under CAMA,s.347(1), the powers of the court under s.347(2)(b) appear more specific, at least in relative terms.

6.3.2.2 Personal Recovery by Shareholders

The court in Nigeria is also empowered under section 347(2) (c) of CAMA, to direct that any amount adjudged payable by a defendant in the action shall be paid, in part or in whole, directly to former and present 'security holders'[170] of the company instead of to the company.[171]A salient observation with regards to the provision of section 347(2) (c) of CAMA, is that it recognises the Common Fund principle as established in *Wallersteiner* (No.2), in which the plaintiff can be ordered to be indemnified from the amount recovered for the benefit of the company since he is only acting as an agent of the company and not for himself.[172] The difference between section 347(2)(c) of CAMA, on the one hand and the common law or the Common Fund principle on the other hand is that under the former, indemnification is targeted at present and former shareholders of the company while under the latter, indemnification is targeted at only the plaintiff.[173] However, it is doubtful if indemnification under s.347 (2) (c) of CAMA, can really be termed as such since it appears not

[169]CAMA, s. 347(2) (b).
[170]Emphasis mine.
[171]CAMA, s.347 (2) (c).
[172]Arad Resiberg, above n 7 at 231. See Maleka Femida Cassim, above n 1 at 147.
[173]The restriction of beneficiaries of the recovery to only shareholders may be traced to the position at common law, where only shareholders may institute derivative actions. See the English case of *Edwards v Halliwell* [1950] 2 All ER 1064.

to be hinged on the concept of reimbursing the litigant, the cost of litigation because he acted on behalf of the company, but on the premise of avoiding a situation where the benefit of the litigation ends up in the hands of directors who are the wrongdoers.[174] Nevertheless, this provision of CAMA, which enables the court to pay some or all of the proceeds recovered from the litigation directly to shareholders including former shareholders may perhaps provide some incentives to shareholders and former shareholders to bring derivative actions.[175]Nonetheless, section 347(2) (c) of CAMA is objectionable in many regards. These objections and reservations have already been discussed in Chapter Five.

6.3.2.3 Payment of Reasonable Legal Fees

Another specific order which the court is empowered to make under section 347(2) of CAMA, is to require the company to pay 'reasonable'[176] legal fees incurred by the applicant in connection with the proceedings.[177] This provision is in line with the reasoning in *Wallersteiner (No.2)*, [178]which maintains that the plaintiff must be indemnified in respect of the costs and expenses 'reasonably'[179] incurred by him in the course of bringing an action for the benefit of the company. There is no definition of the word 'reasonable' nor is there any established guideline for determining what is considered reasonable costs in derivative actions. However, it is maintained that the concept of payment of reasonable legal fees must be aimed at protecting the company from any opportunistic intent of the plaintiff. It is only fair that the company should be made to indemnify the plaintiff for what an average litigant would have incurred in the circumstances.[180] Nevertheless, the lack of precision as to what is considered reasonable may make the issue of the quantum of legal fees which the court may

[174]Maleka Femida Cassim, above n 1 at 156.
[175]*Ibid* at 158.
[176]Emphasis mine.
[177]CAMA, s.347 (2) (d).
[178]Above n 14 at 396.
[179]Emphasis mine.
[180]Maleka Femida Cassim, above n 1 at 158.

order the company to pay, a point of contention between the parties. This may result in prolonging the case, and thus, occasioning more expenses being incurred by the parties. However, I posit that the determination of reasonableness of legal fees or costs may depend upon the following factors: the nature and intricacy of the case; the benefit likely to be obtained from the litigation; the net worth or financial resources of the company; other extraneous circumstances; etc. This thesis posits that in spite of the problem associated with the determination of reasonableness of the amount to be fixed respecting the legal fees, this provision constitutes a good incentive to an intending litigant in a derivative action with respect to funding.[181] It appears that there are no similar provisions in the United Kingdom. However, this provision is perhaps analogous to the provisions under the South African Companies Act, which allow the court to make an order for the remuneration and payment of expenses of the person appointed.[182]

6.3.2.4 Liability for the Remuneration and Payment of Expenses of the Person Appointed.

The court in South Africa is mandated to make or vary any order stating that certain persons are liable for the remuneration and expenses of the person appointed.[183] The persons who are to be made liable are all or any of the parties to the proceedings or the company.[184] It is remarkable that while the costs order available under section 165(10) of the South African Companies Act is discretionary in nature, the order of the court as to liability for remuneration and payment of expenses of the person appointed in S.165 (9) is mandatory. Also, the costs order likely to be granted by the court to a plaintiff if he wins the action is typically nominal in value and may not even be sufficient to cover his out of pocket expenses.[185] Therefore, an order regarding who is liable for the remuneration and payment of expenses of the plaintiff

[181]Maleka Femida Cassim, above n 1 at 158.
[182]SA Companies Act 2008, s.165 (9).
[183]*Ibid*. See Maleka Femida Cassim, above n 1 at 156.
[184]*Ibid.*
[185]*Prudential Assurance v Newman* (*No.2)*, above n 16 at 375.

will be of great assistance in funding the derivative action. Moreso, unlike the common law *Wallersteiner* Costs order, which is mandated to be measured on a Common fund basis,[186] there is no such requirement under the SA Companies Act 2008, s.165 (10).This therefore means that the amount of money that would be paid to a successful litigant may not be dependent on the amount of recovery from the action.

However, in spite of the impressiveness of the provisions of the SA Companies Act 2008, s.165(9), there are some queries or observations that can be raised about its reason and logic. Firstly, it is not clear who exactly 'the person appointed' under s.165 (9) (a) is, [187]since there is no definition given to the phrase under the South African Companies Act.[188] However, this thesis posits that 'the person appointed,' in the context of the principle of indemnification may refer to the plaintiff who has obtained leave to institute the action.[189] This interpretation implies that the remuneration and expenses of an unsuccessful applicant in a leave application will not be the concern of the court.[190] Indeed, the opening paragraph of s.165 (9) stipulates that the remuneration and expenses under the subsection may be awarded only where the court grants leave to a person. However, this constitutes a major disincentive to instituting derivative action, particularly where the fact that the unsuccessful applicant must also pay the costs of the winning party is added to the consideration of whether or whether or not to sue.[191]

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[186]*Wallersteiner v Moir (No.2),* above n 14 at 396-397.
[187]Maleka Femida Cassim, above n 1 at 156.
[188]SA Companies Act 2008, s.1.
[189]Maleka Femida Cassim, above n 1 at 156, where the author argues that the 'person appointed' refers to either the person appointed by the company to investigate the demand under SA Companies Act 2008,s.165(4) or a person who has been granted leave to institute the action. The latter option is preferred in view of the fact that the underlying objective of the costs indemnity system is to protect a bona fide applicant against liability for costs and discourage vexatious actions. See Maleka Femida Cassim, above n 1 at 150.
[190]*Ibid* at 156, where the author maintains that the possible interpretations which may be given to the meaning of the phrase' person appointed' are not problem free.
[191]*Ibid*.

Secondly, I observe that all or any of the parties to the proceedings may be ordered to pay the remuneration of the person appointed.[192] The phrase 'all or any of the parties to the proceedings' includes the plaintiff or the person to whom leave has been granted, going by the definition of the 'person appointed' suggested earlier. Does it then mean that the court is also empowered to order the plaintiff to pay his own remuneration and expenses? This may be a plausible explanation for the suggestion that 'the person appointed' may be referring to the person appointed to investigate the mandatory demand made by the applicant to the company, to institute a derivative action.[193]

Thirdly, if the interpretation given in this thesis to the phrase 'the person appointed' is correct, it would appear that the provision envisages the mandatory payment of some form of remuneration to the plaintiff in a derivative action.[194] This is a plus to the derivative action jurisprudence in South Africa. However, the incentive in the mandatory injunction to pay remuneration to the plaintiff and bear his expenses only gives him an assurance that he will be paid some money. [195]There seems to be no prescribed method of calculating the remuneration and expenses that the plaintiff is to be paid. On the long run, it appears that the issue of remuneration and expenses is going to be largely determined by judicial discretion. This is a major disincentive.[196] It is also important to state that although the court must determine who is liable for the remuneration and expenses of the person appointed at the stage of application for leave, the decision as to the quantum of remuneration and expenses may be made at any time; and is likely to be made at the conclusion of the trial.[197]

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[192]SA Companies Act 2008, s.165 (9).
[193]Maleka Femida Cassim, above n 1 at 156.
[194]*Ibid* at 158.
[195]Anil Hargovan,above n 107 at 648, where the author maintains that monetary incentives under minority protection is just a mere prospect.
[196]*Ibid*.
[197]SA Companies Act 2008, s.165 (10).

6.3.3 TIMING OF THE APPLICATION FOR INDEMNITY

As has already been said, the position of the common law is that application for indemnity costs should be made at the commencement of the derivative action.[198] Under the statutory derivative action, it appears that there is no specific indication as to when the application should be made; at least not in the United Kingdom, South Africa and Nigeria. However, in the United Kingdom there are suggestions that indemnity applications may have been integrated into leave applications.[199]This is justifiably so because an Indemnity application will not be granted (at least at common law), except the plaintiff can prove that he has standing to sue.[200]Also, in statutory derivative actions, standing to sue is also a focal point in leave applications.[201] Therefore,the argument that the conflation of the two applications i.e. application for leave to institute a derivative action and application for an indemnity order, has the propensity to escalate the indemnity costs application into a mini- trial contrary to the admonition of the court in *Wallersteiner(No.2)*, that the proceedings should be simple and inexpensive,[202] is difficult to accommodate.[203] This is because the integration of leave applications with applications for indemnity is better in case management than having the two applications at different times. [204]This thesis however, opines that the integration of the applications will only be effective if it becomes mandatory for the court to grant an indemnity order, where such application has been made and, once leave has been granted to pursue a derivative action.[205] This suggestion is made for two reasons. Firstly, the basis of determining the applicant's standing to sue in a leave application should be as posited in Chapter Four of

[198]*Wallersteiner v Moir (No.2)*, above n 14 at 397.
[199]Daniel Lightman, above n 28 at 71. See Arad Reisberg, above n 7 at 234.See also the English case of *Wishart v Castlecroft Securities Ltd* [2009] CSIH 65.
[200]*Wallersteiner v Moir (No.2)*, above n 14 at 397, where the court maintained that the minority shareholder by his preliminary application showed that he had a reasonable case.
[201]Paul L.Davies, above n 39 at 617.
[202]Above n 14 at 397.
[203]Arad Reisberg, above n 7 at 234-235.
[204]Daniel Lightman, above n 28 at 73.
[205]Maleka Femida Cassim, above n 1 at 151.

this discourse, whether he has been able to show that there is a serious question to be tried.[206]This requirement for obtaining leave is parallel to the criterion of reasonableness of the action in indemnification applications as recommended in *Wallersteiner*.[207] Thus, once the court has decided to grant an applicant leave to institute a derivative action, automatically, he should be entitled to an indemnity since he would have also met the conditions for the grant of an indemnity order.[208] It is posited that this approach would help to save time and also reduce the cost of litigation.[209] Secondly, making the indemnity order mandatory after granting leave to institute a derivative action will remove the problem of uncertainty created by the discretionary stipulation with regards to costs and indemnity.[210]

The problem of the discretionary nature of indemnification order has been aptly demonstrated in the South African case of *Mouritzen v Greystone Enterprises (Pty) Ltd,* [211]where the court refused to make any order as to costs after granting leave and further postponed the issue of costs till after the determination of the substantive suit. The case has been criticised as constituting a serious disincentive to the funding of derivative actions.[212] The court's decision may however have been influenced by the provisions of the law which allow the court to make an order with regards to costs at any time.[213]Since there is a parallel provision of the South African Companies Act 2008, in CAMA,[214] it appears that a Nigerian court is likely to arrive at the same conclusion in similar circumstances. This thesis therefore argues for an amendment of CAMA, and the Companies Procedure Rules in Nigeria mandating

[206]CAMA, s.346 (2) (d).
[207]Above n 14 at 397.
[208]Maleka Femida Cassim, above n 1 at 157.
[209]*Ibid* at 139.
[210]*Ibid* at 157. See SA Companies Act 2008, s.165 (10). See also the South African case of *Mouritzen v Greystone Enterprises (Pty) Ltd* {2012] (5) SA 74.
[211]Above n 199.
[212]Maleka Femida Cassim, above n 1 at 153.
[213]SA Companies Act 2008, s.165 (10).
[214]s.347 (1).

the court to grant indemnity orders as a matter of right once leave has been obtained to institute a derivative action. [215]This has been done in New Zealand, where it is stipulated that the costs of derivative action to be met by the company shall be granted upon application by the person to whom leave has been granted.[216] In the meantime, the courts in Nigeria are enjoined to be bold in the exercise of their judicial discretion by maintaining that an applicant who has been granted leave is entitled to indemnity as to costs as a matter of right. This seems to be the approach of the courts in Canada where the legislative enactment as to costs in derivative actions is similar to what obtains in Nigeria.[217] Thus, in the case of *Turner v Mailhot*,[218] the Canadian court relying on *Wallersteiner (No.2)*, held that an indemnity or order as to costs becomes mandatory once leave has been granted to an applicant.[219] The court however conceded that other factors such as the financial need test are relevant in determining whether to grant an indemnity order.[220]

6.3.4 PROCEDURE FOR OBTAINING INDEMNIFICATION

There is no laid down procedure either under CAMA or under the Companies Proceedings rules in Nigeria, outlining the steps which an applicant must follow in order to obtain an order of indemnification as to costs. Also, neither the South African[221] nor the United Kingdom[222]statutory derivative action jurisprudence prescribe any laid down procedure for obtaining an indemnification order. However, having submitted that an applicant who has obtained leave to institute a derivative action should be automatically entitled to an indemnity order,[223] it is possible to argue that there is no need for a formal application.

[215]Anil Hargovan, above n 107 at 648.
[216]New Zealand Companies Act 1993, s.166.
[217]Canada Business Corporations Act 1985, s.240.
[218][1985] OJ No 251, 50 OR (2d) 561, 28 BLR 222 (HCJ).
[219]Arad Reisberg, above n 7 at 239.
[220]*Turner v Mailhot*, above n 89 at 537. See Maleka Femida Cassim, above n 1 at 161.
[221]SA Companies Act 2008, s.165.
[222]UK Civil Procedure (Amendment) Rules 2007, para. 19.9 E.
[223]Arad Reisberg, above n 7 at 239.See Maleka Femida Cassim, above n 1 at 157.

Although this approach has the advantage of ensuring that the procedure for derivative actions is simple and easy, it nonetheless has its own difficulties. This is because without a formal application supported by evidence as to the quantum of costs which the claimant has incurred and will likely incur, the court might have no basis for the award of any sum of money as indemnification.[224]

The argument for a formal application is also supported by the common law ,which prescribes that the plaintiff must apply by a motion supported by an opinion of counsel as to whether there is a reasonable case or not.[225] While the court in *Wallersteiner* approved that the motion could be *ex parte*,[226] Walton J in *Smith v Croft,* in a later decision allowed an appeal against an *ex parte* order and maintained that the motion must be on notice to the company in order to allow the company to lay its own facts before the courts. [227] The court was convinced that an *ex parte* application for an order of indemnity as to costs would always lead to an Appeal against the order of the court, similar to what happened in that case.[228] This thesis agrees with the decision in *Smith v Croft,* and argues that if there must be a formal application with regards to indemnity, it should be by a Motion on Notice to the company.[229] This view point is further justified on the premise that it will be unfair for the court to give an order asking the company to pay for the cost of litigation instituted by another person without reference to the company.[230] Therefore, it is submitted that there should be an amendment of the Companies Proceedings rules in Nigeria to include a stipulation that indemnification shall only be ordered by the court in a derivative action if there is an application by way of Motion on Notice in which the company is made the respondent; and supported by an affidavit stating the facts in support of the application.

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[224]The English case of *Stainer v Lee* [2010] EWHC 1539. See Daniel Lightman, above n 28 at 66-67.
[225]*Wallersteiner v Moir (No.2)*, above n 14 at 397.
[226]*Ibid*.
[227]Above n 63 at 558.
[228]*Ibid* at 557.
[229]*Ibid*.
[230]Arad Reisberg, above n 7 at 231.See Ben Pettet, above n 134 at 221.

6.3.5 PROBLEMS OF INDEMNIFICATION

So far, this discourse has premised the need for indemnification on the fact that an applicant who brings a derivative action does so as an agent of the company and should not be made to bear the burden of funding the litigation since the benefit accrues to the company.[231]It also appears that an order of Indemnification may help to discourage the applicant from compromising or agreeing to settle the action on terms that may not represent the interests of the company since through indemnification the applicant may obtain funds with which to continue the action. [232]

However, there appears to be reasons why indemnity should not be relied on to solve the problem of funding of a derivative action litigation since it would seem that indemnification has strings attached to it.[233] For instance, the symbiotic attachment of indemnification with application for leave, may form the basis for the application of the stringent requirements related to applications for leave to the grant of indemnification.[234]The court may genuinely feel that it has an obligation to the company to not order it to pay the costs of the action until it is sure that the applicant has a strong case.[235] This may result in protracted and expensive pre-trials as feared by the court in *Wallersteiner (No.2)*.[236]Furthermore, it appears that the preponderance of opinion is that indemnification should be applied with some caution because it is capable of causing injustice to the company, since it enables the court to place some financial burden on the company even before it becomes seised of the whole picture of the case.[237]

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[231]*Wallersteiner v Moir (No.2)*, above n 14 at 396.
[232]Arad Reisberg, above n 7 at 231-232.
[233]*Ibid* at 237.
[234]*Ibid.*
[235]*Ibid*.See Daniel Lightman, above n 28 at 65.
[236]Above n 14.
[237]Ben Pettet, above n 134 at 221. See Carsten A.Paul, above n 162 at 96. See also Daniel Lightman, above n 28 at 65.

Perhaps, the most remarkable argument against indemnity is that it does not help the applicant to mobilise resources to commence the derivative litigation.[238] This means that the applicant has to raise funds to commence the derivative action litigation and hope that the court would exercise its discretion in his favour with respect to indemnification.[239]This thesis observes that the powers vested in the court to indemnify are only applicable to the substantive derivative action and not applicable to leave applications.[240] For example, the determination of any amount adjudged payable by the defendant which is to be distributed to shareholders (past and present) under CAMA,s.347(2) (c), can only be made on the final determination of the case. In the same vein, the court is only empowered to order the company under CAMA, s.347 (2) (d) to pay reasonable legal fees'[241] incurred by the applicant in connection with the proceedings. It is clear from the wordings of this section that it is not intended to accommodate projected or estimated legal fees. This scenario has been interpreted to mean that indemnity does not provide an incentive to commence derivative actions but merely helps to mitigate the deterrence to sue because it only creates the possibility of the litigant being restored to the financial state he was before he commenced the litigation.[242]This argument is validated by the fact that the litigant at the time of commencement of the action must have it at the back of his mind that if he loses the action he will also have to pay the costs of the other party.[243]

Unfortunately, the positive effect of indemnification in helping to reduce the deterrents in derivative action appears to be watered down due to the fact that in a derivative action, the

[238]Arad Reisberg, above n 7 at 232-233. See A.J.Boyle, above n 28 at 83, where the author maintains that the assumption that the system of costs indemnity order strikes the right balance in enabling minority shareholders to bring derivative actions without enormous expense is open to question.
[239]Arad Reisberg, above n 7 at 232-233.
[240]CAMA, s.347 (2) (c)-(d). However, CAMA, s.347 (2) (b) is interlocutory.
[241]Emphasis mine.
[242]Arad Reisberg, above n 7 at 232-233.
[243]Maleka Femida Cassim, above n 1 at 1.

company may advance expenses to a wrongdoing director or indemnify him against any costs and liability he may incur in the course of defending the action.[244] The director may further be protected against any liability through the Directors' and Officers' Insurance.[245] Since directors are vested with the management of the company and therefore control the resources, it is to be expected that a wrong doing director would not have any problem accessing the funds of the company to defend any derivative litigation brought against him. [246]This means that whereas the shareholder who seeks to bring an action to defend the right of the company has to source for funds to commence a derivative action, the directors who have wronged the company have direct access to the funds of the company.[247]

6.3.5.1 Directors' Indemnification and Insurance

The concept of directors' indemnification appears to be hinged on the position that it is imperative to shield directors who are agents of the company from personal liability in the course of running the business of the company in order to give them a free hand to take the risks necessary for the proper management of the company. [248]The protagonists of directors' indemnification and insurance equally assert that it will be difficult for companies to get competent and credible persons to agree to become directors of companies if there is no protection for them from shareholders' suits.[249] Furthermore, it is argued that in cases where the company is able to convince persons to serve on their boards, such directors might be poised to avoid business risks and thereby not engage in businesses that might be profitable

[244]*Ibid* at 165. See CAMA, s.91 (2) (b).
[245]Martha Bruce, *Rights and Duties of Directors* (12th edn, Bloomsbury Professional, Sussex 2012)57. See Vanessa Finch'Personal Accountability and Corporate Control: The Role of Directors' and Officers' Liability Insurance' [1994] 57 *Modern Law Review* 880.
[246]Maleka Femida Cassim, above n 1 at 165.
[247]*Ibid*.
[248]Sanjai Bhagat, James A. Brickley and Jeffrey L. Cole 'Managerial Indemnification and Liability Insurance: The Effect on Shareholder Wealth' [1987] 54(4) *Journal of Risk and Insurance* 721 at 722.
[249]*Ibid*. See Deborah A.DeMott'Indemnification and Advancement Through An Agency Lens' [2011] 74(1) *Law and Contemporary Problems* 175.See also Maleka Femida Cassim, above n 1 at 167.

to the company.[250] On the other hand, antagonists of directors' indemnification and insurance argue that indemnification and insurance of directors undermines the efforts to ensure proper corporate governance since it absolves directors from accountability for their actions within the corporate set-up.[251] They are also apt to maintain that the absence of personal liability may result in the inability of derivative suits to be an efficient tool for the discipline and control of directors and officers of the company. [252]Proponents of directors' indemnification and insurance, however, believe that they remain valuable tools in the face of the loss of reputation by the company, or any stigma that may accrue to the company from the loss of a derivative suit.[253] With regards to insurance, it has been said that commercial reality dictates that the company must insure against any personal liability of its directors and officers because it cannot rely on compensation by the erring directors and officers in the time of loss occasioned by the negligence of its directors and officers.[254] This is because the directors and officers of the company may not have the wherewithal to compensate the company. [255] However, it is important to state that indemnification and insurance of directors do not come with a blanket cover.[256] The director or officer must be acting properly within his authority in the company in order to be entitled to such privilege as will be shown further in this discourse.[257]

Perhaps the most significant argument against indemnification and insurance of directors is that agency law on which the concept of indemnification is fixed does not suit properly into

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[250]Vanessa Finch, above n 245 at 885.
[251]Deborah A.DeMott, above n 249 at 175. See Paul L.Davies, above n 39 at 593.
[252]Sanjai Bhagat, James A. Brickley and Jeffrey L. Cole, above n 248 at 722.
[253]*Ibid.*
[254]Maleka Femida Cassim, above n 1 at 166-167. See Stephen Girvin *et al*, *Charlesworth's Company Law* (18 th edn, Sweet & Maxwell, London 2010)583.
[255]Maleka Femida Cassim, above n 1 at 167.
[256]Paul L.Davies, above n 39 at 593.
[257]CAMA, s.91 (1), renders void any indemnification of a director of the company against any liability which may attach to him under the law in respect of any negligence, default or breach of trust, of which he may be guilty in relation to the company. See Maleka Femida Cassim, above n 1 at 166-167. See also Vanessa Finch, above n 248 at 887.

corporate law.[258]This argument resonates from the fact that at common law, agency law assumes that there must be a principal who is structurally at an arm's length relationship with the agent; is in control of the agent; and therefore also able to properly control the defence of the suit.[259] On the contrary, the corporate structure arrogates the power to manage a company and control its litigation to the directors who are supposedly agents of the company.[260] Indeed, the concept of agency of directors is not well settled.[261] Interestingly, while the debate as to whether there should be indemnification and insurance for directors for the purpose of defending suits brought against them in the course of the management of companies continues, the concept of indemnification and insurance is strongly supported by statutory corporate law.[262]

6.3.5.1.1 *Indemnification of Directors*

In South Africa, subject to a company's Memorandum of Incorporation, a company may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company.[263] The company may also directly or indirectly indemnify a director for expenses irrespective of whether it has advanced expenses, if the proceedings are abandoned or exculpate the director; or with respect to any indemnifiable liability.[264] A company may not however indemnify a director with respect to any willful misconduct or wilful breach of trust on the part of the director; or any fine imposed on a director as a

[258]Deborah A.DeMott, above n 249 at 175.
[259]*Ibid* at 176.See Joseph Johnson Jnr' Indemnification and D & O Liability Insurance for Directors' and Officers' [1978] 33 *The Business Lawyer* 1993, to the effect that the common law principle of agency offers little support in derivative actions since an agent under the common law is not likely to obtain indemnification from his principal even if he is successful in an action against him.
[260]Deborah A.DeMott, above n 249 at 176.
[261]Joseph E.O. Abugu, above n 140 at 452. See G.A Olawoyin, *Status and Duties of Company Directors* (University of Ife Press, Ile-ife 1981)28-29.
[262]Brenda Hannigan, *Company Law* (3rd edn, Oxford University Press, Oxford 2003)198.
[263]SA Companies Act 2008, s.78 (4) (a).
[264]*Ibid* at s.78 (4) (b).

consequence of having been convicted of an offence unless the offence was a strict liability offence.[265]

The South African provisions provide for indemnification of directors by the company in two ways- in the form of expenses advanced to a director to enable him to commence the defence of the action brought against him; [266]and payment for expenses contemplated with respect to the litigation at the conclusion of the litigation.[267] Advance of expenses to a director may be directed at enabling the director to pay court fees and solicitors fees while the second category is more of reimbursement of expenses.[268] The significance of advance of expenses is that it acts as an incentive to enabling a director to defend the litigation against him as opposed to indemnification or reimbursement for expenses incurred which may merely help to remove the deterrence of directors' reluctance to take up directorship positions.[269] It however appears that a director may have to refund any money advanced to him if the court eventually decides the case against him on the grounds of willful breach of duty or misconduct.[270] Thus, when compared to the provision for indemnification and costs for shareholders, directors seem to have an edge over shareholders since there is no provision for advance of expenses to shareholders as an incentive to commencement of derivative actions. [271]However, a company can claim restitution for any amount paid directly or indirectly to a director either directly or indirectly in form of indemnification if the payment is found to be inconsistent with the provisions of the law on indemnification. [272]

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[265]*Ibid* at s.78 (6).See Maleka Femida Cassim, above n 1 at 165-166. See also Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (3rd edn, Lexis Nexis, South Africa 2016) 217.
[266]SA Companies Act 2008, s.78 (4) (a). See John F,Olson, Gillian Mc Phee,' Limitations on D & O Liability' in Bart Schwartz and Amy L.Goodman (eds),*Corporate Governance Law and Practice*(vol. 1, Lexis Nexis, United States 2005) 5-1 at 5-27.
[267]SA Companies Act 2008, s.78 (4) (b).
[268]Maleka Femida Cassim, above n 1 at 165.
[269]Arad Reisberg, above n 7 at 232-233.See John F, Olson, Gillian Mc Phee, above n 266 at 5-16.
[270]SA Companies Act 2008, s.78 (6). See Maleka Femida Cassim, above n 1 at 165-166.
[271]Maleka Femida Cassim, above n 1 at 165.
[272]SA Companies Act 2008, s.78 (8).

There are some salient points worth mentioning in respect of the provisions of directors' indemnification in South Africa. In the first instance, a director is defined to include the following: a former director and alternate director, a prescribed officer, a member of a committee of the Board or of the Audit Committee.[273]Secondly, indemnification of directors is not mandatory except where the Memorandum of Incorporation provides otherwise.[274] This means that private regulation is given significant authority over and above the provisions of the law, which by implication has only permissible or discretionary authority.[275] Therefore, the Memorandum of Incorporation may make provisions for indemnification contrary to the provisions of the Act as long as it does not allow indemnification of directors with respect to fines imposed by the court on conviction;[276] and in cases of breach of duty, willful misconduct or willful breach of trust. [277]Thirdly, it appears that except the Memorandum of Incorporation of a company provides otherwise, the South African Companies Act allows indemnification of directors where the director has been negligent towards the company; and to third parties.[278] Meanwhile, it has been argued that while indemnification of directors for liabilities arising from negligence with respect to third parties may be acceptable, indemnification of a director arising from negligence to the company must be considered from the perspective of breach of director's duty of care and skill to the company.[279]

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[273]*Ibid* at s.78 (1).
[274]Maleka Femida Cassim, above n 1 at 165.Compare with Delaware Corporation Law 2013,s.145(c), where the company is obliged to indemnify a director who has successfully defended an action on merit or otherwise.
[275]Dan A.Bailey *et al*' United States' Edward Smerdon(ed),*Directors' Liability and Indemnification: A Global Guide*(Globe Business Publishing Ltd,London 2007) 335 at 354, where the author maintains that in the United States, the Corporation's articles or bye-law must be relied on in order to enhance the indemnification provisions for directors and officers of the company.
[276]SA Companies Act 2008, s.78 (3). However, the company may indemnify a director for any fine imposed on him if the conviction was based on strict liability.
[277]SA Companies Act 2008, s.78 (6).
[278]Maleka Femida Cassim, above n 1 at 166. See Carl Stein, *The New Companies Act Unlocked* (Siber Ink, Cape-Town 2011) 256.
[279]Maleka Femida Cassim, above n 1 at 166.

In the case of the United Kingdom, the Companies Act stipulates that any provision allowing any indemnification of a director in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void. [280] This implies that unlike what obtains in South Africa, indemnification is not allowed in the United Kingdom where a director has been negligent in his duty to the company. [281]However, indemnification of directors is permitted with respect to qualifying third party indemnity provisions.[282] Thus, while indemnification of directors is permitted for liability arising from negligence with respect to third parties, it is prohibited in other circumstances such as negligence of the director towards the company.[283] In the United Kingdom, there is no particular provision with regards to advance of expenses to a director to defend litigation arising out of his duties to the company as obtainable in South Africa. This thesis however opines that the company may advance expenses to a director in the United Kingdom since the provisions of the law do not expressly prohibit it.[284] The United Kingdom provisions on indemnification of directors are undoubtedly permissive.[285] However, unlike the South African provisions, they are not expressly made subject to the constitution of the company.[286]

[280]UK Companies Act 2006, s. 232(1).
[281]Maleka Femida Cassim, above n 1 at 166.This is similar to what is obtainable in other climes. See Joseph Johnson Jnr, above n 281 at 1996.
[282]UK Companies Act 2006, ss.232 (2) & 234(2). See however UK Companies Act 2006,s.234(3), which prohibits indemnification of a director for criminal fines, regulatory fines imposed on him; and also liability for defending a case in which the director is convicted;or in defending civil proceedings or asking for a relief in which he is not successful. See also Edward Smerdon *et al* ,' United Kingdom' in Edward Smerdon(ed),*Directors' Liability and Indemnification: A Global Guide*(Globe Business Publishing Ltd,London 2007) 317 at 330.
[283]Maleka Femida Cassim,above n 1 at 166.
[284]Edward Smerdon, above n 282 at 330.
[285]UK Companies Act 2006, s.234.
[286]SA Companies Act 2008, s.78 (4).

In the case of Nigeria, it is possible, like what obtains in South Africa,[287] for the Articles of Association to make mandatory provisions with regards to indemnification of directors provided that they are within the confines of the provisions of the law.[288] Meanwhile, the provisions for indemnification of directors in Nigeria are quite similar to those of the United Kingdom.[289] This is because any provision in the Articles of Association of the company or any contract with a company indemnifying a director against any liability with respect to negligence, default, or breach of trust of which he may be guilty in relation to the company shall be void. [290] However, unlike what obtains in the United Kingdom, CAMA does not expressly stipulate that third party indemnities are exempted from the prohibition against indemnity.[291] Nevertheless, the restriction of the prohibition from indemnity to actions in relation to only the company in section 91(1) of CAMA, may imply that the company can indemnify a director against any liability with respect to negligence, default or breach of trust of which he may be guilty in relation to third parties. However, a director can only be indemnified by the company against any liability incurred by him while defending any proceedings whether civil or criminal in which judgment is given in his favour or in which he is granted any relief or in which he is acquitted.[292] Thus, although CAMA does not expressly exclude fines payable by a director in criminal or regulatory proceedings from being indemnified by the court,[293] they are by implication excluded since fines are only applicable when there is a conviction, whether criminal or regulatory. In Nigeria, unlike in the United Kingdom, the law is silent on the issue of indemnity with regards to third parties.[294] This may be interpreted to mean that any provision exempting a director from negligence in

[287] *Ibid*.
[288] CAMA, s.91 (1).
[289] UK Companies Act 2006, s.232 (2).
[290] CAMA, s.91 (1).
[291] UK Companies Act 2006, s.232 (2).
[292] CAMA, s.91 (2) (b).
[293] UK Companies Act 2006, s.234 (3) (a).
[294] Edward Smerdon, above n 282 at 330.

connection with third parties shall not be void. Both the Nigerian and United Kingdom provisions do not expressly provide for advance of expenses like their South African counterpart.[295] However, as explained earlier, it is possible for the Articles of Association of the company or any agreement between the directors and the company or a resolution of the Board or the company to make provisions for advance of expenses, subject to the provisions of the law.

It is remarkable that the scope of persons covered by indemnification under CAMA is wider than what obtains in the United Kingdom. This is because in Nigeria, indemnification covers all officers of the company and even extends to the auditor of the company,[296] while in the United Kingdom only directors can be indemnified by the company.[297] The South African provisions appear to have the widest scope since former directors and alternate directors can also be indemnified. [298]

6.3.5.1.2 *Insurance*

Aside indemnification, directors and officers of the company are often protected further by Directors' and Officers' D & O' Liability Insurance. [299]

In the case of South Africa, a company is expressly allowed to purchase insurance to protect both the directors and the company except the company's Memorandum of Incorporation provides otherwise.[300] Thus, a company may purchase insurance to protect a director against any liability or expenses that are indemnifiable under the Companies Act.[301] This means that the company may not purchase insurance to cover liability for willful misconduct or breach of

[295]SA Companies Act 2008, s.78 (4) (a).
[296]CAMA, s.91 (1).
[297]Stephen Girvin *et al*, above n 254 at 582.
[298]SA Companies Act 2008, s. s.78 (1).
[299]Vanessa Finch, above n 245 at 887. See Michael Hart *et al* ' South Africa' in Edward Smerdon(ed),*Directors' Liability and Indemnification: A Global Guide*(Globe Business Publishing Ltd,London 2007) 261 at 272. See Dan A. Bailey *et al*, above n 275 at 357.
[300]SA Companies Act 2008, s.78 (7). See Carl Stein, above n 278 at 256.
[301]SA Companies Act 2008, s.78 (7).See Maleka Femida Cassim, above n 1 at 166.

trust by a director[302]or with respect to a fine that may be imposed on the conviction of a director except otherwise the conviction was based on strict liability.[303] However, it is noteworthy that the company may also purchase insurance with respect to negligence by a director either to the company or to third parties since negligence of a director is indemnifiable.[304] The company may also purchase insurance to protect itself against any contingency including but not limited to any advance expenses that the company is permitted to incur; and all indemnifiable expenses and liabilities. [305]Thus, while the company may only purchase insurance for a director within the limit of what is indemnifiable, the company may purchase insurance to protect itself against any liability.[306]

In the case of the United Kingdom, the company is allowed to purchase insurance for a director of a company or of an associated company even against non- indemnifiable liabilities.[307] This implies that insurance may be purchased against any liability of a director connected to not only negligence but also default, breach of duty or breach of trust.[308]However, there is no specific provision in the UK Companies Act with respect to the company purchasing insurance to protect itself against liability.

In CAMA, there is no specific provision regarding insurance by the company either to protect a director of the company or the company itself. This does not however restrain the company

[302]Maleka Femida Cassim, above n 1 at 167.
[303]SA Companies Act 2008, s.78 (3), which stipulates that a company may not directly or indirectly pay any fine contemplated under that section. I posit that the use of the word ' indirectly' is targeted at ensuring that the company does not purchase insurance to cover any liability that may be imposed on the director as contemplated in the section.
[304]Maleka Femida Cassim, above n 1 at 167.
[305]SA Companies Act 2008, s.78 (7).
[306]Sanjai Bhagat *et.al*, above n 248 at 275. See E.Norman Veasey,Jesse A. Finkelstein and Stephen Bigler' Delaware Supports Directors with Three –Legged Stool of Limited Liability, Indemnification, and Insurance' [1987] 42(2) *The Business Lawyer* 399 at 417, to the effect that the role of Directors & Officers Insurance is focused on indemnifying the company in situations where indemnification is not available under the rules.
[307]UK Companies Act 2008, s.233. See Stephen Girvin *et al*, above n 254 at 583.
[308]UK Companies Act 2008, s.232 (2).

from insuring a director against any liability or from obtaining insurance to protect itself against any liability since there is no prohibition whatsoever in this regard. It is however desirable that CAMA makes specific provisions with regards to insurance for the sake of clarity.

I posit that there is a high level of liberality concerning purchase of insurance by the company against the liability of directors in all jurisdictions as demonstrated in permitting insurance for negligence in South Africa, [309]in permitting insurance against liability that are ordinarily void in the United Kingdom; [310]and the absence of any such provision in Nigeria. Nonetheless, the commercial reality is that legal actions against directors who are held personally liable for breach of duty but are however, unable to meet those obligations is a waste of time.[311] It is therefore in the best interest of the company to procure insurance against the liability of its directors as far as it can go.[312] In addition, it appears that one of the purposes of D &O insurance is its ability to provide some form of financial support for directors where indemnification is not legally available.[313]

With regards to a company purchasing insurance to protect itself from liability, it is trite that a company, upon incorporation, becomes a legal entity possessing all the powers of a natural person of full capacity.[314] Therefore, I posit that the company as a legal person is automatically entitled to protect itself from any kind of liability without much ado.[315] The silence of the United Kingdom and Nigerian provisions in this respect, and the fact that there is no limit to the liability the company can insure itself against under the South African Companies Act[316] only point to the fact that insurance is primarily a contractual concern. It

[309]SA Companies Act 2008, s.78 (7).
[310]UK Companies Act 2006, s.233.
[311]Maleka Femida Cassim, above n 1 at 167.
[312]*Ibid*.
[313]Delaware General Corporation Law 2013, s.145 (g). See E.NormanVeasey *et al*, above n 306 at 417.
[314]The English case of *Salomon v Salomon* [1897] AC 22.
[315]Maleka Femida Cassim, above n 1 at 167.
[316]SA Companies Act 2008, s.78 (7).

therefore makes sense for the statutory provisions to take a back seat accordingly. It is opined that this posture will largely enhance the potential of D &O Insurance to be a substitute where the company is not able to provide indemnification due to financial incapacity or its unwillingness to do so.[317] It is not unusual that a company might be unwilling to provide indemnification to a director or a former director due to Board room squabbles or change in control.[318]

6.4 OTHER FUNDING OPTIONS

6.4.1 CONDITIONAL & CONTINGENCY FEES ARRANGEMENT

It was Lord Denning who, in the case of *Wallersteiner (No.2),* suggested that derivative actions should be an exception to the general rule in England that the Contingency Fees structure is against public policy.[319] Contingency Fees arise out of an arrangement whereby a lawyer, if he won a case was entitled to a share in the proceeds of the case expressed as a percentage or specific sum or advantage but is however, not entitled to receive anything if he lost.[320] Contingency Fees Arrangements 'CGFA' are popular in the United States and Canada; and resonate on the principle of improving access to justice by enabling wrongs to be remedied even where the plaintiff cannot afford the costs of litigation; and also in cases where the chances of success are slim.[321] CGFA pushes the risk of the action to the lawyer since it is a ''No win- No Fee[322] arrangement. Initially, this arrangement was held in the United Kingdom

[317]Maleka Femida Cassim, above n 1 at 167.
[318]Norman Veasey *et al*, above n 306 at 419.
[319]*Wallersteiner v Moir* (*No.2)*, above n 14 at 399-400.
[320]Arad Reisberg,above n 7 at 257. See Estelle Hurter, above n 2 at 73.
[321]Estelle Hurter, above n 2 at 71.See Arad Reisberg, above n 7 at 263. See also Alfred D.Youngwood 'The Contingent Fee- A Reasonable Alternative?'[1965] 28 *Modern Law Review* 330.
[322]The UK Government White Paper, *Modernising Justice* [1998], para.1.17.

to be against the liability and offences arising from Champerty[323] and Maintenance,[324] but following the abolition of civil and criminal liabilities for Champerty and Maintenance, CGFAs became illegal and contrary to public policy.[325] As expected, the Solicitors' Practice Rule in the United Kingdom maintained that CGFAs were illegal and not acceptable except otherwise for non- contentious matters.[326]Unfortunately, Lord Denning's effort in *Wallersteiner (No.2)*, to employ the power of the Law Society to waive the rule against CGFAs[327] in order to allow its use in derivative actions was not successful.[328]

However, the rejection of Contingency Fee Agreement in *Wallersteiner (No.2)*, did not end the debate on the funding of litigation.[329]The decision of the Government to reduce the number of cases eligible for Legal Aid in the midst of increasing demand for support of litigation through public fund;[330] and concerns about the way and manner lawyers charge fees[331]may have led to the emergence of Conditional Fees Arrangement' CFA' in the United Kingdom.[332] However, this was done amidst skepticism that CFA may create conflicts of interest between the lawyer and his client since the lawyer would have a personal interest in the outcome of the litigation.[333]

[323]Estelle Hurter, above n 2 at 74, where the author defined champerty as a form of maintenance in which the maintainer will share in the proceeds of the action. See Alfred D.Youngwood, above n 321 at 331.
[324]Estelle Hurter, above n 2 at 74,where the author defined maintenance as the giving of assistance to a plaintiff in legal proceedings by a person who has neither a legitimate interest in such proceedings nor a justifiable motive for such assistance.
[325]UK Criminal Law Act 1967, s.14 (2).
[326]UK Solicitors' Practice Rules (193672), rule 4(3). See UK (Contingency Fees) of the Solicitors' Practice Rules 1990, rule 8. See also Daniel Lightman above, n 28 at 72.
[327]UK Solicitors' Practice Rules (1936-1972), rule 5.
[328]*Wallersteiner v Moir (No.2)*, above n 14 at 406, 411.
[329]*Ibid*.
[330]John Peysner 'What's Wrong with Contingency Fees' [2001] 10 *Nottingham Law Journal* 22 at 25-26.
[331]*Ibid* at 23.
[332]*Ibid* at 26.
[333]Estelle Hurter, above n 2 at 72.

6.4.2 CONDITIONAL FEE ARRANGEMENT

6.4.2.1 The Benefits

Conditional Fees were introduced into the United Kingdom by virtue of the Courts and Legal Services Act 1990, with the aim of widening the options available to clients in the legal services market.[334] A Conditional Fee Agreement 'CFA' is described as an agreement with a person providing advocacy or litigation services, which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and provides for a success fee, if it provides that the amount of any fees which it is to be applied be increased above the amount payable.[335]To put it more succinctly, CFA entails a No- Win-No Fee arrangement, in which the lawyer shares the risk of litigation with the client because he does not charge any fees if the case is lost but charges a Success Fee over and above his normal fees if the case is successful.[336] The Success Fee is therefore the lawyer's reward for agreeing to bear the risk of litigation. [337] In the United Kingdom, CFAs have been extended to all civil matters with the exception of family matters.[338] The other aspect of CFA is the use of insurance to mitigate the problems arising from the common law concept of which the loser pays the costs of a successful litigant. [339]This was done by the creation of an insurance product called 'After- the –event Insurance'.[340] Thus, it has been said that the Conditional Fee Arrangement is aimed at

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[334]See s.58. See also Daniel Lightman, above n 28 at 72. See also the English case of Thai *Trading Co. V. Taylor* [1998] QB 781, where a Conditional Fee Arrangement was approved by the court. See *contra* the English case of *Awwad v Geraghty* [2001] QB 570.See also Peter Kunzik' Conditional Fees: The Ethical and Organisational Impact On the Bar' [1999] *Modern Law Review* 62(2)850 at 853.

[335]M.H.Andrews 'Conditional Fee Agreements: The Courts and Parliament in Unison' [1998] 57(3) *The Cambridge Law Journal* 469 at 470.

[336]This assertion is however, not quite correct because a claimant who loses must pay the other party's costs apart from the expenses of his lawyer. See Peter Kunzik, above n 334 at 858.

[337]John Peysner, above n 330 at 26.

[338]UK Conditional Fee Agreements Order 1998.See Kerry Underwood, *No Win, No Fee No Worries* (CLT Professional Publishing Ltd, London 1999) RR3.

[339]John Peysner, above n 330 at 26.

[340]*Ibid*.

providing better access to justice,[341] since it allows litigants to take up cases with the assurance that they will not lose any money except the insurance premium paid in the event that the case is unsuccessful.[342] Conditional Fee Arrangements also appear to address the problem of the hourly rate system of charging legal fees; a system which has been criticised not only for promoting inefficiency but also putting those with skill, speed and good judgment ,who are thus, able to perform their tasks within a comparatively shorter period of time , at a disadvantage.[343]The CFA has therefore been taunted with the fact that it offers a clear, fair and regulated way of operating profitably.[344] More importantly, Conditional Fees in the United Kingdom seem to serve as a form of privatisation of the Legal Aid scheme in the wake of globalisation; and the need to reduce government spending, since matters that will no longer be funded through Legal Aid can find succour in the Conditional Fees Arrangement.[345]

6.4.2.2 The Problems

However, CFAs are not without flaws. For instance, they are required under Statutes to prescribe a maximum increase of 100% over and above the Normal rate (Success Fee) payable by the client in the event of a win.[346] Also, since the law does not indicate a Percentage Cap,[347] it therefore means that the Percentage Cap has to be determined in each situation, and this appears not to be an easy task.[348] In addition, even the issue of what constitutes Success may

[341]Gary Chan Kok Yew, above n 55 at 210, to the effect that courts in Singapore, Australia and Hong Kong do not consider acting for impecunious clients in speculative actions as amounting to a lawyer acquiring interests in the fruit of the litigation.
[342]UK Government White Paper, *Modernising Justice*, above n 322 at para.2.43.
[343]Kerry Underwood, above n 338 at xvi. See John Peysner, above n 330 at 32.
[344]Kerry Underwood, above n 338 at xvi.See Estelle Hurter, above n 2 at 79, where the author maintains that Conditional Fee Agreements are gaining grounds in spite of misgivings about them.
[345]John Peysner, above n 330 at 32.
[346]UK Courts and Legal Services Act 1990, s.58. See Kerry Underwood, above n 338 at RR11. See also Arad Reisberg, above n 7 at 252.
[347]UK Conditional Fee Agreements Order 1995.
[348]John Peysner, above n 330 at 39. See Kerry Underwood, above n 338 at 30.

have to be decided upon in the Agreement.[349] The complexity of the concept of Success is further demonstrated where there is an opportunity for settlement before the conclusion of litigation.[350] Such an opportunity appears to be in the interests of all parties concerned, with the exception of the lawyer, because his Normal fee is reduced and consequently his Success fee which is a percentage of his Normal fee is reduced likewise.[351] The complexity of the Conditional Fee Arrangement is further aggravated by the transferred costs system applicable in the United Kingdom in which the loser pays the costs of the winner. [352]Consequently, CFA is linked with insurance which in itself comes with its own challenges, owing to the limited market in legal expenses and the reluctance of clients to venture into insurance covers with respect to legal contingencies.[353] While a litigant under a CFA might be compelled to take out an insurance cover to protect himself against the costs of the other party, it is doubtful if he will be prepared to do the same with respect to initial costs and out of pocket expenses required to institute the action.[354] It should be noted that the risk required to be borne by the lawyer in a CFA is limited to legal fees.[355] Therefore, unless an indemnity principle has been put in place, whereby the company pays for the expenses of the derivative litigation, CFA cannot stand on its own as an incentive to funding derivative action litigation since the litigant will be responsible for mitigating the costs.[356] Consequent upon the challenges identified above, CFA has been described as an incomplete reform in litigation funding, thus, making it necessary to seek alternatives.[357]

[349]John Peysner, above n 330 at 28. See Estelle Hurter, above n 2 at 81.
[350]Arad Reisberg, above n 7 at 261.
[351]*Ibid*.See John Peysner, above n 330 at 39.
[352]John Peysner, above n 330 at 26.
[353]*Ibid*. See Arad Reisberg, above n 7 at 254-255.
[354]Arad Reisberg, above n 7 at 255.
[355]*Ibid.*
[356]*Ibid*.
[357]John Peysner, above n 330 at 44.

6.4.3 THE CONTINGENCY FEE DEBATE

6.4.3.1 The Problems

The problem with Contingency Fee Arrangements 'CGFA' stems from the fact that they have always been associated with the US style of Contingency Fee Arrangements which are largely managed by a cartel of attorneys who lobby to initiate and 'conduct' litigation on behalf of shareholders. [358] The flood gate of derivative actions suits in the United States, some of which are regarded as strike suits or unmeritorious claims because of their speculative nature, is believed to be the result of the aggressiveness of the US style risk based litigation.[359] Consequently, Contingency Fees are associated with excessiveness.[360]

More importantly, CGFAs are being opposed because they create a potential conflict of interest between the lawyer and the client since the lawyer is entitled to a percentage of the sum awarded or any recoveries made.[361] It is posited that these circumstances potentially foster a profound interest in the lawyer with regards to the outcome of the case.[362] Meanwhile, the professional responsibility of the lawyer requires him to promote the interest of justice as an officer of the court and minister in the temple of justice.[363] It is possible however, that if a lawyer has vested interest in the outcome of a suit he may be tempted to compromise his professional integrity by employing unethical means such as inducing settlement, forgery and falsification of documents or the destruction of evidence in order to ensure that he wins the case.[364]However, it is not only in CGFAs that a lawyer may become interested in the outcome of cases. Lawyers can likewise be interested in the outcome of

[358]Arad Reisberg, above n 7 at 263. See Tshepo Mongalo, above n 13 at 277.
[359]Arad Reisberg, above n 7 at 263.
[360]Estelle Hurter, above n 2 at 71.
[361]Arad Reisberg, above n 7 at 257.
[362]*Ibid*.
[363]Buckley L.J in *Wallersteiner v Moir (No.2)*, above n 14 at 406. See Alfred D.Youngwood, above n 321 at 333.
[364]Estelle Hurter, above n 2 at 75.

cases in CFAs,[365] It is therefore, not surprising that CGFA has been described as a form of Conditional Fee Agreement; and CFA as a species of Contingency Fee Agreement.[366] Hurter is however quick to maintain that although Conditional Fees may be described as a specie of Contingent Fees, there are clear differences in the method of calculation of the fees, the area of application; and the legal system in which they operate.[367]Contingent Fees in the USA are calculated as a percentage of the award made by the court, which the lawyer is entitled to charge only if he wins.[368] This is supported by the common law doctrine which maintains that reasonable legal expenses of a plaintiff in a litigation, in which a common fund that benefits a certain class of people is created, must be paid from the common fund. [369] On the other hand, CFAs are a creation of Statutes,[370] and only allow the lawyer to charge an uplift fee or success fee above the normal fee if the case is successful.[371]In the United States, the UK fee shifting rule in which the loser pays the costs of the winner is not applicable.[372] This means that the loser does not have to pay legal fees under the CGFA.[373] Therefore, while CFA is recoverable from the losing party in the United Kingdom, CGFA is not recoverable from the losing party in the US.[374]

The plaintiff in the case of *Wallersteiner* had argued unsuccessfully that he should be allowed to finance his litigation on a Contingency Fee Arrangement since Legal Aid was not available for derivative actions in the United Kingdom. [375] However, the abolition of Legal Aid for all civil actions in the UK- post *Wallersteiner,* might be a plausible explanation for the

[365]Arad Reisberg, above n 7 at 258. See Peter Kunzik, above n 334 at 865.
[366]Kerry Underwood, above n 338 at RR11. See Arad Reisberg, above n 7 at 256, where Conditional fee was described as a more acceptable cousin to Contingent fee.
[367]Estelle Hurter, above n 2 at 73.
[368]*Ibid*.
[369]Maleka Femida Cassim, above n 1 at 159.
[370]UK Access to Justice Act 1999, s.27.
[371]Estelle Hurter, above n 2 at 73.
[372]Arad Reisberg, above n 7 at 262. See Maleka Femida Cassim, above n 1 at 159.
[373]Maleka Femida Cassim, above n1 at 159.
[374]*Ibid*. See Buckley L.J in Wallersteiner *v Moir* (*No.2)*, above n 14 at 406.
[375]*Wallersteiner v Moir (No.2)*, above n 14 at 390.

introduction of the CFA in the United Kingdom.[376]Similarly, in the United States, where Legal Aid is not available at public expense,[377] CGFAs are used as a public policy device to ensure that the door of justice is not closed against the indigent.[378]

6.4.3.2 The Benefits

This thesis argues that public policy should tilt towards Contingency Fee Arrangements for the following reasons:

Firstly, CGFAs are much simpler than CFAs since there is no issue about calculation of Success Fee or determination of the Percentage Cap on damages.[379] There is also no need to obtain insurance. [380]The features of CFAs include the determination of the components of Success fee and Insurance, the resultant effect being that CFAs are very complex agreements, which lawyers have a duty to explain to clients who oftentimes find them difficult to understand.[381] Secondly, CGFAs appear to be more economically efficient than CFAs. CGFA is arrived at by a fixed percentage of the award or recovery in a suit.[382] On the contrary, CFA is based on percentage of the normal costs at a maximum of 100%.[383] Consequently, the problem of lawyers charging excessive fees is likely to constitute more encumbrances in CFAs than in CGFAs.[384]

Thirdly, it has even been said that a lawyer who is engaged under a CGFA is more likely to encourage Alternative Dispute Resolution 'ADR' or early settlement than his counterpart who

[376]John Peysner, above n 330 at 26.
[377]*Wallersteiner v Moir* (*No.2)*, above n 14 at 405.
[378]*Ibid*. See Arad Reisberg, above n 7 at 267.
[379]Arad Reisberg, above n 7 at 259.
[380]*Ibid*.
[381]*Ibid*. See John Peysner, above n 330 at 40.
[382]John Peysner, above n 330 at 40.
[383]*Ibid* at 32.
[384]*Ibid.*

is engaged under a CFA.[385] This is because while the fees of the lawyer engaged under the CGFA is directly related to the amount of settlement procured, the fees of the lawyer engaged under CFA is more proportional to the amount of work done and therefore based on the hourly rate system.[386]Thus, incidences of abuse of settlements may suggest that the conflict of interest between the client and his lawyer may be more pronounced under CGFAs.[387] However, it is posited that the same conflicts may arise under the CFAs where a lawyer may be tempted to increase his remuneration by taking advantage of the loopholes in the hourly rate system which rewards the amount of work done rather than results achieved, to exploit his client.[388] By and large, since the settlement of derivative actions is now controlled by the courts, the problems arising from settlements cannot overshadow the genuine incentive of CGFAs to promote ADR.[389]

Fourthly, and perhaps the most salient point in favour of the CGFA is that it is not new since it has been around for a while; and is a great incentive to the much acclaimed success of derivative actions in the United States,[390] to the extent that it has been suggested that the US style CGFA should first be introduced into derivative actions in the UK as a test case for other areas of litigation.[391]It is remarkable that even CFA has been described as a persuasive argument for a full-fledged US style CGFA.[392] Underwood argues cogently that the ''No Win-No Fee'' arrangement has always existed in the United Kingdom long before the official introduction of the CFA.[393]Furthermore, CGFAs have always been applicable to non-

[385]John Peysner, above n 330 at 34. See Alfred D.Youngwood, above n 321 at 333.
[386]Arad Reisberg, above n 7 at 260.
[387]*Ibid*.
[388]*Ibid* at 261.
[389]CAMA, s. 349.
[390]*Wallersteiner v Moir* (*No.2)*, above n 2 at 405. See Tshepo Mongalo, above n 13 at 277-278.
[391]Arad Reisberg, above n 7 at 265.
[392]*Ibid* at 259.
[393]Kerry Underwood, above n 338 at xvii.

contentious matters in the United Kingdom.[394] In addition, Underwood argues that both civil Legal Aid work and non- Legal Aid cases involving personal injury have actually often been sustained on the No-Win-No Fee arrangement, even though the arrangements were not officially recognised as such.[395]

6.4.3.3 The Conditions

In the case of *Wallersteiner(No.2),* Buckley L.J[396]& Scarman L.J[397] were of the opinion that Contingency Fee Arrangement can only be accepted in the United Kingdom by legislative reform and by alteration of the relevant professional rules of etiquette and not by judicial consideration. Lord Denning MR was however ready to accept that derivative action litigation should be conducted in accordance with the US style of CGFA on the following conditions:[398]

The action should not be started except on the opinion of a leading counsel that it is a reasonable thing to bring in the interests of the company.

The fee should be a generous sum by a percentage or otherwise, so as to adequately recompense the solicitor for his services; and also to cover the risk of getting nothing in the event that he loses the case.

The other party should be notified of the Arrangement.

The Arrangement should be subject to the approval of the Law Society and the Courts.

The first suggestion of Lord Denning that the action must be reasonable appears to be already captured in the requirement proposed with regards to applications for leave to bring derivative actions as maintained in this discourse, since it would be impossible to argue that

[394]*Ibid*.
[395]*Ibid*.
[396]*Wallersteiner v Moir (No.2)*, above n 14 at 407.
[397]*Ibid* at 412.
[398]*Ibid* at 400.

a derivative action has a serious question to be tried without showing that the action appears reasonable.[399]

With regards to the second point, Lord Denning maintains that it is not unfair to the lawyer taking up a derivative action to be paid a generous sum in the event of success, since he would be paid nothing if he loses the case. [400]This thesis however, suggests that the legal profession must make rules regulating the percentage of the recovery that may be charged because this will help to address the criticism that lawyers' fees under the CGFA are incongruent with the amount of work done as well as the risk taken. [401]

The third suggestion that the other party must be notified is very significant in the light of the principle that costs follow the events applicable in most Commonwealth countries.[402]It is therefore, important that the other party be made aware of the CGFA because of the indemnity costs implication.[403] Meanwhile, Buckley L.J in *Wallersteiner*[404]was not prepared to accept the Contingency Fee Arrangement on the grounds of incompatibility with the indemnity costs regime. He argued that it would be unfair to maintain that the generous fees payable under the CGFA should be recovered from the losing party in the event that the derivative action is successful.[405] On the other hand, if the Contingency Fee litigant were to lose the action, the fact that he is not going to pay any legal fees does not prevent the wining party from being indemnified by him against his own costs.[406] Consequently, a Contingency

[399]It has already been suggested in Chapter Four, that an applicant in a leave application should be required only to show that the cause of action demonstrates that there is a serious question to be tried.
[400]*Wallersteiner v Moir* (*No.2)*, above n 14 at 400.
[401]Arad Reisberg, above n 7 at 260.
[402]*Wallersteiner v Moir* (*No.2)*, above n 14 at 400.
[403]Daniel Lightman, above n 28 at 62.
[404]*Wallersteiner v Moir* (*No.2)*, above n 14 at 406.
[405]*Ibid*.
[406]*Ibid*.

Fee litigant would have to bear part of his own fees in the event of success but must pay the costs to the other party in the event of failure.[407]

It is remarkable that the plaintiff in the derivative action litigation in *Wallersteiner*(*No.2)*, suggested that the Court of Appeal should make an order protecting him against being ordered to pay the costs of any other party in any event whatsoever.[408] Although, the court was right in deciding that it could not prejudge the issue of future costs which is the prerogative of the lower court, it failed to address the real issue of whether the costs indemnity principle could be waived in derivative actions in order to remove its disincentive. Meanwhile, the fee shifting rule prevalent in the United Kingdom has been traced to the litigation crises that arose in the early Middle Ages in which there was a floodgate of litigation arising from conflicts against the Feudal System.[409]The idea that costs must follow the event was therefore established as a disincentive to frivolous or unmeritorious cases.[410]Contrariwise, presently, there is the need to encourage the institution of derivative actions in order to curb corporate misdemeanor.[411] It therefore appears that the motive behind the UK costs regime does not fit into the objective of providing incentives to promote the funding of derivative action litigation. Therefore, this thesis argues that in order to encourage derivative actions, it is necessary to allay the fears of the plaintiff, as expressed in *Wallersteiner (No.2)*, that in the event that he loses the action, he may be ordered to pay the costs of the other party.[412]This will ensure that concerns about the compatibility of the fee-shifting regime with CGFAs are eliminated.[413] More importantly, there will be no problem of

[407]*Ibid*.
[408]*Ibid* at 407.
[409]John Peysner, above n 330 at 24.
[410]*Ibid*.
[411]Maleka Femida Cassim, above n 1 at 146.
[412]*Wallersteiner v Moir (No.2)*, above n 14 at 406.
[413]John Peysner,above n 330 at 24.

the losing party having to pay the enormous costs of the successful litigant who entered into the litigation under a CGFA.[414]

The last suggestion of Lord Denning was that the approval of the Law Society and the courts should be sought before a litigant can be allowed to conduct his derivative action litigation on a Contingency Fee basis.[415] Buckley LJ and Scarman LJ were however, of the opinion that neither the Law Society nor the Courts had the powers to do so under the law.[416] Even the *Amicus curiae* representing the Law Society was of the view that Lord Denning's suggestion required further study.[417] However, it is pertinent to consider whether the approval of the Law Society and the courts would be appropriate assuming the legislative reforms in the law and the rules of the Law Society have been changed to accommodate the CGFA. It is opined that requiring the Law Society and the courts to approve every action instituted under the CGFA would only create complications with respect to funding by increasing the cost of litigation; and also thereby extend the stipulated time within which derivative actions can be litigated.[418] It is however important that the Law Society and the courts should be put on notice of the existence of any CGFA for the following reasons. Firstly, it has earlier been suggested in this discourse that the Law Society should regulate CGFAs,[419] and thus, the requirement that the Law Society be informed about any CGFA would serve a useful purpose in that direction.[420] Secondly, since it has also been observed that indemnification is the means by which the court can order the company to reimburse the plaintiff the cost of bringing a derivative action on its behalf, it is important that the court should be informed

[414] *Ibid*.
[415] *Ibid* at 401.
[416] *Ibid* at 401,407 &412.
[417] *Ibid* at 412.
[418] Arad Reisberg, above n 7 at 270.
[419] Tshepo Mongalo, above n 13 at 257, where the author referred to the recommendation by the South African King 11 code that the Law Society should amend its rules of Court to accommodate the Contingency Fee arrangement.
[420] Arad Reisberg, above n 7 at 271.

that the plaintiff has instituted the action on a CGFA basis in order to assist the court in deciding on the appropriate amount to award in favour of the plaintiff.

6.4.3.4 Contingency Fee in the United Kingdom

After many years of resistance, the CGFA also known as Damage Based Agreements(DBA) was finally accepted in the United Kingdom with effect from 1st April 2013 by virtue of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012(''LASPO Act''). The LASPO Act containing reforms to the funding and costs of civil litigation was promulgated following the acceptance by the Government of the recommendations made by Lord Justice Jackson in 2011.[421] Lord Jackson's argument that litigants should be provided with the choice of funding methods and the freedom to choose the one they consider most appropriate for their cases led to Contingency Fees being allowed in all areas of civil litigation whether contentious or non-contentious.[422] Further stimulus was given to Contingency Fees under the Damage-Based Agreement Regulations 2013.

The LASPO Act came into force in the United Kingdom against the backdrop of the claim that although the CFA has played an important role in extending access to justice, it has also enabled claims to be pursued with no real risk to claimants against the threat of excessive costs to the defendants.[423] Thus, the reform is aimed at reducing the disproportionate costs which defendants contend with while at the same time encouraging claimants to take a keener financial interest in the way their cases are being conducted.[424] Thus, the

[421]*Review of Civil Litigation Costs: Final Report* (2009) https:// www.judiciary.uk. See Reforming Civil Litigation Funding and Costs in England and Wales- Implementation of Lord Justice Jackson's Recommendations: *The Government Response,* Cmn 8041 (2011).
[422]UK Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.45 which amended the Courts and Legal Services Act 1990, s.58AA, to permit Damage Based Agreements.
[423]The Ministerial Foreword to the *Reforming Civil Litigation Funding and Costs in England and Wales*, above n 421.
[424] Rupert Jackson, Foreword to the *Review of Civil Litigation Costs: Final Report*, above n 421.

recoverability of CFA and Success Fee has been abolished.[425]The principle of proportionality is also applicable to DBAs since the existence of a CGFA will not increase the defendant's liability. [426] This means that if the Contingency Fee agreed upon with the lawyer is higher than the reasonable recoverable costs which is calculated on the basis of how many hours were reasonably spent on the case and the reasonable rate, the claimant will have to pay the shortfall of the damages.[427] However, the defendant's liability as to costs may decrease if the amount agreed under the DBA is lower than the actual costs since the claimant will not be allowed to recover more costs than he is liable to pay his lawyer.[428]The CGFA like Conditional Fees are also subjected to a Percentage Cap. Although, the fees range according to the type of claim, most claims are subject to a 50% Cap.[429]

6.4.3.5 Contingency Fee in South Africa.

The South African Contingency Fees Act 1997 came into force in April 1999. However, the content of the Act shows that what is actually available in South Africa is Conditional Fee Arrangements 'CFA' as obtains under the English regime.[430]This is because although the Act provides for a No Win- No –Fee Arrangement on the one hand, on the other hand, a lawyer is allowed to charge a Success fee above the normal costs up to a maximum of 100% if the client is successful.[431] In any case, the Act enables a legal practitioner to undertake actions on

[425]UK Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss.44, 46. See the English case of *MGN v The United Kingdom* [2011] ECHR 39401/04, where the European Court of Human Rights held that recoverable success fee regime in England and Wales breached Article 10 of the defendant's Convention Rights.
[426]UK Civil Procedure Rules 44.18(1).
[427]*Ibid*.
[428]*Ibid* at rules 44.18(2) (b).
[429]The UK Damage Based Agreement Regulations 2013, para. 4.
[430]The South African case of *Masango v Road Accident Fund*, above n 32.See Estelle Hurter, above n 2 at 84. See also Michelle van Eck'Lack of Contractual Capacity- a Fatal Blow to Contingency Agreements' [2022] May *De Rebus* 31, to the effect that signatories to Contingency Agreements 'CFAs' must have contractual capacity as prescribed under the common law.
[431]SA Contingency Fees Act 66 of 1997, s.2 (1).

behalf of clients on a speculative basis. [432] This means that while such actions are prohibited under common law, they are permitted under the Act.[433]The South African Contingency Fee regime is applicable to proceedings before a court of law, tribunal or arbitration or before any functionary having the power of a court of law to grant or recommend the grant of any license or permit for the performance of any act or for the purpose of carrying out any business activity including professional services with the exclusion of criminal and family matters.[434] Thus, Contingency Fees are applicable only in civil matters, excluding family matters.[435] It is however remarkable that Contingency Fees are also applicable in administrative proceedings as specified under the Act.[436] Furthermore, a legal practitioner is only allowed to enter into a Contingency Fee Agreement with his client if he is of the opinion that there is a reasonable prospect of success.[437] However, the definition of success under the SA Contingency Fee Act appears to be problematic.[438] For instance, it is provided under the Act that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such Agreement. [439] The Act also mandates the parties to a Contingency Fee Agreement to determine the amount that may be due and the consequences which may follow in the event of partial success.[440] Moreover, what constitutes success or partial success is not given any fixed definition but is however, to be determined by the agreement between the parties.[441]These problems appear to buttress the usual argument that CFAs are complex in

[432]See the Preamble of the Act.
[433]The South African case of Mfengawa *v Road Accident Fund* [2017] (5) SA 445.This does not mean that the Act prohibits Contingency Fee Agreements that are permitted under the common Law. See the South African case of FluxmansInc *v Levenson* [2017] (2) SA 520 at para.32.
[434]SA Contingency Fees Act 1997, s.1.
[435]*Ibid*.
[436]*Ibid*.
[437]*Ibid* at s.2.
[438]Estelle Hurter, above n 2 at 85.
[439]SA Contingency Fees Act 1997, s.2 (1) (a).
[440]*Ibid* at s.3 (e).
[441]*Ibid* at s.3(c).

nature. [442]The importance of a clear definition of success becomes even more profound in the light of the principle that costs follow the event in which the unsuccessful party bears the costs of the successful party is also applicable in South Africa. [443] Meanwhile, the application of the principle of costs follow the event to South African Contingency Fee Arrangement has been described as incongruent with the underlying objective of access to justice which the No- Win- No -Fee Agreements are deemed to be founded upon.[444]On a positive note however, the Act regulates CGFA by prescribing their form and content.[445] Also,there are decided cases pointing to the enforcement of the Act. [446]This should not however lead to a hasty conclusion that CGFA has been embraced by the legal profession in South Africa.[447]

The US type CGFA has not come within the framework of litigation in South Africa till date. There are even suggestions that the US style CGFA is not practicable in South Africa. [448]It has been argued however,that CGFA are applicable in practice in South Africa since lawyers charge based on Percentage fee structure. [449] Meanwhile, it has been observed that although access to justice is guaranteed under the South African Constitution, it is being threatened, among other factors, by high cost of litigation arising mostly from what has been considered as disproportionate and unregulated lawyers' fees.[450]Although the reforms proposed by Lord

[442]Arad Reisberg, above n 7 at 255.
[443]Maleka Femida Cassim, above n 1 at 149.
[444]Estelle Hurter, above n 2 at 85-86.
[445]SA Contingency Fees Act 1997, s.3.
[446]The South African case of *Tjaji v Road Accident Fund and Two Similar cases* [2013](2) SA 632,where it was held that non- compliance of a CGFA with the law will render it invalid. See the South African case of *Masango v Road Accident Fund*, above n 32 at para. 8-60, which maintained that any contingency fee agreement that is not in consonance with the Contingency Fee Act is null and void. See also the South African case of *Price Waterhouse Coopers Inc. and Ors.v National Potato Co-operative Ltd* [2004] *(*6) SA 66 at para. 41G.
[447]Estelle Hurter, above n 2 at 84.
[448]Maleka Femida Cassim, above n 1 at 159. See however, Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (2nd edn, Lexis Nexis, Durban 2009) 99, where the author maintains that the Contingency Fee structure will help to spur shareholder activism. See also Tshepo Mongalo, above n 13 at 277.
[449]Estelle Hurter, above n 2 at 84.
[450]Patrick Hundermark' Access To Justice And Legal Costs' [2018] *Legal Aid South Africa Conference Paper* 1 at 3.

Justice Jackson in the United Kingdom would not resolve the problem of regulating lawyers' fees, Legal Aid South Africa has suggested that in order to address the problems of access to justice, South Africa should consider the Jackson Reforms such as- amending the funding rule, limiting recoverable costs to proportionate level and controlling the amount of recoverable costs.[451]

6.4.3.6 Contingency Fee in Nigeria

There appears to be no decisive legal framework for the funding of litigation in Nigeria[452] except as may be found under the common law of Maintenance and Champerty; [453]and the Rules of Professional Conduct for Legal Practitioners, 2007. [454]

In the Nigerian case of *Abdallah v Barlatt*,[455] an agreement in which a solicitor was to be paid 10% of the amount recovered in litigation was held to be illegal and champertuos. The court opined that the solicitor had a personal interest in maintaining the action since his fees was dependent on the outcome. [456] Later cases have however, tried to distinguish between Maintenance, Champerty and Contingency Fee Arrangement.[457] In a similar Nigerian case of *Orok Oyo v Mercantile Bank* (Nig) Ltd, [458]in which the appellant was engaged by the respondent bank to recover some debts from its customers for a fixed percentage of the amount recovered, the court disagreed with the judgment of the court in *Abdallah*. [459] Relying on the decision of Lord Denning in the English case of *Trepca Mines Ltd*(No.2), [460] the court

[451]*Ibid* at 17.
[452]Justina Ibebunjo, Iheanyinchukwu Dick and Pascal Ememonu 'The Third Party Litigation Funding Law Review' [2018] 2 *the Law Reviews* 112.
[453]J.Olakunle Orojo, *Professional Conduct of Legal Practitioners In Nigeria* (Mafix Books, Lagos 2008)340.See A.Obi Okoye, Law *in Practice in Nigeria* (3rd edn, Iykememo Publishing, Enugu 2021)516.
[454]See rules 50 & 51.
[455][1931] 1 WACA 137.
[456]J.Olakunle Orojo, above n 453 at 340.
[457]*Ibid.*
[458][1989] 3 NWLR (Pt. 108) 213.
[459]Above n 455.
[460][1963] 1 Ch.199 at 219.

was of the view that the mere fact that a solicitor signed an agreement to be paid a fixed percentage of the judgment sum does not mean he is to be regarded as 'Maintaining'[461] the action. [462] Lord Denning in the *Trepca* case defined Maintenance as ''improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse,''[463] while Champerty was defined as occurring when a person maintaining another demands a share of the proceeds.[464] Thus, the court in *Orok Oyo* did not accept that the agreement between the appellant and the respondent was champertuos since it was the respondent bank, and not the appellant who maintained the action by paying its expenses.[465] The court however held that the agreement to pay the solicitor from the proceeds of the action only if he wins was a CGFA which is contrary to public policy under English law but could only be held to be unprofessional and therefore unenforceable in Nigeria since there is no legal framework labeling it as contrary to public policy in Nigeria.[466]However, this decision appears to be contrary to the decision of the court in the case of *Egbor v Ogbebor*[467] where the Court of Appeal in Nigeria, upheld a Contingency Agreement to pay fees from the proceeds of the debt recovered. Similarly, the Supreme Court in the Nigerian case of *Savannah Bank Plc v Opanubi*[468]approved a CGFA for payment of professional fees with respect to a recovered debt.

[461]Emphasis mine.
[462]The Nigerian case of *Oloko v Ube*[2001] 13 NWLR(Pt.729) 161 at 181,where the court held that an agreement by a solicitor to provide funds for litigation; or without charge to conduct litigation in consideration of a share of the proceeds is champertous.
[463]*Trepca Mines Ltd (No.2)*, above n 460 at 219.
[464]*Ibid*.
[465]*Orok Oyo v Mercantile Bank* (Nig) Ltd, above n 458 at 229.
[466]*Ibid*.
[467][2015] LPELR -24902.
[468] [2004] 15 NWLR (Pt. 896) 437.

It appears that more impetus has been given to the recognition of CGFA in Nigeria following the enactment of the Rules of Professional Conduct for Legal Practitioners in 2007. Under rule 50(1), a legal practitioner may enter into contract with his client for a contingent fee in respect of civil matters undertaken for a client whether contentious or non-contentious. However, the Contingency Fee contract can only be valid if the contract is reasonable in all the circumstances of the case including the risk and uncertainty of the compensation. [469] In spite of the flexibility of this provision, it is vague and is likely to pose challenges since there is no prescribed definition of what is 'reasonable.'[470]The Rules of professional conduct also prescribe that the contract must not be vitiated by fraud, mistake and undue influence or be contrary to public policy.[471] Under rule 51, a lawyer is also not allowed to bear the costs of his client's litigation,[472] however, the lawyer may in good faith, advance expenses as a matter of convenience, and subject to reimbursement.[473]

The significance of the recognition of Contingency Fee in the Rules of Professional Conduct in Nigeria, lies in the fact that defendants will no longer be able to rely on the defence of Champerty after benefitting from the CGFA Agreement. [474] It is observed that most of the cases where the CGFA has been adopted are debt recovery matters.[475] It is however doubtful if CGFAs would be embraced by lawyers in view of the experiences gleaned from some of these cases. For instance in the *Orok Oyo* case,[476] the appellant, a legal practitioner was

[469]Rules of Professional Conduct for Legal Practitioners in Nigeria 2007(as amended), rule 50(1) (a). See A.Obi Okoye, above n 453 at 517.
[470]See however, Rules of Professional Conduct for Legal Practitioners in Nigeria(as amended), rule 50(3), which stipulates that a lawyer must explain the effect of the Contingent Fee Agreement to his client and also give the client an opportunity to retain him on an arrangement where he will be paid a reasonable value of his service.
[471]*Ibid* at rule 50(1) (b).
[472]This prohibits a legal practitioner from being involved in Maintenance.
[473]J.Olakunle Orojo, above n 453 at 341.
[474]*Orok Oyo v Mercantile Bank Ltd*, above n 458; Egbor *v Ogbebor,* above n 467. See A.Obi Okoye, above n 453 at 516.
[475]J.Olakunle Orojo, above n 453 at 340.
[476]Above n 458.

engaged by the respondent to recover debts from about 10 debtors for a fee of 10% of the sum recovered. The appellant was able to recover debts from two of the debtors without recourse to litigation. On the instructions of the respondent, the lawyer instituted an action against the remaining 8 debtors and had filed a motion for judgment when he was debriefed by the respondent. Apparently, the debtors had approached the respondent bank directly and settled the matter with it without involving the lawyer. Subsequently, the appellant's bill for payment based on an agreed percentage was dishonoured by the respondent. The Court of Appeal in Nigeria, however held that the appellant was entitled to remuneration on *quantum meruit* for services rendered. Yet, in a similar case of *Savannah Bank v Opanubi*,[477] the Nigerian court refused to grant the plaintiff any remuneration on *quantum meruit*. In that instant case, the plaintiff/respondent was engaged by the defendant/appellant to recover a debt for a fee of 10% of the sum recovered. The plaintiff was able to obtain judgment for the whole debt, however, the debtors paid only part of the debt. The plaintiff was paid 10% of the sum recovered and was subsequently debriefed by the defendants. The plaintiff's Bill of charges claiming 10% of the unpaid balance was rejected by the defendant. Thereafter, the plaintiff brought an action to claim some amount for services rendered by him to the defendant on *quantum meruit basis*. The Supreme Court up turned the decision of the Court of Appeal which awarded the plaintiff some amount of money on *quantum meruit* basis.

The challenges confronted by the plaintiffs in the cases of *Orok Oyo*[478] and *Savannah Bank*[479] appear to be pointers to the necessity of having a well-developed Contingency Fees Agreement framework in Nigeria. This point is buttressed by the fact that it appears that learned authors in Nigeria are not in agreement as to the interpretation of Contingent Fees

[477]Above n 468.
[478]Above n 458.
[479]Above n 468.

under the rules of professional conduct. For instance,while Orojo[480] maintains that charging on percentage basis for debt claims will not fall foul of the rules of professional conduct provided it is reasonable, Obi- Okoye argues that sharing of the proceeds of litigation is outside the sphere of a contingent fee arrangement.[481] The latter argument may have been influenced by the fact that the rules stipulate that a lawyer is not allowed to purchase or acquire interest in the subject matter of litigation.[482]Furthermore, the Rules of Professional Conduct for Legal Practitioners in Nigeria can only regulate the practice of the law profession,[483] and is only a subsidiary legislation made pursuant to the Legal Practitioners Act.[484] Meanwhile, Contingency Fee Agreements have been defined in other climes to extend beyond applications in litigation to applications in arbitration and administrative proceedings which are not necessarily exclusive to lawyers.[485]It is therefore, imperative for Nigeria to enact a substantive law of a general application on Contingency Fee Arrangements. It is also important that the substantive law be accompanied by regulations detailing the form and content of the CGFAs, etc. like what obtains in South Africa[486] and the United Kingdom. [487] It is submitted that these efforts will pave way for the application of Contingency Fees Arrangements in derivative actions in Nigeria. In addition, it is hereby suggested that there should be a Practice direction of the courts to recognise the application of CGFA in derivative suits. Furthermore, in order to encourage derivative actions, the principles of costs following

[480]J.Olakunle Orojo, above n 453 at 341.
[481]A.Obi Okoye, above n 453 at 516.
[482]*Ibid*. See Rules of Professional Conduct for Legal Practitioners in Nigeria 2007(as amended), rule 50(3).
[483]In the Nigerian case of *Orok Oyo v Mercantile Bank*, above n 458, the Plaintiff maintained that the Contingency Fee agreement between him and the defendant could not be champertuos under the rules of Professional Conduct for Legal Practitioners since he was not a lawyer.
[484]Laws of The Federation of Nigeria (LFN) 2004, Cap 207.
[485]SA Contingency Fees Act 1997, s.1.See the English case of Bevan *Ashford v Geoff Yeandle* [1998] 3 WLR 172, where the court held that although the UK Courts and Legal Services Act 1990, does not extend expressly to Arbitration but that since the traditional public policy objection to Conditional Fees extended to Arbitration, then Conditional Fees sanctioned by the courts would be free from public policy objections in Arbitration proceedings. See also M.H Andrews, above n 335 at 471.
[486]SA Contingency Fees Act 1997,s.3.
[487]The UK Damage Based Agreement Regulations 2013.

the event in which the loser is made to bear the costs of the winner should not be made applicable to derivative actions. [488]

6.4.4 THE COMMON FUND DOCTRINE/ SUBSTANTIAL BENEFIT DOCTRINE

It has been maintained elsewhere, that the adoption of CGFA into derivative actions without the application of the Common Fund Doctrine and the Substantial Benefit Doctrine is not workable.[489] Reisberg submits that this accounts for why derivative actions have not been as successful in Canada as in the United States.[490] Also, Cassim argues for the adoption of the US Common Fund doctrine and the Substantial Benefit doctrine in the South African jurisdiction.[491] The Common Fund doctrine insists that if the derivative action instituted by the plaintiff results in a monetary recovery which will benefit a certain class of persons like the shareholders, it will amount to unjust enrichment if the legal expenses of the action are not borne by the beneficiaries out of the fund recovered. [492]Thus, the US Common Fund doctrine can be said to be premised on the mandatory requirement that the plaintiff must be indemnified by the company.[493] It has already been clearly stated in this discourse that indemnification of the plaintiff in a derivative action must be mandatory and not discretionary. [494]What is however, novel is the suggestion that the indemnification of the plaintiff by the company must come from any damages or compensation obtained from the derivative action.Furthermore, in situations where the benefit obtained from the derivative litigation is in kind and not in cash, the US Substantial Benefit doctrine stipulates that the legal expenses of the plaintiff should be paid using the Lodestar method of which work done based

[488]Maleka Femida Cassim, above n 1 at 149.
[489]Arad Reisberg, above n 7 at 266.
[490]*Ibid*.
[491]Maleka Femida Cassim, above n 1 at 159.
[492]*Ibid*.
[493]Tshepo Mongalo, above n 13 at 277.
[494]Maleka Femida Cassim, above n 1 at 159.

on an hourly rate is used to calculate the remuneration. [495] Therefore, if a derivative action results in the removal of an erring director as suggested in Chapter Five, then the plaintiff will be entitled to indemnification with respect to his reasonable legal expenses. The Substantial Benefit Doctrine is unarguably instructive since it justifies the rationale that derivative actions have both compensation and deterrence objectives.[496] The challenge however,is how to determine the amount to be paid. It has been said earlier in this discourse that calculation of remuneration based on the hourly rate is flawed in many ways.[497] This is because, it rewards efforts not results and thereby may unwittingly reward an inexperienced professional who expends more time on a job than an expert would do.[498] In order to avoid the complications associated with the calculation based on the hourly rate, it is suggested that the plaintiff should be indemnified by the company for an amount calculated on the basis of such factors such as the importance of the remedy obtained for the company, the size of the company, the financial status of the company etc. The Practice Direction of the court detailing factors to be considered by the court in indemnification proceeedings will also help to regulate what is to be paid when there are no monetary benefits, as well as where there are monetary benefits.

6.5 CONCLUSION

The fundamental problem associated with the funding of derivative actions litigation in Nigeria is the lack of sufficient incentives to spur litigants to bring derivative actions.[499] The existing provisions only stipulate that a plaintiff may be compensated or indemnified after he has instituted the action. [500] Therefore, the principle of indemnification of the plaintiff

[495] *Ibid* at 159-160.
[496] *Ibid* at 160.
[497] Kerry Underwood, above n 338 at xvi.
[498] *Ibid.*
[499] Andrew Keay, above n 5 at 55.
[500] CAMA, s.347 (2) (c) & (d).

appears not to be an incentive in the real sense since the crux of the matter appears to be how to financially mobilise the plaintiff to enable him to institute derivative actions.[501] If the challenge of funding confronted by the plaintiff in derivative actions and the stringent requirements for leave to institute derivative actions[502] are juxtaposed with the incentives available to the wrong doing directors who are the defendants in terms of advancing expenses to defend the action, [503] and indemnification of directors,[504]it appears that the framework of derivative litigation with respect to the plaintiff is like that of a stick without a carrot.

This thesis opines that the solution to the problem lies in a structured fee arrangement in which the financial burden of litigation is passed to the legal practitioner. [505]Meanwhile, the UK Conditional Fee Arrangement (CFA) has been rejected on account of its complexity.[506] However, it appears that the US Contingency Fee Arrangement(CGFA) is to some extent already in operation in Nigeria,[507] but however requires a well-developed legal framework in order to be fully integrated into the Nigerian jurisprudence and ultimately into the derivative action regime. This thesis argues that the adoption of the US style Contingency Fee Arrangement is the catalyst needed to establish an effective derivative actions funding regime in Nigeria.[508]In addition, it is suggested that it is imperative to do away with the Civil Procedure Principle that costs follow the event, which this thesis argues, is a major disincentive to the funding of derivative actions.[509]

[501]Arad Reisberg, above n 7 at 222.
[502]CAMA, s.347 (2).
[503]SA Companies Act 2008, s.78.
[504]Vanessa Finch, above n 245 at 880.
[505]Maleka Femida Cassim, above n 1 at 159.
[506]Arad Reisberg, above n 7 at 222.
[507]Nigerian Rules of Professional Conduct for Legal Practitioners 2007, rules 50 & 51.
[508]John Peysner,above n 330 at 44.
[509]Arad Reisberg, above n 7 at 267.See Maleka Femida Cassim, above n 1 at 148.

CHAPTER SEVEN

FACILITATIVE AND REGULATORY ENFORCEMENT- THE PRIVATE PUBLIC PARTNERSHIP 'PPP' MODEL

7.1 INTRODUCTION

The concept of corporate law has been viewed from both the enabling /facilitative perspective on the one hand[1] and the mandatory/regulatory perspective on the other hand. [2]Thus, while the contractarians argue that corporate law falls within the realm of private law because it is fundamentally a nexus of contracts between the various participants in the company, [3]the communitarians maintain that the company is a public entity with social responsibilities.[4] Undoubtedly, both perspectives are not without their pros and cons. The concept of private ordering may be justified on the principles of freedom of contract, flexibility; and the need to protect the commercial reality of business transactions.[5] It has however, been argued that the nexus of contract principle is based on certain fallacies such as a perfect market, [6]rationality and information.[7] Consequently, it is posited that regulation or mandatory perspective of corporate law is required to correct the assumptions under private ordering.[8] However, in reality the enabling and regulatory aspects of corporate law are not mutually exclusive.[9] This for example implies that, although the Memorandum and

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[1]Janet Dine, *The Governance of Corporate Groups* (Cambridge University Press, United Kingdom 2000) 8.
[2]*Ibid* at 17.
[3]*Ibid* at 8. See Iris H.Chiu' Contextualising Shareholders' Disputes- a Way to Reconceptualise Minority Shareholder Remedies' [2006] *Journal of Business Law* 312 at 314. See also CAMA, s.46, to the effect that the Memorandum and Articles of Association is a contract between the company and its members and officers; and between the members and officers themselves.
[4]Janet Dine, above n 1 at 17.
[5]*Ibid* at 9.
[6] Iris H.Chiu' The Role of a Company's Constitution in Corporate Governance' [2009] *Journal of Business Law* 697 at 718.
[7]Janet Dine, above n 1 at 12

[8] Ian M.Ramsay, 'Models of Corporate Regulation: the Mandatory/ Enabling Debate' in Ross Grantham & Charles Rickett (eds), *Corporate Personality in the 20th Century* (Hart Publishing, Oxford 1998) 215 at 219-220, where the author maintains that regulatory intervention is necessary in corporate law in order to correct not just market failure but also to reduce risks, define boundaries and ensure fairness and justice.
[9]Iris H.Chiu, above n 3 at 320-321. See Janet Dine, above n 1 at 21, in discussing the Concession Theory, the author argues that the State has a role to play in ensuring that corporate governance structures are fair and democratic. The author also submits that derivative action is a right that is derived from a public interest right to ensure that the company is properly managed but that however, in the United States, where the Contractarian model is more acceptable, modification of derivative actions to allow derivative actions arbitration instead of derivative action litigation is more plausible.

Articles of Association is a contractual document, it is also a constitutional document. [10] This position might be founded on the fact that the Memorandum and Articles do not always create contracts with respect to all the participants in the company as in the case of majority and minority shareholders; employees and contractors.[11] It is therefore important for the mandatory aspects of corporate law to be available to fill in the gap.[12] Thus, this chapter is concerned with employing both the enabling and mandatory aspects of corporate law i.e. the Private Public Partnership 'PPP' Model for the purpose of enhancing the derivative action regime in Nigeria.[13]

The preceding chapters of this discourse have been predicated on the enforcement of breach of corporate duties through litigation. However, it is a well- known fact that the process of litigation is usually fraught with legalistic bottlenecks, which can even become more complicated through the delaying tactics of lawyers.[14] Although this thesis has attempted to promote or enhance the efficiency of the courts in derivative actions by making some suggestions such as rejection of the concept of futility of demand and the streamlining of the requirement of leave etc.,[15] it appears that such suggestions are not enough to sustain an effective derivative action regime. In other words, although the courts have a fundamental part to play in the development of derivative actions, [16]this thesis is of the opinion that causes of action in derivative actions can also be resolved through a facilitative and regulatory approach without recourse to litigation. [17] In line with the 'PPP' Model, this discourse shall be concerned with how disputes which fall within derivative actions can also be resolved through the application of the concept of Alternative Dispute Resolution(ADR).[18] In addition, this thesis will attempt to make enquiries into how disputes which fall under the scope of derivative actions can be resolved contractually through the application of the provisions of

[10]Janet Dine, above n 1 at 4-5.
[11]CAMA, s.46; SA Companies Act 2008, s. 15(6).
[12]Iris H.Chiu, above n 3 at 321.
[13]Maleka Femida Cassim, *the New Derivative Action under the Companies Act – Guidelines for Judicial Discretion* (Juta, Claremont 2016) 171.
[14]UK Government, White Paper: *Modernising Company Law*, Command Paper CM 5553-II [2002], para.2.36, to the effect that it is not always cost – effective to refer shareholder disputes to court.
[15]See Chapter Three.
[16]Ian M.Ramsay, above n 8 at 237.
[17]*Ibid* at 234.
[18]Iris H.Chiu, above n 3 at 324.

the Memorandum and Articles of Association and the Shareholders' Agreement without recourse to the provisions of the law on minority protection.[19]

This chapter shall also in addition examine how existing public institutions like the Corporate Affairs Commission and the Securities and Exchange Commission can be in the forefront of the enforcement of breach of corporate duties not only through derivative actions litigation but also through regulatory or administrative means.[20]Furthermore, it is argued that there is the need to establish a Companies Tribunal which shall be an independent body charged with the responsibility of resolving corporate disputes by administrative means.[21] This discourse shall also consider how the application of 'soft law'[22] as depicted in the now famous codes of corporate governance established by various regulatory bodies can be used to encourage the resolution of disputes in derivative actions. [23] Since the codes have also been extended by the regulatory bodies to include the Codes of Conduct for Non- Governmental Organisations such as Shareholders Associations,[24] it is also proposed to discuss the role of NGOs in derivative actions. Again, it is also proposed to discuss the role of the Non-Governmental Organisations such as the Law Society in regulating the funding of derivative actions. [25]

7.2 PRIVATE / FACILITATIVE ENFORCEMENT

7.2.1 THE MEMORANDUM AND ARTICLES OF ASSOCIATION

The effect of the memorandum and articles of association of a company when registered is that it is a contract under seal between the company and its members and officers and between the members and officers themselves.[26] This appears to be the foundational basis for considering corporate law as stemming from private law.[27] However, in the United Kingdom, the memorandum and articles of association constitutes a statutory contract

[19]*Ibid* at 313.
[20]Maleka Femida Cassim, 'Enforcement And Regulatory Agencies 'in Farouk Hl Cassim (ed), *Contemporary Company Law* (3rd edn, Juta, Claremont 2021) 1135 at 1137.
[21]*Ibid* at 1169. See SA Companies Act 2008, s.195 (1).
[22]Iris H.Chiu, above n 6 at 725.
[23]Janet Dine, above n 1 at 131.
[24]See SA Code for Responsible Investment 2011(CRISA).
[25]Brian R. Tracy, 'Trust, Loyalty and Cooperation in the Business Community: Is Regulation Required?' in Barry AK. Rider (Ed), *The Realm of Company Law* (Kluwer Law International, London 1998) 53 at 75.
[26]CAMA, s.46; SA Companies Act 2008, s.15 (6). See Maleka Femida Cassim, 'Formation of Companies and the Company Constitution' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3rd edn, Juta, Cape Town 2021) 137 at 184--185.
[27]Janet Dine, above n 1 at 3-4.

between the company and the members only.[28] Consequently, reliance on the principle of statutory contract in the United Kingdom is limited with regards to resolving intra- corporate disputes,[29] since the courts have held that other persons within the corporate set up who are not shareholders cannot use it.[30] The problem of the contractual limitation of the memorandum and articles of association is however, not restricted to the United Kingdom. This is because even where the contractual effect of the memorandum and articles of association extends beyond shareholders and the company to officers of the company, the spectrum does not cover all persons that might be affected by the way the company is being governed. [31]In essence, while the position in the United Kingdom which allows only shareholders to enforce the memorandum and articles of association tallies with the fact that only a shareholder may institute derivative actions in the United Kingdom,[32] the situation is however, different in Nigeria[33] and South Africa,[34] where the categories of persons entitled to institute derivative actions exceed those who can enforce proper corporate governance through personal rights entrenched in the memorandum and articles of association of the company. Nonetheless, the distinction may not be quite obvious in view of the fact that the derivative actions litigation is dominated by actions brought at the instance of shareholders.[35]It is also important to note that the rights emanating from the memorandum and articles of association being personal rights can only be effective, subject to the corporate rights enforceable by majority of the shareholders of the company and the proper plaintiff rule.[36]

The limitations of the contractual posture of the memorandum and articles of association may be responsible for its rejection in jurisdictions like the United States of America and Canada and also South Africa where the statutory division of power model has been

[28]UK Companies Act 2006, s.33.
[29]Janet Dine, above n 1 at 6.
[30]The English case of *Eley v Positive Government Life Assurance* [1876] 1 ExD 88, where it was held that an employee/shareholder could not rely on the contractual rights of the Memorandum and Articles of Association to enforce his employment.
[31]Peter Nta, *Shareholders' Rights Under The Nigerian Laws* (Tiger Press Ltd, Nigeria 2009)275. See E.O.Akanki,' Protection of the Minority in Companies' in E.O.Akanki (ed), *Essays on Company Law* (University of Lagos Press, Lagos 1992) 276 at 282-283.
[32]UK Companies Act 2006, s.260 (1).
[33]CAMA, s.352.
[34]SA Companies Act 2008, s.165 (2).
[35]UK Companies Act 2006, s.262 (2).
[36]Nigerian Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law* [1988] vol. 1, p. 232. See A.J Boyle, *Minority Shareholders' Remedies* (Cambridge University Press, United Kingdom 2002)13.

adopted.[37] Under the statutory division of power model, the powers of the constituents or interests in the company under the memorandum and articles of association are derived from the Companies Act or Statute.[38] This means that since the statutory division of power model is not based on statutory contract, it is devoid of the problems of the capacity in which a person is related to the company.[39] More interestingly, the statutory division of power model has been interpreted to translate into better protection of the interests of the different constituents in the company including minority shareholders. [40]

Nonetheless, the memorandum and articles of association,[41] whether in the contractual model or statutory division of powers model can be used to deviate from the provisions of the Companies Act that are neither mandatory nor prohibitive.[42] This means that the memorandum and articles of association can be used to facilitate the resolution of disputes between the various interests in the company.[43] In particular, the articles of association may provide for the resolution of corporate disputes through Alternative Disputes Resolution (ADR) methods such as Negotiation, Mediation and Arbitration. [44]Thus, the ADR approach may encourage a complaints procedure whereby persons who are aggrieved with the way the company is being managed may make formal complaints using the company's complaints procedure as provided under the Articles. [45]The Articles may also provide that the complaints

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[37]Mathew Berkahn, *Regulatory and Enabling Approaches to Corporate Law Enforcement (*Centre for Commercial &Corporate Law, Christchurch 2016)22. See Maleka Femida Cassim, above n 26 at 161.

[38]Mathew Berkahn, above n 37 at 22.

[39]*Ibid* at 23. See however, Maleka Femida Cassim, above n 26 at 184, to the effect that the Memorandum of Incorporation in South Africa has the legal effect of a statutory contract, in spite of the fact that South Africa has adopted the statutory division of power model. See also Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (2nd edn, Lexis Nexis, Durban 2009) 49-50.

[40]Mathew Berkahn, above n 37 at 22.

[41]South Africa has abandoned the two document approach and has adopted a one document method –the Memorandum of Incorporation. See Maleka Femida Cassim, above n 26 at 160. See also Mervyn E. King SC, ' The Synergies and Interaction Between King 111 and the Companies Act 61 of 2008 ' in Tshepo H Mongalo (ed), *Modern Company Law for A Competitive South African Economy* (Juta, Claremont 2010) 446 at 447.

[42]Iris H.Chiu, above n 3 at 318, to the effect that the articles cannot be used to modify the mandatory duties of directors. See the English case of *Prudential Assurance Co.Ltd v Newman Industries Ltd (No.2)* [1982] 1 All ER 354 at 367.See also Maleka Femida Cassim, above n 26 at 161.

[43]R.C. Nolan 'The Continuing Evolution of Shareholder Governance' [2006] *Cambridge Law Journal* 93. Nolan argues for continued adherence to the basic facilitative structure of company law, which allows shareholders to modify the Articles of Association innovatively to govern the company in accordance with changing needs. He argues that the facilitative structure should play a more prominent role in corporate law than regulatory intervention, which he posits should only apply in limited circumstances, after careful thought and justification. See Tobie Wiese' The Use of Alternative Dispute Methods in Corporate Disputes: The Provisions of The Companies' Act of 2008' [2014] 26(3) *SA Mercantile Law Journal* 668 at 671, where the author argues that Section 158 of the SA Companies Act 2008, allows for flexibility in the interpretation of the Memorandum of Incorporation and other documents with a view to effective resolution of disputes.

[44]Iris H.Chiu, above n 3 at 338. See Maleka Femida Cassim, above n 13 at 85.

[45]Maleka Femida Cassim, above n 13 at 85.

may be heard by members of the Board who are not affected by the complaints; such as independent directors or a committee of the Board. [46]

7.2.2 SHAREHOLDERS' AGREEMENT

A shareholders' agreement is a contractual agreement which contains the powers and responsibilities of the shareholders, the procedure for the running of the company, the rules for resolution of disputes.[47] Shareholders' Agreements, like the articles of association may be used to modify default provisions of the law but only as permitted by the law.[48] However, it has been posited that through the inclusion of some procedural devices/provisions, the articles or shareholders' agreements can be used to protect the minority shareholders from the domination of the majority shareholders even where such provisions negate the company's statutory power.[49] Nonetheless, shareholders' agreements, being private-contractual agreements are concerned with the rights and responsibilities of shareholders alone unlike the memorandum and articles of association which protects the rights of shareholders and some other stakeholders,[50] on the other hand, the memorandum and articles of association is a public document.[51] Meanwhile, shareholders' agreements, being private documents procure the advantage of allowing details of the agreement between the parties to be kept in secret away from public view. [52]However, while shareholders' agreements are mere or ordinary contractual agreements, the memorandum and articles of association is a statutory contractual agreement. [53] Furthermore, shareholders' agreements are only binding on the shareholders who consented to the agreement since new

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[46]*Ibid*.

[47]K.R.Thomas & C.Ryan, *The Law and Practice of Shareholders' Agreement* (3rd edn, Lexis Nexis, London 2009) 1.

[48]The English case of *Russell v Northern Bank Development Corp Ltd* [1992]2 Ch.426. See SA Companies Act 2008, s.15 (7), to the effect that the Shareholders' Agreement must be consistent with the company's Memorandum of Incorporation and the Companies Act. See Maleka Femida Cassim, above n 26 at 181. See also Carl Stein, *The New Companies Act Unlocked* (Siber Ink, Cape Town 2011) 75. See also Rita Cheung 'Shareholders' Agreements: Shareholders' Contractual Freedom in Company Law' [2012] 6 Journal *of Business Law* 504-505.

[49]K.R.Thomas & C.Ryan, above n 47 at 127-128. See Rita Cheung, above n 48 at 504. See Peter Nta, above n 31 at 105.

[50]Rita Cheung, above n 48 at 511.

[51]A.J Boyle, above n 36 at 54.

[52]The English case of *Fulham Football Club v Richards* [2012] 2 WLR 1008. See however, Harry Mc Vea' Section 994 of the Companies Act 2006 and the Primacy of Contract'[2012] 76(5) *Modern Law Review* 1123, to the effect that the primacy of arbitration constitutes a clog in the wheel of the progress of the Unfair Prejudice Action as a weapon of minority protection. This may however not always be true in South Africa since provisions of Shareholders' Agreements which are not in consonance with the Memorandum of Incorporation 'MOI' must be incorporated into the MOI, which is a public document in order to be effective. See Carl Stein, above n 48.

[53]CAMA, s.46.

shareholders would have to consent to the agreement before it can be binding on them.[54] This is unlike the memorandum and articles of association which is automatically binding on new shareholders without prior consent.[55] Nevertheless,in the light of the reality of derivative actions being shareholder driven,[56] the importance of the role of shareholders' agreements in facilitating good corporate governance cannot be over-emphasised.[57]For example, shareholder agreements are not subject to the rule in *Foss v Harbottle*.[58]Moreover, shareholders' agreements, being veritable tools for protecting the personal rights of shareholders,[59] can also be used to provide for resolution of disputes outside of litigation through the use of ADR mechanisms such as arbitration and mediation.[60]

7.2.3 ALTERNATIVE DISPUTE RESOLUTION

Given the limitation of the courts in resolving shareholders' disputes or corporate disputes as mentioned earlier, it becomes imperative that alternate means should be sought to enhance the resolution of disputes within the corporate circle. [61]Alternative Dispute Resolution (ADR) such as arbitration and mediation has been said to procure many advantages which may help to fill the gap occasioned by the limitations in the ability of the courts to provide a robust and efficient system of dispute resolution. [62] One outstanding point in favour of ADR is party autonomy, since the parties, may in the case of arbitration for instance, choose their own arbitrators, the venue or place of arbitration , and at the same time are at liberty to determine the laws, principles and procedures to be applied, etc. [63]The resultant effect of this approach is that ADR is reputed to be less formal, more flexible, quicker and sometimes less expensive

[54]K.R.Thomas & C.Ryan, above n 47 at 69.
[55]*Ibid*.
[56]Maleka Femida Cassim, above n 13 at 171.
[57]Peter Nta, above n 31 at 105. See Carl Stein, above n 48 at 76-77, to the effect that Shareholders' Agreements can be used to provide for the appointment and removal of directors, to give minority shareholders right to veto a resolution of the board or shareholders, to provide for anti-dilution of shares clause, pre-emptive rights etc.
[58]A.J Boyle, above n 36 at 54.
[59]The English case of *Halle v Tax* [2000] BCC 1020.
[60]Iris H.Chiu, above n 3 at 324. See the English case of *Fulham Football Club (1987) Ltd v Richards,* above n 52.
[61]Iris H.Chiu, above n 3 at 324. See Tobie Wiese, above n 43 at 668.
[62] Scott R. Haiber 'The Economics of Arbitrating Shareholder Derivative Actions' [1991-92] 4 *DePaul Business Law Journal* 85 at 93. See D.A.Guobadia 'The Rules of Good Corporate Governance and the Methods of Efficient Implementation: a Nigerian Perspective' [2001] 22(4) *The Company Lawyer* 119 at 125. See also Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford University Press, Oxford 2007) 303.See also Etienne A Oliver 'Regulating Against False Corporate Accounting: Does The Companies Act 71 of 2008 Have Sufficient Teeth?' [2021] *SA Mercantile Law Journal* 1 at 15.
[63]Scott R. Haiber, above n 62 at 96.

than litigation.[64] It is also significant that ADR, owing to its informality allows for confidentiality. [65]This means that the fear of negative publicity for the company that is typical of corporate litigation is absent.[66] In addition, ADR, being in the mode of private enforcement, is supportive of the State since it transfers the burden of ensuring good corporate governance from the State to the individuals concerned.[67] Also, the fact that the parties own the litigation may also result in effective management of the dispute.[68] Furthermore, one outstanding feature of ADR is that, unlike judges, arbitrators must be persons with particular expertise and competence in the subject matter of the dispute.[69]

ADR however, may not cover the scope of every corporate dispute since mandatory issues devolving on rights which are of public interests may not be constrained to the realm of private ordering. [70]Thus, matters bordering on a waiver of the right to bring a derivative action [71]or modification or waiver of fiduciary duties,[72] are likely to fall within the category of what is not arbitrable. Therefore, it may be right to maintain that ADR or arbitration is more suited for matters which fall within the private enabling or facilitative angle of corporate governance.[73] Consequently, there are concerns about whether arbitration or ADR is suitable for companies with widely dispersed shareholding such as publicly held and listed companies.[74] This is because of the conflict between the consensual nature of arbitration and the difficulty of obtaining the approval of a widely dispersed number of shareholders.[75] This challenge may however be surmounted by providing an arbitration clause in the memorandum of association of the company or by including an arbitration clause in the shareholders' agreement.[76] Nonetheless, it has been asserted that the acclaimed benefits of

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[64]*Ibid*.See Henry J.Brown and Arthur L.Marriot, *ADR Principles and Practice* (Sweet & Maxwell, London 1993) 10. See also Tobie Wiese, above n 43 at 669.

[65]Hakeem Seriki 'Confidentiality in Arbitration Proceedings: Recent Trends and Developments' [2006] *Journal of Business Law* 300 at 302.

[66]Maleka Femida Cassim, above n 13 at 76.

[67]Scott R. Haiber, above n 62 at 93.

[68]*Ibid*.

[69]*Ibid* at 96. See Iris Chiu, above n 3 at 325.

[70]Iris Chiu, above n 3 at 324.

[71]*Ibid* at 328.

[72]*Ibid* at 317.

[73]*Ibid* at 324.

[74]Louis Bouchez et al. ' The Quality of Corporate Law and the Role of Corporate Law Judges' *The OECD's Work Programme On Corporate Governance and Dispute Resolution* 3 at 6 (January 29, 2009, 10:04 am) http://www.volokh.com/posts/1233241458.shtml.

[75]*Ibid*.

[76]*Ibid* at 12, where reference was made to the adoption of Arbitration by The Shell company as the only mechanism for dispute resolution in its Articles. See Henry J.Brown and Arthur L.Marriot, above n 64 at 57.

the ability of arbitration to further harmonious dispute resolution has no place in corporate dispute mechanisms involving public companies since there is no pre-existing close filial relationship among the shareholders.[77] This argument is supported by the fact that one of the advantages that shareholders in public companies have over their counterparts in private companies, is that shares are easily transferable in public companies since there is no restriction in the transfer of shares.[78] In view of the problems concomitant with determining whether a matter falls within the mandatory or facilitative aspect of the law, this thesis, proposes an amendment of CAMA and the Companies Proceedings Rules, such that an applicant may apply to court to contextualise disputes in derivative actions; and such that the courts would be empowered to refer matters for resolution through the ADR mechanism.[79] It is also proposed, that a Practice Direction of the court,[80] which would provide a list of matters or causes of action which fall within the mandatory or facilitative categories be put in place as a guide, so that an applicant needs to apply to court only if he is unsure of the category into which his claim falls.[81] This may also help to resolve the conflict as to cause of action between unfairly prejudicial remedy and derivative actions, considering that actions which are prescribed as mandatory will clearly not be appropriate for unfairly prejudicial action.[82]

The argument on the superiority or efficacy of ADR in corporate dispute resolution is however not limited to public companies.[83] It has been argued that while the much touted expertise available in ADR when compared to the traditional court system might be significant in highly technical matters, it cannot hold waters in matters bordering on determination of corporate governance.[84] This is perhaps in consonance with the argument that the problem of inefficiency of the courts may be resolved by the creation of specialised courts. [85]Meanwhile, ADR has come under serious attacks in recent times, and this has led to the assertion that the only benefits of ADR in corporate governance are the speedy resolution of disputes and the attendant consequence of cheaper costs of litigation. [86]It is posited that the speed in

[77]Scott R. Haiber, above n 62 at 97.
[78]CAMA, s.22 (2).
[79]Iris H.Y.Chiu, above n 3 at 330.
[80]*Ibid* at 331.
[81]This may help to undermine the argument that application to court may lengthen the process. See Iris H. Chiu, above n 3 at 332-333.
[82]*Ibid* at 336.
[83]Scott R. Haiber, above n 62 at 97.
[84]*Ibid.*
[85]Louis Bouchez *et al*, above n 74 at 10.
[86]Scott R. Haiber, above n 62 at 97.

arbitration may be due to the less formal nature of arbitration and the consequential relaxation of the rules of procedure. [87]Another outstanding feature of arbitration is the flexibility of the arbitral award made at the conclusion of arbitration that makes it possible for the award to be arrived at without reference to any established rule of law. [88]Moreover, the essential private nature of arbitration or ADR implies that the decisions are not made public.[89] Consequently, arbitration or ADR does not allow for legal precedent to be created as obtainable in litigation. [90]

However, the informal nature of ADR is perceived as capable of limiting the power of the applicant to have access to adequate or complete information about any breach of corporate governance since the arbitrators will only order the production of witnesses and documents in rare circumstances.[91] Although the challenge of access to information in derivative actions litigation is well documented,[92] the problem of limited discovery in arbitration, may perhaps put an applicant in a derivative actions litigation in a better position than an applicant before an Arbitral panel. [93] Consequently, it has been maintained that ADR may indirectly assist breach of corporate governance by enabling erring directors and officers of the company to conceal relevant information.[94]Furthermore, it has also been maintained that arbitration in particular is adversarial in nature and therefore, similar to litigation.[95] This is because arbitration involves making an award which must be effected by the court.[96]

This thesis posits that the arguments against ADR or arbitration can only matter or become significant where arbitration or ADR is mandatory. The consensual and private nature of ADR makes it flexible and adaptive enough to be able to circumvent any undesirable consequence. [97]

In spite of the arguments bordering on the disincentives to ADR, it is important to mention that the problem of the loser having to pay the costs of the other party cannot exist in ADR

[87]*Ibid* at 96-97.
[88]*Ibid* at 105. Thus,arbitration has been accused of being capable of meddling with corporate governance because the arbitrators may substitute their own opinion for the decision of the general meeting of the company. See Iris Chiu, above n 3 at 325.
[89]Scott R. Haiber, above n 62 at 105.See Hakeem Seriki, above n 65.
[90]Scott R. Haiber, above n 62 at 105.
[91]*Ibid* at 98.
[92]See Chapter Four.
[93]Scott R. Haiber, above n 62 at 98.
[94]*Ibid*.
[95]Iris Chiu, above n 3 at 325.
[96]*Ibid*.
[97]Maleka Femida Cassim, above n 20 at 1167.See Etienne A Oliver, above n 62 at 15.

or arbitration since it is premised on a Win- Win approach.[98] This means that the disincentive of paying the costs of the other party which exists in derivative action litigation may be absent in ADR.[99] As has already been explained in Chapter Six of this thesis, the Contingency Fees Arrangement recommended in that chapter as a means of solving the problem of funding derivative actions is very compatible with the ADR since it enables the solicitor to be paid an agreed percentage of the award while avoiding the rigours of litigation.[100]

It is remarkable that South Africa appears to be a trail blazer with regards to the incorporation of ADR into corporate governance disputes.[101] The Companies Act expressly stipulates that as an alternative to applying to court for relief, an application for resolution of corporate disputes under the Act by mediation, conciliation or arbitration may be made to the Companies Tribunal; an accredited entity,[102] or any other person.[103] As is typical in ADR arrangements, it can be implied from the SA Companies Act that ADR is voluntary and not compulsory since it is provided that where ADR has been commenced, a certificate may be issued to the effect that it has failed.[104]The South African Companies and Intellectual Property Commission 'Commission' is also empowered to accredit juristic persons or associations that function predominantly to provide conciliation, mediation or arbitration services.[105] Such juristic persons or associations must have demonstrated capacity to perform such services within the context of company law; and have satisfied the prescribed requirements for accreditation. [106] Meanwhile, it is the Minister, who, after due consultation with the Commission, has the power to designate any organ of the State as an accredited entity; [107] and determine the prescribed requirements for accreditation of juristic persons and associations.[108]

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[98]Chantal Epie'Alternative Dispute Resolution: Understanding the Problem Solving (Win/Win) Approach in Negotiations' [2004]1 *Negotiation & Dispute Resolution Journal 71* at 76.

[99]However, it has been argued that in jurisdictions where derivative actions are propelled by Attorneys, the fact that the winner's Attorney's cost is not paid by the loser may be a disincentive. See Scott R. Haiber, above n 62 at 99.

[100]John Peysner 'What's Wrong with Contingency Fees?' [2001] 10 *Nottingham Law Journal* 22 at 33-34.

[101]Maleka Femida Cassim, above n 20 at 1167-1168. See Carl Stein, above n 48 at 376.

[102]SA Companies Act 2008, s.166. (3), stipulates that an accredited entity means either a juristic person or an association of persons; or an organ of state or entity.

[103]SA Companies Act 2008, s.166.

[104]*Ibid* s.166 (2). See Dennis M.Davis, 'Dealing with Corporate Defaulters: Curbing the Unfettered Access of Criminal Law' in Tshepo H Mongalo (ed), *Modern Company Law for A Competitive South African Economy* (Juta, Claremont 2010) 411 at 422.

[105]Maleka Femida Cassim, above n 20 at 1167.

[106]SA Companies Act 2008, s.166 (4) (a).

[107]*Ibid* at s.166 (5) (a).

[108]*Ibid* at s.166 (5) (b).

In other jurisdictions like Nigeria,[109] and the United Kingdom,[110] however, ADR is available for the resolution of disputes generally in accordance with the law;[111] and the rules of professional conduct.[112] The frontier of ADR has even been extended in Nigeria through the concept of the multi-door court ADR, which allows cases to be referred to ADR from the regular courts.[113]However, it is novel that in the case, of South Africa, ADR is provided for in the Companies Act. [114]It is also significant that the SA Companies Act allows not only public institutions like the Companies Tribunal, but also allows private institutions like accredited entities and also private individuals to be involved in resolution of corporate disputes.[115]

7.3 PUBLIC/MANDATORY/REGULATORY ENFORCEMENT

7.3.1 THE COURTS

The courts have always played a very strategic part in derivative actions. [116]This is so because litigation is the means by which shareholders/stakeholders can bring actions on behalf of the company to redress corporate maladministration. [117] This interventionist role of the courts has enabled ordinary provisions of the law to be interpreted contextually such that they are given significance. [118] This is aside the fact that many facets of corporate law such as the rule in *Foss v Harbottle* and its exceptions evolved into Statutes from judge made laws.[119]

However, there is a general consensus that there are many limitations to the ability of the courts to discharge its responsibility of facilitating good corporate governance. [120]It has been said that one major limitation is that the courts are usually able to intervene post the corporate governance crisis.[121] This may be attributed to the general posture of judicial non-

[109]Nigerian Arbitration and Conciliation Act 2004.
[110]UK Arbitration Act 2010.
[111]SA Arbitration Act 1965.
[112]The Nigerian Rules of Professional Conduct for Legal Practitioners 2007,rule 15(3)(d).See A.Obi Okoye,*Law in Practice in Nigeria*(3rd edn,Iykememo Publishing, Enugu 2021)516.
[113]Lagos Multi- Court House Law 2007, s.2. See Tobie Wiese, above n 43 at 668, where the author refers to the court annexed Mediation rules applicable to Magistrate Courts in South Africa. See Akin Ibidapo Obe & F.Abayomi Williams, *Arbitration in Lagos State* (Concept Publications, Lagos 2010) 28. See also Henry J, Brown and Arthur L.Marriot, above n 64 at 44.
[114]SA Companies Act 2008, s.166 (1). See Carl Stein, above n 48 at 376.
[115]SA Companies Act 2008, s.166 (1).See Maleka Femida Cassim, above n 20 at 1167.
[116]Ian M. Ramsay, above n 8 at 236.
[117]Peter Nta, above n 31 at 301.
[118]Ian M. Ramsay, above n 8 at 237.
[119]CAMA, s.341.
[120]Ian M. Ramsay, above n 8 at 234.
[121]*Ibid*.

interference in the affairs of companies.[122] However, the lengthy duration of litigation and the attendant prohibitive costs are likely to top the list of limitations. [123] Judicial attitude or interpretation has also been taunted as a major hindrance to the development of corporate governance.[124] For instance, it has been said that in the United States of America, in spite of the several criminal sanctions imposed on breaches of corporate obligations, the courts have been quite reluctant to impose such punishments because white collar crimes are perceived as being less harmful to the society as opposed to blue collar crimes such as rape, murder, etc. [125] This is in addition to the fact that judges are being accused of interpreting the law in a non-commercial sense that does not favour free enterprise, contrary to the underlining philosophy of company law.[126] It has also been maintained that derivative action litigation allows minority shareholders to foist their opinion on the company, which may not be in the best interests of the company.[127] Perhaps, the most damming of the criticisms is the allegation that the courts are not competent to intervene in corporate affairs because they lack the expertise and flexibility required to adjudicate on every affair of the company.[128] Thus, it has been said that while the courts are competent to determine whether a director is in breach of fiduciary duties of good faith and loyalty, they may not be competent when the issues border on whether or not the directors have acted in the best interests of the company.[129]

7.3.1.1 Specialised Courts

It has been suggested that the weakness of the courts as an institutional framework for efficient resolution of corporate disputes may be ameliorated by the establishment of special courts.[130] There are claims that the specialised court system has the potential to address not

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[122]A.J Boyle, above n 36 at 39.
[123]*Ibid* at 9. See Wole Obayomi' Raising Standards in Litigation Management' [2004]1 *Negotiation & Dispute Resolution Journal 93* at 95.
[124]James B.Comey Jr. 'Go Directly To Jail: White Collar Sentencing after the Sarbanes-Oxley Act' [2009]122 *Harvard Law Review*1729 at 1731.
[125]*Ibid*.
[126]L.S.Sealy, 'The Courts and Their Role in Corporate Affairs' in L.S.Sealy (ed), *Company Law and Commercial Reality* (Sweet & Maxwell, London 1984) 35 at 39- 40, 46.The author appears to suggest at p.39, that in the English case of *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, the court ought to have allowed the directors to retain their secret profit in order not to strangulate business initiatives. See D.A.Guobadia, above n 62 at 125.
[127]This argument is premised on the notion that majority shareholders are likely to act in the best interests of the company because they have a higher stake in the fortune of the company. See Ian M. Ramsay, above n 8 at 236.
[128]*Ibid.*
[129]*Ibid* at 237. See Maleka Femida Cassim, above n 13 at 104. See also SA Companies Act 2008, s.165 (7).
[130]Louis Bouchez *et al*, above n 74 at 5.

only the problem of adequate skills but also the problem of paucity of judges. [131]Specialised courts can therefore result in the ability of the judiciary to dispense justice in a more intentional and efficient manner. [132]In the case of the United States, there is evidence that there are functioning Business Courts in several states including the State of Delaware.[133] The Delaware- Chancery Court is said to have a history of relevance in resolving corporate governance issues because of its limited jurisdiction.[134] In the case of Nigeria, the Federal High Court was established under the Nigerian Constitution to handle matters relating to corporate governance, involving the Federal Government and several other commercial issues, etc. [135] Although the Federal High Court was created as a specialised court to facilitate expeditious dispensation of justice in commercial matters, it appears that the court has not been able to sustain this expectation.[136] It is therefore evident that there is need to seek alternatives. In the case of South Africa, there appears to be no specialised court with respect to the resolution of corporate disputes.[137] However, the Companies Act 2008, provides for the establishment of the Companies Tribunal, which allows for alternative dispute resolution of corporate disputes without resort to the High Court.[138]

7.3.2 ADMINISTRATIVE COMPLAINTS PROCEEDINGS/PANELS

A major problem that has been identified in corporate governance in recent times is that the enforcement of corporate law has not been effective due largely to the criminalisation of corporate duties.[139] Consequently, the preponderance of opinion appears to be that it is important to differentiate between corporate crimes and illegal corporate behaviour; thereby

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[131]*Ibid*.
[132]*Ibid*.
[133]See Jacqueline L. Allen *et al* ,' Business Courts ' in American Bar Association, *Recent Developments in Business and Corporate Litigation'* (vol.2,ABA Publishing, Chicago 2014) 147.
[134]*Ibid.*
[135]The Constitution of The Federal Republic of Nigeria 1999, s.251. See Peter Nta, above n 31 at 303.
[136]The Nigerian Investment and Securities Tribunal was established by the Nigerian Securities and Exchange Commission pursuant to the Nigerian Investment and Securities Act (ISA) 2007, s.274. This section confers exclusive jurisdiction on the Tribunal with regards to capital market matters.
[137]Dorothy Farisani, 'The Potency of Co-ordination of Enforcement Functions by the New and Revamped Regulatory Authorities under the New Companies Act' in Tshepo H Mongalo, (ed), *Modern Company Law for a Competitive South African Economy* (2010) 433 at 443.
[138]SA Companies Act 2008, s.166.
[139]Dennis M.Davis, above n 104 at 411. See Vicky Comino 'Australia's ' ''Company Law Watchdog'': The Australian Securities and Investments Commission and the Civil Penalties Regime' [2014] Journal *of Business Law* 228 at 229.

discouraging the later through administrative orders and imposition of fines.[140] Thus, while the goal of litigation and ADR is to resolve corporate disputes, [141]administrative proceedings and panels appear to be focused on resolving corporate problems.[142]Nonetheless, the resolution of corporate problems through administrative complaints procedure or administrative panels will not only help to reduce the volume of corporate litigation but also offers some of the advantages of ADR such as less formality, speed, reduced costs, etc.[143]

7.3.2.1 Complaints Proceedings

South Africa has a complaints procedure which allows any person to file a complaint in writing to the Companies and Intellectual Property Commission- 'Commission' or the Takeover Regulation Panel to issue Compliance Notice to any person who has contravened the Companies Act or benefitted directly or indirectly from the contravention. [144] The Commission can initiate a Compliance Notice either on its own motion or on the request of another Regulatory body.[145] There appears to be no comparable provisions under CAMA and the UK Companies Act. A Compliance Notice may require a person to cease or refrain from doing any act in contravention of the Companies Act or mandate compliance with the requirements of the Act.[146] It is interesting to note that a Compliance Notice may also require a person to restore assets or their value to a company or any other person.[147] The SA Companies Act stipulates that a Compliance Notice must state the following: The person to whom it applies; the provisions of the law which has been breached including the extent of non-compliance; any action required to be taken to remedy the breach; the stipulated time within which these

[140]Dennis M.Davis, above n 104 at 413. See Maleka Femida Cassim, above n 20 at 1137. In Nigeria, CAMA has followed suit by stipulating that only offences relating to fraud have criminal consequences, while other infractions such as failure to notify the Commission of changes in the company within the stipulated time frames are treated with administrative penalties. See for example, CAMA, s.339 (3). See however, Vicky Comino, above n136 at 236-237, to the effect that there are procedural and enforcement problems with civil penalty proceedings because they are neither civil nor criminal in nature.
[141]Maleka Femida Cassim, above n 20 at 1137.
[142]*Ibid* at 1156.
[143]J.Olakunle Orojo and M.Ayodele Ajomo, *Law and Practice of Arbitration And Conciliation In Nigeria* (Mbeyi & Associates Nigeria Limited, Lagos 1999) 6.
[144]SA Companies Act 2008, s.171 (1).See Maleka Femida Cassim, above n 20 at 1156. See also Dennis M.Davis, above n 104 at 419. See Carl Stein, above n 48 at 381.
[145]SA Companies Act 2008 s. 168(2). See Maleka Femida Cassim,above n 20 at 1162. See also Etienne A Oliver, above n 62 at 17, to the effect that the South African Companies and the Intellectual Property Commission have been issuing Compliance Notices where they deems it fit.
[146]SA Companies Act 2008, s.171 (2) (a).See Maleka Femida Cassim, above n 20 at 1163.
[147]SA Companies Act 2008, s.171 (2) (c).See Maleka Femida Cassim, above n 20 at 1163.

steps must be taken; and the penalty to be imposed for failure to comply with the Notice.[148] The features of a Compliance Notice is a pointer to the fact that it is aimed primarily at ensuring that the offender is transformed from corporate misbehaviour to corporate compliance and not to punish the violator. [149] Thus, a company that has failed to file or disclose certain information can be given Notice to comply. [150]It is significant that the Commission must liaise with other relevant regulatory bodies in the process of administering Compliance Notices. [151] This is to say that the Commission cannot issue a Compliance Notice without sending a copy to the regulatory body which licensed the offender. [152]Also, where a person who has been issued a Compliance Notice fails to comply, the Commission must apply to the court to impose an administrative fine.[153] The legislature has also prescribed guidelines which the court must follow.[154] It is therefore not surprising that the power to issue Compliance Notices has been described as the most novel feature of the South African Companies Act 2008.[155] It is however doubtful whether it can be used to resolve every corporate governance issue since it is not applicable if the alleged contravention can be addressed by application to Court or the Companies Tribunal.[156] Thus, it appears that where a complaint can be resolved by a derivative action or any minority protection action in court or by ADR at the Companies Tribunal, neither the Commission nor the Take Over Panel would have the jurisdiction to issue Compliance Notices. [157]Nonetheless, this thesis opines that this administrative remedy can be used to resolve corporate problems so that they do not become

[148]SA Companies Act 2008, s.171 (4).
[149]*Ibid* at s.175(2)(f), to the effect that in South Africa, cooperation with the Commission and the court by the respondent to a Compliance Notice will be considered in determining the amount of administrative fine to be imposed on him. See Maleka Femida Cassim, above n 20 at 1165.
[150]SA Companies Act 2008, s.171 (1).
[151]*Ibid* at s.171 (3).
[152]*Ibid.*
[153]SA Companies Act 2008, s.175 (1).
[154]*Ibid*. Generally the fine must not exceed the greater of 10% of the respondent's turnover during the period of non- compliance with the Notice, and the maximum fine prescribed by the Regulations made by the Minister under s.175 (5). In determining the specific amount, the court must consider the following factors as prescribed under s.175 (2): the nature and gravity of the contravention; the loss or damage caused; the behaviour of the respondent; the market circumstances of the contravention; the level of profit derived from the contravention; the degree to which the respondent cooperated with the Commission and the court; and whether the respondent had previously contravened the Act. See Maleka Femida Cassim, above n 20 at 1165.
[155]Dennis. M.Davis, above n 104 at 419.
[156]SA Companies Act 2008,s.171(1).
[157]*Ibid*.

corporate disputes like derivative actions.[158] It is therefore suggested that CAMA should be amended to allow for the initiation of Complaints Proceedings.

7.3.2.2 Administrative Proceedings Committee

One of the innovations in the recently enacted CAMA is the fact that the CAC is allowed to establish the Administrative Proceedings Committee (APC). [159]The main function of the APC is to enable those alleged to have contravened CAMA to defend themselves; as well as to resolve disputes and grievances arising from the operations of the Act or its regulations.[160]Sanctions that may be imposed by the APC include administrative penalties, suspension or revocation of registration or recommendation for criminal prosecution for any criminal act or conduct.[161] It is however, not clear why the power of the APC does not include recommendation for civil actions such as derivative actions. A plausible explanation may be that the focus of the APC is decriminilisation such that in cases where administrative penalties would not suffice, criminal prosecution may be recommended. [162]It is however, posited that since most of the administrative penalties are targeted at ensuring that resolutions are filed, statutory records are kept and sundry disclosures are made,[163] it does appear that they may not fit into providing remedies for disputes in the sphere of derivative actions. Nonetheless, it is opined that the decriminilisation agenda of the APC of the CAC may help to facilitate access to information, albeit in a limited dimension.[164] Meanwhile, it appears that the penalty of suspension or revocation of registration is targeted at the procedure for objection to the registered name of a company, etc. that must be brought before the APC.[165]

7.3.2.3 Panel for Investigation of Companies

In South Africa, upon the receipt of a complaint by the Commission or the initiation of a complaint directly by the Commission, the Commission may set up a Panel of inspectors or

[158]S de Lange 'Compliance Notices in Terms of The Companies Act 71 of 2008: Some Observations Regarding The Issuing of and Objection To Compliance Notices' [2018] 30 (3) *SA Mercantile Law Journal* 434 at 435.
[159]CAMA, s.851 (1).See J.A.M Agbonika, *Modern Nigeria Company Law* (Ababa Press, Ibadan 2021)599.
[160]CAMA, s.851 (4).
[161]*Ibid* at s.851 (10).
[162]A.F. Afolayan *et al* 'A Critical Examination of the Criminal and Quasi Criminal Offences Created under the New Companies and Allied Matters Act,2020'[2021] *Legal Network Series* (A) Ixxx 1 at 35. See Yemi H.Bhadmus, *Bhadmus on Corporate Law Practice* (5th edn, Chenglo Limited, Enugu 2021)418.
[163]See for Example CAMA, ss.339 &389.
[164]See Chapter Four.
[165]CAMA, s.857.

Investigators to investigate the complaint.[166] The Commission may designate one or more persons to assist in the investigation.[167] The power to investigate is also available in Nigeria[168] and the United Kingdom.[169] In these two jurisdictions, at the instance of a member holding at least 10% of the shareholding or membership of the company;and not less than 200 members holding at least 10% of the shareholding of the company, a Panel of Inspectors may be appointed by the CAC or the Secretary of State respectively to investigate the affairs of company.[170] Investigation can also be conducted at the instance of persons holding not less than 1/5 of the membership of a company in the case of a company without share capital; [171] or on the application of the company itself. [172] An investigation may also be ordered by the Court.[173] The CAC or the Secretary of State may also on its own appoint Inspectors in circumstances where there is intent to defraud creditors; unfair prejudicial action against the interests of members; fraud with regards to management or formation of a company; and denying members access to information regarding the affairs of the company.[174] The power of Investigation is directed primarily at protecting the interests of members in corporate governance.[175] It so often happens that because members are not vested with powers to manage the day to day affairs of the company, they have little information on what the directors are doing and thus, are not able to monitor them effectively.[176] The power of Investigation is therefore important as a veritable means by which the public interest of ensuring that companies are properly managed is demonstrated.[177] Consequently, based on an Inspectors' Report, the CAC or Secretary of State may institute a derivative actions on behalf of the company,[178] make presentation for the winding up of the company[179] or refer

[166]SA Companies Act 2008, s.169 (1) (c) & (2) (a). See Maleka Femida Cassim, above n 20 at 1158. See also Carl Stein, above n 48 at 380.
[167]SA Companies Act 2008, s.169 (2) (a).
[168]CAMA, s.357.
[169]UK Companies Act 1985, ss.431 & 432.
[170]CAMA, s.357 (2) (a) & (b).
[171]UK Companies Act 1985, s.431.
[172]*Ibid* at s.431 (2) (c). See CAMA, s.357 (2) (c).
[173]CAMA, s. 358(1); UK Companies Act 1985, s.432 (1).
[174]CAMA, s.358 (2).
[175]Maleka Femida Cassim, above n 20 at 1158.
[176]Joseph E.O.Abugu,*Principles of Corporate Law in Nigeria*(MIJ Professional Publishers, Lagos 2014)663.See Paul L.Davies ,*Gower And Davies' Principles of Modern Company Law* (7th edn, Sweet & Maxwell, London 2008)467. See also the English case of *Norwest Holst v. Secretary of State for Trade* [1978] 3 All ER.280, where the court referred to the board of directors as a self-perpetuating oligarchy and unaccountable.
[177]Maleka Femida Cassim, above n 13 at 169. See Peter Nta, above n 31 at 285.
[178]*Ibid* at 170.See CAMA, s.364.
[179]CAMA, s.366.

the Report to the appropriate Prosecuting Authority for the purpose of instituting criminal proceedings. [180]Thus, a member of the company can apply to the CAC or Secretary of State for the Investigation of a company, the result of which may enable him to obtain information which he may use to institute a derivative action or any other action in the interests of corporate governance.[181]However, the right of a member to apply for Investigation is not automatic since he is required to hold a certain percentage of shareholding or membership to be qualified to apply.[182] This may mean that the right of a member to apply for Investigation appears to be merely academic owing to the problem of lack of coordination amongst members which makes it difficult to garner the required shareholding or membership. [183] In addition, the positions in Nigeria[184] and the United Kingdom[185] require a member applying for Investigation to show evidence of good reasons to support his application.[186] This may appear to buttress the argument of the need for strict monitoring of applications for Investigations occasioned by members in order to discourage frivolous applications and undue disruption of business activities.[187] However, it is posited that in the light of the problem of information asymmetry, it does not seem appropriate to expect that a member would be able to produce evidence showing that he has good reasons to bring the application. [188] Another disincentive to applications for Investigations by member is the requirement that a member must give security for costs. Although this has now been abolished under CAMA, it was a requirement under the Nigerian Companies Act 1968.[189] However, in the United Kingdom,the Secretary of State is empowered to require the member applying for Investigation to give security for costs not exceeding 5,000 Pounds.[190] On the other hand, a member who applies for Investigation of companies in Nigeria runs the risk of having to defray the costs of Investigation since the law stipulates that he may be liable to such extent as the

[180]*Ibid* at s.365.
[181]Maleka Femida Cassim, above n 13 at 170.
[182]CAMA, s.357 (2).
[183]Arad Reisberg, above n 62 at 87.
[184]CAMA, s.357 (3).
[185]UK Companies Act 2006, s.431 (3). See Paul L.Davies, *Gower And Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell, London 2008)635-636.
[186]See Peter Nta, above n 31 at 287.See the Nigerian case of *Oguntayo v Adebutu* [1997] 12 NWLR (Pt. 531) 83 at 96, where the Court of Appeal quashed an Order of Investigation made by the trial court because there was no good cause for ordering the Investigation etc.
[187]Joseph E.O.Abugu, above n 176 at 658.
[188]Maleka Femida Cassim, above n 13 at 139.
[189]CAMA, s.357. See Joseph E.O.Abugu, above n 176 at 652.
[190]UK Companies Act 1985, s.431 (4). See Paul L.Davies, above n 185 at 636.

CAC may direct.[191] Meanwhile, Investigations ordered by the court or brought at the instance of the CAC are funded primarily by the State. [192]This thesis suggests that the approach of the South African Companies Act in which any person may initiate a complaint which may lead to the Investigation of a company better serves the interests of corporate governance. [193] It has also been suggested that owing to the difficulties associated with applications for Investigation by members, it is better for a member who wants a company to be Investigated to hint the regulatory body charged with Investigations, about the need for such an Investigation, considering that the regulatory body has the power to *suo moto* instigate an Investigation into the affairs of a company in certain circumstances.[194]

It is important to state that it is possible for the court to grant a remedy of Investigation in an unfair prejudice action to a member who does not have the requisite qualification to make an application for Investigation as a member. [195] Be that as it may, in the Nigerian case of *Otong v Mogal,*[196] the court, in an unfair prejudice action ordered an Investigation into the affairs of a company because the directors had neither been keeping statutory records nor had they been calling meetings of the company; and had never filed any Annual or Tax Returns. Nevertheless, it seems impracticable for a member seeking an administrative remedy to be expected to take up an action in court such as under the unfair prejudicial action in order to be able to get the CAC to appoint Inspectors to Investigate the company. It is therefore not surprising that Investigations of companies at the instance of the court are as rare as Investigations at the instance of members.[197]

It is quite regrettable that the use of the power to initiate Investigation by the relevant regulatory bodies has also been reported to be very rare.[198] It has been maintained that this is perhaps due to the fact that the power of Investigation is not of a general supervisory nature.[199] This is founded on the fact that the Investigation of companies depends more often

[191]CAMA,s.367(1)(c).
[192]CAMA,s.367. See Joseph E.O.Abugu, above n 176 at 672.
[193]SA Companies Act 2008, s.168 (1).
[194]Paul L.Davies, above n 185 at 636. See Joseph E.O.Abugu, above n 176 at 672.
[195]CAMA, s.355 (1) (g).
[196][1978]FRCR 80.
[197]Paul L.Davies, above n 185 at 635.
[198]*Ibid* at 629,634.
[199]Oliver C. Schreiner 'The Shareholder's Derivative Action- A Comparative Study of Procedures' [1979] 96 *The South African Law Journal* 203.

than not on a shareholder or other persons making applications for such Investigations.[200] However, it appears that this argument might no longer hold water in Nigeria, since the law now allows Company Registries like the CAC to *suo moto* conduct Investigations into the affairs of companies.[201] Nonetheless, it appears that the power of the CAC to conduct Investigations is not without challenges for the following reasons. Firstly, it is difficult to envisage how a company's registry can practically instigate Companies Investigations on its own whereas it can only rely on information such as disclosed in Annual Returns filed by officers of the companies who are likely to be the objects of such Investigations; or disclosed in Annual Reports prepared by the company.[202]

Secondly, it appears that regulatory bodies are reluctant to interfere in the affairs of companies except in circumstances where there is a strong public interest.[203]Thirdly, appointment of Inspectors may be accompanied by such publicity that may be damaging to the company;[204] and which may also allow the directors to tamper with any incriminating records.[205]Thus, in the United Kingdom, there seems to be a distinction between appointment of an Investigator and appointment of Inspectors.[206] However, the appointment of Investigators is preferred because the law allows Investigators to launch inquisitorial raids on companies while avoiding the problem of delay and obstruction that may be caused by companies in cases where Inspectors are appointed. [207] Fourthly, the costs and expenses of

[200]D.A.Guobadia, above n 62 at 7. See *Oguntayo v Adebutu, above* n 186, where the court in Nigeria refused to make an order of Investigation on the premise that the plaintiff shareholder only asked for an order of inquiry into the business of the company.

[201]CAMA, s.358 (2). See the Nigerian case of *CAC v UBA Plc & 5 Ors.* [2013] 5 CLRN 133 at 136, where the Federal High Court relying on ss.315 of the Old CAMA, held that the CAC cannot validly, suo moto undertake an Investigation into the affairs of a company without an order of court as prescribed under s.315 (1); and that the order of the court will only be granted upon the fulfillment of the conditions prescribed under s.315 (2). See however, Eseni Azu Udu, *Principles of Company Law And Practice in Nigeria* (2nd edn, Miridam Prints, Enugu 2021)143-144, on the position of the law under CAMA. It is posited that in order to depart from the situation under the Old CAMA, where s.315(2), was subject to s.315 (1), the preamble to CAMA,s.358(2), clearly stipulates that notwithstanding s.358(1), the Commission may appoint Inspectors to Investigate a company. It is opined that s.357 (1) referred to under s.358 (2) is erroneous since it ought to be s.358 (1).

[202]Arad Reisberg, above n 62 at 25.

[203]For instance, Investigation conducted by the Central Bank of Nigeria led to the discovery of gross mismanagement and corporate fraud by Banks in Nigeria in the 1990s. See Joseph E.O.Abugu, above n 176 at 655. See also *CAC v UBA Plc & 5 Ors.*, above n 201, where the CAC attempted unsuccessfully to conduct a special inspection exercise with regards to records of all loan transactions and documentations between banks and companies registered in Nigeria from the period 2008 to 2010.

[204]Andrew Lidbetter, *Company Investigations And Public Law* (Hart Publishing, Oxford 1999)1. See R.D Fraser' Administrative Powers of Investigations into Companies' [1971] 34(3) *Modern Law Review* 260 at 270.

[205]Paul L.Davies, above n 185 at 630.

[206]*Ibid*.

[207]*Ibid* at 629. See UK Companies Act, 1985, s.447.

Investigation is a major disincentive because they are to be borne primarily by the regulatory body,[208] although it may later be defrayed by the company or any other person.[209] Nevertheless, the problem of under-funding of regulatory bodies, dearth of expertise and other resources may underscore the infrequency of Investigation of companies. [210]

In spite of the problems associated with Investigation of companies, it remains a veritable means of establishing facts within the corporate organisation without recourse to the courts.[211] A Panel of Inspectors is usually headed by a Queen's Counsel or a Senior Advocate in the United Kingdom and Nigeria respectively, with chartered accountants constituting part of the membership.[212] This must be intended to ensure that the Investigation is carried out with the advantage of expertise. This thesis however posits that the expertise could be broadened to include other specialisations particularly in view of the need for the CAC to collaborate with other regulatory bodies which shall be canvassed later in the discourse. Another advantage of Panels of Investigation is the flexibility, privacy and informality of the conduct of Investigations. Thus, the proceedings are not made open to members of the public since they are conducted in private. [213] Also, it has been said that the Panel of Inspectors is an administrative body and not a judicial nor a quasi- judicial body, and is therefore not obliged to follow the rules of Natural Justice.[214]Nonetheless, it must be seen to be fair in the conduct of its proceedings.[215] This posture is hinged on the fact that Investigation is merely a preliminary exercise which may lead to other actions being taken.[216] However, since the Panel is given some of the powers of a court in the conduct of its proceedings, it may be proper to categorise it as a quasi- judicial body.[217]

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[208]Paul L.Davies, above n 185 at 641.

[209]CAMA, s.367, to the effect that in Nigeria, the expenses of Investigation are defrayed in the first instance out of the Consolidated Revenue Fund but other persons listed in in the section may be liable to make repayment. See C.O. Okonkwo,' The Corporate Affairs Commission' in E.O.Akanki (ed), *Essays on Company Law*(University of Lagos Press, Lagos 1992) 14 at 31.

[210]Dennis M.Davis, above n 104 at 413. See Maleka Femida Cassim, above n 13 at 171.

[211]C.O. Okonkwo, above n 209 at 36.

[212]Joseph E.O.Abugu, above n 176 at 663.See Paul L.Davies, above n 176 at 467.

[213]Joseph E.O.Abugu, above n 176 at 663.

[214]The English case of *Re Grosvenor and West End Railway Terminus Hotel Ltd* [1897] 7 QB 124.

[215]Paul L.Davies, above n 182 at 640. See *Norwest Holst v Secretary of State*, above n 176 at 226-227, where the English court maintained that there is no requirement to disclose the reasons for the Investigation. See also Andrew Lidbetter, above n 204 at 41.

[216]The English case of *Rees v Crane* [1994] 2 AC 173 at 191.

[217]CAMA s.362, to the effect that any obstruction of Inspectors is to be treated as contempt of court.

7.4 THE ROLE OF REGULATORY INSTITUTIONS.

Regulatory authorities are bodies established to maintain certain prescribed standards in certain fields.[218] Since the aim of derivative actions is to ensure that certain standards of corporate behaviour are observed in corporate administration,[219] it is posited that regulatory authorities are well suited to assist in the furtherance of derivative actions. This is aptly demonstrated in the investigative powers of the Companies Commission which possesses administrative fact finding facilities to access information which may result in the institution of derivative actions. [220]Regulatory bodies may also enable the resolution of disputes through the ADR mode or Administrative Tribunals or Panels which may impose fines and penalties without resort to litigation. [221]This is particularly true in South Africa and recently in Nigeria where the importance of regulatory bodies in corporate governance has been more emphasised in the sphere of enforcement without unnecessary recourse to criminal sanctions.[222] Moreover, regulatory bodies can also participate in the mandatory aspects of corporate governance by instituting derivative actions.[223] Thus, regulatory bodies are able to combine both the facilitative and mandatory aspects of this discourse. This means that they can be used to ensure that derivative action litigation can only arise after exhausting all the voluntary and regulatory means of resolving the problem.[224] The contribution of regulatory bodies to derivative action is however discussed in this chapter under the mandatory framework because they are established under the mandatory spectrum of the law. It is important to state that in spite of the problems of lack of funding, bureaucracy, dearth of expertise, etc. confronting regulatory bodies, they are still in a better and stronger position to further the cause of derivative actions much more than the ordinary shareholder or stakeholder.[225] It is however, imperative to ensure that the activities of the different

[218]Fabian Ajogwu, *Corporate Governance and Group Dynamics* (Centre for Commercial Law Development, Lagos 2013) 158.
[219]Maleka Femida Cassim, above n 13 at 3.
[220]Andrew Lidbetter, above n 204 at 42.
[221]Dorothy Farisani, above n 137 at 434.
[222] *Ibid*. See Etienne Oliver, above n 62 at 17.
[223] CAMA, s.352 (c).
[224]Dorothy Farisani, above n 137 at 444.
[225]Dennis M Davis, above n 104 at 413.See Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003) 227,on the need to fund the Office of the Registrar of Companies for effective performance.

regulatory bodies are harnessed and coordinated to avoid conflicts and multiplicity of purposes and efforts.[226]

7.4.1 THE CORPORATE AFFAIRS COMMISSION

The Corporate Affairs Commission'CAC', is the body established under CAMA in Nigeria, to administer its provisions.[227] Similar bodies exist in South Africa[228] and the United Kingdom.[229] The CAC is vested with the following powers:[230] To regulate and supervise the formation, incorporation, registration, management and winding of companies pursuant to the Act.; To maintain Companies Registries throughout the Federation; To perform any function as may be specified under any provision of the law; To undertake such other activities as are necessary or expedient for giving full effect to the provisions of the Act etc. As mentioned earlier, the CAC is empowered specifically to conduct Investigations into the affairs of companies,[231] and also to institute derivative actions.[232]

The powers vested in the Companies and Intellectual Property Commission of South Africa 'the Commission'; [233]and the Companies House in the United Kingdom, are similar to the powers vested in the CAC, in the sense that in those jurisdictions, the Companies Registries are the depository of information on companies since they are responsible for the handling of their incorporation and post incorporation compliance matters.[234] The Company's Registries are also empowered to institute derivative actions with the exception of the United Kingdom where only shareholders may institute derivative actions.[235]

The South African Companies Act is however, unique in the sense that it stipulates that the Commission may promote voluntary resolution of disputes not only between a company and

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[226]*Ibid.*
[227]CAMA, s.1 (1) (a). See Peter Nta, above n 31 at 176.
[228]SA Companies Act 2008, s.185, which establishes The Companies and Intellectual Property Commission.
[229]The UK Companies House.
[230]CAMA, s.8 (1); SA Companies Act 2008, s.185; UK Companies Act 2006, s.1061, detailing major functions of the Registrar of Companies.
[231]CAMA, s.357; SA Companies Act 2008, s187 (2) (c) - (e); UK Companies Act 2006, s.1035.
J.Olakunle Orojo, *Company Law And Practice in Nigeria* (Lexis Nexis, South Africa 2006) 255, where the author posits that the protection afforded through Investigation is even more necessary and justified in a largely illiterate society like Nigeria.
[232]CAMA, S.357.
[233]Dorothy Farisani, above n 137 at 435.
[234]Joseph E.O. Abugu, *Company Securities: Law and Practice* (2nd edn, MIJ Professional Publishers, Lagos 2014)74.See Carl Stein, above n 48 at 388.
[235]UK Companies Act 2006, s.260 (1).

a shareholder; but also between a company and a director or officer of the company without any intervention in or adjudicating any such dispute. [236]

However, it has been said that the CAC has not satisfactorily performed its statutory obligation of ensuring compliance with CAMA.[237]This may be attributed to the fact that compliance with corporate governance is a wide and all-encompassing responsibility which may be difficult for a single regulatory body to manage.[238] Consequently, suggestions are rife that there should be more than one body to regulate the different aspects of Corporate governance in Nigeria.[239]The problem arising from having the CAC as the only body vested with power to monitor the Companies Act is perhaps clearly demonstrated in the case of the Securities and Exchange Commission of Nigeria 'SEC', which is assigned the sole responsibility for the protection of the securities of investors in the capital market but is however, not enabled under the law to regulate the Corporate governance of the issuers of those securities. [240] It is doubtful if the CAC is in a better position to manage and enforce Corporate governance infractions of capital market operators than SEC. Although the law permits the appointment of Inspectors who are likely to be experts,[241] it is also doubtful if the CAC is likely to conduct thorough Investigations into the affairs of capital market operators in such special interest matters involving insider abuses and market manipulations without any input from SEC.[242] This thesis maintains that the provisions of CAMA are only general interest provisions on Corporate governance which may not be able to cater for the Corporate governance needs in specialised areas of the law such as market regulation. [243] This position appears to be somewhat embraced by CAMA to the extent that it is now stipulated that the functions of the CAC do not affect the powers, duties or jurisdiction of SEC under the Investments and Securities Act.[244] It is therefore hoped that this new provision will eventually lead to the

[236]SA Companies Act 2008, s187 (2) (a). See Carl Stein, above n 48 at 391.
[237]Fabian Ajogwu, above n 218 at 163-164. See E.O.Akanki 'The Companies and Allied Matters Act: Practice and Implementation' [1993] 2(1) *Journal of Nigerian Law* 46 at 50-51.
[238]D.A.Guobadia, above n 62 at 125.
[239]*Ibid*. See Oluwasegun Ojemuyiwa 'The Corporate Affairs Commission as Corporate Conditioners of the Nigerian Investment Climate: an Unmitigated Disaster' [2002] 1 *The Commercial And Industrial Law Review* 191 at 204.
[240]The Nigerian Investment and Securities Act 2007, s.13.
[241]Peter Nta, above n 31 at 286.
[242]R.D Fraser, above n 204 at 273-274, on the power of SEC in the United States to conduct Investigations on companies.
[243]For Example, the CBN Governor in Nigeria is given power to remove directors under the Nigerian Banks and Other Financial Institutions Act 2014, s.35 (2) (d).
[244]CAMA, s.8 (2).

restructuring of the regulation or enforcement of Corporate governance in Nigeria, such that other specialised regulatory bodies other than the CAC can effectively participate in supervising the Corporate governance of the entities they are supposed to regulate. This appears to be the position in South Africa where other regulatory bodies apart from the Commission, such as the Companies Tribunal, Takeover Regulations Panel and the Financial Reporting Standards Council are established under the Companies Act; and are recognised as participants in the administration of the Act. [245]It is therefore, argued for instance, that regulatory bodies other than the CAC should be allowed to institute derivative actions. This thesis is not unmindful of the fact that multiple regulatory bodies are likely to create conflicts, duplications and difficulties in coordination, etc. [246] Nonetheless, it is posited that this problem can be resolved through proper coordination. [247]It is important to state that the Financial Reporting Council of Nigeria Act, in an attempt to harness the administration of Corporate governance in Nigeria, which appears to be in disarray as demonstrated by the proliferation of Corporate Governance Codes,[248] vests in the Financial Reporting Council of Nigeria, the objective of coordinating Corporate governance in Nigeria. [249] However, this provision is without doubt, an affront on the powers of the CAC. [250]Nonetheless, the better option with regards to monitoring in Corporate governance, appears to be titling in the direction of multiple regulatory frameworks.[251]

7.4.2 THE FINANCIAL REPORTING COUNCIL OF NIGERIA

The Financial Reporting Council of Nigeria 'FRCN' is a statutory body established pursuant to the Financial Reporting Council of Nigeria Act 2014. The FRCN is charged with the responsibility of enforcing and approving the enforcement of compliance with accounting, auditing, Corporate governance and Financial Reporting standards in Nigeria.[252] The main functions of FRCN appears to be ensuring that Financial Statements of public entities are in line with accounting and Financial Reporting standards as well as ensuring compliance with

[245]Maleka Femida Cassim, above n 20 at 1137.
[246]Dorothy Farisani, above n 137 at 434.
[247]*Ibid* at 444.
[248]See The Aims and Objectives of the Nigerian Code of Corporate Governance 2008.
[249]Financial Reporting Council of Nigeria Act 2004, s.11c.
[250]CAMA, s.8 (1) (a). See Dorothy Farisani, above n 137 at 444, to the effect that overlap of functions may be a way of the legislature ensuring that there are no loopholes in the enforcement of the law. The author however, advocates for consultation and cooperation in cases of duplication of roles.
[251]D.A.Guobadia, above n 62 at 126.
[252]Financial Reporting Council of Nigeria 'FRCN' Act 2014, s.7 (2) (a).

Corporate governance.[253]Thus, FRCN maintains a register of chartered accountants and other professionals engaged in the Financial Reporting process.[254] The FRCN in pursuance of its objective to regulate Corporate governance in both the private and public sectors[255] has enacted two codes: The National Code of Corporate Governance 2016; [256]and the Nigerian Code of Corporate Governance 2018.[257] In the United Kingdom, The Financial Institutions Reporting Council Limited 'FIRC', a company limited by guarantee, is vested with powers to ensure the integrity and transparency of Financial Statements and business in general. Although The United Kingdom, FIRC is not established under the UK Companies Act, it is however, recognised under the Act.[258] The UK, FIRC is responsible for the establishment of the UK Corporate Governance Codes.[259] A similar body, - The Financial Reporting Standards Council 'FRSC' exists in South Africa. Unlike Nigeria and the United Kingdom, the FRSC is established under the Companies Act.[260] The Code of Corporate Governance in South Africa is however not authored by FRSC but by the Institute of Directors of South Africa. [261]

Concerns about the reliability of Financial Statements have always been expressed in the various Companies Acts, and demonstrated by the provisions regulating Financial Statements and Accounts. [262] However, renewed concerns about Financial Statements in recent times may be attributed to the global corporate scandals of the 1990's, which revolved around mis-statements of Financial Statements. [263] Nonetheless, the powers given to the new regulatory bodies monitoring financial statements, appear to conflict with the powers of the regulatory bodies monitoring the Companies Act. [264] This scenario is more potent in the case of Nigeria, where the FRCN, relying on sections 11c & 51c of the FRCN Act, seems to have assumed the

[253]*Ibid* at s.8 (1).
[254]Ibid at s.8 (1) (f).
[255]*Ibid* at s.11C.
[256]The National Code was suspended due to the controversies it generated, especially with regards to the regulation of Not for Profit entities. See Victor Ahiuma Young 'NECA lauds FG's suspension of FRCN's Code of Corporate Governance' *Vanguard* Nigeria (November 09, 2016, 2.52am).
[257]This Code is also controversial because although it seeks to consolidate the existing sectoral Codes,it does not abolish the existing Codes since the FRCN does not have such powers.
[258]UK Companies Act 2006, s.1228, which allows the Secretary of State to appoint a body like the FIRC as an independent supervisor of Auditors.
[259]The UK Corporate Governance Code 2018.
[260]SA Companies Act 2008, s.203. However, the scope of the Council includes both private and public companies. See Dorothy Farisani, above n 137 at 441.
[261]King IV Report on Corporate Governance for South Africa 2016.
[262]For example, CAMA, Part X1.
[263]Jeffrey N. Gordon, 'What Enron means for the Management and Control of the Modern Business Corporation: Some Initial Reflections' in Thomas Clarke (ed), *Theories of Corporate Governance* (Routeledge, Oxon 2004)322.
[264]Dorothy Farisani, above n 137 at 442.

position of having the power to coordinate Corporate governance in Nigeria over and above the CAC.[265] The fact that the CAC is a member of the FRCN may perhaps give credence to this assumption.[266] The FRCN Act conceivably typifies the disconnect and lack of coordination amongst regulatory bodies, which does not augur well for derivative actions and Corporate governance.[267]

In order to attempt to remove the disconnect in this context, it is suggested as follows:

That the FRCN should be included in the lists of persons who may bring derivative actions;

That representatives of the FRCN should mandatorily be appointed as Inspectors with respect to Investigations involving mis-statements of earnings and fraud in financial records.

7.4.3 THE SECURITIES AND EXCHANGE COMMISSION

The raising of capital by financial institutions to maintain companies is critical to the survival of any economy.[268] It is therefore not surprising that most countries have regulatory bodies supervising the operation of the market for securities. [269]

The Investments and Securities Act (ISA), stipulates in general terms that the Securities and Exchange Commission (SEC) is the apex regulatory body in the Nigerian Capital Market.[270] Thus, SEC has numerous and specific responsibilities bordering on the protection of investors such as protecting the integrity of the securities market against all forms of abuse including insider dealings; intervening in the management and control of capital market operators, etc.[271] With regards to the enforcement of Securities law, SEC is allowed to do the

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[265]The Nigerian case of *Eko Hotels v FRCN* unreported Suit No.FHC/L.CS/1430/2012, where the court held that the FRCN lacked the statutory power to insist that a private company must file its Annual Returns and Financial Statements with it. The attitude of the FRCN may have arisen because although the issue of corporate governance is as old as corporate law, the phrase was hardly used in Companies legislations until after the corporate scandals of the 1990s. This thesis posits that the primary role of the CAC is the enforcement of corporate governance since it is mandated to ensure compliance with the CAMA. See CAMA, s.8 (1) (d).

[266]The FRCN is however, not specifically mentioned as a member of the CAC. However, the FRCN is a parastatal under the Nigerian Federal Ministry of Industry, Trade and Investment, whose representative is statutorily a member of the Board of the CAC. See CAMA, s, 2(b) (viii). See Peter Nta, above n 31 at 183.

[267]For example, no representative of SEC is included in the list of members of the FRCN. Meanwhile the main focus of the FRCN Act is regulating the financial statements of public companies. Also publicly listed companies are regulated by SEC. See Nigerian Investment and Securities Act (ISA) 2007, s.13(c).

[268]Joseph E.O.Abugu, above n 234 at 213.

[269]In Nigeria, the Securities and Exchange Commission is established under the Investments and Securities Act 2007, s.13 (a).See the UK Financial Services Market Act, 2000, which is regulated by the UK Financial Services Authority. See also SA Financial Markets Act 2012, which is regulated by the Financial Services Board 1990.

[270]Nigerian Investment and Securities Act (ISA) 2007, s.13.

[271]*Ibid*.

following:[272]bring administrative proceedings before one of its Committees[273] or institute civil actions before the Investments and Securities Tribunal[274] or any court or Tribunal.[275] It is however, surprising that SEC is not given the power to institute derivative actions in the exercise of its powers to protect investors and regulate capital market operators. [276]In addition, SEC does not have the power to demand an Investigation into the affairs of a company or have any part to play in the Investigation, even if the subject matter of the Investigation might be related to corporate governance infractions involving market abuse by the directors and officers or issuers of securities brought by an investor.[277]

This thesis observes that the separation of corporate governance from regulation of securities is not peculiar to Nigeria. Other jurisdictions appear to be on the same pedestal. [278] The resultant effect of this model of securities regulation has been said to be responsible for the corporate scandals of the 1990s, which in turn have been attributed to the failure of securities regulation to address the humongous agency problems existing in capital market operations.[279] The need to have a stronger SEC is also evidenced in the concerns across the globe about the prevalence of insider trading, market abuse and manipulations.[280]

The US has attempted to resolve the problem of corporate governance in the markets through the promulgation of the Sarbanes-Oxley Act 2002.[281] In other climes like Nigeria, South Africa and the United Kingdom however, the immediate response to the problem has been the promulgation of Codes of Corporate Governance by regulatory institutions. [282] In recent times, CAMA has also stipulated that the responsibility of the CAC to ensure good corporate governance shall not preclude similar responsibilities by SEC. [283]These reactions are perhaps

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[272]Joseph E.O. Abugu, above n 234 at 79-80.
[273]ISA 2007, s.259 (1).
[274]The Tribunal was established by the provisions of ISA 2007, s.284. See Peter Nta, above n 31 at 302. The United Kingdom also has the Financial Services Market Tribunal in place.
[275]Joseph E.O. Abugu, above n 234 at 80.
[276]*Ibid*. See however, Eseni Azu Udu,above n 201 at 21-22, where the author maintains that by a combination of ISA 2007,ss.66(1) & 310, SEC can enforce the corporate governance of companies under its supervision.
[277]Joseph E.O.Abugu, above n 234 at 75.
[278]Eva Lomnicka 'Capital Markets Regulation in Nigeria and the UK: The Role of the Courts' [2002] 46(2) *Journal of African Law* 155-156. See Robert A. Prentice 'The inevitability of a Strong SEC' [2006] 91 *Cornell Law Review* 775 at 778.
[279]Robert A. Prentice, above n 278. See Tshepo Mongalo, above n 225 at 177.
[280]*Ibid*. See Rehana Cassim 'An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 1)' [2008] 20(1) SA *Mercantile Law Journal* 33 at 34.
[281]Robert A. Prentice, above n 278 at 777.
[282]Nigerian Code of Corporate Governance 2018; South African Code of Corporate Governance King IV 2016; UK Code of Corporate Governance 2018.
[283]CAMA, s.8 (2). See Eseni Azu Udu, above n 201 at 21-22.

testament to the position of this thesis that corporate governance and the securities market regulation must go hand in hand. [284]

In view of the arguments raised above, this thesis suggests that the provisions of CAMA should be amended to make way for the inclusion of the Securities and Exchange Commission in the list of persons who can institute derivative actions. [285] In addition, it is posited that SEC should be included in the list of persons empowered to apply to the CAC to conduct Investigations into the affairs of companies. [286] The scope of companies which SEC should be allowed to apply to Investigate must however, be restricted to public companies [287]and companies with foreign portfolio investments whether private or public,[288] since SEC is empowered to regulate the securities of only these types of companies.[289] Admittedly, the provisions of CAMA allow the courts to appoint any person who has made an application to the court, to institute derivative actions.[290] However, applying to the court before being able to institute a derivative action appears to be a long process, since SEC must go through the hurdle of litigation before being adjudged qualified to sue. It is also possible that in the process of applying to court for an order mandating the CAC to conduct an Investigation, the company concerned may get wind of SEC's intention, and consequently take steps to cover its track and thereby defeat the purpose of the application.[291]

It appears that SEC may apply to the court for an order of the court mandating the CAC to conduct an Investigation into the affairs of a company. [292]However, this route is at most an indirect way of enabling SEC to be able to contribute to the concept of Investigation of companies.

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[284]Joseph E.O. Abugu, above n 234 at 74-75. The Johannesburg Stock Exchange Listing Requirements include protection of investors, disclosure of full information to holders of securities, fair and equal treatment of securities holders, and promotion of corporate governance in the conduct of the applicant issuers affairs and in the market place as a whole. Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (3rd edn, Lexis Nexis, Durban 2016) 312.See Tshepo Mongalo, above n 225 at 230, with respect to the role of the Johannesburg Stock Exchange in monitoring the corporate governance of listed companies.
[285]CAMA, s.345.
[286]*Ibid* at ss. 357 &358.
[287]ISA 2007, s.13 (d).
[288]*Ibid* at s.13 (l).
[289]ISA 2007, s.13.
[290]CAMA, s.352 (d).
[291]Paul L.Davies, above n 185 at 630.
[292]CAMA,s.358.

The limitations highlighted above help to underscore the need to expressly include SEC as one of the persons qualified to bring derivative actions and to apply for Investigation of companies. One major reason for canvassing for the inclusion of SEC in the list of those to bring derivative actions, and inclusion in the list of persons that can apply for Investigation of companies, is that SEC is vested with power to regulate the securities of companies and ensure the protection of investors.[293] This implies that SEC should be enabled by law to obtain access to the information which it needs to sustain a derivative action and to protect the rights of companies under its regulation.

It is also posited that Investigation into the affairs of public companies, particularly companies listed under the Nigerian Exchange; and companies with foreign participation both of which are controlled by SEC should be done jointly by the CAC and SEC considering that these companies are under the regulation of SEC. [294]This thesis opines that this approach will facilitate a more effective regulation since SEC will come to the table with all its expertise in the securities market regulation. Therefore, it is further maintained that the power granted to the CAC to require information as to persons interested in shares, and powers to impose restriction on shares,[295] in the course of Investigation can only be properly implemented by applying the expertise of SEC in matters relating to shares and investments.

This thesis also observes that one of the functions of the SEC is to regulate mergers and takeovers.[296] In South Africa, The Takeover Regulation Panel is established under the South African Companies Act.[297] It is not surprising therefore that the Takeover Panel in South Africa may issue Compliance Notices to anyone in defiance of the provisions of the Companies Act. [298]It has earlier been suggested that CAMA should be amended to allow the CAC to issue Compliance Notices as obtainable under the Companies Act of South Africa.[299] However, it is difficult to propose that SEC should be allowed to issue Compliance Notices since unlike the Takeover Panel of South Africa, SEC is not a body established under the Nigerian Companies Act. It is however posited that an amendment of CAMA which confers eligibility on any person

[293]ISA 2007, s.13.
[294]*Ibid*.
[295]CAMA, ss.371 & 372.See J.A.M Agbonika, above n 158 at 413.
[296] ISA, s.13 (p).
[297]SA Companies Act 2008, s.196.
[298]Maleka Femida Cassim, above n 20 at 1156. See Carl Stein, above n 48 at 384.
[299]SA Companies Act 2008, s.171.

to be able to initiate a complaint to the CAC will enable SEC to be able to make recommendations to the CAC to issue Compliance Notices to anybody or persons under its regulation.

Moreover, it is suggested that in line with the provisions of CAMA,[300] the Investment and Securities Act should be amended to enable SEC to attend to the corporate governance of the securities market.

7.4.4 OTHER FINANCIAL INSTITUTIONS

In other climes, the role of the SEC is not limited to the protection of investors' securities, but however, includes the regulation of those aspects of the financial sector such as insurance and banking, which are directly connected with investments.[301] Admittedly, this approach might create conflicts of interests amongst regulatory bodies, but that is not within the scope of this discourse.[302] What is however relevant, is the fact that investment bankers, underwriters, etc. are parties to public issues of securities; and also that their corporate governance is key to investments. [303] The Codes of Corporate Governance that have emanated from these sectors are testimonies to their relevance in corporate governance.[304] More importantly, the laws establishing the regulatory bodies which supervise the financial sector such as banking and insurance in Nigeria, allow the Governor of the Central Bank of Nigeria(CBN), and the Commissioner for Insurance to discipline directors and officers of Banks and Insurance companies respectively .[305] Pursuant to the powers granted under the law, the Governor of the CBN, in the exercise of such powers vested in him sacked some executive directors of ailing banks found to have been involved in corporate governance infractions.[306] This thesis posits that although the exercise of the powers of the Governor of the CBN to remove directors and appoint new ones in their stead was done legally, it is nonetheless an

[300]CAMA, s.8 (2).
[301]Joseph. E.O.Abugu, above n 234 at 89.See the UK Financial Services and Markets Act, 2000. See also Peter Nta, above n 31 at 209.
[302]Dorothy Farisani, above n 137 at 444.
[303]Nigerian SEC Rules 2013, rule 178(2), which defines capital market experts to include investment bankers and underwriters.
[304]The Nigerian Code of Corporate Governance for Banks and Discount Houses 2014; National Insurance Commission Code of Good Corporate Governance for The Insurance Industry in Nigeria 2009.
[305]The Nigerian Banks and Other Financial Institutions Act 2014, s.35 (2) (d); National Insurance Commission Act 2014, s.41 (2) (d).
[306]Okechukwu Nnodim, 'First Bank Directors Fired to Protect Customers, Minority Shareholders-CBN' *The Punch* Nigera (April, 30, 2021) 20.

affront on the principle of corporate democracy, which maintains that it is the inherent right of shareholders to appoint and remove directors.[307] The fact that the power vested on the Governor of the CBN was originally granted under a Decree during the military era in Nigeria may perhaps be a plausible explanation for sidetracking the norm of shareholder hegemony in the appointment and removal of the directors .[308] It is therefore submitted that the power granted to the Governor of the CBN to remove and appoint new directors of banks should to be withdrawn. Furthermore, It is posited that in order to encourage the discipline of executives of banks and insurance companies by their regulators, the CBN and the Nigerian Insurance Commission(NAICOM), should be included in the list of persons who may bring derivative actions for the following reasons: [309] Firstly, if the suggestion of this thesis as made in Chapter Five that the remedies available in derivative actions should be expanded to include the removal of directors is implemented, the regulatory bodies will be able to accomplish the removal of directors in a proper and acceptable manner,[310] while the shareholders might replace them by exercising their inherent powers to appoint new directors. [311]Secondly, it is suggested that Investigation of companies in the banking and insurance sectors by the CAC will best be conducted with the involvement of the relevant regulatory bodies. This is because the relevant regulatory bodies are likely to bring their particular knowledge and expertise to bear on the process of investigation. [312] With regards to recommendation to the CAC pertaining to the issuance of Compliance Notices,[313] it is suggested that the Commissioner of Insurance and the Governor of Central Bank be empowered to do the same.

7.4.5 THE COMPANIES TRIBUNAL

The concept of adoption of Tribunals in the adjudication of disputes is premised on the deficiencies of the regular court system such as incessant delays, bottleneck bureaucracy,

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[307]Olga N.Sirodoeva Paxson' Judicial Removal of Directors: Denial of Directors' License to Steal or Shareholders' Freedom to Vote?'(1998) 50(1) *Hastings Law Journal* 97 at 101.
[308]Nigerian Banks and Other Financial Institutions Decree 1991.
[309]Although the CBN and NAICOM can apply to court to be allowed to bring derivative actions under CAMA.s. 352(d), the process is not encouraging because after crossing the hurdle of being allowed to bring an application, the applicant must bring another application for leave to institute the derivative action.
[310]Rehana Cassim, *The Removal of Directors And Delinquency Orders Under The South African Companies Act* (Juta, Cape Town 2020) 246.
[311]*Ibid* at 48. See Olga N.Sirodoeva Paxson, above n 307 at 101.
[312]Maleka Femida Cassim, above n 13 at 169.
[313]*Ibid*.

inflexibility, lack of expertise, etc.[314] It therefore appears pertinent that there should be a mode of adjudication that will make derivative actions more attractive for stakeholders. In line with this argument, the United Kingdom set up the Financial Services and Markets Tribunal.[315] In Nigeria, the Investments and Securities Tribunal 'IST'[316] was established in order to fairly and justly handle civil cases.[317]The IST is composed of 10 members [318]and each Panel of the Tribunal is composed of at least 3 members.[319] The rationale behind having large membership is that it enables persons who are neither lawyers nor judges, but who however have the expertise in the subject matter under consideration, to bring their know how to bear.[320] The IST enjoys the status of a court of law since it has exclusive jurisdiction in capital market disputes.[321] It is also given requisite powers to effectively perform its functions including summoning of witnesses, mandating the examination of documents etc.[322] Also, its decisions or judgment can be enforced by the Federal High Court.[323] Furthermore, Appeals emanating from the decision of the Tribunal on points of law only must be made to the Court of Appeal, in like manner as Appeals from the High Courts.[324]

The Companies Tribunal in South Africa is established under the Companies Act.[325] The South African Companies Tribunal is a juristic body,[326] whose decision may be filed in the High Court as an order of the court.[327] If the parties to the dispute consent to the order, an application

[314]Henry J, Brown and Arthur L.Marriot, above n 64 at 44. See Carl Stein, above n 48 at 394. See also Peter Nta, above n 31 at 302.
[315]UK Financial Services and Markets Tribunal 2000, s.132.
[316]The Nigerian Investments and Securities Act (ISA) 2007, s.274.
[317]The Nigerian Investments and Securities Tribunal (IST) (Procedural rules) 2003, Rule 2(1) & (2). Rule 2 defines the phrase 'deal fairly and justly' to include providing a reliable,informed,expedient,flexible and affordable dispute settlement mechanism for investors, public companies, capital market operators; promoting capital market integrity etc. See Joseph E.O. Abugu, above n 234 at 423. See also for example, ISA 2007, s.288 (5), which stipulates that the Tribunal must dispose of cases within three months of commencement. See Peter Nta, above n 31 at 191.
[318]ISA 2007, s.275 (1).
[319]*Ibid* at s.276 (1).
[320]Joseph E.O.Abugu, above n 234 at 426.
[321]The Nigerian Investments and Securities Act 2007, s.284. However, the powers of the IST has not been without controversy. For example in the Nigerian case of *SEC v. Kasumu* [2009] 10 NWLR (Pt.1150) 159, the Court of Appeal maintained that the powers vested on the Tribunal was inconsistent with the powers of the Federal High Court under the Constitution.
[322]ISA at s.290 (2).
[323]*Ibid* at s.293 (3).
[324] *Ibid* at s.295.
[325]SA Companies Act 2008, s.193. See Maleka Femida Cassim, above n 20 at 1151. See also Dorothy Farisani, above n 137 at 442.See also Carl Stein, above n 48 at 394.
[326]SA Companies Act 2008, s.195.
[327]*Ibid* at s.195 (8).

must be made to the High Court to confirm the order.[328] The confidentiality of the parties is put into consideration during hearing. [329]This implies that members of the public are not allowed access to the venue of the hearing. [330] However, although the proceedings may be conducted informally, they must also be conducted expeditiously; and in accordance with the principles of natural justice.[331] The Tribunal is usually constituted by a single member Panel in prescribed situations or a 3 Man Panel.[332] Generally, members of the Panel are required to be persons with suitable qualifications and experience in law, commerce, industry or public affairs.[333] However, it is mandatory for at least one member of the Panel to have requisite qualification and experience in law.[334] The functions of the Tribunal include adjudication of any disputes and making any order as empowered by the Companies Act, or performing any other function assigned to it under the law.[335] This is aside its role of assisting in the voluntary resolution of disputes under the ADR method as aforesaid.[336] The rationale behind the establishment of the Companies Tribunal appears to be to decriminalise the enforcement of company law by substituting it with civil/ regulatory or public enforcement.[337] Thus, if the Commission receives a Complaint, it may with the assistance of the agency or the complainant refer the Complaint to the Tribunal for adjudication.[338] In addition, after the receipt of the report of an Investigation, the Commission may also refer the Complaint to the Companies Tribunal.[339] Moreover, a Compliance Notice may be set aside, confirmed or modified by the Companies Tribunal on application.[340]

In India, the National Company Law Tribunal, 'NCLT' was established under the Indian Companies Act 2013. The Indian NCLT is similar to the SA Companies Tribunal in many respects. In the first instance, the composition of any Panel of the Tribunal must reflect both judicial and technical competence. [341] Although, the NCLT is expected to apply the rules of

[328]*Ibid* at s.167.
[329] *Ibid* at s.167 (4).
[330]*Ibid* at s.180 (2).
[331]*Ibid* at s.180 (1).
[332]*Ibid* at s.195 (2).
[333]*Ibid* at s.194 (3).
[334]*Ibid* at s.195 (3) (a).
[335]*Ibid* at s.195 (1).
[336]*Ibid* at s.166.
[337]Maleka Femida Cassim, above n 20 at 1137. See Etienne A.Oliver, above n 62 at 15.
[338]ISA Companies Act 2008, s.169 (1) (b).
[339]*Ibid* at s.170 (1) (b).
[340]*Ibid* at s.172 (2).
[341] Indian Companies Act 2013, s.408.

procedures, it must also adopt some flexibility by applying the rules of natural justice.[342] It is also important to state that cases adjudicated upon under the NCLT must be done expeditiously within a time frame of three months.[343] However, unlike the SA Companies Tribunal whose jurisdiction is limited to ADR and administrative matters,[344] the jurisdiction of the Indian NCLT entails a comprehensive jurisdiction over corporate affairs issues.[345]Appeals from the decision of the NCLT go to the Appellate Tribunal.[346]Furthermore, the NCLT does not need an order of a High Court to be able to execute its decisions.[347]

This thesis is advocating for the establishment of a Company's Tribunal in Nigeria which will support the Federal High Court in the adjudication of corporate disputes by providing a framework for voluntary, administrative and regulatory adjudication. Therefore, it appears that the South African type of Companies Tribunal would be more suitable for Nigeria. The Indian type of Companies Tribunal, if adopted in Nigeria, would be a direct affront on the constitutionally guaranteed powers of the Federal High Court.[348] This thesis is not unmindful of the existing conflict between the Investment and Securities Tribunal 'IST' and the Federal High Court in Nigeria with regards to the adjudication of Capital Market disputes.[349] It is posited that if a similar conflict is brought to the arena of corporate governance, it would be counter- productive, owing to the prevalence of corporate governance problems and the need to harness resources to tackle the problems. This thesis therefore, suggests that a Companies Tribunal should be established in Nigeria as an independent and juristic body like what obtains in South Africa.[350] It is also suggested that the composition of a Panel of the Companies Tribunal should consist of 3 members headed by a legal practitioner who is versed

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[342]*Ibid* at s.424 (1).
[343]*Ibid* at s.422.
[344]SA Companies Act 2008, s.195 (1) (a). See Dorothy Farisani, above n 137 at 443, where the author maintains that administrative matters that fall under the jurisdiction of the SA Companies Tribunal include removal of directors, disputes over company's names, review of compliance notices.
[345]Indian Companies Act 2013, s.424 (3).
[346]*Ibid* at s.421.
[347]*Ibid* at s.424 (3).
[348]The Constitution of The Federal Republic of Nigeria 1999, s.251. See CAMA, s.8. See Peter Nta, above n 31 at 303.
[349]The Constitution of The Federal Republic of Nigeria 1999, s.251. See however, the Nigerian case of *Wealthzone v SEC* [2016] LPELR-41808, where the Court of Appeal maintained that the IST has concurrent jurisdiction with the Federal High Court under the 1999 Constitution by virtue of section 6 (4) (a) of the Constitution, which authorised the National Assembly to establish courts in Nigeria other than those already established under the Constitution. See also Nelson C.S.Ogbuanya, *Essentials of Corporate Law Practice in Nigeria (*Novena Publishers, Lagos 2010) 638-640, on the jurisdictional conflict in Nigeria between the Federal High Court and the Investment & Securities Tribunal.
[350]SA Companies Act 2008, s.193. See Peter Nta, above n 31 at 301.

in corporate governance while the other two members should be versed in capital market operations and accounting or any other relevant discipline. The Head of the Panel may be appointed from the Corporate Affairs Commission while the other 2 members may be appointed from the Securities and Exchange Commission and the Financial Reporting Council of Nigeria. Also, in cases where the adjudication involves a bank or an insurance company, it is suggested that representatives of the Central Bank of Nigeria or the National Insurance Commission should be appointed members of the Panel respectively. It is posited that this approach will help to foster mutual understanding and cooperation among the regulatory authorities since the Tribunal can potentially serve as a rallying point.[351]

It has been said that one of the reasons why regulatory enforcement is not effective is because the regulatory agencies lack financial resources.[352] Therefore, this thesis posits that the establishment of a separate regulatory agency distinct from the CAC for the purpose of regulatory enforcement would help to ameliorate the problem of paucity of funds which is common with regulatory bodies. [353] This thesis suggests that the functions of the Tribunal should be as follows:

Adjudication of disputes involving the contravention of CAMA or any other legislation in breach of corporate governance using the media of negotiation, mediation, arbitration and conciliations;[354]reviews and interventions with respect to Compliance Notices;[355] Investigation of companies;[356] and any other function that may be prescribed by CAMA or any other Act.[357]

This thesis maintains that it is important that the Tribunal be independent of the Corporate Affairs Commission in order to ensure fairness and at the same time to win the confidence of the public. It is also proposed that the Companies Tribunal be made to handle corporate governance disputes using both the ADR and litigation method.[358]

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[351]Dorothy Farisani, above n 137 at 444.
[352]Dennis M Davis, above n 104 at 413.
[353]Maleka Femida Cassim, above n 13 at 171.
[354]SA Companies Act 2008, s.166 (1).
[355]*Ibid* at s.171 (5).
[356]*Ibid* at s.170 (b).
[357]*Ibid* at s.195 (1) (c).
[358]The Investments and Securities Tribunal (Procedure) Rules 2003, rule 3(4), which provides for reconciliation and amicable settlement of disputes before the Investment and Securities Tribunal. See rule 10(a), which allows for Notification of Request for a Negotiated Settlement. See also Joseph E.O. Abugu, above n 234 at 429.

7.5 THE CODES OF CORPORATE GOVERNANCE

One of the major contributions of regulatory bodies to corporate governance is the enactment of the Codes of Corporate Governance. [359]The introduction of the Codes appears to have come into the forefront after the global corporate crisis of the 1990's.[360] The United Kingdom blazed the trail with the establishment of the Code of Best Practices in 1992, [361] while other countries in the Commonwealth like Nigeria and South Africa have followed suit.[362] Codes of Corporate Governance are entrenched upon principles, and unlike laws or legislations, they are not rules but rather best practices or recommendations.[363] Thus, the Codes engender flexibility, and mutual cooperation considering that the principles are not imposed like laws or rules upon the market because they are self-made regulations. [364] In addition, the Codes are based on broad principles of accountability and transparency in corporate conduct.[365] In particular, the Codes focus on matters such as board structure, engagement with stakeholders, nomination and remuneration of directors, risk management, etc. [366] The Codes are therefore soft laws which are capable of addressing market issues in circumstances where the law has stopped or cannot reach. [367] The idea behind the Codes is to further enhance the ability of the shareholders and other stakeholders to engage or monitor the managers of their companies.[368]Furthermore, Corporate Governance Codes have been used to not only address the problem of corporate governance[369] but also addresss

[359]Ige Omotayo Bolodeoku' Making Corporate Governance Work For Public Companies in Nigeria' [2018] 19(1) *Nigerian Journal of Contemporary Law* 1 at 6.
[360]Ramani Naidoo, above n 284 at 32. See Stephen Griffin, *Company Law* (4th edn, Pearson, England 2006)365. See Tshepo Mongalo, above n 225 at 177.
[361]Cadbury Committee Report on Financial Aspects of Corporate Governance. See UK Corporate Governance Code 2018, formerly known as the Combined Code.
[362]Nigerian Code of Corporate Governance 2018; King IV Report on Code of Corporate Governance for South Africa 2016.
[363]Nolan Haskovec 'Codes of Corporate Governance: A Review Working Paper' [2012] *Milstein Center for Corporate Governance and Performance* 8.
[364]Tshepo Mongalo, above n 225 at 231.
[365]*Ibid* at 232. See OECD Principles of Corporate Governance [1999]. See also Thomas Clarke, *International Corporate Governance: A Comparative Approach* (Routledge, London 2007) 245.
[366]The Nigerian Code of Corporate Governance 2018 is hinged on 28 principles.
[367]Compare with the US, which in response to corporate scandals enacted the Sarbanes- Oxley Act, 2002, hinged on the principle of transparency, integrity and oversight of the financial market in order to restore confidence to the market. See Ramani Naidoo, above n 39 at 106. See also Ige Omotayo Bolodeoku, above n 359 at 18.
[368]Olufemi Amao & Kenneth Amaeshi' Galvanising Shareholder Activism: A Prerequisite for Effective Corporate Governance and Accountability in Nigeria' [2008] 82(1) *Journal of Business* Ethics 119 at 123.
[369]Jan Eijsbouts 'Corporate Codes as Private Co- Regulatory Instruments in Corporate Governance and Responsibility and Their Enforcement' [2017] 24(1) *Indiana Journal of Global Legal Studies* 181 at 183.

agency problems arising from the investor- investee relationship between fund managers and beneficiaries of institutional investments.[370] Adherence to Corporate Governance Codes is largely voluntary, although there are some Codes that are mandatory. [371] In any case, Voluntary Codes have been said to be effective in influencing the court to determine the standard of care required in directorial conduct.[372] Also, it has been argued that a director who in the course of litigation, intends to rely on the Business Judgment rule as provided in some legislations, would find it easier to convince the court, if he had been adopting good corporate governance practices.[373]In addition, the principles set out in voluntary Codes may be indirectly enforced if they are incorporated into the listing rules.[374] Moreover, principles in Codes of Corporate Governance have sometimes been enacted as mandatory rules in legislations.[375] Thus, it may be proper to say that Codes of Corporate Governance are founded on the regulatory regime of Corporate Governance. Indeed, the effectiveness of the Codes depends largely on regulatory enforcement.[376] Since the Codes are supposed to be regulatory interventions in Corporate Governance, they further buttress the position of this thesis for the reinforcement of regulatory bodies both financially and with respect to expertise in order to ensure a more effective enforcement of the Codes.[377] This argument is founded on the fact that since Codes are self-regulatory and lack legislative enforcement there is need to strengthen their cooperative strategic compliance attributes.[378]

[370]Nolan Haskovec, above n 363 at 8-9.
[371]The Central Bank of Nigeria (CBN) Code of Corporate Governance for Banks and Discount Houses in Nigeria 2014, para. 8.0, stipulates sanctions for non-compliance. The argument against this legislative approach is that it cannot logically be suitable for all kinds of companies. Also, the cost of compliance with the Sarbanes- Oxley Act by the American economy, has been argued to be an amount considered to be more than the total write-off of Enron, World Com and Tyco combined. See Institute of Directors Southern Africa, *King Report on Corporate Governance* [2009] 3. See also Ige Omotayo Bolodeoku, above n 359 at 24.
[372]Institute of Directors Southern Africa, King IV *Report on Corporate Governance for South Africa* (2016) Part 111: 35.
[373]*Ibid*.
[374]Nolan Haskovec, above n 363 at 12. See Richard Smerdon, *A Practical Guide to Corporate Governance* (3rd edn, Sweet & Maxwell, London 2007) 42.
[375]The Central Bank of Nigeria (CBN) Code of Corporate Governance for Banks and Discount Houses in Nigeria 2014, para. 8.0.
[376]Ige Omotayo Bolodeoku, above n 359 at 36.
[377]Adenike Adewale' An Evaluation Of The Limitations Of The Corporate Governance Codes In Preventing Corporate Collapses in Nigeria' [2013] 7(2) *Journal of Business Management* 116. See C.A.Riley'Controlling Corporate Management: UK and US Initiatives' [1994] 14(2) *Legal Studies* 244 at 263.
[378]Tshepo Mongalo, above n 225 at 233.

7.5.1 THE RELEVANCE OF CORPORATE GOVERNANCE CODES IN DERIVATIVE ACTIONS

The Codes of Corporate Governance are premised on enabling and reinforcing shareholder engagement with the Board.[379] Thus, they promote shareholder activism by encouraging shareholders to contribute to the Agenda at meetings,[380] thus,enabling shareholders to attend meetings; [381] and ensuring that minority shareholders are adequately protected from abusive actions by controlling shareholders, etc.[382] It is posited that these efforts may help to remove the problem of information asymmetry as the shareholders may be able to obtain relevant information for the purpose of instituting derivative actions.[383] This argument is supported by the principle of allowing and protecting Whistleblowing, which is prevalent in the Codes of Corporate Governance.[384] In addition, the flexibility of the Codes allows them to adopt the Alternative Dispute Resolution (ADR) as a means of resolving disputes. [385]

7.6 THE ROLE OF NON- GOVERNMENTAL ORGANISATIONS

Non- governmental organisations are private organisations set up to achieve social or public interests objectives. These include professional and non-professional bodies. Non-Governmental Organisations such as the Legal Profession and Shareholders Associations are identified in this thesis as some of the organisations that have the potential to contribute to the development of the regulatory framework for derivative actions.

7.6.1 THE LEGAL PROFESSION

It has already been submitted in Chapter Six of this thesis that the Contingency Fees Arrangement (CGFA) should be adopted into the Nigerian legal framework in order to encourage the institution of derivative actions. [386] This change must of necessity entail a review of the methods by which fees may be charged by legal practitioners.[387] Therefore, as proposed in Chapter Six of this thesis, the Rules of Professional Conduct have to be amended

[379]C.A.Riley, above n 377 at 262.
[380]For Example, Nigerian Code of Corporate Governance 2018, para. 21.1.
[381]*Ibid* at para. 21.3, to the effect that the venue of general meetings must be accessible to shareholders.
[382]*Ibid* at para.23.
[383]Maleka Femida Cassim, above n 13 at 23.
[384]Nigerian Code of Corporate Governance 2018, para.19.
[385]Dennis M.Davis, above n 104 at 454. See Tobie Wiese, above n 43 at 690-670, on the explicit requirement of the South African Code of Corporate Governance King 111 to apply ADR in the resolution of corporate disputes.
[386]See Above para.6.4.
[387]Tshepo Mongalo, above n 225 at 257.

in order to reflect the application of the CGFA.[388] More importantly, it has been pointed out in Chapter Six, that it is imperative that Nigerian legal practitioners embrace the CGFA in order to improve the system of funding derivative actions litigation. [389]This is expected to ultimately increase stakeholder participation, shareholder activism inclusive.[390]

7.6.2 SHAREHOLDERS' ACTIVISM

The expected role of shareholders in corporate management is the monitoring of managers in order to keep track of corporate governance. [391]This role if well performed may lead to the institution of derivative actions. [392] However, shareholders are oftentimes unable to perform this role due to lack of coordination occasioned by dispersed shareholding and bounded rationality in which a shareholder is reluctant to bring any action because the benefit will accrue to not only him but to other shareholders as well.[393] The activities of Shareholders' Associations and Institutional investors are however, indispensable in ensuring that shareholders are able to checkmate the activities of the Board.[394]

7.6.2.1 The Role of Shareholders' Associations

Shareholders Associations are a veritable tool of corporate governance because they have the potential to engage management and regulatory organisations in the furtherance of their interests. [395]They help to improve investment experience by offering a wide range of educational and information services; and campaigns for good corporate governance. [396]They may also render assistance to shareholders when the companies they invested in misbehave and refuse to act in their best interests.[397] Shareholders Associations are usually private or

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[388]Arad Reisberg, above n 62 at 226. See Tshepo Mongalo, above n 225 at 257, where the author posits that the Law Society in South Africa should amend its rules of court to accommodate Contingency Fees as recommended under King 11 Code.
[389]Tshepo Mongalo, above n 225 at 257.
[390]Ramani Naidoo, above n 39 at 99.
[391]Tshepo Mongalo 'Shareholder Activism in the United Kingdom Highlights the Failure of Remuneration Committees: Lessons for South Africa' [2003] *South African Law Journal* 756.
[392]Ramani Naidoo, above n 39 at 98.
[393]Arad Reisberg, above n 62 at 87.
[394]Paul L.Davies,above n 185 at 425. See Nigel Boardman' The Duties of Directors in the Face of Activism' [2016] 2(2) *Journal of Corporate and Commercial Law & Practice* 1 at 7.See Carl Stein, above n 48 at 369, to the effect that in South Africa, Institutional shareholders have been able to curtail some of the over indulgence of directors, particularly in the area of excessive remuneration packages.
[395]Emmanuel Adegbite *et al* 'The Politics of Shareholder Activism in Nigeria' [2012] 105 *Journal of Business Ethics* 389 at 219. See Peter Nta, above n 31 at 219, 221.
[396] UK ShareSoC Investors Academy Mission Statement @sharesoc.org.
[397] *Ibid*.

non- profit organisations.[398]In Nigeria, in order to encourage public participation in the ownership of companies, the government arranged the formation of Shareholders Associations in 1992.[399] It was only afterwards that private or independent Shareholder Associations were established.[400] Unfortunately, there are reports that Shareholder Associations have become politicised and corrupt.[401] More often than not members of their executives engage in harassment of management or disruption of meetings in order to obtain personal benefits.[402] There are also reports that the Shareholders Associations who align with Board, do so for their own selfish interests to the detriment of the Associations.[403] On a positive note however, Shareholders Associations may appear to justify their establishment by their noble interventions and achievements in corporate governance. For instance in Nigeria,the Stanbic/IBTC Bank saga, in which the Stanbic bank was sanctioned for misstatements in its financial records was initiated by a petition from its minority shareholders under the auspices of Trusted Shareholders Association.[404] Also, in line with the current trend of shareholder activism in Europe, the United States of America and South Africa, there are reports that shareholders have been able to intervene on some occasions in order to restore good corporate governance in their companies.[405]

[398]Examples are South African- Just Share, Shareholders Association of South Africa & United Kingdom Shareholders Association.
[399]Olufemi Amao & Kenneth Amaeshi, above n 368 at 124.
[400]*Ibid* at 125. The list of Shareholders Association on the website of the Nigerian Securities and Exchange Commission shows that there are about 111 Shareholders Associations in Nigeria.
[401]Emmanuel Adegbite *et.al,* above n 395 at 396.
[402]*Ibid*.
[403]*Ibid* at 389.
[404]Henry Odious- 'FRCN v Stanbic IBTC Is FRC Playing the Puppet Again?' This Day Nigeria 29 Oct 2016 https://www.presreader.com. See Shareholders task SEC on minority protection by News Agency of Nigeria- January 9, 2019, where it was reported that Progressive Shareholders Association of Nigeria (PSAN) and the Independent Shareholders of Nigeria (ISAN) emphasised the need for SEC and the Nigerian Stock Exchange now Nigerian Exchange Group, to further enhance the protection of minority shareholders in order to make the market attractive; and also boost liquidity. See *The Nigerian case of Agip Nig. Ltd. v Agip Petroli International and others* [2010] NWLR (Pt.1187) 348 at 380, to the effect that members of the Nigerian Shareholders Solidarity Association instituted the action to protect the rights of minority shareholders in the appeallant company.
[405]The shareholders of Database, a company listed in the Johannesburg Stock Exchange were able to ensure a share buy- back by the company and reduction in remuneration packages of its directors; and also requisitioned an extraordinary general to overhaul the Board. See Ezra Davids & Ryan Kitcat' The Shareholder Rights and Activism Review' [2019] 4 *Law Reviews*- thelawreviews.co.uk. In May 2003, the shareholders of GlaxoSmithKline in the United Kingdom voted against the directors' remuneration policy and demanded a revised remuneration package for the CEO.See also Richard Smerdon, above n 374 at 369. See also Ramani Naidoo, above n 284 at 117.

7.6.2.2 The Role of Institutional Investors

Institutional investors are characterised by professional investors who buy shares in companies on behalf of their clients with funds that are usually sourced from Pension and Insurance fund. [406] The nature of institutional investments entails that they hold substantial shares in various companies.[407] There is therefore, a preponderance of opinion that institutional investors should use their expertise, recognition and financial resources to protect the interests of the companies they are involved with by engaging the Boards at meetings and taking actions to protect the companies. [408]This form of shareholder activism can be exercised through proxy solicitations, election of representatives of shareholders to the Boards or putting forward proposals to the Boards.[409]There are however, suggestions that institutional investors, due to pressure to give returns to the beneficiaries of their investments, are more interested in the short term goal of profitability than in the long span objective of commitment.[410] Consequently, institutional investors prefer to exit a company than use their voices to protect the interests of the company. [411] On the other hand, it has also been posited that managerial discretion should be the default principle in corporate law and not shareholders' empowerment, in line with the principle of separation of ownership from control which gives the power of management of the company to the Board and not to the owners of the company. [412]This position is further reinforced by the claim that institutional shareholder activism has improved neither the profitability nor the well-being of companies. [413] However, it is opined that institutional investment is useful in resolving the problems associated with dispersed ownership occasioned by the separation of ownership

[406]Paul L.Davies, above n 185 at 424.
[407]*Ibid*. See Ramani Naidoo, above n 39 at 101. See also Richard Smerdon, above n 374 at 367.
[408]Tshepo Mongalo, above n 225 at 246. See Stephen M.Bainbridge, *Shareholder Activism And Institutional Investors* (University of California Law and Economics Research Paper Series, The SSRN http.//ssrn.com/abstract=796227) 10. See A.J. Boyle, above n 36 at 75. See also Reinier Kraakman *et al*, *The Anatomy of Corporate Law* (Oxford University Press, Oxford 2004)68. See Carl Stein, above n 48 at 369, alluding to the effectiveness of institutional shareholders, in curbing some of the excesses of the Board of listed companies in South Africa.
[409]Stephen M. Brainbridge, above n 408 at 11.
[410]Tshepo Mongalo, above n 225 at 247. See Thomas Clarke, above n 365 at 109. See also Fabian Ajogwu, *Corporate Governance In Nigeria: Law & Practice* (Centre for Commercial Law Development, Lagos 2007)25.
[411]Ramani Naidoo, above n 39 at 102. See Richard Smerdon, above n 374 at 368.
[412]Stephen M.Bainbridge, above n 408 at 11.
[413]*Ibid*.

from control.[414] The reality is that institutional investment has changed the structure of shareholding from dispersed ownership to concentrated ownership.[415] This is especially true of countries like Nigeria [416]and South Africa,[417] where institutional investments and foreign investments have modified the share ownership structure of companies to a mix of dispersed and concentrated ownership.[418] Furthermore, there are suggestions that institutional investors have increasingly begun to show interests in corporate governance. [419]This position is perhaps buttressed by concerns about the corporate governance between the investors and the fund managers as demonstrated in the different Codes of Conduct for Institutional Investors in different parts of the globe.[420] However, the rise of institutional shareholder activism appears to have been a recent development.[421] The incessant corporate failures of the 1990s may have given rise to the clamour for increased shareholder power in order to address the problem of corporate mismanagement.[422]Thus, it is on record that the securities market in the US, Europe and Africa have experienced significant increase in institutional investments. [423] However, critics maintain that institutional shareholder activism is no longer effective or on the increase.[424]They posit that all the publicity institutional shareholders get is because of the high stake that employee Pension Funds have in institutional investments.[425] Quite incidentally, contribution to the Pension Funds in Nigeria has increased tremendously since the introduction of the contributory Pension Scheme whereby employers and employee contribute some percentage of the employee's salary to a Pension Fund.[426]

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[414]Lucian A.Bebchuk *et.al*, *The Agency Problems of Institutional Investors* (Havard Law School Program on Corporate Governance Discussion Paper 2017-11) 4.
[415]Thomas Clarke, above n 365 at 111.
[416]Boniface Ahunwa, *Globalization and Corporate Governance in Developing Countries* (Transnational Publishers, New York 2003)62.
[417]Tshepo Mongalo, above n 225 at 260.
[418]*Ibid*.
[419]Thomas Clarke, above n 356 at 109-110.
[420]SA Code for Responsible Investment 2011(CRISA), on the fiduciary duties of Institutional Investors. See also SA Code of Corporate Governance, King IV 2016, principle 17.See Ramani Naidoo, above n 284 at 122-123.
[421]Stephen M.Bainbridge, above n 408 at 10. See C.A.Riley, above n 377 at 259.
[422]Stephen M.Bainbridge, above n 408 at 10.
[423]*Ibid*. See Ramani Naidoo, above n 39 at 101.
[424]This has been attributed to the rational apathy of shareholders due to the fact that the benefit of a shareholder's activism will be shared by all; and the problem of access to information or lack of expertise. See C.A.Riley, above n 377 at 259.
[425]Stephen M.Bainbridge, above n 408 at 11. See C.A. Riley, above n 377 at 260.
[426]The Nigerian Pension Reform Act 2014. The Pension Fund in Nigeria has been said to have an asset value of N10.218 Trillion as at December 31, 2019. See www.pencom.gov.ng/wp-content/uploads/2020/02/.

7.7 CONCLUSION

This chapter posits for a Private Public Participation- 'PPP' Model in the derivative actions regime of corporate governance. [427]This is an inclusive approach which adopts a network of private contractual arrangements alongside public and regulatory facilities or structures.[428] It is hoped that this will engender a more robust derivative actions framework which extends beyond the traditional court action or litigation.

It is therefore argued in this chapter that derivative actions must be supported with private contractual arrangements useful for the protection of personal rights within the corporate framework such as may be contained in the Memorandum and Articles of Association and Shareholders Agreements. [429]The contractual arrangements are useful in making provisions for the resolution of corporate problems and disputes both within the court system and Alternative Dispute Resolution(ADR) method.[430]

In pursuance of the objective of the need to strengthen the public/mandatory/regulatory framework, the idea of specialised courts has been mooted as a way of ameliorating the problems of litigation' [431]However, since Investments and Securities Tribunal (IST) in Nigeria, was established as a result of the inadequacies of the Federal High Court which was established as a specialised court, [432]it is evident that there is need to examine other modes in the mandatory/regulatory framework.[433] It has therefore been suggested that the Investigative powers of the CAC - an administrative proceedings which can culminate into the initiation of derivative actions be overhauled.[434] Moreover, in order to take optimum advantage of administrative proceedings, especially in the light of the need to decriminalise corporate law,[435] this thesis has suggested the introduction of the application of Compliance Notices to be issued by the CAC to bring corporate defaulters to order,[436] as well as the establishment of an independent Companies Tribunal.[437] Furthermore, it has been suggested that the functions of the CAC and other relevant regulatory bodies should be enhanced and

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[427]Maleka Femida Cassim, above n 13 at 171.
[428]*Ibid* at 3.
[429]A.J Boyle, above n 36 at 13.
[430]*Ibid*.
[431]Louis Bouchez *et.al*, above n 74 at 7.
[432]Nigerian Investment and Securities Act(ISA) 2007,s.13.
[433]Robert A. Prentice, above n 278 at 778.
[434]CAMA, s.321.
[435]Dennis M Davis, above n 104 at 413.
[436]SA Companies Act 2008, s.171.
[437]*Ibid* at s.193.

coordinated for more effective resolution of corporate problems and disputes including derivative actions. [438] In particular, it is posited that effective monitoring of the Codes of Corporate governance by regulatory bodies is important because they provide a good avenue for the enhancement of derivative actions. [439]In addition, due recognition has been given to the role Non- Governmental Organisations like the legal profession, could play in promoting the funding of derivative actions via its rule of professional ethics and conduct;[440]and the shareholder activism of Shareholder Associations and Institutional Shareholders' investors, which largely has the ability to reduce the problem of lack of coordination - a major hindrance to the institution of derivative actions.[441]

[438]D.A.Guobadia, above n 62 at 125.
[439]C.A.Riley, above n 377 at 262.
[440]J.Olakunle Orojo, above n 231 at 340.
[441]Arad Reisberg, above n 62 at 87.

CHAPTER EIGHT

CONCLUSIONS, RECOMMENDATIONS AND FINAL REMARKS

8.1 INTRODUCTION

This thesis has attempted to examine derivative actions in South Africa and the United Kingdsom with reference to the United States of America and other Commonwealth countries in comparison with Nigeria. More importantly, this thesis is founded on the problem of the inadequacy of the common law derivative action to resolve the problems of the Proper Plaintiff rule and Majority rule as encapsulated in the rule in *Foss v Harbottle*.[1] Meanwhile, statutory derivative actions, following the abolition of the common law derivative actions, [2]has facilitated the avoidance of some of the problems of the rule in *Foss v Harbottle*, such as the problems of the requirement of fraud on the minority and wrongdoer control. [3] In addition, statutory derivative actions has allowed the modification of the principles of ratification in an attempt to resolve the problem of what is ratifiable and what is not ratifiable.[4] This is apart from the general advantage of express legislation which imparts positively on accessibility to the law, unlike under the common law where the law of derivative actions could only be deciphered by lawyers who were encumbered with the onerous tasks of discovering the law amidst conflicting cases.[5]

However, despite the abolition of the common law derivative action[6] and the adoption of the statutory derivative actions regime,[7] many of the problems inhibiting the development of derivative actions are yet to be resolved.[8] Against this backdrop, this thesis has attempted to address and to make recommendations on issues such as removing the obstacles arising from the requirements with respect to application for leave to institute derivative actions;[9]

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[1][1843] 2 Hare 461.
[2]Maleka Femida Cassim, *The New Derivative Action under the Companies Act – Guidelines for Judicial Discretion* (Juta, Claremont 2016) 6.
[3]*Ibid* at 1.
[4]CAMA,s.348.
[5]Nigerian Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law*, [1988] vol. 1, at 2,where the paucity of Nigerian cases on company law and the high cost of obtaining English Law Reports and text books, resulting in difficulty of finding the law was observed.
[6]Maleka Femida Cassim, above n 2 at 9.
[7]Paul von Nessen *et al'* The Statutory Derivative Action: Now Showing Near You '[2008] *Journal of Business Law* 627 at 632-633.
[8]Andrew Keay 'Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act' [2016]16(1) *Journal of Corporate Law Studies* 39 at 41. See David Kershaw 'The Rule in *Foss v Harbottle* is Dead: Long Live the Rule in *Foss v Harbottle*' [2015] 3 *Journal of Business Law* 274 at 276.
[9]See Chapter Four.

the problem of inadequate remedies under the derivative actions regime which has resulted in the preference of litigants for the unfair prejudice remedy;[10] the problem of funding ,etc.[11]Since the disincentives to instituting derivative actions are not limited to substantive issues, this thesis has also attempted to address the procedural problems arising thereof, such as requirement of demand, parties to an action, mode of commencement, etc. [12] In addition, suggestions have been made on not only how improvements can be made in derivative actions litigation, but also how derivative actions can further be enhanced through ADR; and improved regulatory involvement.[13]

8.2 THEORETICAL BACKGROUND

Derivative actions are significant because of the much acclaimed qualities of compensation for breach of corporate duties and deterrence of corporate mal-administration.[14] These values are incalculable, given the spate of corporate governance scandals the world over.[15] The premium placed on derivative actions has culminated in the abolition of the common law derivative actions in many Commonwealth countries like South Africa[16] and the United Kingdom,[17] and the enactment of the statutory derivative actions regime in order to resolve the problems associated with the common law such as the requirements of fraud on the minority and wrongdoer control. [18]However, in Nigeria, the common law derivative actions is yet to be abolished.[19] This means that in Nigeria, recourse has to be made to the common law in order to fill in any lacuna in the statutory derivative actions regime. Consequently, the statutory derivative actions law in Nigeria is not comprehensive. Furthermore, it contains some of the trappings of the common law that other jurisdictions which have abolished the

[10]See Chapter Five.
[11]See Chapter Six.
[12]See Chapter Three.
[13]See Chapter Seven.
[14]Maleka Femida Cassim, above n 2 at 8. See Arad Reisberg, *Derivative Actions and Corporate Governance* (Oxford University Press, Oxford 2007 54.
[15]Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (2nd edn, Lexis Nexis, Durban 2009) 1.
[16]SA Companies Act 2008, s.165 (1).
[17]UK Companies Act 2006, s.262 (1). See Paul L.Davies, *Gower And Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell, London 2008)610. See however, Daniel Lightman, ' Derivative Claims' in Victor Joffe *et al*,(eds),*Minority Shareholders- Law Practice and Procedure* (Oxford University Press, Oxford 2011)29 at 37.See also David Kershaw, above n 8 at 282.
[18]David Kershaw, above n 8 at 276.
[19]CAMA, s.346.

common law derivative actions regime have attempted to avoid.[20] By extension, the statutory derivative actions in Nigeria is far from being clear because of the necessity of recourse to common law from time to time.[21]It is on the basis of these observations that this thesis maintains that the common law derivative actions in Nigeria should be abolished.[22] The advantages inuring from the abolition of the common law derivative actions as discussed in this thesis include firstly, the enhanced flexibility of the exceptions to the rule in *Foss v Harbottle* through the expansion of the cause of action for derivative actions beyond the exceptions recognised in the common law.[23]Secondly, the abolition of common law derivative actions allows for the minimisation of the concept of shareholder dominance by allowing other stakeholders in the corporation to institute derivative actions.[24] This thesis has taken advantage of the flexibility approach to explore the maximisation of the role of regulatory authorities in derivative actions.[25] This approach has been adopted in full recognition of the great importance of the role of Shareholders' Associations and Shareholders' activism in the enabling aspects of derivative actions.[26] Thirdly, as has already been said, the jurisdictions that have abolished the common law derivative actions have been able to do away with the procedural difficulty of the infamous requirements of fraud on the minority and wrongdoer control.[27]Therefore, this thesis has argued for a comprehensive procedural framework for derivative actions in Nigeria which goes beyond litigation to include both ADR and administrative proceedings. [28] Whereas, Chapters Three – Six of this thesis are dedicated to the enabling aspects of derivative actions, Chapter Seven is dedicated to ensuring the activation of the regulatory aspects of derivative actions. In line with the overriding objective of this discourse, which entails having a comprehensive law on derivative actions and

[20]The Nigerian case of *Agip Nig. Ltd v. Agip Petroli International &Ors*. [2010] NWLR (Pt. 1187) 348 at 395,where the court had to make recourse to common law, in order to determine that the procedure for application for leave to commence a derivative action was by way of Motion on Notice as opposed to Motion *Ex –parte*. See Joseph E.O.Abugu, *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers, Lagos 2014) 381.
[21]*Agip Nig. Ltd v Agip Petroli*, above n 20.
[22]See Chapter Two. See also Paul von Nessen *et al*, above n 7 at 632.
[23]Maleka Femida Cassim, 'Shareholder Remedies and Minority Protection' in Farouk Hl Cassim(ed), Contemporary *Company Law* (3rd edn, Juta, Cape Town 2021)1015 at 1055.
[24]*Ibid* at 1059.See SA Companies Act 2008, s.165 (2); CAMA, s.352.See however, UK Companies Act 2006, s.260 (1), which limits the applicant in a derivative action to only members.
[25]Ian M.Ramsay, 'Models of Corporate Regulation: the Mandatory/ Enabling Debate' in Ross Grantham & Charles Rickets (eds),*Corporate Personality in the 20th Century*(Hart Publishing, Oxford 1998) 215 at 219-220.
[26]Emmanuel Adegbite *et.al* 'The Politics of Shareholder Activism in Nigeria' [2012] 105 *Journal of Business Ethics* 389.
[27]UK Companies Act 2006, s.262.See Paul von Nessen *et al*, above n 7 at 631.
[28]Maleka Femida Cassim, 'Enforcement And Regulatory Agencies' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3rd edn, Juta, Cape Town 2021) 1135 at 1167.

simplifying the requirements of the law,[29]it is posited that the birthing of the enabling /mandatory approach, which is termed Private Public Partnership 'PPP' approach in this thesis would make the law more accessible and acceptable to litigants.[30] .

However, as has been posited earlier, the problem of derivative actions is not limited to the challenges it faced at common law.[31] This position is perhaps best articulated in the scarceness or unpopularity of derivative actions even under the statutory regime.[32] This poor outing has been attributed to several factors and can be summarised as follows: Firstly, legislative attitude has maintained that derivative actions should be a matter of last resort,[33] and must be subject to judicial scrutiny. [34] Secondly, it appears that the judiciary has chosen a limiting approach as opposed to an open-minded approach, to its arduous oversight functions with respect to derivative actions.[35] These observations provide enormous stimulus to the arguments in this thesis, arguments which are founded on liberalisation and simplification of the law on derivative actions.[36]

8.3 COMMENCEMENT OF DERIVATIVE ACTIONS

The Third chapter of this thesis is concerned with issues arising from the commencement of new and existing derivative actions applications.[37] In the course of the discourse, issues such as the requirement of Demand,[38] mode of commencement of derivative actions, [39]etc. are addressed.

[29]Andrew Keay &Joan Loughrey 'Something Old, Something New, Something Borrowed: An Analysis of The New Derivative Action Under The Companies Act 2006' [2008] 124 *Law Quarterly Review* 469.
[30]Ian M.Ramsay, above n 25.
[31]Kathy Idensohn 'The Fate of Foss under the Companies Act 71 of 2008' [2012] 24(3) *SA Mercantile Law Journal* 355 at 359.
[32]Andrew Keay, above n 8 at 41.
[33]Arad Reisberg, above n 14 at 137.
[34]Andrew Keay, above n 8 at 40.
[35]*Ibid* at 44.
[36]Andrew Keay & Joan Loughrey, above n 29.
[37]CAMA, s.346.
[38]James H.Shnell 'A Procedural Treatment of Derivative Suit Dismissals by Minority Shareholders' [1981] 69 *California Law Review* 885.
[39]Joseph E.O.Abugu, above n 20 at 380.

8.3.1 THE REQUIREMENT OF DEMAND

The requirement of demand is fundamental to derivative actions given the fact that the Proper Plaintiff and the Majority rule which allow only the board of directors or the majority shareholders to institute corporate actions still remain part of the law. [40]

8.3.1.1 Form of Demand

CAMA merely requires that reasonable notice should be given to the company. [41]It does not however state the form of demand.[42] This thesis suggests that the Notice must be in writing and may be given either in person or by a solicitor or an agent.[43]

8.3.1.2 Mode of Service of Demand.

The mode of service of demand is not expressly stated in the law in Nigeria.[44] However, it is has been suggested that service of demand must be in accordance with the mode prescribed under CAMA for service of documents, which is service to a principal officer of the company at the registered office subject to any mode of service prescribed under the Articles or any other Agreement.[45] This approach may however, accommodate service by electronic means as obtains in recent times.[46]

8.3.1.3 Content of the Notice/ Demand

CAMA prescribes that the Notice of Demand must contain a factual basis for the claim and the actual or potential damage caused to the company. [47]However, it has been suggested that the position in Delaware may be adopted as a guide. In Delaware, the Notice must state the following[48]: the identity of the alleged wrongdoers; the alleged wrongdoing; and the legal action the shareholder wants the company to take.

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[40]Maleka Femida Cassim, above n 2 at 6.
[41]CAMA, s.346 (2) (b).
[42]*Ibid*.
[43]Maleka Femida Cassim, above n 2 at 18.
[44]CAMA, s.346 (2) (b).
[45]*Ibid* at s. 104.
[46]The South African case of *Mouritzen v Greystone Enterprises (Pty) Ltd* [2012] 5 SA 74.See Maleka Femida Cassim, above n 2 at 18.
[47]CAMA, s.346 (2) (d).
[48]Delaware Chancery Court rules 23.1.See James H.Shnell, above n 38 at 889.See also Leo Herzel, Laura D. Richman' Delaware's Preeminence by Design' in R. Franklin Balotti and Jesse A. Finkelstein(eds), *The Delaware Law of Corporations and Business Organisations* (vol.1, Law and Business Incorporated, New Jersey 1986) 637.

8.3.1.4 Time Frame.

Under the Nigerian law, there is no stipulated time frame within which an applicant is required to give reasonable notice of demand to the company.[49] Thus, this thesis has suggested that CAMA should be amended such that a stipulated time frame is given in order to make the law more predictable. [50]It is however posited that since there is no express provision for the appointment of an independent and impartial committee to investigate the demand such as obtains in South Africa,[51] the time frame could be shorter than the 60 days prescribed in South Africa.[52]

8.3.1.5 Refusal of Demand

This thesis advocates for an express provision in CAMA mandating the company to give Notice of Refusal where it does not intend to comply with the Notice of Demand.[53] The requirement of a Notice of Refusal will not only help to expedite the process of bringing derivative actions but will also assist in diffusing the vagueness of the provisions of CAMA which mandates a prospective applicant to give reasonable notice without prescribing the length of the notice.[54] This is because an applicant will be able to proceed to apply for leave immediately after receipt of the notice of refusal.[55] In addition, a notice of refusal given to an applicant by the company will enhance the applicant's ability at the stage of applying for leave to discharge the onus of proof that the company has refused to take action.[56]

8.3.2 CAUSE OF ACTION

This thesis observes that under the Old CAMA, the cause of action for derivative actions could only be deciphered by reference to the common law since it was not expressly stated under

[49]CAMA, s.346 (2) (b). Compare with SA Companies Act 2008, s.165 (4) (b), which prescribes a 60 business days period.
[50]Motunrayo. O.Egbe 'Global Trends In Statutory Derivative Actions: Lessons For Nigeria' [2013]12 *Nigerian Law & Practice Journal* 51 at 63.
[51]SA Companies Act 2008, s.165 (4) (a).See Helena Stoop 'The Derivative Action Provision in The Companies Act 71 Of 2008' [2012] 129 *The South African Law Journal* 527 at 539.
[52]SA Companies Act 2008, s.165 (4) (b).See Fidy Xiangxing and S.H. Goo 'Derivative Actions in China: Problems and Prospects' [2009] 4 *Journal of Business Law* 376 at 390, to the effect that a 30 day period is applicable in China.
[53]SA Companies Act 2008, s.165 (4) (a).
[54]CAMA, s.346 (2) (b).
[55]SA Companies Act 2008, s.165 (4) (b) (ii).
[56]CAMA, s.346 (2) (c).

the law.[57] However, the scope of the cause of action for derivative actions has now been expanded beyond the wrongdoing of directors to include wrongdoing of former directors but more importantly to include negligence of both directors and former directors whether or not the directors have profited or benefitted from the negligence. [58] Nonetheless, it is suggested that the concept of directors in derivative actions should be expressly defined to include shadow directors and de-facto directors. [59]Furthermore, it is suggested that breach of duties by third parties should be expressly included in the cause of action as obtainable in the United Kingdom.[60] It is interesting to note that multiple derivative action which is available in South Africa[61] is now available in the Nigerian jurisprudence.[62] This thesis proposes an amendment of CAMA to the effect that the cause of action in derivative actions may involve not only any breach of the legal right or interests of the company as obtains in South Africa[63]but to also include any right of the company whether legal or equitable. This approach has a wider spectrum which includes breach of wrongdoing or negligence whether or not arising from a benefit accruing from directors and will also cover wrongdoing or negligence of third parties,[64]and also goes further to include equitable rights or interests.[65]

8.3.3 PERSONS WHO MAY BRING DERIVATIVE ACTIONS

8.3.3.1 Shareholders

This thesis accepts that shareholders and former shareholders should be allowed to bring derivative actions as provided under CAMA.[66] It is however suggested that it should be expressly stated that it is immaterial whether the applicant became a shareholder either before or after the cause of action.[67] This is necessary in order to negate the American concept of Contemporaneous Ownership of Shares.[68] It is however suggested that it is better

[57]Old CAMA, s.303.
[58]CAMA, s.346 (2) (a). See Andrew Keay & Joan Loughrey, above n 29 at 469.
[59]UK Companies Act 2006, s.260 (5) (a) (b).
[60]*Ibid* at s.260 (3). See Stephen Girvin *et al*, *Charlesworth's Company Law* (18th edn, Sweet & Maxwell, London 2010) 518.
[61]SA Companies Act 2008, s.165 (2) (a).See Maleka Femida Cassim, above n 2 at 15.
[62]CAMA, s.346 (1).See Pearlie Koh 'Derivative actions' 'Once Removed'' '[2010] *Journal of Business Law* 101.
[63]SA Companies Act 2008, s.165 (2).
[64]Maleka Femida Cassim, above n 2 at 15.
[65]SA Companies Act 2008, s.165 (2). See Maleka Femida Cassim, above n 2 at 5.
[66]CAMA, s.352 (a).
[67]UK Companies Act 2006, s.260 (3). See Motunrayo. O.Egbe, above n 50 at 58.
[68]Oliver C. Schreiner 'The Shareholder's Derivative Action- a Comparative Study of Procedures' [1979] 96 *The South African Law Journal* 203 at 224.

to stipulate that shareholders/ members are entitled to apply to the court to institute derivative actions in order to accommodate members of companies limited by guarantee who are not shareholders of the company since the company does not have any shareholding.[69]

8.3.3.2 Directors

Directors and former directors are allowed to bring derivative actions in Nigeria.[70] This thesis however, argues that directors and former directors of holding companies should be allowed to bring derivative actions with regards to their subsidiaries and sub –subsidiaries just like what obtains under multiple derivative actions.[71]

8.3.3.3 Employees

Directors are required under CAMA to have regard to the interests of employees.[72] In order to give legal teeth to this provision, this thesis suggests that employees, former employees, Trade Unions and their representatives in companies and related companies should be included in the list of persons who can institute derivative actions in Nigeria.[73]

8.3.3.4 The Corporate Affairs Commission

This thesis argues that because of such limitations as funding and expertise, which regulatory bodies are accustomed to, [74]other regulatory bodies apart from the Corporate Affairs Commission,[75] such as the Securities and Exchange Commission,[76] and the Financial Reporting Council of Nigeria,[77] should be included in the list of persons who may institute derivative actions in Nigeria.[78]

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[69]CAMA, s.26 (1).
[70]*Ibid* at s.352 (b).
[71]Daniel Lightman, above n 17 at 82.
[72]CAMA, s.305 (4).
[73]*Ibid* at s.352.
[74]Dennis M.Davis, 'Dealing with Corporate Defaulters: Curbing the Unfettered Access of Criminal law' in Tshepo H Mongalo (ed), *Modern Company Law for A Competitive South African Economy* (Juta, Claremont 2010) 411 at 413.See D.A.Guobadia 'The Rules of Good Corporate Governance and the Methods of Efficient Implementation: A Nigerian Perspective' (2001)22 *Company Lawyer International* 119 at 126.
[75]CAMA, s.8.
[76]Nigerian Investments and Securities Act 2007, s.13.
[77]Financial Reporting Council of Nigeria Act 2004, s.1.
[78]D.A.Guobadia, above n 74 at 125, on the need to have more than one corporate governance regulator in Nigeria.

8.3.3.5 Creditors

This thesis maintains that the argument that creditors should not be included in the list of those who can bring derivative actions since they already have personal contracts with the company does not hold water since persons such as directors who can also have personal contracts with the company are included in the list.[79] It is further suggested that shareholders of companies in liquidation should be included in the list of those who can bring derivative actions since they are residual claimants, where liquidators fail to protect the interests of the company.[80]

8.3.3.6 Any Other Person Appointed By the Court

This thesis commends the fact that any other person appointed by the court may be allowed to institute derivative actions [81]owing to its flexibility and capacity to fill in the gap in the law with regards to persons who may bring derivative actions .[82]It is however, suggested that pending the amendment of the law expanding the list of those who can bring derivative actions,[83] the court should use the provision to allow creditors, employees, Trade Unions or their representatives to institute derivative actions.

8.3.4 PROCEDURE FOR THE COMMENCEMENT OF ACTIONS

8.3.4.1 Mode of Commencement of Proceedings

In response to the confusion arising from the position of the law on the mode of commencement of derivative actions in Nigeria,[84] this thesis hereby suggests the following amendments:

[79]Maleka Femida Cassim, above n 2 at 15. See Andrew Keay 'Directors' Duties and Creditors' Interests' [2014] 13 *Law Quarterly Review* 443.
[80]See however, Daniel Lightman, above n 17 at 78-79.
[81]CAMA, s.352 (d).
[82]Maleka Femida Cassim, above n 2 at 15.
[83]CAMA, s.352.
[84]The Nigerian case of *Agip Nig. Ltd v Agip Petroli International,* above n 20. See Joseph E.O.Abugu,above n 20 at 380. See *contra* Daniel Lightman, above n 17 at 44-45, with respect to the clear procedure under the UK CPR 19.9.

An express provision of the Companies Proceedings rules[85] that derivative actions shall be commenced by the filing of an Originating Summons to commence an action; [86]and a Motion on Notice applying for leave to continue the action.[87]

Furthermore, it is suggested that section 346(1) of CAMA should be adjusted to expressly state that an applicant in a derivative action must bring a Motion on Notice when applying for 'leave or permission to continue the action' as opposed to 'applying for leave to bring an action'.[88] This suggestion is aimed at bringing clarity into the procedure for commencing derivative actions in Nigeria. Since the application to institute a derivative actions must be commenced by filing an Originating Summons,[89] it appears clearer as obtains in the United Kingdom for him to apply for leave to continue the action he has already commenced.[90]

8.3.4.2 Parties to an Action

CAMA does not appear to give any clue as to the parties in derivative actions.[91] It is therefore suggested that the Companies Proceedings Rules should expressly provide that the applicant must bring a derivative action in his name as the plaintiff, albeit, derivatively in the name and on behalf of the company (nominal plaintiff), while the wrongdoers and the company would be sued as defendants and (nominal defendants) respectively.[92]

8.3.4.3 Limitation of Actions

This thesis advocates that a period of limitation of six years as applicable in civil procedure be expressly prescribed for derivative actions under the law, in order to encourage prompt reactions to breach of corporate duties.[93] However, in order to ensure that the interests of an applicant is not jeopardised, it is recommended that the period of limitation should start to count from the time the de-facto plaintiff gets to know about the corporate malfeasance

[85]Cap C 20, Laws of The Federation of Nigeria (LFN) 2004.
[86]Nigerian Companies Proceedings Rule 1992, rule 2.
[87]*Agip Nig. Ltd v Agip Petroli International,* above n 20.
[88]UK Civil Procedure rules 19.9. See Stephen Girvin *et al*, above n 60 at 518. See also Paul L.Davies, above n 17 at 620.
[89]Above n 86.
[90]Daniel Lightman, above n 17 at 69.
[91]CAMA, s.346.
[92]Paul L.Davies, above n 17 at 615. See Daniel Lightman, above n 17 at 43.
[93]The Nigerian case of *Eboigbe v NNPC* [1994] 5 NWLR (Pt.347) 649 at 659.

and not from the time the de-jure plaintiff, i.e. the company becomes aware of it. [94]It is also suggested that the applicant should be deemed to have commenced the action from the date of the application for leave.[95]

8.4 RECOMMENDATIONS FOR APPLICATION FOR LEAVE

This thesis examined the requirements stipulated for judicial review of applications for leave to institute derivative actions under the statutory regime;[96] and other issues such as the problem of ratification [97]and access to justice [98]that may constitute hindrances to an effective derivative action regime.

8.4.1 THE REQUIREMENT OF GOOD FAITH

This thesis observes that good faith is vague and difficult to define or prove;[99] and can at best be described as the opposite of bad faith.[100] In an attempt to define good faith, the applicant may be required to show that he is honest and reasonable.[101] Meanwhile, honesty appears to be subjective while reasonableness appears to be objective in nature and cannot be explained without having to show that the action has been brought in the best interests of the company.[102] Also, an act cannot be said to have been done in good faith if it cannot be shown that there is a good cause of action i.e. a serious question to be tried.[103] In view of the difficulty of defining the concept of good faith and the fact that the requirement can also be collapsed into other requirements of application for leave, that is to say, that the action is in the best interests of the company,[104] and that there is a serious question to be tried;[105] this thesis advocates for the removal of the requirement of good faith for the purpose of

[94]Robert W. Thompson, Scott T. Jeffers, Codie L. Chisholm 'The Limits of Derivative Actions: The Application of Limitation Periods to Derivative Actions' [2012] 49 (3) *Alberta Law Review* 603 at 613.
[95]*Ibid* at 627.
[96]CAMA, s.346.
[97]*Ibid* at s.348.
[98]*Ibid* at s.346 (4).
[99]Maleka Femida Cassim, above n 2 at 37. See Andrew Keay and Joan Loughrey' Derivative Proceedings in a Brave New World for Company Management and Shareholders' [2010] 3 *Journal of Business Law* 151 at 165.
[100]The South African case of *Mbethe v United Manganese of Kalahari (Pty) Ltd* [2017] (6) SA 409.
[101]Maleka Femida Cassim, above n 2 at 38.See Maleka Femida Cassim, above n 23 at 1075.
[102]Maleka Femida Cassim, above n 2 at 38.
[103]Arad Reisberg, above n 14 at 116.
[104]Brighton M Mupangavanhu' Evolving Statutory Derivative Action Principles in South Africa: The Good Faith Criterion and Other Legal Grounds' [2021] 65(2) *Journal of African Law* 293 at 307.
[105]Maleka Femida Cassim, above n 2 at 39.

applications for leave.[106]However, since bad faith is much easier to prove than good faith, [107]it is suggested that CAMA should also be amended to the effect that evidence of bad faith of an applicant shown by defendants should be taken into consideration in deciding whether or not to grant leave in a derivative action.[108]

8.4.2 THE REQUIREMENT OF THE BEST INTERESTS OF THE COMPANY

This thesis has shown that the list of matters that constitute the best interests of the company is wide and open- ended.[109] More materially, the requirement appears to be more concerned with the commercial viability of the litigation.[110] Moreover, this thesis posits that an insider of a company is in a better position to show whether or not a matter is commercially viable or in the best interests of a company than the ordinary applicant in a derivative action.[111] Another significant observation of this thesis is that proof of the requirement of best interests can be narrowed down to showing that there is a serious question to be tried.[112] This is apart from the fact that there is an overlap between the concept of good faith and the concept of the requirement of best interests of the company.[113]

This thesis therefore postulates that because of the problems associated with the requirement of acting in the best interests of the company, [114]it should be expunged from the requirements for application for leave to institute derivative actions in Nigeria. However, it is posited that the defendant directors are nevertheless better able to use the issue of the applicant not acting in the best interests of the company as a defence to any claim against them. It is therefore, proposed that CAMA should be amended to the effect that the court must take into consideration the evidence given by the company such as that the decision of the company to not litigate is in the best interests of the company.[115]

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[106]Kunle Aina *'Current* Development In the law of Derivative Action In Nigerian Company Law*'* [2014] 1 *Babcock University Socio- Legal Journal* 49 at 67.
[107]Maleka Femida Cassim, above n 2 at 44.
[108]Andrew Keay & Joan Loughrey, above n 99 at 169.
[109]Kunle Aina, above n 106 at 76.
[110]*Ibid* at 77. See Arad Reisberg, above n 14 at 104.
[111]Maleka Femida Cassim, above n 2 at 104.
[112]*Ibid* at 76.
[113]Arad Reisberg, above n 14 at 120.
[114]*Ibid*.
[115]Maleka Femida Cassim, above n 2 at 75.

8.4.3 THE REQUIREMENT OF A SERIOUS QUESTION TO BE TRIED

As stated above, the requirements of good faith and acting in the best interests of the company are vague and difficult to determine.[116]Therefore, this thesis recommends an amendment of CAMA to the effect that the requirement of a serious question to be tried[117] be made the sole requirement for application for leave. This position is further supported by the fact that a matter cannot be said to have been brought in good faith and in the best interests of the company if there is lack of evidence that there is a serious question to be tried.[118] However, in order to address the problem of turning inquiries into whether or not a cause of action has a serious question to be tried into a mini-trial,[119] it is suggested that Practice Directions of the Federal High Court should include provisions to the effect that applications for leave to institute derivative actions must be done summarily.

8.4.4 THE REQUIREMENTS IN RESPECT OF EXISTING APPLICATIONS

CAMA stipulates that an applicant may apply for leave for the purpose of intervening in an action to which the company is a party for the purpose of prosecuting or defending the action on behalf of the company.[120]This means that there is room under CAMA to commence derivative actions with regards to existing applications. The law is however, far from being clear in this regard. Therefore, it is suggested that the law should be amended to expressly allow derivative actions with respect to existing applications in these areas: Firstly, a derivative action application may be made to enable an existing action to be continued as a derivative claim.[121] Secondly, a derivative action application may be made to continue a derivative claim brought by another person.[122]Thirdly, a derivative action application may be made to discontinue or settle a derivative action.[123]

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[116]Arad Reisberg, above n 14 at 119.
[117]CAMA, s.346 (2) (d). See SA Companies Act 2008, s.165 (5) (b) (iii).
[118]Maleka Femida Cassim, above n 2 at 65. See Darren Subramanien ' A Discussion of the Requirements of a Trial of a Serious Question of Consequence and The Best Interests of the Company as Contemplated in Section 165(5)(b) of the Companies Act 71 of 2008'[2020] 6(1) *Journal of Corporate and Commercial Law & Practice* 1.
[119]Maleka Femida Cassim, above n 2 at 64.
[120]CAMA, s.346 (1).
[121]UK Companies Act 2006, s.262 (1). See Paul L.Davies, above n 17 at 621.
[122]UK Companies Act 2006,s.264(1);SA Companies Act 2008,s.165(12).See A.J Boyle, *Minority Shareholders' Remedies*(Cambridge University Press, United Kingdom 2002) at 82.
[123]SA Companies Act, s.165 (15). See Daniel Lightman,above n 17 at 61.

8.4.4.1 Continuing an Existing Application as a Derivative Action

It is suggested that the court may exercise its discretion to give permission or grant leave to an applicant to continue an existing action as a derivative action on the following grounds:[124] The manner in which the company commenced or continued the claim amounts to an abuse of court process; the company has failed to prosecute the claim diligently; and it is appropriate for the member to continue the claim as a derivative claim.

8.4.4.2 Substituting an Applicant in a Derivative Action

It is suggested that CAMA should be amended to the effect that in applications for substituting an applicant in a derivative action, the applicant must show proof of the existence of any of the conditions suggested for taking over a corporate action as a derivative action.[125]

8.4.4.3 Discontinuance / Settlements of Derivative Actions

It is suggested that there should be an amendment of the Companies Proceedings rules in Nigeria to the effect that application for discontinuance or settlement must be by motion on notice, in order to ensure every one affected is put on Notice. [126] It is also suggested that the court, in deciding whether or not to grant an application for discontinuance or settlement cannot rely on the general requirements of bringing application for leave because they appear not to be compatible with discontinuance or settlement.[127] It is therefore suggested that as obtainable in other jurisdictions, particular conditions must be stipulated to ensure clarity.[128] Thus, it is recommended that instead of the blanket provision which allows the court to decide whether or not to approve the discontinuance or settlement on such terms as it thinks fit,[129] CAMA should be amended to require the court to consider whether the terms of settlement are fair, reasonable, and adequate when compared with the probable recovery at the trial[130]

[124]UK Companies Act 2006, s.262 (2).
[125]*Ibid*.
[126]James H.Shnell, above n 38 at 903.
[127]CAMA, s.346 (1).
[128]SA Companies Act 2008, s. 165(15).
[129]CAMA, s.349.
[130]Leo Herzel, Laura D. Richman, above n 48 at 666, as per what obtains in Delaware.

8.4.5 THE PROBLEM OF RATIFICATION

In Nigeria, ratification or approval by a majority of the shareholders is not a barrier to instituting a derivative action in the sense that it may be taken into account only in deciding whether or not to grant leave; and in making other orders.[131]However, this thesis suggests that there should be a modification of the concept of ratification as follows:, Firstly, the votes of wrongdoing directors, officers of the company and persons connected with them who are also shareholders of the company will not count when deciding whether a matter has been ratified by the company, even though their votes may count for the purpose of forming quorums for meetings of the company. [132]

Secondly, in line with the UK Companies Act 2006, s.239 (7), it is proposed that CAMA should be amended to expressly stipulate that there can be no ratification where the transaction in issue involves fraud.[133]Thirdly, because of the problem of information asymmetry, lack of coordination and other corporate governance issues that may arise in taking decisions in large companies where there is separation of ownership from control, [134]it is suggested that the concept of ratification should not be applicable to companies with more than 50 members.[135]

8.4.6 AVAILABILITY OF PERSONAL / ALTERNATIVE REMEDY

This thesis suggests that availability of personal remedy should not prevent derivative actions from being instituted as long as there is evidence that the cause of action involves breach of corporate duties.[136] In the same vein, availability of alternative remedies such as ADR should not debar corporate suits since derivative action litigation as suggested in this thesis, also incorporates ADR and administrative proceedings.[137]

8.4.7 ACCESS TO INFORMATION

This thesis maintains that the regime which enables applicants to inspect certain specified records of the company; and disclosure requirements which stipulate that companies must

[131]CAMA, s.348.
[132]Maleka Femida Cassim, above n 2 at 133.
[133]W' Derivative Actions and Foss v Harbottle' [1981] 44(2) *Modern Law Review* 202 at 206.
[134]Maleka Femida Cassim, above n 2 at 133.
[135]Arad Reisberg, above n 14 at 22-23.
[136]The English case of *Kiani v Cooper* [2010] EWHC 577.See Daniel Lightman, above n 17 at 54.
[137]Maleka Femida Cassim, above n 28 at 1167, 1169.

give annual reports to shareholders are not sufficient to provide adequate information to promote derivative actions.[138] Although CAMA now specifically stipulates that the Plaintiff in a derivative action has the right to obtain relevant documents from the defendant,[139] it does not appear to procure any new advantage to the plaintiff since his right to access the documents only arise after he has instituted the derivative action.[140] In any case, the plaintiff has always been so entitled under the rules of civil procedure that enables him to file Notice to produce documents against the defendant.[141]

Therefore, it is suggested that the Nigerian Company Proceedings rules[142] should be amended to include a provision allowing any person qualified to bring a derivative action to apply by motion *ex-parte* to access any information available to the company prior to commencement of the action.

It is further suggested that there should be a legislation on whistleblowing in Nigeria to protect not only employees but anyone who is in possession of any information that may assist an applicant in any derivative action.[143] In particular, it is suggested that CAMA should stipulate that there must be protection for employee whistleblowers in derivative actions as obtainable in applications for Investigations under the Nigerian law at the moment.[144]

8.5 RECOMMENDATIONS FOR FUTHER REMEDIES AND INTERVENTIONS

8.5.1 REMEDIES AVAILABLE UNDER THE COMPANIES AND ALLIED MATTERS ACT

This thesis observes that the summation of the remedies available under derivative actions in CAMA reveal that they are either interlocutory remedies i.e. remedies available during the pendency of an action; [145]or ancillary remedies because they help in the funding of derivative

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[138]Arad Reisberg, above n 14 at 86. See Vela Madlela' The Unqualified Right of Access To Company's Records by Non- Holders of Company's Securities Under South African Company Law' [2016] 40(1) *Obiter* 173 at 176.
[139]CAMA, s.346 (4).
[140]Maleka Femida Cassim above n 2 at 168.
[141]D.I. Efevwerhan, *Principles of Civil Procedure in Nigeria* (2nd edn, Snaap Press Ltd, Enugu 2013)299. See however,Theresa Oby Ilegbune 'Freedom of Information Act, 2011:An Explanatory Commentary' [2011] *Nigerian Law and Practice Journal* 30 at 33, 41, to the effect that it is possible for a prospective applicant to obtain information in limited circumstances under the Nigerian Freedom of Information Act, 2011.
[142]Cap 20, Laws of The Federation of Nigeria, 2004.
[143]SA Protected Disclosure Act (No.26 of 2000).See Philip M Berkowitz' Sarbanes-Oxley and Related State Whistleblower Protections in the United States' [2008] *Business Law International* 200. See Arad Reisberg, above n 14 at 86.See also Monray Marsellus Bortha 'The Protected Disclosure Act 26 of 2000, The Companies Act 71 2008 & The Competition Act 89 of 1998 With Regards To Whistle-Blowing Protection: Is There a Link?'[2014] *Journal of South African Law* 337 at 338-339.
[144]CAMA, s.357 (4) & (5).
[145]*Ibid* at s.347 (2) (a) & (b).

actions;[146]or are compensatory in nature.[147] On the whole, the remedies appear to be discretionary in nature since the court is not expressly mandated to grant any remedy to a successful derivative action litigant.[148] In addition, the remedies do not fully reflect the rationale of derivative actions which is both compensatory and deterrent in nature. [149] The remedies available under CAMA are discussed hereafter.

8.5.1.1 Authorising /Giving Direction for the Conduct of a Derivative Action

CAMA makes provision for interlocutory remedies in derivative actions. Thus, the court can authorise the applicant or any other person to control the conduct of the action, [150]in addition to giving directions for the conduct of the action.[151]These remedies can be granted by the court at the time of granting leave to institute a derivative action and are not substantive remedies that can be ordered by the court at the stage of final judgment.

8.5.1.2 Reimbursement of Legal Fees

The court is given discretion under CAMA to require the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings. [152] This thesis posits that this remedy is an ancillary remedy aimed at assisting an applicant with respect to the financial burden of derivative action litigation.[153] Therefore, this remedy is examined in Chapter Six of this thesis, where the funding of derivative action is discussed.

8.5.1.3 Award of Compensation/Personal Recovery by Shareholders

This thesis maintains that the remedy which allows the court to direct that any amount adjudged payable by a defendant be paid either in whole or in part to former and present shareholders instead of to the company[154] may have been intended at ensuring that any compensation awarded to the company does not end up in the hands of the defendant

[146]*Ibid* at s.347 (2) (d).
[147]*Ibid*.
[148]*Ibid* at s.347 (1).See Maleka Femida Cassim, above n 2 at 149.
[149]Maleka Femida Cassim, above n 2 at 8.
[150]CAMA, s.347 (2) (a).
[151]*Ibid* at s.347 (2) (b).
[152]*Ibid* at s.347 (2) (d).
[153]Maleka Femida Cassim, above n 2 at 139.
[154]CAMA. s.304 (2) (c).

wrongdoers, who are the directors of the company or constitute an unjust enrichment of present shareholders at the expense of former shareholders who suffered from the harm .[155]However, the underlying implication of this provision is that it is a negation of the fundamental principle that a company is different and separate from its members. [156]Besides, the provision also appears to be directed at the compensatory aspect of derivative actions only while neglecting its other side of deterrence, since it borders on monetary compensation alone. [157] In addition, the compensation appears to be directed more at protecting the interests of the owners of the company while relegating the right of the company to be compensated to the background. In order to address these issues therefore, this thesis recommends as follows:

That there should be a specific provision in CAMA expressly stating that the court may order the company to be compensated by any amount it adjudges to be adequate.

That the provision allowing the court to order that compensation in terms of payment be made to the shareholders instead of the company should be abolished.[158]

That in order to infuse the deterrent aspect of derivative action into the remedies available in derivative actions under CAMA, additional remedies such as judicial removal of directors and disqualification of directors should be introduced.[159]

8.5.2 ADDITIONAL REMEDIES

The unfair prejudice action constitutes a major threat to derivative actions due to its wide and liberal remedies.[160] Consequently, where a cause of action falls within breach of personal rights and in tandem with unfair prejudicial action; and breach of corporate duties, litigants have oftentimes preferred to institute the unfair prejudice action.[161] It is therefore posited that the introduction of additional remedies such as judicial removal of directors and

[155]Maleka Femida Cassim, above n 2 at 156.See Andrew Keay, above n 8 at 49.
[156]The English case of *Salomon v Salomon* [1897] AC 22.
[157]Maleka Femida Cassim, above n 2 at 8.
[158]CAMA, s.347 (2) (c).
[159]Rehana Cassim, *The Removal of Directors and Delinquency Orders Under The South African Companies Act* (Juta, Cape Town 2020) 215,243.
[160]CAMA, s.355.See E.O.Akanki, 'Protection of the Minority in Companies' in E.O.Akanki (ed), *Essays on Company Law* (University of Lagos Press, Lagos 1992)276 at 300.See HGJ Beukes &WLJ Swart 'Blurring the Dividing line between Oppression Remedy and Derivative Actions:Kudumane Investment Holdings Ltd v Northern Cape Manganese (Pty) Ltd and others' [2012] 24(4) *SA Mercantile Law Journal* 467 at 471.
[161]A.J Boyle, above n 122 at 23. See Brenda Hannigan 'Drawing Boundaries between Derivative Claims and Unfairly Prejudicial Petitions' [2009] *Journal of Business Law* 606 at 614. See also Daniel Lightman, above n 17 at 76-77.

declaring a director delinquent will not only help to reduce the paucity of remedies under derivative actions, but also reduce the threat to the relevance of derivative actions posed by the unfair prejudice remedy.[162]

8.5.2.1 Judicial Removal of Directors

The removal of directors by shareholders appears to be a myth and is indeed easier said than done owing to several reasons such as lack of coordination, conflict of interests, and procedural impairment.[163]This thesis therefore suggests an express enactment in CAMA to the effect that the courts at the final stage of derivative actions can remove a director on grounds of breach of his duties to the company.[164]This will help to remove the difficulties hindering shareholders from exercising their inherent right to discipline erring directors.[165]

8.5.2.2 Delinquency Proceedings

This thesis maintains that delinquency proceeding is a tool for the discipline of directors through removal from office. [166]Since derivative actions is also a corporate governance device, [167]it is therefore recommended that it is possible to infuse delinquency proceedings into derivative actions as suggested by the applicant in the South African case of *Lewis v Woollam*. [168]It is also maintained that the filtering process of the requirement of demand,[169] application

[162]Rehana Cassim, 'Governance and the Board of Directors' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3rd edn, Juta, Claremont 2021) 535 at 594, where the author described the rights of shareholders to remove directors and to declare a director delinquent as powerful weapons.

[163]Andrew Keay 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders' [2007] *Journal of Business Law* 656 at 680. See Tebello Thabane 'The Removal of Directors In State Owned Companies: Shareholders' Franchise in Jeopardy'? Molefe & Ors. V Minister of Transportation & Ors.'[2018] 30 SA *Mercantile Law Journal* 155,163.

[164]The United States Revised Model Business Corporation Act 2000, s.8.09.See Olga N.Sirodoeva Paxson' Judicial Removal of Directors: Denial of Directors' License to Steal or Shareholders' Freedom to Vote?'[1998] 50(1) *Hastings Law Journal 97* at 101.

[165]Andrew Keay, above n 163 at 680. See Caroline B Ncube' You are Fired! The Removal of Directors under the Companies Act 71 of 2008' [2011] 128 *South African Law Journal* 33.

[166]Tshepo Mongalo, *Corporate Law & Corporate Governance* (Van Schaik Publishers, South Africa 2003)153.See Rehana Cassim,above n 155 at 1.See also Jean Jacques du Plessis and Jeanne Nel de Koker, 'Analyses, Perspectives and Jurisdictional overview' in Jean Jacques du Plessis and Jeanne Nel de Koker (eds), *Disqualification of Company Directors- A Comparative Analysis of the Law in the UK, Australia, South Africa, the US and Germany*' (Routledge, Oxfordshire 2017) 1 at 24- 25.

[167]Maleka Femida Cassim, above n 2 at 5.

[168][2017] (2) SA 547. See Rehana Cassim 'Launching of Delinquency Proceedings under the Companies Act 71 of 2008 By Means of The Derivative Action- *Lewis Group Limited v Woollam'* 2017 (2) SA 547 (WCC) [2017] 38(3)*Obiter* 673.See Pereowei Subai' Disqualifying Unfit Directors: What Lessons Can Nigeria Learn From The Commonwealth Countries?'[2020] *Commonwealth Law Bulletin* 1 at 8.

[169]Rehana Cassim, above n 159 at 247.

for leave,[170] etc., available in derivative actions is not incompatible with delinquency proceedings but rather, helps to prevent its abuse.[171]However, it is suggested that it is important to amend the law in Nigeria so that a company is listed as one of those persons who can bring delinquency proceedings.[172] This will enable stakeholders to bring derivative actions with respect to delinquency proceedings in order to protect the interests of the company where the company has failed to do so.[173]

8.5.3 JUDICIAL DERIVATIVE ACTIONS-THE DERIVATIVE ACTIONS REMEDY UNDER THE UNFAIR PREJUDICE REMEDY-

One of the significant proofs of the benevolence of the unfair prejudice remedy is the availability of derivative actions as one of its remedies. [174]However, the preponderance of opinion is that it is impracticable to expect an applicant who has instituted an action under the unfair prejudice faction of minority protection to be willing to institute another action i.e. a derivative action at the end of the unfair prejudice action.[175] In order to make this derivative action remedy practicable and more attractive to litigants, this thesis posits that derivative actions emanating from unfair prejudicial actions should be branded as judicial derivative actions, since they are instituted by virtue of an order of the court.[176] It is maintained that this will not only differentiate derivative actions ordered by the court from other derivative actions[177] but also enhance the possibility of their being exempted from the requirements that have appeared to constitute hurdles or barriers to derivative actions.[178] Thus, it is suggested that CAMA should be amended to the effect that judicial derivative action is expressly exempted from the requirement of demand,[179] and the requirement of obtaining leave.[180] In addition, since judicial derivative action under the unfair prejudice remedy is still a type of derivative action,[181] it is recommended that in order to link it expressly with

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[170]*Ibid* at 248.
[171]Rehana Cassim, above n 168 at 682.
[172]SA Companies Act 2008, s.162 (2). Compare with CAMA, s.254 (1) (b) (ii).
[173]Rehana Cassim, above n 159 at 247.
[174]CAMA, s.312 (e).
[175]Arad Reisberg, above n 14 at 279.
[176]CAMA, s.355 (2) (e).
[177]*Ibid* at s.346.
[178]*Ibid*.
[179]*Ibid* at s.346 (2) (b).
[180]*Ibid* at s.346 (2) (d)-(f).
[181]*Ibid* at s.355 (2) (e).

derivative actions, [182]CAMA should be amended to the effect that the court can order judicial derivative actions to be instituted at the instance of not only members but also by any person who is qualified to bring a derivative action under CAMA.[183]

8.6 FUNDING OF DERIVATIVE ACTIONS: PROBLEMS AND OPTIONS

The problem of funding derivative actions is a major hindrance to its use as a corporate governance tool.[184] This thesis posits that since an applicant in a derivative action is bringing an action to protect the rights of the company he ought not to bear the financial burden of the action.[185] Furthermore, there should be enough incentives to motivate him to institute the action.[186]

8.6.1 COSTS AND INDEMNIFICATION

This thesis maintains that the system of costs and indemnification does not constitute sufficient incentives for the funding of derivative actions.[187] Also, the civil procedure system of the loser paying the costs of the winner is a disincentive to instituting derivative actions. [188]Furthermore, even where costs are awarded to a successful plaintiff, they are awarded at the end of the case; are usually nominal in nature, and therefore not sufficient to reimburse the expenses.[189] More importantly, the power of the court to award costs is discretionary, and thus, creates uncertainty.[190] Although, interim costs may be awarded at any time during the proceedings,[191] it is doubtful if the courts will grant interim costs prior to the determination of the issue of whether the applicant is entitled to be granted leave to bring an action.[192] Another factor which might affect the granting of interim costs is the Financial Need Test.[193] This thesis however, suggests that if the financial circumstances of an applicant

[182]*Ibid* at s.346.
[183]*Ibid* at s. 352.
[184]Maleka Femida Cassim, above n 2 at 139.
[185]*Ibid*.
[186]*Ibid*.
[187]Arad Reisberg, above n 14 at 452.
[188]*Ibid* at 226.
[189]*Ibid.*
[190]CAMA, s.347 (2) (d). See Maleka Femida Cassim, above n 2 at 151.
[191]*Ibid* at s.347 (1).
[192]Maleka Femida Cassim, above n 2 at 153.
[193]Daniel Lightman, above n 17 at 62.

is to be considered relevant at all, it should become irrelevant once the applicant has obtained leave to institute a derivative action.[194]

As a means of indemnifying an applicant in a derivative action, the court is empowered to make an order requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.[195] It is suggested that the following factors may be used to determine what is reasonable, considering that the term 'reasonable' is not defined in CAMA: the nature and intricacy of the case; the benefit likely to be obtained from the litigation; the net worth or financial resources of the company; other extraneous circumstances etc.[196] It is posited that the adoption of these suggestions in the Practice Direction of the Federal High Court of Nigeria would also help to reduce the uncertainties in derivative action litigation funding.

This thesis observes that the requirements for obtaining leave to institute a derivative action are parallel to the criterion of reasonableness of the action in indemnification applications as recommended in *Wallersteiner v Moir (No.2)*.[197] It is therefore suggested that the law should be amended to the effect that once the court has decided to grant an applicant leave to institute a derivative action, he should be automatically entitled to an indemnity since he would also have fulfilled the condition for the grant of an indemnity order.[198]It is posited that this approach would help to save time and reduce cost of litigation. Secondly, it is posited that making the indemnity order mandatory after granting leave to institute a derivative action will remove the problem of uncertainty created by the discretionary stipulation with regards to costs and indemnity.[199]

8.6.1.1 Directors' Indemnification and Insurance

It has been argued that indemnification does not provide any incentive to bringing derivative suits but merely reduces the deterrence to bringing such suits.[200] This is mainly because the applicant is only indemnified after he has incurred costs with respect to the derivative

[194]Maleka Femida Cassim, above n 2 at 151.
[195]CAMA, s.347 (2) (d).
[196]Maleka Femida Cassim, above n 2 at 76.
[197][1975]2 WLR 389 at 397. See Maleka Femida Cassim, above n 2 at 151.
[198]Maleka Femida Cassim, above n 2 at 151.
[199]SA Companies Act 2008, s.165 (10). See Anil Hargovan 'Under Judicial and Legislative Attack: The Rule in Foss v Harbottle' [1996] 113 SALJ 631 at 648.
[200]Arad Reisberg, above n 14 at 452.

action.[201] On the other hand, the respondent directors may be entitled to not only reimbursement of the costs but also payment for advance expenses.[202] This is apart from the fact that directors and officers are often protected by Directors and Officers Insurance. [203]

8.6.1.2 Procedure for Obtaining Indemnification

An applicant should be automatically entitled to indemnification once he has been granted leave.[204]It is however posited that there is the need for a formal application to be made in order to show the quantum of costs incurred. Otherwise, the court would lack the basis for determining the amount to be awarded. This thesis therefore submits that there should be an amendment of the Companies Proceedings rules in Nigeria to include a stipulation that Indemnification will only be ordered by the court in a derivative action if there is an application by way of Motion on Notice in which the company is made the respondent; and supported by an affidavit stating the facts in support of the application.

8.6.2 OTHER METHODS OF FUNDING

lt is suggested that in view of the inadequacies of the costs and indemnity arrangement with respect to applicants in derivative action *vis-a- avis* the incentives available to directors and officers of the company who are usually the respondent wrongdoers, other methods of funding derivative suits must be sought.

8.6.2.1 The Conditional Fee Arrangement

A Conditional Fee Arrangement (CFA) is a No- Win-No Fee[205] arrangement in which the lawyer shares the risk of litigation with the client because he does not charge any fees if the case is lost, but however, charges a Success Fee over and above his normal fees if he is successful. [206]However, the risk required to be borne by the lawyer in a CFA arrangement is limited to only legal fees.[207] This therefore means that other costs would have to be borne by the

[201]*Ibid*.
[202]Vanessa Finch 'Personal Accountability and Corporate Control: The Role of Directors' and Officers' Liability Insurance' [1994] 57 *Modern Law Review* 880.
[203]Maleka Femida Cassim, above n 2 at 167.
[204]*Ibid* at 157.
[205]Kerry Underwood, *No Win, No Fee No Worries* (CLT Professional Publishing Ltd, London 1999) RR3.
[206]*Ibid*.
[207]*Ibid.*

applicant.[208] Consequently, the CFA may have to rely on indemnity (which has already been criticised as not being an incentive to the funding of derivative actions) as a means of support.[209] This is besides the fact that CFA is complicated by issues such as determining the success fee etc.[210] Therefore, this thesis does not recommend the CFA regime for Nigeria.

8.6.2.2 The Contingency Fee Arrangement

The US style Contingent Fees Arrangement-CGFA is also a No Win- No Fee modem which allows a lawyer to charge fees calculated as a percentage of the award made by the court, if he wins.[211] CGFAs are however, much simpler than CFAs for the reason that there is no issue about calculation of Success Fee or determination of the Percentage Cap on damages.[212] CGFAs also appear to be more economically efficient than CFAs.[213] CGFA is arrived at by a fixed percentage of the award or recovery in a suit.[214]It has been said that a lawyer who is engaged under a CGFA is more likely to encourage Alternative Dispute Resolution 'ADR' or early settlement than his counterpart who is engaged under a CFA.[215] This is because the fees of the lawyer under the CGFA are directly related to the amount of settlement.[216]

CGFA had been viewed in the UK as being against public policy because they create a potential conflict of interest between the lawyer and the client, since the lawyer is entitled to a percentage of the sum awarded or any recoveries made.[217] It has however now been accepted into the UK legal framework.[218]

There appears to be no focused legal framework for the funding of litigation in Nigeria.[219]However, some form of Contingency Fee Arrangements (CGFA) appear to be

[208]*Ibid.*
[209]Arad Reisberg, above n 14 at 452.
[210]*Ibid* at 259.
[211]*Ibid*.
[212]*Ibid*.
[213]Estelle Hurter 'Contingency Fees: The British Experience and Lessons for South Africa' [2001] 34(1) *Comparative and International Law Journal of South Africa* 71 at 76.
[214]John Peysner 'What's Wrong with Contingency Fees' [2001] 10 *Nottingham Law Journal 22* at 40.
[215]*Ibid* at 34.
[216]Estelle Hurter, above n 213 at 76.
[217]Arad Reisberg, above n 14 at 257.
[218]UK Legal Aid, Sentencing and Punishment of Offenders Act 2012, Part 2.
[219]Justina Ibebunjo, Iheanyinchukwu Dick and Pascal Ememonu 'The Third Party Litigation Funding Law Review' [2018] 2 *The Law Reviews* 112.

approved by the Rules of Professional Conduct for Legal Practitioners 2007.[220] This is supported by conflicting and seemingly controversial cases which are however, limited to debt recovery cases scenarios.[221] In view of the obvious limitation of the Rules of Professional Conduct for Legal Practitioners towards regulating the practice of CGFA, this thesis suggests a proper and structured framework for Contingency Fee Arrangement in Nigeria as follows:

The enactment of a substantive law on Contingency Fee Arrangement;[222]

The amendment of the Companies Proceedings rules to include regulations for Contingency Fee Arrangement;

Practice Direction on Contingency Fee Arrangement by the Federal High Court.

Moreover, in order to address the criticism that lawyers' fees under the CGFA are incongruent with the amount of work done and risk taken, [223] it is suggested that the legal profession must make rules intentionally regulating how lawyers' fees will be charged under the CGFA.[224] It is also suggested that in order to enhance the enforcement of the regulation, the law should stipulate that the Bar Association should be informed of any CGFA.[225]

In a CGFA, the wining party is under obligation to pay enormous fees to his lawyer.[226] A combination of this factor with the system whereby the losing party is ordered by the court to pay the costs of the other party puts the defendant at a disadvantage.[227] Therefore, in order to remove the concerns about the compatibility of the fee-shifting regime with CGFAs,[228] it is suggested that the fee-shifting regime in civil procedure be removed with respect to derivative actions.

8.6.2.2.1 *The Common Fund and Substantial Benefit Doctrine*

This thesis suggests that the Contingency Fee Arrangement (CGFA) must be accompanied by the adoption of the US Common Fund and Substantial Benefit doctrine. [229]This approach will

[220]rule 50(1). See J.Olakunle Orojo, *Professional Conduct of Legal Practitioners In Nigeria* (Mafix Books, Lagos 2008)340.
[221]The Nigerian case of *Orok Oyo v Mercantile Bank* (Nig) Ltd [1989] 3 NWLR (Pt. 108) 213.Compare with the Nigerian case of *Savannah Bank Plc v Opanubi* [2004] 15 NWLR (Pt.896) 437.
[222]Estelle Hurter, above n 213 at 78.
[223]Arad Reisberg, above n 14 at 260.
[224]Tshepo Mongalo, above n 166 at 281.
[225]*Ibid*.
[226]Arad Reisberg, above n 14 at 260.
[227]*Ibid* at 226.
[228]*Ibid.*
[229]Maleka Femida Cassim, above n 2 at 159.

achieve at least two things. Firstly, it will ensure that in line with the Common Fund doctrine, the indemnification of the plaintiff by the company must come from any damages or compensation obtained from the derivative actions.[230] Secondly, where the remedy is not measurable in monetary terms such as removal or disqualification of directors, the substantial benefit doctrine will be used to determine the amount that the applicant is entitled to out of the damages or compensation obtainable from the derivative actions.[231] However, in order to address the criticisms arising from the application of the hourly rate method in the Substantial Benefit doctrine to calculate the compensation due to an applicant, this thesis suggests as follows:

That the hourly rate method should be discarded;

That the courts should be guided by factors such as the importance of the remedy obtained for the company, the financial capacity of the company, the size of the company, etc. in determining the amount of compensation; and

That the guidelines suggested should be used as the Practice Direction of the court.

8.7 RECOMMENDATIONS FOR A PRIVATE PUBLIC PARTICIPATION 'PPP' FRAMEWORK

8.7.1 PRIVATE / CONTRACTUAL ENFORCEMENT

This thesis argues that derivative action litigation is inadequate to support an efficient derivative actions regime.[232] It is therefore suggested that derivative actions can be resolved contractually through provisions of the memorandum and articles of association and shareholders' agreements.[233] Notable among these provisions is the provision for the resolution of disputes through the Alternative Dispute Resolution' ADR'. [234]By and large, it is suggested that derivative actions should be defined to include contractual resolution of disputes.[235]

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[230]*Ibid*.

[231]*Ibid*.

[232]Iris H.Chiu' Contextualising Shareholders' Disputes- a Way to Reconceptualise Minority Shareholder Remedies' (2006) *Journal of Business Law* 312 at 320-321.

[233]*Ibid* 324.

[234]*Ibid*.

[235]Tobie Wiese' The Use of Alternative Dispute Methods in Corporate Disputes: The Provisions of The Companies' Act of 2008' [2014] 26(3) *SA Mercantile Law Journal* 668 at 671. See Carl Stein, *The New Companies Act Unlocked* (Siber Ink, Cape Town 2011) 75.

8.7.2 PUBLIC/ MANDATORY/ REGULATORY ENFORCEMENT

In view of the problems associated with litigation, it has been suggested that Special Courts should be established in order to resolve some of the problems of the traditional courts particularly due to lack of expertise.[236] This thesis however, maintains that the establishment the Federal High Court in Nigeria, vested with original and exclusive jurisdiction in civil causes and matters arising from the operation of CAMA or any other enactment with regards to the operation of companies,[237]appears not have been able to meet this expectation.[238]Thus, the Investment and Securities Tribunal was subsequently established in Nigeria to handle capital market disputes.[239]It also appears that the establishment of the new Administrative Proceedings Committee in Nigeria is not particularly targeted at resolving derivative action disputes.[240] Thus, it is suggested that a Companies Tribunal should be established in Nigeria because of its flexibility and informality which are well suited for ADR and administrative proceedings.[241] It is posited that if this position is combined with the suggestion that the administrative powers of the CAC should be strengthened by specifically allowing it to receive complaints and issue Compliance Notices to any person in breach of CAMA, [242] it can help to further decriminalise corporate law.[243]

It is also suggested that the powers of the CAC to conduct Investigations into the affairs of a company be reinforced particularly by liberalising the requirements for shareholders intending to apply for Investigation;[244] and stipulating that the costs of the Investigation should be paid by the CAC.[245] In order to ensure proper conduct of Investigations, it is suggested that Investigations of companies in Nigeria should not be solely a CAC affairs. [246] That is to say, that other statutory bodies regulating the companies whose affairs are being

[236]Jacqueline L. Allen *et.al*,' Business Courts ' in American Bar Association *Recent Developments in Business and Corporate Litigation*(vol.2, ABA Publishing, Chicago 2014) 147.
[237]The Constitution of The Federal Republic of Nigeria1999, s.251,as amended.
[238]Joseph E.O. Abugu, *Company Securities: Law and Practice* (2nd edn, MIJ Professional Publishers, Lagos 2014) 423.
[239]Peter Nta, *Shareholders' Rights Under The Nigerian Laws* (Tiger Press Ltd, Nigeria 2009)1 302.
[240]CAMA, s.851.
[241]Maleka Femida Cassim, above n 28 at 1151.
[242]See SA Companies Act 2008, s.171.
[243]Maleka Femida Cassim, above n 28 at 1137.
[244]CAMA, s.357 (2) & (3).
[245]*Ibid* at s. 367.
[246]D.A.Guobadia, above n 74 at 125.

Investigated such as SEC, should also be involved.[247] Likewise, it is posited that since other regulatory bodies apart from the CAC are also concerned with or affected by the corporate governance of such companies that they regulate, they should be specifically included in the list of those who can bring derivative actions.[248] In addition, this thesis posits that CAC should not be the only regulatory body responsible for ensuring compliance with CAMA.[249] However, there is need to strengthen and coordinate the functions of the regulatory bodies such that the conflicts that may arise from carrying out their various statutory responsibilities can be reconciled.[250]

This thesis maintains that the strengthening of regulatory bodies will help to ensure the enforcement of the Codes of Corporate Governance which are usually authored by the regulatory bodies; [251]and have been recognised as means of ensuring that the shareholders engage the management of the companies. [252] Meanwhile, the role of Shareholders' Associations and Institutional Shareholders in promoting derivative actions are recognised by this thesis as instruments for stimulating effective monitoring of the Board.[253]It has also been suggested that there is the need for the legal profession being also a Non- Governmental Organisation to support the CGFA by amending its rules of professional conduct accordingly.[254]

[247]Nigerian Investment and Securities Act 2007, s.13.
[248]For example, CAMA, s.8 (2),acknowledges the role of the Securities and Exchange Commission in corporate governance. See Eseni Azu Udu, *Principles of Company Law And Practice in Nigeria* (2nd edn, Miridam Prints, Enugu 2021) 22.
[249]D.A.Guobadia, above n 74 at 125.
[250]Dorothy Farisani, 'The Potency of Co-ordination of Enforcement Functions by the New and Revamped Regulatory Authorities under the New Companies Act' in Tshepo H Mongalo, (ed), *Modern Company Law for a Competitive South African Economy* (2010) 433 at 444.
[251]Ige Omotayo Bolodeoku' Making Corporate Governance Work For Public Companies in Nigeria' [2018] 19(1) *Nigerian Journal of Contemporary Law* 1 at 6. See Rehana Cassim, 'Corporate Governance' in Farouk Hl Cassim (ed), Contemporary *Company Law* (3rd edn, Juta, Claremont 2021) 641 at 674.
[252]Thomas Clarke, *International Corporate Governance: A Comparative Approach* (Routledge, London 2007) 245.
[253]Stephen Bainbridge 'Shareholder Activism And Institutional Investors, UCLA Law and Economics Research Paper Series The SSRN http.//ssrn.com/abstract=796227.at 10. See Rehana Cassim, above n 246 at 676-677.
[254]Nigerian Rules of Professional Conduct for Legal Practitioners, 2007, ss.50 &51. See Tshepo Mongalo, above n 166 at 281.

8.8 FINAL REMARKS

The fact that so much attention has been given to the concept of corporate social responsibility and corporate sustainability in recent times does not appear debatable.[255] It is however, posited that the ideals of corporate citizenship and responsible business[256] require a strong internal corporate governance framework to succeed.[257]Although, the concept of corporate governance has also been receiving global attention, the modus operandi appears to be reactionary in the wake of global financial crises of the 1990s.[258] Regrettably, the responses have been tilted more towards re-visiting the ethical behaviour of players in the corporate set-up without a commensurate objective of fortifying the means of enforcement of corporate duties.[259]

The focal point of this thesis arises from the position that derivative actions is a major factor in determining the state of corporate governance in any environment since it borders on how corporate responsibility can be enforced. [260]The discussions above have therefore been concerned about how more attention should be given to the subject matter; and how the process of instituting derivative actions could be simplified and made more attractive such that it becomes the preferred choice in the market for redress for corporate infractions.[261] These recommendations which entail both legal[262] and regulatory [263]reforms are posited as being capable of guaranteeing a sustained future for corporate governance.

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[255]Ramani Naidoo, *Corporate Governance- An Essential Guide for South African Companies* (3 rd edn, Lexis Nexis, Durban 2016) 375. See Jerome J.Shestack, 'Global Responsibility of Business' in Ramon Mullerat (ed), *Corporate Social Responsibility : The Corporate Governance of the 21st Century(*Kluwer Law International, Hague 2005) 97. See however, Aina Oyetunde, 'Public Private Partnership, A Tool For Sustainable Development And Corporate Responsibility' Epiphany Azinge *et.al* (ed), *Corporate Governance and Responsibility: A Tribute in Honour Of Professor I.A.Ayua* (Nigerian Institute of Advanced Legal Studies, Lagos 2014) 249, where the author maintains that Public Private Partnership-(PPP) is only a means of delivery of an asset or service or providing infrastructure.

[256]Joseph E.O.Abugu, above n 20 at 611.

[257]Ramon Mullerat, 'Global Responsibility of Business' in Ramon Mullerat (ed), *Corporate Social Responsibility : The Corporate Governance of the 21st Century*(Kluwer Law International, Hague 2005) 3 at 5. See Mervyn King SC, ' The Synergies and Interactions between King 111 and the Companies Act 61 of 2008' in Tshepo H Mongalo (ed), *Modern Company Law for A Competitive South African Economy* (Juta, Claremont 2010) 446 at 449. See also Tshepo Mongalo, above n 166 at 177.

[258]John C.Coffee Jr, 'What Caused Enron? A Capsule Social and Economic History of the 1990s' from Journal of Financial Economics (1976) in Thomas Clarke(ed), *Theories of Corporate Governance* (Routeledge, Oxon 2004) 332.

[259]Ramani Naidoo, above n 15 at 32.

[260]Alan Dignam, John Lowry, *Company Law* (7th edn, Oxford, London 2012)194. See Maleka Femida Cassim, above n 2 at 8.

[261]Brenda Hannigan, above n 161 at 614.

[262]Maleka Femida Cassim, above n 2 at 1.

[263]*Ibid* at 169.

BIBLIOGRAPHY

1. LEGISLATION

1.1 NIGERIAN LEGISLATION

Banks and Others Financial Institutions Act 2014

Companies and Allied Matters Act 2020

Companies and Allied Matters Act 1990

Companies Act 1968

Constitution of The Federal Republic of Nigeria 1999

Freedom of Information Act 2011

Financial Reporting Council of Nigeria Act 2011

Investment and Securities Act (ISA) 2007

Lagos Multi- Court House Law 2007

Limitation Act 2004

Limitation Law of Lagos State 2015

National Insurance Commission Act 2004

Pension Reform Act 2014

Companies Proceedings Rules 2004

Federal High Court (Civil Procedure) rules 2009

High Court of F.C.T, Abuja (Civil Procedure) Rules 2005

Investments and Securities Tribunal (IST) (Procedural rules) 2003

Securities and Exchange Commission Rules 2013

Rules of Professional Conduct for Legal Practitioners 2007

Code of Corporate Governance for Banks and Discount Houses 2014

Nigerian Code of Corporate Governance 2018

1.2 SOUTH AFRICAN LEGISLATION

Companies Act 61 of 1973

Companies Act 71 of 2008

Constitution of The Republic of South Africa, Act No.108 of 1996

Promotion of Access to Information Act 2 of 2000

Protected Disclosures Act 2000

South African Prescription Act 68 of 1969

SA Contingency Fees Act 66 of 1997

Companies Regulations No.R.351 of 2011

King Code of Governance Principles 1994 (King l)

King Code of Governance Principles 2002 (King ll)

King Code of Governance Principles 2009 (King lll)

King Code of Governance Principles 2016 (King lV)

The Department of Social Development's Code of Good Practice for South African Non Profit Organisations 2001

South African National NGO Coalition Codes of Ethics for Non Profit Organisations 1997

The Independent Code of Governance and Values for Non Profit Organisations in South Africa 2012

1.3 ENGLISH LEGISLATION

UK Access to Justice Act 1999

UK Companies Act 2006

UK Companies Act 1985

UK Company Directors Disqualification Act 1986

UK Courts and Legal Services Act 1990

UK Charities Act 2011

Criminal Law Act 1967

UK Limitation Act 1980

UK Freedom of Information Act 2000

UK Financial Services Market Act 2000

Legal Aid, Sentencing and Punishment of Offenders Act 2012

UK Public Interest Disclosure Act 1998

UK Civil Procedure Rules 1998

UK Civil Procedure (Amendment) Rules 2007

UK (Contingency Fees) of the Solicitors' Practice Rules 1990

UK Conditional Fee Agreements Order 1998

Damage- Based Agreement Regulations 2013

UK Practice-Direction-Pre Action Conduct (PD PAC)

UK Corporate Governance Code 2018

1.4 USA LEGISLATION

Delaware General Corporation Law

Alberta Limitation Act 2000

Delaware General Corporation Law 2013

Model Business Corporation Act 1984

Sarbanes Oxley Act 2002

Delaware Chancery Court rules 2013

United States Federal Rules of Civil Procedure1966

District of Columbia Code 2018

1.5 CANADIAN LEGISLATION

Alberta Limitation Act 2000

Canada Business Corporation Act 1985

Ontario Business Corporation Act 1990

1.6 AUSTRALIAN LEGISLATION

Australian Corporations Act 2001

1.7 NEW ZEALAND LEGISLATION

New Zealand Companies Act 1993

1.8 SINGAPOREAN LEGISLATION

Singapore Companies Act 1994

1.9 HONG KONG LEGISLATION

Hong Kong Companies Ordinance

1.10 INDIAN LEGISLATION

Indian Companies Act 2013

2. CASE LAW

2.1 NIGERIAN CASES

Abubakri v Smith [1973] 1 All NLR (Pt.1)730

Abdallah v Barlat[1931] 1 WACA 137

Adebayo v Johnson [1969] 1 All NLR 176

Adekoya v F.H.A [2008] LPELR 105 SC 1

Adenuga v Odumeru [2002] 8 NWLR 163

Agip Nig. Ltd. v Agip Petroli International and others [2010] NWLR (Pt. 1187) 348

Ajibona v Kolawole [1996] 10 NWLR(Pt.476)22

Attorney- General Kaduna State v Hassan [1985] 2 NWLR (Pt. 8) 483

B.P.R v Awayewaserere [2002] 33 WRN 138

CAC v U.B.A PLC & 5 ORS [2013] 5 CLRN 133

CBN v Kotoye [1994] *NWLR* 3 (Pt. 330) 66

Citec Int'l Estates v. Francis [2021] 5 NWLR (Pt. 1768)

Daily Times (Nigeria) Plc v Akindiji [1998] 13 NWLR 22

Daily Times of Nigeria Plc v.D.S.V.Ltd [2014] FWLR 1978

Eboigbe v N.N.P.C [1994] 5 NWLR (Pt.347)649

Ede v Central Bank of Nigeria [2015] All FWLR 1113

Edokpolo v. Sem-Edo Wire Industries Ltd [1984] 7 SC 119

Egbor v Ogbebor [2015] LPELR -24902

Eko Hotels v FRCN unreported Suit No.FHC/LCS/1430/2012

Elufioye v Halilu [1993] 6 NWLR (Pt. 301)570

Emmanuel Iwuchukwu v David Nwizu [1994] 7 NWLR 379

Green v Green [1987] 3 NWLR (Pt. 61) 480

Kotoye v CBN [1989] 1 NWLR (Pt. 98) 419

Ladejobi v Odutola Holdings Ltd [2002] 3 NWLR 122

Longe v F.B.N [2010] 6 NWLR (Pt. 1189)1

Mobil Producing (Nig) Ultd v LASEPA &Ors. [2002]12 SCNJ 1

MTN v Bolingo Hotels & Towers Ltd [2004] 13 NWLR (Pt. 889)117

Nigerian Railway Corporation v Nwanze [2008] 4 NWLR (Pt. 1076) 92

Nigerian Stores Workers Union v Uzor [1972] 2 ALR 412

Nwagu v Okolo [2012] LPELR 9460

Oduntan v General Oil Limited [1995] 4 NWLR 1

Odutola Holdings v Ladejobi [2007]14 WRN 1

Oguntayo v Adebutu [1997] 12 NWLR (Pt. 531) 83

Ohanenye v Ohanenye [2016] LPELR 40458

Oloko v Ube [2001] 13 NWLR (Pt. 729) 161

Omisade v Akande[1987] 2 NWLR (Pt.55) 158

Orok Oyo v Mercantile Bank (Nig) Ltd [1989] 3 NWLR (Pt. 108) 213

Ozueh v.Ezeweputa & Ors. [2005]4 NWLR 321

Pam v Mohammed [2008] All FWLR (Pt. 436) 1868

Papersack Nigeria Ltd v Alhaji J.A. Odutola& Anor [2010] LPELR 4829

Post Master General V Agbasi [2006] LPELR 11926

Re Italcomm (W.Nig) Ltd [1972] NCLR 293

Savannah Bank Plc v Opanubi[2004] 15 NWLR (Pt.896) 437

Shitta & Ors. v Ligali &Ors. [1941] 16 NLR 23

Solomon Tanimola & Ors.v Surveys and Mappings Geodata Ltd &Ors. [1995]6 NWLR (Pt.403) 617

Sparks Ltd v Ponmile [1986]2 NWLR (Pt.23) 516

Tikatore Press v Abina [1973] 4 SC 63

Union Bank v Nwokolo [1995] 4 SCNJ 93

Wealthzone v SEC [2016] LPELR 41808

Williams v Edu [2002]3 NWLR 401

Yalaju- Amaye v A.R.E.C [1990] 4 NWLR (Pt.145) 422

2.2 SOUTH AFRICAN CASES

Amdoc SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd [2014] (5) SA 532

Bayly v Knowles [2010] (4) SA 548

Benjamin v Elysium Investments (Pty) Ltd [1960] (3) SA 467

Brummer v Minister of Social Development [2009] (6) SA 323

Da Silva v CH Chemical (Pty) Ltd [2008] (6) SA 620

FluxmansInc v Levenson [2017] (2) SA 520

Francis George Hill Family Trust v South African Reserve Bank [1992] (3) SA 91

Gihwala v Grancy Property Ltd [2016] ZASCA 35

Grancy Property Ltd v Manala [2015] (3) SA 313

Grundling v Beyers [1967] (2) SA 131

Kukama v Lobelo [2012] ZAGP JHC 60

Lazarus Mbethe v United Manganese Kalahari (Pty) Ltd [2015] (5) SA 414; [2017] ZASCA 67

Lewis Group Ltd v Woollam And Ors. [2017](2) SA 547

Lewis Group Limited v Woollam (3) [2017] ZAWCHC 15

Masango v Road Accident Fund [2016] (6) SA 508

McLelland v Hulett & Ors. [1992] (1) SA 456

Mfengawa v Road Accident Fund [2017] (5) SA 445

Minister of Defence and Military Veterans v Motau & Ors. [2014](5) SA 69

Molefe &Ors. v Minister of Transportation &Ors. [2017] ZAGPPHC 120

Mouritzen v Greystone Enterprises (Pty) Ltd [2012] (5) SA 74

Nchabeleng v Phasha [1997] (4) All SA 158

Price Waterhouse Coopers Inc and Ors.v National Potato Co-operative Ltd [2004] (6) SA 66

Sammel v President Brand Gold Mining Co Ltd [1969] (3) SA 629

Spieth & Anor v Nagel [1997] (3) All SA 316

Tjaji v Road Accident Fund and Two Similar cases [2013] (2) SA 632

TWK Agriculture Ltd v NCT Forestry Co-operative Ltd [2006] (6) SA 20

Van Zyl v Loucol (Pty) Ltd [1985] (2) SA 680

2.3 ENGLISH CASES

Abouraya v Sigmund [2015] BCC 503

American Cynamid Co. v Ethicon [1975] AC 396

Atwool v Merryweather [1867] LR.5 Eq.464n

Awwad v Geraghty [2001] QB 570

Bamford v Bamford [1970] CH 212

Barrett v Duckett [1995] 1 BCLC 243

Bevan Ashford v Geoff Yeandle [1998] 3 WLR 172

Bhullar v Bhullar [2015] EWHC 1943

Birch v.Sulliman [1958] All ER 56

Borland's Trustee v.Steel [1901] 1 CH 279

Brady v Brady [1987] 3 BCC 315

Burland v Earle [1902] AC 83

Carlen v Drury [1912] 35 ER 61

Charterbridge Corporation Ltd v Lloyds Bank Ltd [1970] CH 62

Clark v Cutland [2003] EWCA civ 810

Clarkson v Davies [1923] AC 100

Colin Gwyer& Associates v London Wharf (Limehouse) Ltd [2003] BCC 885

Cook v Deeks [1916] 1 AC554

Cooke v Cooke [1997] 2 BCLC 28

Cotter v National Union of Seamen [1929] 2 CH 28

Daniels v Daniels [1978] CH 406

Dorchester Finance Co. v Stebbing [1989] BCLC 498

East Pant Du United Lead Mining Co. Ltd v. Merryweather [1864] 2 Hem. & M.254

Edwards v Halliwell[1950] 2 All ER 1064

Eley v Positive Government Life Assurance [1876] 1 ExD 88

Estamanco (Kilner House) Ltd v Greater London Council [1982] 1 All ER 909

Facia Footwear Ltd (In Administration) v Hinchliffe [1998]1 BCLC 218

Fanmailuk.com Ltd v Cooper [2008] BCC 877

Foss v Harbottle [1843] Hare 461, 67 ER 189

Franbar Holdings Ltd v Patel [2008] EWHC 1534 CH 23

Fulham Football Club (1987) *Ltd v Richards* [2011] EWCA Civ. 855

Greenhalgh v Arderne Cinemas Ltd [1950] 2 All ER 1120

Halle v Tax [2000] BCC 1020

Harman Pictures N.V v. Osborne [1967]1 WLR 723

Heyting v Dupont [1964] 1 WLR 847

Hodgson v NALGO [1972] 1 WLR 130

Hogg v Cramphorn Ltd [1967] CH 254

Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821

Iesini v Westrip Holdings Ltd [2009] EWHC 2526

Industrial Development Consultants v Cooley [1972] 2 All ER 162

Jaybird Group Ltd v Greenwood [1986] BCLC 318

Johnson v Gore, Wood & Co [2002] 2 AC 1

Kiani v Cooper [2010] EWHC 577

Konamaneni v Rolls-Royce Industrial Power (India) Ltd [2002] 1 WLR 1269

Langley Ward v Trevor [2011] EWHC1893 CH 61

MacDougall v Gardiner [1875-76] LR 1CH 13

Marshall's Valve Gear Co v Manning Wardle & Co Ltd [1909]1 CH 267

McDonald v Horn [1995] 1 All ER 961

Menier v. Hooper's Telegraph [1874] 9 CH App 350

MGN v The United Kingdom [2011] ECHR 39401/04

Mumbray v Lapper [2005] BCC 990

National Dock Labour Board Pin & Wheeler Ltd & Ors. [1989] BCLC 647

Norwest Holst v. Secretary of State for Trade [1978] 3 All ER 280

Nurcombe v Nurcombe [1985] 1 All ER 65

N.W. Transportation v. Beatty [1916] 1 AC 589

O'Neill v Phillips [1999] 1 WLR 1092

Panorama Development (Guildford) Ltd v Fidelis Furnishing Fabrics [1971]2 QB 711

Parke v Daily New Ltd [1962] 2 All ER 929

Pavlides v Jensen [1956] CH 565

Pender v Lushington [1877] 6 CH D. 70

Percival v Wright [1902] 2 CH 421

Pittman v Prudential Deposit Bank Ltd [1896] 13 TLR 110

Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] 1 All ER 354

Re A Company [1981] 2 All ER 1007

Re Bellador Silk Ltd [1985] 1 All ER 667

Re Blue Arrow [1987] BCLC 585

Re City Equitable Fire Insurance Co. [1925] CH 407

Re *Elgindata* [1991] BCLC 959

Rees v Crane [1994] 2 AC 173

Regal Hastings Ltd v Gulliver [1942] 1 All ER 378

Re Grosvenor and West End Railway Terminus Hotel Ltd [1897] 7 QB 124

Re HLC Environmental Projects Ltd [2013] EWHC 2876

Russel v Northern Bank Development Corp Ltd [1992]2 CH 426

Russell v Wakefield Waterworks [1875] LR 20 Eq. 474

Re Saul D.Harrison Plc [1995] 1 BCLC 14

Re Westbourne Galleries Ltd [1970] 1 WLR 1378

Scottish Co-Operative Wholesale Society Ltd v Meyer [1958] 3 All ER 66

Smith v Croft (No.1) [1986] 2 All ER 551

Smith v Croft (No.2) [1988] 1 CH 114

Salomon v Salomon & Co [1897] AC 22

Stainer v Lee [2010] EWHC 1539

Stimpson v Southern Landlords Association [2010] BCC 387

Thai Trading Co. v. Taylor [1998] QB 781

Towers v African Tug Co [1904] 1 CH 550

Trepca Mines Ltd (No.2) [1963] 1 CH 199

Trumann Investment Group v Society General SA [2003] EWHC 1316

Universal Project Management Services Ltd v Fort Gillicker Ltd [2013] EWHC 348

Wallersteiner v Moir (No. 2) [1975] 2 WLR 389; [1975] QB 373

Watts's v Midland Bank Plc [1986] BCLC 15

Wishart v *Stimpson* [2009] CSIH 65: 2009 SLT 812

2.4 AMERICAN CASES

Aronson v Lewis, 473 A.2d 805,813 (Del.1984)

Auerbach v.Bennett 47 N.Y.2d 619

Harbor Finance Partners v Huizenga, 751 A. 2d 879 (Del.Ch.1999)

Judicial Watch Inc, v Deutsche Bank, A.G., 9 Fed. Appx.14 (D.C.Cir.May 20, 2001)

Kahn v Portnoy 2008 WL 5197164 at 10 (Del.Ch.Dec.11, 2008)

*Kahn v Seaboard Corp*625 A (2d) 269 (Del. Ch 1993)

*Kemp v Metzner*2000 BCCA 462, 190 DLR (4th) 388

Lewis v Anderson, 453 A.2d 474,480(Del.Ch.1982)

Potter v Banks [1971] SJ No 92 (QL) (QB)

Re Bank of New York Derivative Litigation Bank of N.Y. II, 320 F.3d

Re Oracle Corp Derivative Litigation, 808 A.2d 1206, 1210 (Del.Ch.2002)

Smachio v Birkelo, 576 F.Supp.1493(D.Del.1983)

Zapata Corp. v Maldonado, 430 A.2d 779,784 (Del.1981)

2.5 CANADIAN CASES

Richardson Greenshields of Canada Ltd v Kalmacoff et al [1995]80 Ontario Appeal Cases 98

Turner v Mailhot [1985]50 OR (2d) 561

2.6 AUSTRALIAN CASES

ASIC v Adler [2002] NSWSC 483

Biala Pty Ltd & Anor. V Mallina Holdings Ltd & Ors. [1993] 11 ACLC 1082

Chahwan v Euphoric Pty Ltd [2008] 65 ACSR 661

Hurley v BGH Nominees (Pty) Ltd [1982]1 ACLC 387

Kinsela v Russel Kinsela Pty Ltd [1986]4 ACLC

Magafas v Carantinos [2006] NSWSC 1459

Swansson v R A Pratt Properties Pty Ltd [2002] 42 ACSR 313

Talisman Technologies Inc v Queensland Electronic Switching Pty Ltd [2001] QSC 324

Wood v Links Golf Tasmania Pty Ltd [2010] FCA 570

2.7 NEW ZEALAND CASES

Coleman v Myers [1977] 2 NZLR 225 CA

Vrij v Boyle [1995] 3 NZLR 763

2.8 HONG KONG CASES

Waddington Ltd v Chan Chun Hoo Thomas [2009] 2 BCLC 82

3. BOOKS

Abugu, J. *Principles of Corporate Law in Nigeria*.Lagos: MIJ Professional Publishers, 2014.

Abugu, J. *Company Securities: Law and Practice* 2edn. Lagos: MIJ Professional Publishers, 2014.

Abugu, J. *Company Securities: Law and Practice*. Lagos: University of Lagos Press, 2005.

Agbonika,JAM.*Modern Nigeria Company Law.*Ibadan:Ababa Press, 2021.

Ahunwa, B. *Globalization and Corporate Governance in Developing Countries.*New York:Transnational Publishers, 2003.

Ajogwu, F.*Corporate Governance in Nigeria: Law and Practice.* Lagos: Centre for Commercial Law Development, 2007.

Ajogwu, F. *Corporate Governance & Group Dynamic.* Lagos: Centre for Commercial Law Development, 2013.

Amadi, J. *Limitation of Action- Statutory & Equitable Principles.* Vol. 1. Port-Harcourt: Pearl Publishers, 2011.

Arsalidou, D. *Rethinking Corporate Governance in Financial Institutions*. New York: Routeledge, 2016.

Balotti, RF. and Finkelsten, JA.The *Delaware Law of Corporations and Business Organisations.* Vol.1.New Jersey: Law and Business Incorporated, 1986.

Barnes, KD. *Cases and Materials on Nigerian Company Law*.Ile-Ife: Obafemi Awolowo University Press Limited, 1992.

Berkahn, M. *Regulatory And Enabling Approaches To Corporate Law Enforcement*. Christchurch: The Centre for Commercial & Corporate Law, 2006

Bhadmus, YH.Bhadmus *on Corporate Law Practice*.5edn.Enugu: Chenglo Limited, 2021.

Boyle, AJ. *Minority Shareholders' Remedies*. United Kingdom: Cambridge University Press, 2002.

Brown, HJ. And Marriot, AL. *ADR Principles and Practice.*London: Sweet & Maxwell, 1993.

Bruce, M.Rights *and Duties of Directors.*12edn.Sussex: Bloomsbury Professional, 2012.

Cassim, MF.*The New Derivative Action Under The Companies Act: Guidelines for Judicial Discretion*. South Africa: Juta, 2016.

Cassim, FHI, (ed).Cassim, MF, Cassim, R, Jooste, R, Shev, J, Yeats, J. *Contemporary Company Law*. 3edn. South Africa: Juta, 2021.

Cassim, FHI, (ed). Cassim, MF, Cassim, R, Jooste, R, Shev, J, Yeats, J. *Contemporary Company Law*. 2edn. South Africa : Juta,2012.

Cassim,R.*The Removal of Directors And Delinquency Orders Under The South African Companies Act.* Cape Town:Juta, 2020.

Clarke,T.(ed).*International Corporate Governance -A Comparative Approach*. London: Routledge,2007.

Clarke, T.(ed). *Theories of Corporate Governance*. London: Routledge, 2004.

Davies,PL. Worthington,S.*Gower Principle of Modern Company Law*.10 edn. Sweet & Maxwell, London 2016.

Davies, PL. Worthington, S. *Gower & Davies Principles of Modern Company Law.* 9edn.London: Sweet & Maxwell, 2012.

Davies, PL. *Gower And Davies Principles of Modern Company Law.* 8edn.London: Sweet & Maxwell,2008.

Davies, PL. *Gower And Davies Principles of Modern Company Law.*7edn.London: Sweet & Maxwell, 2003.

Davies, PL. *Gower's Principles of Modern Company Law*. 6edn.London: Sweet & Maxwell, 1997.

Delport, P.Henochsberg *on Companies Act 71 of 2008.* 1edn. South Africa: Lexis Nexis, 1994.

Dignam, A. Lowry, J. *Company Law.* 7edn. London: Oxford University Press. 2012.

Dine, J. *The Governance of Corporate Groups.* United Kingdom: Cambridge University Press, 2000.

Du Plessis, JJ. and Nel Koker, J. *Disqualification of Company Directors: A Comparative Analysis of the Law in the UK, Australia, South Africa, the US and Germany*.Oxfordshire: Routledge, 2017.

Easterbrook, FH. Fischel, DR. *The Economic Structure of Corporate Law*. Cambridge: Harvard University Press, 1991.

Efevwerhan, DI. *Principles of Civil Procedure In Nigeria*.2edn. Enugu:Snapp Press Nig.Ltd, 2013.

Farrar,JH. *Farrar's Company*.4 edn.London: Butterworths, 1998.

French,D.*French & Ryan Company Law.*29 edn. Oxford: United Kingdom, 2012-2013.

French,D.*French & Ryan Company Law.*28 edn. Oxford: United Kingdom, 2011.

Girvin, S. Frisby, S. Hudson,A. *Charlesworth's Company Law.*18 edn. United Kingdom: Sweet & Maxwell,2010.

Goo,SH. *Minority Shareholders' Protection*. Great Britain: Cavendish Publishing, 1994.

Goulding,S. *Company Law.* 2edn. London :Cavendish Publishing Limited, 1999.

Gower,LCB. *Gower's Principles of Modern Company Law*.5 edn. London: Sweet & Maxwell, 1992.

Gower, LCB. *Modern Company Law.*4edn. London: Stevens & Sons Limited,
1979.

Hannigan,B.*Company Law.*4 edn.Oxford : Oxford University Press, 2015.

Hannigan,B.*Company Law*.3edn.Oxford: Oxford University Press, 2003.

Hollington,R. *Hollington On Shareholders' Rights.*7edn. London : Sweet &Maxwell, 2013.

Ibidapo O. Abayomi,A. Williams,F.*Arbitration in Lagos State.*Lagos:Concept Publications, 2010.

Joffe, V. Drake, D. Richardson, G. Lightman, D. Collingwood, T. Minority Shareholders 'Law*, Practice, and Procedure.* 4edn.London: Oxford University Press, 2011.

Kraakman, R.*et al*. *The Anatomy of Corporate Law: A Comparative and Functional Approach.* 2edn.United States: Oxford University Press, 2009.

Lidbetter,A. *Company Investigations and Public Law.* Portland: Hart Publishing,1999.

Mongalo, TH. *Modern Company Law. South Africa*: Juta, 2010.

Morse, G.Charlesworth *& Morse Company Law.* 16edn. London: Sweet &Maxwell, 1999.

Morse,G.*Palmer's Company Law.* Vol. 1.London: Thomas Reuters, 2009.

Naidoo,R.*Corporate Governance-An Essential Guide for South African Companies*.3ed.Durban: Lexis Nexis, 2016.

Naidoo,R. *Corporate Governance- An Essential Guide for South African Companies.* 2ed.South Africa: Juta, 2009.

Nta, P. *Shareholders' Rights Under the Nigerian Laws.*Nigeria: Tiger Press Ltd, 2009.

Obi Okoye,A.*Law in Practice in Nigeria.* 3ed.Enugu: Iykememo Publishing, 2021.

Oded,S. *Corporate Compliance- New Approaches to Regulatory Enforcement.* United Kingdom: Edward Elgar Publishing Limited, 2013.

Olawoyin, G. *Status and Duties of Company Directors.* Ile-Ife: University of Ife Press, 1977.

Orojo, O.Company *Law and Practice in Nigeria.*5ed.Durban: Lexis Nexis Butterworths, 2008.

Orojo, O.Company *Law And Practice In Nigeria.* Vol.1.South Africa: Lexis Nexis, 2006.

Orojo,JO.*Professional Conduct of Legal Practitioners In Nigeria*. Lagos: Mafix Books, 2008.

Orojo, JO. and Ajomo,MA. *Law and Practice of Arbitration And Conciliation In Nigeria.* Lagos: Mbeyi, 1999.

Osunbor, OA. *The Bank Director And The Law.* 2ed.Nigeria: FITC, 2007.

Palmer, R. *Palmer's Company Law*. London: Sweet &Maxwell, 2007.

Pennington, R. *Pennington's Company Law.* 8ed. United Kingdom: Oxford University Press, 2001.

Pennington, R.*Company Law.* 7ed. London: Butterworths, 1995.

Pettet, B.Company *Law.*2ed.England: Pearson, 2005.

Ramsay, IM. & Saunders,BJ. *Litigation by Shareholders and Directors: An Empirical Study of Statutory Derivative Action.*Melbourne:Centre for Corporate Law and Securities Regulation, 2006.

Rautenbach, C.*Introduction To Legal Pluralism in South Africa*.Durban: Lexis Nexis, 2010.

Reisberg, A. *Derivative Actions And Corporate Governance- Theory And Operation*. United States: Oxford University Press, 2007.

Smerdon, E. (ed.).*Directors 'Liability and Indemnification*.London: Globe Business Publishing Limited, 2007.

Smerdon, RA. *Practical Guide to Corporate Governance*.3ed.London: Sweet & Maxwell, 2007.

Stanley-Idum, MM. & Agaba, JA.Civil *Litigation in Nigeria*.2ed.Lagos: Renaissance Law Publishers, 2018.

Stein, C.The *New Companies Act Unlocked.* Cape Town: Siber Ink, 2011.

Thomas, KR, Ryan, C. (ed). Baylis, D. *The Law and Practice of Shareholders' Agreement.* London: Lexis Nexis, 2009.

Udu, EA.Principles *of Company Law And Practice in Nigeria.*2ed. Enugu: Miridam Prints, 2021.

Underwood. K.*No Win, No Fee, No Worries: Conditional and Contingency Fees Explained.* London: CLT Professional Publishing, 2009.

Wen, S.Shareholder *Primacy and Corporate Governance.* Oxfordshire: Routledge, 2013.

Wild, C, Weinstein, S. *Smith and Keenan's Company Law.*16ed.United Kingdom: Pearson, 2013.

4. CHAPTERS IN BOOKS

Akanki, EO. 'Protection of the Minority in Companies' in E.O.Akanki (ed), *Essays on Company Law* (University of Lagos Press, Lagos 1992)276.

Allen, JL. *et al*. 'Business Courts' in American Bar Association, *Recent Developments in Business and Corporate Litigation* (Vol.2, ABA Publishing, Chicago 2014) 147.

Armour, J. *et al.*'Agency Problems and Legal Strategies' in Reinier R. Karaakman *et al* (eds), *The Anatomy of Corporate Law* (2nd edn, Oxford, New York 2009) 36.

Bailey,DA. *et al*. 'United States' in Edward Smerdon(ed), *Directors' Liability and Indemnification: A Global Guide* (Globe Business Publishing Ltd, London 2007) 335.

Cassim, FHI. ' The Duties And The Liability Of Directors' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3rd edn, Juta, Claremont 2021) 681.

Cassim, MF. 'Enforcement And Regulatory Agencies' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3rd edn, Juta, Claremont 2021)1135.

Cassim, MF. 'Formation of Companies And The Company Constitution' in Farouk Hl Cassim (ed), *Contemporary Company Law* (3rd edn, Juta, Claremont 2021) 137.

Cassim, MF. 'Shareholder Remedies and Minority Protection' in Farouk Hl Cassim (ed), Contemporary *Company Law* (3rd edn, Juta, Claremont 2021) 1015.

Cassim, R. 'Governance and the Board of Directors' in Farouk Hl Cassim (ed), Contemporary *Company Law* (3rd edn, Juta, Claremont 2021) 465.

Cassim, R. 'Governance and Shareholders' in Farouk Hl Cassim (ed), Contemporary *Company Law* (3rd edn, Juta, Claremont 2021) 465.

Clendenen, PT, Rollins, JS. & Phinney, AW. 'Derivative Litigation: Fundamental Concepts and Recent Developments' in *Recent Developments in Business And Corporate Litigation* (Vol.11, ABA Publishing, Chicago 2014)511.

Coetzee, L.' A comparative analysis of the derivative litigation proceedings under the Companies Act 61 of 1973 and the Companies Act 71 of 2008' in Tshepo H Mongalo(ed),*Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010)290.

Coffee. JC. Jr. 'What Caused Enron? A Capsule Social and Economic History of the 1990s' from Journal of Financial Economics (1976) in Thomas Clarke(ed), *Theories of Corporate Governance* (Routeledge, Oxon 2004)333.

Davies,P. ' Enforcement of Management Duties And The Protection Of Minorities' in Geoffrey Morse *et al* (eds) ,*Palmer's Company Law*(Vol. 1, Thomas Reuters, London 2009) 8231.

Davis, DM.' Dealing with Corporate Defaulters: Curbing the Unfettered Exercise of Criminal Law' in Tshepo H Mongalo (ed),*Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010) 411.

Deakin, S. 'Corporate Governance, Finance and Growth: Unravelling the Relationship' in Tshepo H Mongalo(ed), *Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010) 191.

Du Plessis, JJ. ' A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in South Africa and in Australia' in Tshepo H Mongalo (ed), *Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010)263.

Du Plessis, JJ. and Nel de Koker,J. 'Analyses, Perspectives and Jurisdictional Overview' in Jean Jacques du Plessis and Jeanne Nel de Koker(eds),*Disqualification of Company Directors- A Comparative Analysis of the Law in the UK, Australia, South Africa, the US and Germany*'(Routledge, Oxfordshire 2017) 1.

Farisani, D. ' The Potency of Co-ordination of Enforcement Functions by the New and Revamped Regulatory Authorities Under the New Companies Act' in Tshepo H. Mongalo(ed),*Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010) 433.

Gordon,JN. 'What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections' in Thomas Clarke (ed), *Theories of Corporate Governance* (Routeledge, Oxon 2004)322.

Grivner, GG. *et al.* 'Corporate Law' in K.Tyler O'Connell, Danielle Gibbs (eds),*Recent Developments in Business Associations Law*(Vol. 2, ABA Publishing, Chicago 2014)7.

Hansmann, H. & Karaakman, R. 'What is Corporate Law?' in Reinier R. Karaakman *et al.* (eds), *The Anatomy of Corporate Law* (2nd edn, Oxford, New York 2009) 2.

Hart,M.*et al*. 'South Africa' in Edward Smerdon(ed),*Directors' Liability and Indemnification: A Global Guide*(Globe Business Publishing Ltd,London 2007) 261.

Jensen, MC. Meckling, WH. 'Theory of The Firm: Managerial Behaviour, Agency Costs and Ownership Structure' from Journal of Financial Economics (1976) in Thomas Clarke(ed), *Theories of Corporate Governance* (Routeledge, Oxon 2004) 58.

Jerome JS. 'Global Responsibilty of Business' in Ramon Mullerat (ed), *Corporate Social Responsibilty : The Corporate Governance of the 21st Century*(Kluwer Law International, Hague 2005) 97.

Joffe, V. 'Unfair Prejudice: The Statutory Remedy' in Victor Joffe *et al*.(eds), *Minority Shareholders- Law Practice and Procedure* (4th edn, Oxford University Press, Oxford 2011)273.

Katz, MM. 'Governance under the Companies Act 2008: Flexibility is the Keyword' in Tshepo H.Mongalo(ed), *Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010) 248.

Keay, A.& Loughrey, J. 'An Assessment of The Present State of Statutory Derivative Proceedings' in Joan Loughrey (ed),*Directors' Duties And Shareholder Litigation In The Wake of The Financial Crisis* (Edward Elgar Publishing Limited, United Kingdom 2013)187.

Kilian,N.*et al.*'South Africa' in Jean Jacques du Plessis and Jeanne Nel de Koker(eds),*Disqualification of Company Directors- A Comparative Analysis of the Law in the UK, Australia, South Africa, the US and Germany*'(Routledge, Oxfordshire 2017) 112.

King,ME.'The Synergies and Interaction between King 111 and the Companies Act 61 of 2008' in Tshepo H.Mongalo (ed),*Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010) 446.

Lazonick, W. O'Sullivan, M. 'Maximising Shareholder Value: A New Ideology for Corporate Governance' in Thomas Clarke(ed), *Theories of Corporate Governance* (Routeledge, Oxon 2004)290.

Lightman,D. ' Derivative Claims ' in Victor Joffe *et al.* (eds), *Minority Shareholders- Law Practice and Procedure* (4 th edn, Oxford University Press, Oxford 2011)29.

Milman, D. 'Security for Costs: Principles and Pragmatism in Corporate Litigation' in Barry A K Rider (ed), *The Realm of Company Law* (Kluwer Law International, London 1998)167.

Mullerat,R. 'Global Responsibilty of Business' in Ramon Mullerat (ed), *Corporate Social Responsibilty : The Corporate Governance of the 21st Century*(Kluwer Law International, Hague 2005)3.

Olson, JF.' South Africa Moves to a Global Model of Corporate Governance but with Important National Variations' in Tshepo H.Mongalo(ed),*Modern Company Law for a Competitive South African Economy* (Juta, Claremont 2010) 219.

Olson,JF.& Mc Phee, G.' Limitations on D & O Liability' in Bart Schwartz and Amy L.Goodman (eds),*Corporate Governance Law and Practice* (Vol. 1, Lexis Nexis, United States 2005) 5-1.

Osamolu, SA. 'The Supreme Court's Decision In Longe v. First Bank Of Nigeria Plc: A Case of The Apex Court Being Infallible Because It Is The Final Court?' in A.O.Adegoke and S.A.Osamolu (eds), *Topical Issues In Nigerian Law: Essays in Honour of Hon.Justice S.K.Otta* (Ben Oketola Publications, Abuja 2011) 417.

Ramsay,IM. 'Models of Corporate Regulation: the Mandatory/ Enabling Debate' in Ross Grantham & Charles Rickett (eds), *Corporate Personality in the 20th Century* (Hart Publishing, Oxford 1998) 215.

Sealy, LS. 'The Courts and Their Role in Corporate Affairs' in L.S.Sealy(ed), *Company Law and Commercial Reality*(Sweet & Maxwell, London 1984) 35.

Sealy,LS. 'Problems of Standing, Pleading and Proof in Corporate Litigation' in B.G.Pettet(ed), *Company Law In Change* (Stevens & Sons, London 1987)1.

Smerdon, E. 'United Kingdom' in Edward Smerdon(ed),*Directors' Liability and Indemnification: A Global Guide*(Globe Business Publishing Ltd,London 2007) 317.

5. ARTICLES

Adegbite, E. *et al*. 'The Politics of Shareholder Activism in Nigeria' *Journal of Business Ethics* 105:389, 2012.

Adewale, A.' An Evaluation Of The Limitations Of The Corporate Governance Codes In Preventing Corporate Collapses in Nigeria'*Journal of Business Management* 7(2): 116, 2013.

Afolabi, AA. 'Examining Corporate Governance Practices in Nigeria and South African Firms' *European Journal of Accounting Auditing and Finance Research* 3:10, 2015.

Afolayan, AF.*et al*.' A Critical Examination of the Criminal and Quasi- Criminal Offences Created Under the New Companies and Allied Matters Act 2020' *Legal Network*1: lxxx, 2021.

Ahern, D. 'Directors' Duties, Dry Ink and the Accessibility Agenda' *Law Quarterly Review* 128: 114, 2012.

Aina, K. 'Current Development In the law of Derivative Action In Nigerian Company Law *'Babcock University Socio- Legal Journal* 1:49, 2014.

Aiyegbayo, O. & Villiers, C. 'The Enhanced Business Review: Has it Made Corporate Governance More Effective? ' *Journal of Business Law* 7: 699, 2011.

Andrews, MH. 'Conditional Fee Agreements: The Courts and Parliament in Unison *'The Cambridge Law Journal* 57(3): 469, 1998.

Arsalidou, D. 'The Regulation of Executive Pay and Economic Theory *'Journal of Business Law* 431, 2011.

Berkowitz, PM.' Sarbanes-Oxley and Related State Whistleblower Protections in the United States *'Business Law International* 200, 2008.

Beukes, HGJ. & Swart, WLJ. 'Blurring the Dividing line between Oppression Remedy and Derivative Actions: Kudumane Investment Holdings Ltd v Northern Cape Manganese (Pty) Ltd and others' *SA Mercantile Law Journal*24 (4):467, 2012.

Bhagat, S. Brickley, JA. and Cole, JL. 'Managerial Indemnification and Liability Insurance: The Effect on Shareholder Wealth' *Journal of Risk and Insurance* 54(4):721, 1987.

Berkowitz, PM. 'Sarbanes- Oxley and Related Whistleblower Protection In the US *'Business Law International 9*(3):200, 2008.

Boardman, N.' The Duties of Directors in the face of Activism' Journal *of Corporate and Commercial Law & Practice*2 (2):1, 2016.

Bortha, MM. 'The Protected Disclosure Act 26 of 2000, The Companies Act 71 2008 & The Competition Act 89 of 1998 With Regards To Whistle-Blowing Protection: Is There a Link?'*Journal of South African Law* 337, 2014.

Bortha, MM. 'The Protection of Whistle-Blowers in The Fight Against Fraud and Corruption: A South African Perspective *'Obiter* 574, 2012.

Boyle, AJ. 'Indemnifying the Minority Shareholder *'Journal of Business Law* 18, 1976.

Bradley, C. 'Corporate Control: Markets and Rules *'Modern Law Review*53 (2):170, 1990.

Cassim, MF. 'Enhancing Corporate Democracy By The Use of Shareholder Proxies' Obiter 40(1): 47, 2019.

Cassim, MF. 'The doctrine of Contemporaneous Share Ownership and Aspects of locus Standi in the New Derivative Action *'South African Law Journal* 101, 2018.

Cassim, MF. ' Untangling The Requirement of Good Faith in the Derivative Action In Company Law (Part 2)' *Obiter* 602, 2018.

Cassim, MF.' When Companies Are Harmed By Their Own Directors: The Defects in the Statutory Derivative Actions And The Cures (Part 1)'*SA Mercantile Law Journal*25: 168, 2013.

Cassim, MF. 'When Companies Are Harmed By Their Own Directors: The Defects In The Statutory Derivative Actions And The Cures (Part 2)'*SA Mercantile Law Journal*25:301, 2013.

Cassim, R.' A Comparative Discussion of the Judicial Disqualification of Directors under the South African Companies Act' Journal *of African Law* 65(1):87, 2021.

Cassim, R. 'An Analysis of Directors' Fiduciary Duties In the Removal of a Director from Office' *Stellenbosch Law Review* 212, 2019.

Cassim, R. 'A Critical Analysis On The Use Of The Oppression Remedy by Directors Removed from Office by The Board of Directors Under The Companies Act 71 of 2008' *Obiter* 40(3): 154, 2019.

Cassim, R. ' The Power to Remove Company Directors from Office: Historical and Philosophical Roots'.*Fundamina* 25(1): 37, 2019.

Cassim, R.' The Removal of Directors by the Board of Directors under the Companies Act 71 of 2008: Should it be a Mandatory or an Alterable Provision? *'The Comparative And International Law Journal of Southern Africa* 389, 2019.

Cassim, R. 'An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 1) 'SA *Mercantile Law Journal* 20(1): 33, 2018.

Cassim, R. 'Launching of Delinquency Proceedings under the Companies Act 71 of 2008 By means of The Derivative Action- *Lewis Group Limited v Woollam* 2017 (2) SA 547' 38(3): 673, 2017.

Cassim, R.'Contesting The Removal of a Director by the Board of Director Under the Companies Act' South *African Law Journal* 1:133, 2016.

Cassim, R.' Delinquent Directors Under the Companies Act 71 of 2008: *Gihwala v Grancy Property Limited* ZASCA 35'*Potchefstroom Electronic Law Journal* 19:1, 2016.

Cassim, R. & Madlela, V. 'Disclosure of Directors' Remuneration under South African Company Law: Is it Adequate?' *South African Law Journal*134 (2): 383, 2017.

Cheung, R. 'Shareholders' Agreements: Shareholders' Contractual Freedom in Company Law *'Journal of Business Law* 6: 504, 2012.

Chiu, IHY. 'Contextualising Shareholders' Disputes-a Way to Reconceptualise Minority Shareholder Remedies *'Journal of Business Law* 5: 312, 2006.

Chiu, IHY. 'The Role of a Company's Constitution in Corporate Governance' *Journal of Business* Law7*:* 697, 2006.

Coffee, JC. 'What Caused Enron? A Capsule Social And Economic History Of The 1990s'. *Cornell Law Review* 89(2): 269, 2004.

Coffee, JC Jr.'Litigation Governance: Taking Accountability Seriously *'Columbia Law Review* 110:288, 2010.

Columbia Law Review Association' Statute of Limitation and Shareholders' Derivative Actions' 56(1) *Columbia Law Review* 56(1):106, 1956.

Comey, JB. 'Go Directly To Jail: White Collar Sentencing After The Sarbanes-Oxley Act' *Harvard Law Review* 122: 1728, 2009.

Comino, V.' Australia's ''Company Law Watchdog'': The Australian Securities and Investments Commission and the Civil Penalties Regime' *Journal of Business Law* 3:228, 2014.

Davies, B.'Codified Obstacles'*New Law Journal* 158:1409, 2008.

De Lange, S. 'Compliance Notices in Terms of The Companies Act 71 of 2008: Some Observations Regarding The Issuing of and Objection To Compliance Notices'*SA Mercantile Law Journal* 30(3): 434, 2018.

DeMot, DA. 'Indemnification and Advancement Through An Agency Lens' *Law and Contemporary Problems* 74(1):175, 2011.

Du Plessis, J. & Delport, P. 'Delinquent Directors' and 'Directors under Probation': A Unique South African Approach Regarding Disqualification of Directors' South *African Law Journal*134 (2): 274, 2017.

Edelman, J.' When do Fiduciary Duties Arise?'*Law Quarterly Review* 126: 303, 2010.

Egbe, MO. 'Global Trends in Statutory Derivative Actions: Lessons for Nigeria'*Nigerian Law and Practice Journal* 12:51, 2013.

Egbe, MO. 'Case Review- Bernard Ojeifo Longe v. First Bank of Nigeria Plc *'Babcock University Socio-Legal Journal* 1:295, 2013.

Emons, W. 'Conditional Versus Contingent Fees' Oxford *Economic Papers* 59: 89, 2007.

Flannigan, R. 'The Adulteration of Fiduciary Doctrine In Corporate Law'*Law Quarterly Review* 122:453, 2006.

Flannigan, R. 'Shareholder Fiduciary Accountability' *Journal of Business Law* 1:1, 2014.

Finch, V.'Personal Accountability and Corporate Control: The Role of Directors' and Officers' Liability Insurance'*Modern Law Review* 57(6): 880, 1994.

Griffin, S. 'Shareholder Remedies and the No Reflective Loss Principle: Problems Surrounding the Identification of a Membership Interest '*Journal of Business Law* 6:461, 2010.

Guobadia, DA. 'The Rules of Good Corporate Governance and the Methods of Efficient Implementation: a Nigerian Perspective *'The Company Lawyer* 22(4):119, 2001.

Hamadziripi, F. 'Judicial Construction of The Requirement of Good Faith in Section 165(5) (b) of The Companies Act 71 of 2008: Mbethe v United Manganese of Kalahari' *Journal of Corporate and Commercial Law & Practice* 4(2):74, 2018.

Hamadziripi, F. & Osode, PC. 'The Nature and Revolution of The Business Judgment Rule and its Transplantation to South Africa under the Companies Act of 2008' *Speculum Juris* 33(1):26, 2019.

Haiber, SR. 'The Economics of Arbitrating Shareholder Derivative Actions' *De Paul Business Law Journal* 4: 85, 1991-1992.

Hannigan, B. 'Drawing Boundaries Between Derivative Claims and Unfairly Prejudicial Petitions *'Journal of Business Law* 2009(6): 606, 2009.

Hargovan, A. 'Under Judicial and Legislative Attack: The Rule in *Foss v Harbottle 'South African Law Journal* 113: 605, 1996.

Hirt, HC. 'The Company's Decision to Litigate Against Its Directors: Legal Strategies To Deal with The Board of Directors' Conflict of Interest *'Journal of Business Law* 159, 2005.

Hurter, E. 'Contingency Fees: The British Experience and Lessons for South Africa *'Comparative and International Law Journal of South Africa* 34(1): 71, 2001.

Ibebunjo, J. Dick, I. and Ememonu,P. ' The Third Party Litigation Funding Law Review *'The Law Reviews* 2: 112, 2018.

Idensohn, K. 'The Fate of Foss under the Companies Act 71 of 2008' *SA Mercantile Law Journal* 24(3):355, 2012.

Ilegbune, TO. 'Freedom of Information Act, 2011: An Explanatory Commentary' *Nigerian Law and Practice Journal* 30: 33, 2011.

Jafta, JC.' Critical Analysis of the Extended Legal Standing Provisions Under Section 157(1) Of The Companies Act 71 Of 2008 To Apply For Legal Standing' *Journal of Corporate and Commercial Law & Practice* 35, 2015.

Johnson Jnr, JF. 'Indemnification and D & O Liability Insurance for Directors and Officers *'The Business Lawyer* 33:1993, 1978.

Kaplan, W. & Elwood, B.' The Derivative Action: A shareholder's'' Bleak House''?'*University of British Columbia Law Review* 36:459, 2003.

Keay, A. 'Assessing and Rethinking The Statutory Scheme for Derivative Actions Under the Companies Act 2006'*Journal of Corporate Law Studies* 16(1): 39, 2016.

Keay, A. 'Directors' Duties and Creditors *'Law Quarterly Review* 13:443, 2014.

Keay, A. 'Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?'*European Company & Financial Law Review* 3:369, 2010.

Keay, A. & Loughrey, J. 'Derivative Proceedings in a Brave New World for Company Management and Shareholders'*Journal of Business Law* (3): 151, 2010.

Keay, A. 'Ascertaining The Corporate Objective: An Entity Maximisation and Sustainability Model' *Modern Law Review* 71(5): 663, 2008.

Keay, A. & Loughrey, J. 'Something Old, Something New, Something Borrowed:An Analysis of the New Derivative Action under the Companies Act 2006'*Law Quarterly Review* 124: 469, 2008.

Keay, A. 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders'*Journal of Business Law* 9:656, 2007.

Kershaw, D.' The Rule in Foss v Harbottle is Dead: Long Live the Rule in Foss v Harbottle'.*Journal of Business Law* 3: 274, 2015.

Khan, IA. 'The Unfair Prejudice and Investor Protection in Pakistan' *Journal of Business Law* 5:388, 2014.

Kilian, N.' Definition of a Member/Shareholder in the South African Companies Act: a Brief Comparison with Australian Legislation' *Journal of African Law* 65(1):69, 2021.

Koh, P.' Derivative Actions ''Once Removed'' '*Journal Of Business Law* 2: 101, 2010.

Kraakman, R. *et al*.'When Are Shareholder Suits In Shareholder Interests? *'Georgetown Law Journal* 82:1733, 1994.

Kunzik, P.' Conditional Fees: The Ethical and Organisational Impact On the Bar' *Modern Law Review* 62(2):850, 1999.

Lacy, J. 'The Concept of a Company Director: Time for a New Expanded and Unified Statutory Concept' *Journal of* Business Law 267, 2006.

Langford, RT. and Ramsay, IM. 'Directors' Duty to Act in the Interests of the Company: Subjective or Objective' *Journal of Business Law Cambridge Law Journal* 173, 2015.

Lin, JLS.*'* Barring Recovery For Diminution In Value of Shares On The Reflective Loss Principle' *Cambridge Law Journal* 66(3): 537, 2007.

Lomnicka, E. 'Capital Markets Regulation in Nigeria and the UK: The Role of the Courts *'Journal of African Law* 46(2): 155, 2002.

Loughrey, J. 'Privileged Litigants: Shareholder Rights, Information Disclosure and Corporate Legal Professional Privilege *'Journal of Business Law* 10:778, 2007.

Madlela, V. ' The Unqualified Right of Access To Company's Records by Non- Holders of Company's Securities Under South African Company Law' *Obiter* 40(1): 173, 2016.

Mason, H. 'Ratification of the Directors' Acts: An Anglo- Australian Comparison *'Modern Law Review* 41(2): 161, 1978.

Mathew, J.' Fiduciaries and the Law of Limitation *'Journal of Business Law* 4: 344, 2008.

McConvil, J. and Holland, E. '''Pre-nuptial Agreements'' for Removing Directors in Australia- are they a valid Part of the Marriage Between Shareholders and the Board? *'Journal of Business Law* 204, 2006.

Mc Vea, H. 'Section 994 of the Companies Act 2006 and the Primacy of Contract *'Modern Law Review* 75(6):1123, 2012.

Mongalo, T.'Shareholder Activism in the United Kingdom Highlights the Failure of Remuneration Committees: lessons for South Africa '*South African Law Journal* 756, 2003.

Mongalo, TH. ' A Fair and Reasonable Proposal' by The Board May Still Amount to Breach of Duty to Exercise Directors' Power for a Proper Purpose' *Journal of Corporate & Commercial Law Practice* 5(2): 29,2019.

Mwenda, KK. &Wiseberg, A. 'Corporate-Law Safeguards Against Oppression of Minority Shareholders *'South African Mercantile Law Journal* 11: 28, 1999.

Myburg, E. 'Holding Delinquent Directors Personally liable *'De Rebus* July: 29, 2017.

Ncube, CB. ' You are fired! The removal of directors under the Companies Act 71 of 2008' *South African Law* Journal 128: 33, 2011.

Ngalwana, VR. 'Majority Rule and Minority Protection in South African Company Law: A Reddish Herring *'South African Law Journal* 113: 527, 1996.

Nolan, RC. 'Controlling Fiduciary Power *'Cambridge Law Journal* 293, 2009.

Nolan, RC. 'The Continuing Evolution of Shareholder Governance' *Cambridge Law Journal* 93, 2006.

Norman Veasey, E. Finkelstein, JA. and Stephen Bigler, C.' Delaware Supports Directors with Three –Legged Stool of Limited Liability, Indemnification,and Insurance *'The Business Lawyer* 42(2): 399, 1987.

Odeyinde,O.' Appraisal of the Companies and Allied Matters Act 2020'1 *Bells University of Technology Journal of Management Sciences* 1:116, 2021.

Oliver, EA. ' Regulating Against False Corporate Accounting: Does The Companies Act 71 of 2008 Have Sufficient Teeth?' *SA Mercantile Law Journal* 1, 2021.

Osunbor, OA. 'The Doubtful Exception to the Rule in *Foss v Harbottle 'The Lawyer (Nigeria)* 37, 1984.

Otuturu, GG.' Shareholders' Rights in Modern Companies: A Comparative Analysis' *Nigerian Journal of Business and Corporate Law* 2(2): 34, 2011.

Paul, CA. ' Derivative Actions under English and German Corporate Law' *European Company and Financial Law Review* 81, 2010.

Payne, J.' Shareholders' Remedies Reassessed' *Modern Law Review* 67 (3):500, 2004.

Payne, J. '"Clean hands" in derivative actions *'Cambridge Law Journal* 61(1):
76, 2002.

Payne, J. 'A Re- Examination of Ratification *'Cambridge Law Journal* 58(3): 604, 1999.

Payson, KR.'Dismissal of Derivative Actions: The Debate *'Delaware Journal of Corporate Law* 6: 566, 1981.

Paxson, ONS.' Judicial Removal of Directors: Denial of Directors' License to Steal or Shareholders' Freedom to Vote? *'Hastings Law .Journal* 50(1):97, 1998.

Peysner, J. 'What's Wrong with Contingency Fees' *Nottingham Law Journal* 10: 22, 2001.

Prentice, RA.'The inevitability of a Strong SEC' *Cornell Law Review 19* (4):775, 2006.

Reisberg, A. 'Derivative Actions and the Funding Problem: The Way Forward *'Journal of Business Law* 6:445, 2006.

Riley, AC.' Controlling Corporate Management: UK and US initiatives' *Legal Studies* 14(2): 147, 1994.

R.L.M ' Zapata Corp.v. Maldonado: Restricting the Power of Special Litigation Committees to Terminate Derivative Suits' *Virgina Law Review* 68(5):197,1982.

Robinson Jr, TL.'A New Interpretation of the Contemporaneous Ownership Requirement in Shareholder Derivative Suits: *in re Bank of New York Derivative Litigation* and the Elimination of the Continuing Wrong Doctrine *'Brigham Young University Law Review* 229, 2005.

Roe, MJ. 'Legal Origins, Politics, And Modern Stock Markets *'Harvard Law Review* 120:462, 2006.

Schreiner, OC. 'The Shareholder's Derivative Action–A Comparative Study of Procedures *'South African Law Journal* 96: 203, 1979.

Seriki, H. 'Confidentiality in Arbitration Proceedings: Recent Trends and Developments *'Journal of Business Law* 300, 2006.

Shnell, JH.'A Procedural Treatment of Derivative Suit Dismissals by Minority Directors' *California Law Review* 69: 885, 1981.

Stoop, H. 'The Derivative Action Provisions In The Companies Act 71 of 2008'*South African Law Journal* 129(3): 527, 2012.

Subai, P.' Disqualifying Unfit Directors: What Lessons Can Nigeria Learn From The Commonwealth Countries? *'Commonwealth Law Bulletin* 1, 2020.

Subramanien, D. 'Section 165(5) (b) of The Companies Act 71 of 2008: A Discussion of the Requirement of Good Faith' *Journal of Corporate and Commercial Law & Practice* 6(2): 212, 2020.

Sullivan, GR. 'Restating the Scope of the Derivative Action *'Cambridge Law Journal*44:236, 1985.

Thabane, T. 'The Removal of Directors In State Owned Companies: Shareholders' Franchise in Jeopardy'? Molefe & Ors. V Minister of Transportation & Ors.' SA *Mercantile Law Journal* 30:155, 2018.

Thompson, RW. Jeffers, ST. Chisholm, CL. 'The Limits of Derivative Actions: The Application of Limitation Periods to Derivative Actions *'Alberta Law Review* 49(3): 604, 2012.

Tobie, W.' the Use of Alternative Dispute Methods in Corporate Disputes: The Provisions of The Companies' Act of 2008'*SA Mercantile Law Journal*26 (3):668, 2014.

Van Eck, M. 'Lack of Contractual Capacity- a Fatal Blow to Contingency Agreements' De *Rebus* May: 31, 2022.

Van Tonder, JL.' An Analysis of Directors Duty To Act In The Best Interests of The Company, Through The Lens of The Business Judgment Rule' *Obiter* 36(3): 702,2015.

Von Nessen, P. Goo, SH. & Low, CK. 'The Statutory Derivative Action: Now Showing Near You *'Journal of Business Law 7*: 627, 2008.

W. 'Derivative Actions and Foss v Harbottle *'Modern Law Review* 44(2): 202, 1981.

Wedderburn, KW. 'Shareholders' Rights and the Rule in Foss v Harbottle (Continued)'*Cambridge Law Journal* 16(1):93, 1958.

Wedderburn, KW.' Shareholders' Rights and the Rule in Foss v Harbottle *'Cambridge Law Journal* 15(2):194, 1957.

Xiangxing, F. and Goo, SH. 'Derivative Actions in China: Problems and Prospects' *Journal of Business Law* 4:376, 2009.

Yap, LJ.'whither the Common Law Derivative Action? *'Commercial Law World Review* 197, 2009.

Yew, GCK.' Champerty, Professional Legal Ethics and Access to Justice for Impecunious Clients' *Singapore Journal of Legal Studies* 206, 2014.

Youngwood, AD. 'The Contingent Fee- A Reasonable Alternative? *'Modern Law Review*28:330, 1965.

Zander, M. 'Government's Plan on Legal Aid and Conditional Fees *'Modern Law Review*61 (4):538, 1998.

Zhang, Z.' The Shareholder Derivative Action and Good Governance in China: Why The Excitement Is Actually For Nothing's *Pacific Basin Law Journal* 28(2): 174, 2011.

6 CONFERENCE PAPERS

Bainbridge, SM. 'Shareholder Activism And Institutional Investors'UCLA Law *and Economics Research Paper Series*10.

Bebchuk LA. *et al* 'The Agency Problems of Institutional Investors' 2017 11 *Havard Law School Program on Corporate Governance Discussion Paper*.

Hundermark, P.' Access To Justice And Legal Costs' [2018] *Legal Aid South Africa Conference Paper* 1.

7 LAW REFORM AND LAW COMMISSION REPORTS

7.1 NIGERIAN REPORT

Nigerian Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law*[1988] Vol.1.

7.2 SOUTH AFRICAN REPORTS

Hansard HC Vol 450, Official Report, 17/10/06,col 832.

Memorandum on the Objects of the Companies Bill, 2008, Companies Bill [B 61D--2008].

South Africa Company Law for the 21st Century: Guidelines for Corporate Law Reform [2004] Gazette No.26493, vol 468, Notice 1183.

Van Wyk de Vries Commission of Enquiry into the Companies Act, *Main Report* RP 45/1970.

7.3 ENGLISH REPORTS

Cadbury Committee Report on Financial Aspects of Corporate Governance (1992).

English Law Commission, *Shareholder Remedies* Law Com: No 246 Cm 3769, (1997).

Law Commission, *Consultative Document* No.142, (1996).

Review of Civil Litigation Costs, *Final Report* (2009) https:// www.judiciary.uk. Reforming Civil Litigation Funding and Costs in England and Wales- Implementation of Lord Justice Jackson's Recommendations, *The Government Response* Cmn 8041, (2011).

The Law Commission, *Shareholders Remedies Consultation Paper* ('Consultation Paper') No. 142 (1996), para. 14.1- 14.4.

The White Paper, Sixth Report of Session (2002-03).

7.4 USA REPORTS

American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (1994).

Nolan Haskovec, *Codes of Corporate Governance: A Review working Paper* (Milstein Center for Corporate Governance and Performance, 2012).

7.5 OECD REPORT

Louis Bouchez *et al* 'The Quality of Corporate Law and the Role of Corporate Law Judges' *The OECD's Work Programme On Corporate Governance and Dispute Resolution* 3 at 5 (January 29, 2009, 10:04 am). http://www.volokh.com/posts/1233241458.shtml.

8 E. JOURNALS

Ackman, D. 'Sherron Watkins Had Whistle, But Blew It' https://www.forbes.com/2002/02/140214watkins.html.

Coker, O.' Bringing a Derivative Action' www.internationallawoffice.com.

Davids, E. & Kitcat, R.' The Shareholder Rights and Activism Review' Law *Reviews-thelawreviews.co.uk.*4:2019.

Eghobamien, O.' The Triumph of Form over Substance' https://greymile.perchstoneand graeys.com/2012/03/21 July 05 3.04pm.

Odeleye, A. 'Review of Agip Nigeria Plc v Agip Petroli International &Ors' (July 05, 2016, 1.52pm) https.www.yumpu.com/en/document/view/6351577.

Omotayo, FO.' The Nigerian Freedom of Information Law: Progress, Implementation, Challenges and Prospects *'Library Philosophy and Practice (e-journal) 2015.*

Sule, I. 'Whistleblowers' Protection Legislation: In Search For a Model For Nigeria'www.ippa.org/IPPC4/Proceedings/....Paper 18-8.pdf.

9 NEWSPAPERS REPORTS

Gabriel Omoh, Babajide Komolafe' CBN sacks 5 Banks' CEOs, appoints Acting MD/CEOs' *Vanguard* (August 14, 2009, 5.01pm) www.vanguardngr.com/2009/08/cbn-sacks-5-banks-directors.

Ighomwenghian Kingsley' Nigeria: Why CBN sacked Ibru, Akingbola, Ebong, Others' *Daily Independent* (August 15, 2009).

Okechukwu, Nnodim'First Bank directors fired to protect customers, minority shareholders-CBN' *The Punch* (April30, 2021) 20.

APPENDIX

i. COMPANIES AND ALLIED MATTERS ACT 2020,SECTIONS 341-373

CHAPTER 13—PROTECTION OF MINORITY AGAINST ILLEGAL AND OPPRESSIVE CONDUCT ACTION BY OR AGAINST THE COMPANY

341. Subject to the provisions of this Act, where an irregularity is made in the course of a company's affairs or any wrong is done to the company, only the company can sue to remedy that wrong and only the company can ratify the irregular conduct.

342.—(1) For the purposes of this section, "major asset transaction" means a transaction or related series of transactions which includes the—

(*a*) purchase or other acquisition outside the usual course of the company's business ; and

(*b*) sale or other transfer outside the usual course of the company's business, of the company's property or other rights the value of which, on the date of the company's decision to complete the transaction, is 50% or more of the book value of the company's assets based on the company's most recently compiled balance sheet.

(2) In undertaking a major asset transaction—

(*a*) the board of directors of the company shall recommend the transactionand direct that it be submitted for approval to an annual or extraordinarygeneral meeting of members ;

(*b*) notice of the transaction, stating that a purpose of the meeting is toconsider the transaction and including a summary of the transaction and ofthe recommendation of the board of directors on the transaction, shall begiven to all members entitled to notice of or to attend the meeting or to voteon the transaction ; and

(*c*) at the meeting the members shall approve the transaction by a specialresolution, unless the company's memorandum of association provides for its approval by an ordinary resolution, in which case it is approved by an ordinary resolution.

343. Without prejudice to the rights of members under sections 346-351and sections 353-355 of this Act or any other provisions of this Act, the Court,on the application of any member, may by injunction or declaration restrain the company or its officers from—

(*a*) entering into any transaction which is illegal or ultra vires ;

(*b*) purporting to do by ordinary resolution any act which by its articles or this Act required to be done by special resolution ;

(*c*) any act or omission affecting the applicant's individual rights as a member ;

(*d*) committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done ;

(*e*) where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders ;

(*f*) where the directors are likely to derive a profit or benefit, orhave profited or benefited from their negligence or from their breach of duty ; and

(*g*) any other act or omission, where the interest of justice so demands.

344.—(1) Where a member institutes a personal action to enforce aright due to him personally, or a representative action on behalf of himself and other affected members to enforce any right due to them, he or they are subject to subsection (2), entitled to—

(*a*) damages for any loss incurred on account of the breach of that right ; or

(*b*) declaration or injunction to restrain the company or the directors from doing a particular act.

(2) Where, in proceedings brought under this section, the Court finds the directors or any of them liable for any wrongdoing, the erring director is personally liable in damages to the aggrieved member.

(3) Where any member institutes an action under this section, the Court may award costs to him personally whether or not his action succeeds.

(4) In any proceeding by a member under section 343 of this Act, the Court may, if it deems fit, order that the member shall give security forcosts.

345. For the purpose of sections 343 and 344 of this Act, "*member*"includes—

(*a*) the personal representative of a deceased member ; and

(*b*) any person to whom shares have been transferred or transmitted by operation of law.

346.—(1) Subject to the provisions of subsection (2), an applicant may apply to the Court for leave to bring an action in the name or on behalf of acompany or a company's subsidiary, or

to intervene in an action to which the company or the company's subsidiary is a party, for the purpose of prosecuting,defending or discontinuing the action on behalf of the company or the company's subsidiary.

(2) No action may be brought and no intervention may be made under subsection (1), unless the Court is satisfied that—

(*a*) a cause of action has arisen from an actual or proposed act or omission involving negligence, default, breach of duty or trust by a director or a former director of the company ;

(*b*) the applicant has given reasonable notice to the directors of the company of his intention to apply to the Court under subsection (1) ;

(*c*) the directors of the company do not bring, diligently prosecute, defend or discontinue the action ;

(*d*) the notice contains a factual basis for the claim and the actual or potential damage caused to the company ;

(*e*) the applicant is acting in good faith ; and

(*f*) it appears to be in the best interest of the company that the action be brought, prosecuted, defended or discontinued.

(3) An action under this section may be against the director or any other person (or both).

(4) In any action referred to in this section the plaintiff shall have the right to obtain any relevant documents from the defendant and the witnessesat trial, and may in pursuance of that right request categories of documents from such person without identifying specific documents.

347.—(1) In connection with an action brought or intervened undersection 346 of this Act, the Court may, at any time, make any such order or orders as it deems fit.

(2) The Court may make an order—

(*a*) authorising the applicant or any other person to control the conduct of the action ;

(*b*) giving directions for the conduct of the action ;

(*c*) directing that any amount adjudged payable by a defendant in the action is paid, in whole or in part, directly to former and present security holders of the company instead of to the company ; and

(*d*) requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings.

348. An application made or an action brought or intervened in under section 6 shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or a duty owed to the company has been or maybe approved by the shareholders of such company, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 347.

349. An application made or an action brought or intervened in under section 346 shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the Court given upon such terms as the Court deems fit and, if the Court determines that the rights of any applicant may be substantially affected by such stay, discontinuance, settlement or dismissal, the Court may order any party to the application or action to give notice to the applicant.

350. An applicant shall not be required to give security for costs in any application made or action brought or intervened in under section 346 of this Act.

351. In an application made or an action brought or intervened in undersection 346, the court may at any time order the company to pay to the applicantinterim costs before the final disposition of the application or action.

352. In sections 346-351 of this Act, "*applicant*" means—

(*a*) a registered holder or a beneficial owner and a former registered holder or beneficial owner, of a security of a company ;

(*b*) a director or an officer or a former director or officer of a company ;

(*c*) the Commission ; or

(*d*) any other person who in the discretion of the Court, is a proper person to make an application under section 346.

RELIEF ON THE GROUNDS OF UNFAIRLY PREJUDICIAL AND OPPRESSIVE CONDUCT

353.—(1) An application to the Court by petition for an order under section 354 in relation to a company may be made by—

(*a*) a member of the company ;

(*b*) a director or officer, former director or officer of the company ;

(*c*) a creditor ;

(*d*) the Commission ; or

(*e*) any other person who, in the discretion of the Court, is the proper person to make an application under section 354.

(2) In sections 354 and 355 of this Act, "*member*" includes—

(*a*) the personal representative of a deceased member ; and

(*b*) any person to whom shares have been transferred or transmitted by operation of law.

354.—(1) An application for relief on the ground that the affairs of a company are being or have been conducted in an illegal or oppressive manner may be made to the Court by petition.

(2) An application to the Court by petition for an order under this section in relation to a company may be made by—

(*a*) a member of the company who alleges that—

(*i*) the affairs of the company are being or have been conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is or has been in disregard of the interests of a member or the members as a whole, or

(*ii*) an act or omission or a proposed act or omission, by or on behalf of the company or a resolution, or a proposed resolution, of a class of members, was, is or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was, is or wouldbe in a manner which is in disregard of the interests of a member or themembers as a whole ;

(*b*) any of the persons mentioned under section 353 (1) (*b*), (*c*) and (*e*)who alleges that—

(i) the affairs of the company have been or are being conducted in amanner oppressive or unfairly prejudicial to or discriminatory against orin a manner in disregard of the interests of that person, or

(*ii*) an act or omission, or a proposed act or omission was, is or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against,or was or is in disregard of the interests of that person, or

(*c*) the Commission in a case where it appears to it in the exercise of its powers under the provisions of this Act or any other enactment that—

(*i*) the affairs of the company were or are being conducted in a manner that was or is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members, or was or is in disregard of the public interest, or

(*ii*) any actual or proposed act or omission of the company, including an act or omission on its behalf which was, is or would be oppressive, orunfairly prejudicial to, or unfairly discriminatory against a member or members in a manner which was or is in disregard of the public interest.

355.—(1) If the Court is satisfied that a petition under sections 353 and354 is well founded, it may make such order or orders as it deems fit for givingrelief in respect of the matter complained of.

(2) Without prejudice to the generality of subsection (1), the Court may make an order—

(*a*) that the company be wound up ;

(*b*) for regulating the conduct of the affairs of the company in future ;

(*c*) for the purchase of the shares of any member by other members ofthe company ;

(*d*) for the purchase of the shares of any member by the company andfor the reduction accordingly of the company's capital ;

(*e*) directing the company to institute, prosecute, defend or discontinue specific proceedings, or authorising a member or the company to institute,prosecute, defend or discontinue specific proceedings in the name or on behalf of the company ;

(*f*) varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract ;

(*g*) directing an investigation to be made by the Commission ;

(*h*) appointing a receiver or a receiver and manager of property of the company ;

(*i*) restraining a person from engaging in specific conduct or from doing a specific act or thing ; or

(*j*) requiring a person to do a specific act or thing.

(3) Where an order that a company be wound up is made under this section, the provisions of this Act relating to winding-up of companies shall apply, with such modifications as are necessary, as if the order had been made upon an application duly filed in the Court by the company.

(4) Where an order under this section makes any alteration or addition tothe memorandum or articles of a company, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company does not have power, without the leave of the Court, to make any furtheralteration or addition to the memorandum and articles inconsistent with theprovisions of the order but, subject to this subsection, the alteration or additionshall have effect as if it had been made by a resolution of the company.

(5) A certified true copy of an order made under this section altering or giving leave to alter a company's memorandum or articles shall, within 14 days from the making of the order or such longer period as the Court may allow, be delivered by the company to the Commission for registration, and if the company defaults in so complying, the company and each officer of it are liable to a penalty as the Commission shall specify in its regulations.

356. Any person who contravenes or fails to comply with an order made under section 355 that is applicable to him, commits an offence and is liable to a penalty as the Commission shall specify in its regulations.

357.—(1) The Commission may appoint one or more competent inspectors to investigate the affairs of a company and to report on them in such manner as it may direct.

(2) The appointment may be made—

(*a*) in the case of a company having a share capital, on the application of members holding at least one-tenth of the class of shares issued ;

(*b*) in the case of a company not having a share capital, on the application of at least one-tenth in number of the persons on the company's register of members ; and

(*c*) in any other case, on the application of the company.

(3) The application shall be supported by such evidence as the Commission may require for the purpose of showing that the applicant or applicants have good reason for requiring the investigation.

(4) Where a company's employee, in compliance with an inspector's request, provides the inspector with any information concerning the company's affairs, the company shall protect the employee from any form of discrimination or other unfair treatment.

(5) Any employee relieved of his employment without any just cause,other than for reason of disclosure made pursuant to the provision of this section,is entitled to a compensation which is calculated as if he had attained the maximum age of retirement or had served the maximum period of service, in accordance with his terms of employment or conditions of service to the company.

358.—(1) The Commission shall appoint one or more competent inspectors to investigate the affairs of a company and report on them in such manner as it directs, if the Court, by order declares that its affairs ought to be investigated.

(2) Notwithstanding the provisions of sections 357 and subsection (1) of this section, the Commission may appoint one or more competent inspectors to investigate the affairs of a company and report on them in such manner as it directs, if it appears to it that there are circumstances suggesting that—

(*a*) the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person, or in a manner which is unfairly prejudicial to some part of its members ;

(*b*) any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose ;

(*c*) persons concerned with the company's formation or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards it or towards its members ; or

(*d*) the company's members have not been given all the information with respect to its affairs which they might reasonably expect.

(3) Subsections (1) and (2) are without prejudice to the powers of the Commission under section 366, and the power conferred by subsection (2) is exercisable with respect to a body corporate, notwithstanding that it is in a course of being voluntarily wound up.

(4) Reference in subsection (2) to a company's member, includes—

(*a*) any of the personal representatives of a deceased member ; and

(*b*) any person to whom shares have been transferred or transmitted byoperation of law.

359.—(1) If an Inspector appointed, under section 357 or 358, toinvestigate the affairs of a company thinks it necessary for the purposes of his investigation to investigate the affairs of another body corporate which is or at any time been the company's subsidiary or holding company, or a subsidiaryof its holding company or a holding company of its subsidiary, he shall report on the affairs of the other body corporate so far as he thinks that the results of his investigation of its affairs are relevant to the investigation of the affairs of the company first mentioned above.

(2) An inspector appointed under either section 357 or 358 may at any time in the course of his investigation, without the necessity of making an interim report, inform the Commission of matters coming to his knowledge as a result of the investigation tending to show that an offence has been committed.

360.—(1) When an inspector is appointed under section 357 or 358, it is the duty of both past and present officers and agents of the company, and all past and present officers and agents of any other body corporate whose affairs are investigated under section 359, to—

(a) produce to the inspector all information, books and documents of or relating to the company or, as the case may be, the other body corporate,which are at their disposal, in their custody or power ;

(b) appear before the inspector when required to do so ; and

(c) give the inspector all assistance in connection with the investigation which he is reasonably able to give.

(2) If the inspector considers that a person other than an officer or agent of the company or other body corporate is or may be in possession of information concerning its affairs, he may require that person to produce to him such information, books or documents at his disposal, under his custody or power relating to the company or other body corporate, to appear before him and give him all assistance in connection with the investigation which he is reasonably able to give, and it is that person's duty to comply with the requirement.

(3) An inspector may examine on oath the officers and agents of the company or other body corporate, and any such person as is mentioned insubsection (2) in relation to the affairs of the company or other body, and administer an oath accordingly.

(4) In this section, a reference to officers or to agents includes past and present officers or agents, as the case may be, and "agent" in relation to a company or other body corporate, includes its bankers and solicitors and persons employed by it as auditors, whether these persons are or are not officers of the company.
(5) An answer given by a person to a question put to him in exercise of powers conferred by this section (whether as it has effect in relation to an investigation under any of sections 357-359 as applied by any other section in this Act) may be used in evidence against him.
(6) Where any officer or agent of the company, or any other person refuses to answer any question put to him by the inspector, or provide any information, books or documents at his disposal, under his custody or power with respect to the affairs of the company, or other body corporate, the inspector may apply to Court for contempt proceedings against the officer,agent or person.

361.—(1) If an inspector has reasonable grounds for believing that adirector, or past director, of the company or other body corporate whose affairs he is investigating maintains or has maintained a bank account of anydescription, whether alone or jointly with another person and whether in Nigeria or elsewhere, into or out of which there has been paid—
(a) the emoluments or part of the emoluments of his office as suchdirector, particulars of which have not been disclosed in the financial statements of the company or other body corporate for any financial year,contrary to the provisions of Part V of the Second Schedule to this Act (in relation to particular in accounts of directors) ;
(b) any money which has resulted from or been used in the financing of an undisclosed transaction, arrangement or agreement ; or
(c) any money which has been in any way connected with an act oromission or series of acts or omissions, which on the part of that director constituted misconduct whether fraudulent or not towards the company orbody corporate or its members, the inspector may require the director to produce to him all documents in the director's possession, or under his control, relating to that bank account.
(2) For purposes of subsection (1) (b) of this section, an "undisclosed"transaction, arrangement or agreement is one the particulars of which have not been disclosed in the financial statement of any company or in a statement annexed thereto for any financial year, including the disclosure of contractsbetween companies and their directors.

362.—(1) When an inspector is appointed under section 357 or 358 to investigate the affairs of a company, the following applies in the case of—

(a) any officer or agent of the company ;

(b) any officer or agent of another body corporate whose affairs are investigated under section 359 ; and

(c) any such person as is mentioned in section 360 (2).

(2) Section 360 (4) applies with regards to references in subsection (1)to an officer or agent.

(3) If that person—

(a) refuses to produce any book or document which it is his duty under section 360 or 361 to produce, or

(b) refuses to appear before the inspector when required to do so,the inspector may certify the refusal in writing and apply to the Court for contempt proceedings against the person.

(4) The Court may thereupon enquire into the case, and after hearing any witness who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence,the Court may punish the offender in like manner as if he had been guilty of contempt of the Court.

363.—(1) The inspector may, and if so directed by the Commissionshall, make interim reports to the Commission, and on the conclusion of his investigation shall make a final report to it and any such report shall be written or printed, as the Commission may direct.

(2) The Commission may direct that a copy of the inspector's report be forwarded to the company at its registered or head office.

(3) Where an inspector is appointed under section 357 in pursuance of an order of the Court, the Commission shall furnish a copy of any of its reports to the Court.

(4) In any other case, the Commission may, if it deems fit—

(a) furnish a copy on request and on payment of the prescribed fee to—

(i) any member of the company or other body corporate which is the subject of the report,

(ii) any person whose conduct is referred to in the report,

(iii) the auditors of that company or body corporate,

(iv) the applicants for the investigation, and

(v) any other person whose financial interests appear to the Commission to be affected by the matters dealt with in the report, whether as creditors of the company or body corporate, or otherwise ; and

(b) cause any such report to be printed and published.

364.—(1) If, from any report made under section 363, it appears to the Commission that any civil proceeding ought in the public interest to be brought by the company or anybody corporate, the Commission may itself bring such proceedings in the name and on behalf of the company or the body corporate.

(2) The Commission shall indemnify the body corporate against any costs or expenses incurred by it in or in connection with proceedings broughtunder this section, and any costs or expenses so incurred shall, if not otherwise recoverable, be defrayed out of the Consolidated Revenue Fund.

365.—(1) If, from any report made under section 363, it appears that any person has, in relation to the company or anybody corporate whose affairs have been investigated by virtue of section 359, been guilty of any offence for which he is criminally liable, the report shall be referred to the Attorney-General of the Federation.

(2) If the Attorney-General of the Federation considers that the case referred to him is one in which a prosecution ought to be instituted, he shall direct action accordingly, and it is the duty of all past and present officers and agents of the company or other body corporate, (other than the defendant inthe proceedings), to give all assistance in connection with the prosecution which they are reasonably able to give.

(3) If, from any report made under section 363, it appears to the Commission that proceedings ought, in the public interest, to be brought by anybody corporate dealt with by the report for the recovery of damages inrespect of any fraud, misfeasance or other misconduct in connection with the promotion or formation of that body corporate or the management of its affairs,or for the recovery of any property of the body corporate which has been misapplied or wrongfully retained, it may refer the case to the Attorney-General of the Federation for his opinion as to the bringing of proceedings for that purpose in the name of the body corporate and if proceedings are brought, its hall be the duty of all past and present officers and agents of the company or other body corporate (other than the

defendants in proceedings), to give him
all assistance in connection with the proceedings which they are reasonably able to give.
(4) Costs and expenses incurred by a body corporate in or in connectionwith any proceedings brought by it under subsection (3) shall, if not otherwiserecoverable, be defrayed out of the Consolidated Revenue Fund.

366. If, in the case of any body corporate liable to be wound up under this Act, it appears to the Commission from a report made by an inspector under section 363 that it is expedient in the public interest that the body corporate should be wound up, the Commission may (unless the body corporate is already wound up by the Court) present a petition for it to be wound up if the Court considers it just and equitable to do so.

367.—(1) The expenses of, and incidental to, an investigation by an inspector appointed by the Commission under the provisions of this Act, are defrayed in the first instance out of the Consolidated Revenue Fund, but the following persons are, to the extent mentioned, liable to make repayment,—
(a) any person who is convicted on a prosecution instituted, as a result of the investigation by the Attorney-General of the Federation, or who isordered to pay damages or restore any property in proceedings broughtunder section 365 (3), may, in the same proceedings, be ordered to pay thesaid expenses to such extent as are specified in the order ;
(b) any body corporate in whose name proceedings are brought under section 365 (3) is liable to the extent of the amount or value of any sums or property recovered by it as a result of those proceedings ; or
(c) unless, as the result of the investigation, a prosecution is instituted by the Attorney-General of the Federation, the applicants for the investigation,where the inspector was appointed under section 357, are liable to such extent, if any, as the Commission may direct, and any amount for which a body corporate is liable under paragraph (b), shall be a first charge on the sums or property mentioned in that paragraph.
(2) For the purposes of this section, any costs or expenses incurred bythe Commission in or in connection with proceedings brought by virtue of section 364 (2), is treated as expenses of the investigation giving rise to the proceedings.

(3) Expenses to be defrayed by the Commission under this section are,so far as not recoverable are to be paid out of the Consolidated Revenue Fund.

368.—(1) A copy of any report of an inspector appointed under sections357 and 358, certified by the Commission to be a true copy, is admissible in any legal proceedings as evidence of the opinion of the inspector in relation to any matter contained in the report.
(2) A document purporting to be such a certificate as mentioned insubsection (1) shall be received in evidence and be deemed to be such a certificate, unless the contrary is proved.

369.(1) Where it appears to the Commission that there is good reason so to do, it may appoint one or more competent inspectors to investigate and report on the membership of any company, and otherwise with respect to the company, for the purpose of determining the true persons who are or have been financially interested in the success or failure (real or apparent) of the company or able to control or materially to influence the policy of the company.
(2) The appointment of an inspector under this section may define the scope of his investigation, whether in respect of the matter or the period to which it is to extend or otherwise, and in particular may limit investigation to matters connected with particular share or debenture.
(3) Where an application for an investigation under this section with respect to particular share or debenture of a company is made to the Commission by members of the company, and the number of applicants or the amount of the shares held by them is not less than that required for an application for the appointment of an inspector under section 357 (2) (a) and (b)—
(a) the Commission shall appoint an inspector to conduct that investigation,unless it is satisfied that the application is vexatious ; and
(b) the inspector's appointment is not excluded from the scope of his investigation any matter which the application seeks to include, except in so far as the Commission is satisfied that it is reasonable for the matter to be investigated.
(4) Subject to the terms of an inspector's appointment, his powers shall extend to the investigation of any circumstances suggesting the existence of an arrangement or

understanding which, though not legally binding, is or was observed or likely to be observed in practice and which is relevant to the purposes of his investigation.

370.—(1) For the purposes of any investigation under section 369, the provisions of sections 359-363 apply with the necessary modifications to references to the affairs of the company or those of any body corporate, that—

(a) the said sections shall apply in relation to all persons who are or have been, or whom the inspector has reasonable cause to believe to be or have been, financially interested in the success or failure or the apparent success or failure of the company or any other body corporate whose membership is investigated with that of the company, or able to control or materially to influence the policy thereof, including persons concerned only on behalf of others, as they apply in relation to officers and agents of thecompany or of the other body corporate, as the case may be ; and

(b) the Commission is not bound to furnish the company or any other person with a copy of any report by an inspector appointed under this section or with a complete copy thereof if he is of the opinion that there is good reason for not divulging the contents of the report or any part thereof,but shall keep a copy of any such report, or, the parts of any report, as regards which he is not of that opinion.

(2) The expenses of any investigation under section 369 shall be defrayed out of the Consolidated Revenue Fund.

371.—(1) Where it is made to appear to the Commission that there is good reason to investigate the ownership of any share in or debenture of a company and that it is unnecessary to appoint an inspector for the purpose, the Commission may require any person who it has reasonable cause to believe to—

(a) be or to have been interested in those shares or debentures ;

(b) act or to have acted in relation to those shares or debentures as a legal practitioner or an agent of someone interested therein ; or

(c) give to the Commission any information which the person has or might reasonably be expected to obtain as to the present and past interest in those shares or debentures and the names and addresses of the persons interested, and of any persons who act or have acted on their behalf inrelation to the shares or debentures.

(2) For the purposes of this section, a person is deemed to have an interest in a share or debenture if he has any right to acquire or dispose of the share or debenture or any interest therein or to vote in respect thereof, or if his consent is necessary for the exercise of any of the rights of other persons interested therein, or if other persons interested therein can be required or are accustomed to exercise their rights in accordance with his instructions.
(3) Any person who fails to give any information required of him under this section, or who, in giving any such information, makes any statement which he knows to be false, or recklessly makes any statement which is false commits an offence and liable to a penalty as the Commission shall specify in its regulations.

372.—(1) Where, in connection with an investigation under section 369or 371, it appears to the Commission that there is difficulty in finding out therelevant facts about any share (whether issued or to be issued), and that the difficulty is due wholly or mainly to the unwillingness of the persons concerned,or any of them, to assist the investigation as required by this Act the Commissionmay in writing direct that the shares shall, until further notice, be subject to the restrictions imposed by this section.
(2) If shares are directed to be subject to the restrictions imposed by this section—
(a) any transfer of those shares, or in case of unissued shares, any transfer of the right to be issued therewith and any issue thereof, is void ;
(b) no voting rights are exercisable in respect of those shares ;
(c) no further shares shall be issued in right of those shares or in pursuance of any offer made to the holder of shares ; and
(d) except in a liquidation, no payment shall be made of any sums due from the company on those shares, whether in respect of capital or otherwise.
(3) Where the Commission directs shares to be subject to restrictions under this section, or refuses to direct that shares shall cease to be subject thereto, any person aggrieved thereby may appeal to the Court, and the Courtmay, if it deems fit, direct that the shares shall cease to be subject to the said restrictions.
(4) Any direction or order of the Court that shares shall cease to be subject to restrictions under this section, expressed to be made with a view to permitting a transfer of those shares, may continue the restrictions mentioned in subsection (2) (c) and (d), either in whole or in part, so far as they relate to any right acquired or offer made before the

transfer.

(5) Any person who—

(a) exercises or purports to exercise any right to dispose of shares which, to his knowledge, are for the time being subject to restrictions under this section,

(b) votes in respect of such shares, whether as holder or proxy, or appoints a proxy to vote in respect thereof, or

(c) being the holder of such shares, fails to notify that they are subject to the said restrictions, commits an offence and is liable to a penalty as the Commission shall specify in its regulations.

(6) Where shares in any company are issued in contravention of the said restrictions, the company and each officer of the company who are in default commits an offence and is liable to a penalty as the Commission shall specify in its regulations.

(7) A prosecution shall not be instituted under this section except by or with the consent of the Attorney-General of the Federation.

(8) This section applies in relation to debentures as it applies in relation to shares.

373. Nothing in this Part requires disclosure to the Commission or to an inspector appointed by it, by a—

(a) legal practitioner of any privileged communication made to him in that capacity, except as regards the name and address of his client ; or

(b) company's banker as such, of any information as to the affairs of any of their customers other than the company

ii.SOUTH AFRICAN COMPANIES ACT 71 OF 2008, SECTIONS 165, 163

DERIVATIVE ACTIONS

165.(1) Any right at common law of a person other than a company to bring orprosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.

(2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person—

(a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;

(b) is a director or prescribed officer of the company or of a related company;

(c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or

(d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.

(3) A company that has been served with a demand in terms of subsection (2)may apply within 15 business days to a court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

(4) If a company does not make an application contemplated in subsection (3),or the court does not set aside the demand in terms of that subsection, the company must—

(a) appoint an independent and impartial person or committee to investigate the demand, and report to the board on—

(i) any facts or circumstances—

(aa) that may gave rise to a cause of action contemplated in the demand; or

(bb) that may relate to any proceedings contemplated in the demand;

(ii) the probable costs that would be incurred if the company pursued any such cause of action or continued any suchproceedings; and

(iii) whether it appears to be in the best interests of the company to pursue any such cause of action or continue any such proceedings; and

(b) within 60 business days after being served with the demand, or within a longer time as a court, on application by the company, may allow, either—

(i) initiate or continue legal proceedings, or take related legal steps to protect the legal interests of the company, as contemplated in the demand; or

(ii) serve a notice on the person who made the demand, refusing to comply with it.

(5) A person who has made a demand in terms of subsection (2) may apply to a court for leave to bring or continue proceedings in the name and on behalf ofthe company, and the court may grant leave only if—

(a) the company—

(i) has failed to take any particular step required by subsection(4);

(ii) appointed an investigator or committee who was not independent and impartial;

(iii) accepted a report that was inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations;

(iv) acted in a manner that was inconsistent with the reasonable report of an independent, impartial investigator or committee; or

(v) has served a notice refusing to comply with the demand, as contemplated in subsection (4) (b) (ii); and

(b) the court is satisfied that—

(i) the applicant is acting in good faith;

(ii) the proposed or continuing proceedings involve the trial of aserious question of material consequence to the company; and

(iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be.

(6) In exceptional circumstances, a person contemplated in subsection (2) may apply to a court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in that subsection, or without affording the company time to respond to the demand in accordance with subsection (4), and the court may grant leave only if the court is satisfied that—

(a) the delay required for the procedures contemplated in subsections (3) to (5) to be completed may result in—

(i) irreparable harm to the company; or

(ii) substantial prejudice to the interests of the applicant or another person;

(b) there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the company's interests that the applicant seeks to protect; and

(c) that the requirements of subsection (5) (b) are satisfied.

(7) A rebuttable presumption that granting leave is not in the best interests ofthe company arises if it is established that—

(a) the proposed or continuing proceedings are by—

(i) the company against a third party; or

(ii) a third party against the company;

(b) the company has decided—

(i) not to bring the proceedings;

(ii) not to defend the proceedings; or

(iii) to discontinue, settle or compromise the proceedings; and

(c) all of the directors who participated in that decision—

(i) acted in good faith for a proper purpose;

(ii) did not have a personal financial interest in the decision, and were not related to a person who had a personal financial interest in the decision;

(iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and

(iv) reasonably believed that the decision was in the best interests of the company.

(8) For the purposes of subsection (7)—

(a) a person is a third party if the company and that person are not related or inter-related; and

(b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

(9) If a court grants leave to a person under this section—

(a) the court must also make an order stating who is liable for the remuneration and expenses of the person appointed;

(b) the court may vary the order at any time;

(c) the persons who may be made liable under the order, or the order as varied, are—

(i) all or any of the parties to the proceedings or application; and

(ii) the company;

(d) if the order, or the order as varied, makes two or more persons liable, the order may also determine the nature and extent of the liability of each of those persons; and

(e) the person to whom leave has been granted is entitled, on giving reasonable notice to the company, to inspect any books of the company for any purpose connected with the legal proceedings.

(10) At any time, a court may make any order it considers appropriate about the costs of the following persons in relation to proceedings brought or intervened in with leave under this section, or in respect of an application for leave under this section—

(a) The person who applied for or was granted leave;

(b) the company; or

(c) any other party to the proceedings or application.

(11) An order under this section may require security for costs.

(12) At any time after a court has granted leave in terms of this section, a person contemplated in subsection (2) may apply to a court for an order that they be substituted for the person to whom leave was originally granted, and the court may make the order applied for if it is satisfied that—

(a) the applicant is acting in good faith; and

(b) it is appropriate to make the order in all the circumstances.

(13) An order substituting one person for another has the effect that—

(a) the grant of leave is taken to have been made in favour of the substituting person; and

(b) if the person originally granted leave has already brought the proceedings, the substituting person is taken to have brought those proceedings or to have made that intervention.

(14) If the shareholders of a company have ratified or approved any particular conduct of the company—

(a) the ratification or approval—

(i) does not prevent a person from making a demand, applying for leave, or bringing or intervening in proceedings with leave underthis section; and

(ii) does not prejudice the outcome of any application for leave, or proceedings brought or intervened in with leave under this section; or

(b) the court may take that ratification or approval into account in making any judgment or order.

(15) Proceedings brought or intervened in with leave under this section must not be discontinued, compromised or settled without the leave of the court.

(16) For greater certainty, the right of a person in terms of this section to serve a demand on a company, or apply to a court for leave, may be exercised by that person directly, or by the Commission or Panel, or another person on behalf of that first person, in the manner permitted by section 157.

RELIEF FROM OPPRESSIVE OR PREJUDICIAL CONDUCT OR FROM ABUSE OF SEPARATE JURISTICPERSONALITY OF COMPANY

163. (1) A shareholder or a director of a company may apply to a court for relief if—

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interestsof, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including—

(a) an order restraining the conduct complained of;

(b) an order appointing a liquidator, if the company appears to be insolvent;

(c) an order placing the company under supervision and commencing businessrescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)*(a)* apply;

(d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;

(e) an order directing an issue or exchange of shares;

(f) an order—

(i) appointing directors in place of or in addition to all or any of the directors then in office; or

(ii) declaring any person delinquent or under probation, as contemplated in section 162;

(g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;

(i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;

(j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;

(k) an order directing rectification of the registers or other records of a company;or

(l) an order for the trial of any issue as determined by the court.

(3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation—

(a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16(4); and

(b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.

(4) ….[Sub-s.(4) deleted by s.102 of Act No. 3 of 2011]

iii.UNITED KINGDOM COMPANIES ACT 2006, SECTIONS 260 – 264,994-996

DERIVATIVE CLAIMS

260.-(1) This Chapter applies to proceedings in England and Wales or Northern Ireland by a member of a company–

(a) in respect of a cause of action vested in the company, and

(b) seeking relief on behalf of the company.

This is referred to in this Chapter as a "derivative claim".

(2) A derivative claim may only be brought–

(a) under this Chapter, or

(b) in pursuance of an order of the court in proceedings under section 994 (proceedings for protection of members against unfair prejudice).

(3) A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.

The cause of action may be against the director or another person (or both).

(4) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member ofthe company.

(5) For the purposes of this Chapter–

(a)"director" includes a former director;

(b) a shadow director is treated as a director; and

(c) references to a member of a company include a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

Application for permission to continue derivative claim

261.-(1) A member of a company who brings a derivative claim under this Chapter must apply to the court for permission (in Northern Ireland, leave) to continue it.

(2) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission(or leave), the court–

(a) must dismiss the application, and

(b) may make any consequential order it considers appropriate.

(3) If the application is not dismissed under subsection (2), the court–

(a) may give directions as to the evidence to be provided by thecompany, and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(4) On hearing the application, the court may–

(a) give permission (or leave) to continue the claim on such terms as it thinks fit,

(b) refuse permission (or leave) and dismiss the claim, or

(c) adjourn the proceedings on the application and give such directions as it thinks fit.

Application for permission to continue claim as a derivative claim

262.-(1) This section applies where–

(a) a company has brought a claim, and

(b) the cause of action on which the claim is based could be pursued as a derivative claim under this Chapter.

(2) A member of the company may apply to the court for permission (inNorthern Ireland, leave) to continue the claim as a derivative claim on the ground that–

(a) the manner in which the company commenced or continued the claim amounts to an abuse of the process of the court,

(b) the company has failed to prosecute the claim diligently, and

(c) it is appropriate for the member to continue the claim as a derivative claim.

(3) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission(or leave), the court–

(a) must dismiss the application, and

(b) may make any consequential order it considers appropriate.

(4) If the application is not dismissed under subsection (3), the court–

(a) may give directions as to the evidence to be provided by the company, and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(5) On hearing the application, the court may–

(a) give permission (or leave) to continue the claim as a derivative claimon such terms as it thinks fit,

(b) refuse permission (or leave) and dismiss the application, or

(c) adourn the proceedings on the application and give such directions as it thinks fit.

Whether permission to be given

263.-(1) The following provisions have effect where a member of a company applies for permission (in Northern Ireland, leave) under section 261 or 262.

(2) Permission (or leave) must be refused if the court is satisfied–

(a) that a person acting in accordance with section 172 (duty to promotethe success of the company) would not seek to continue the claim, or

(b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or

(c) where the cause of action arises from an act or omission that has already occurred, that the act or omission–

(i) was authorised by the company before it occurred, or

(ii) has been ratified by the company since it occurred.

(3) In considering whether to give permission (or leave) the court must take into account, in particular–

(a) whether the member is acting in good faith in seeking to continue theclaim;

(b) the importance that a person acting in accordance with section 172(duty to promote the success of the company) would attach to continuing it;

(c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances wouldbe likely to be–

(i) authorised by the company before it occurs, or

(ii) ratified by the company after it occurs;

(d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

(e) whether the company has decided not to pursue the claim;

(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.

(4) In considering whether to give permission (or leave) the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.

(5) The Secretary of State may by regulations–

(a) amend subsection (2) so as to alter or add to the circumstances in which permission (or leave) is to be refused;

(b) amend subsection (3) so as to alter or add to the matters that the court is required to take into account in considering whether to give permission (or leave).

(6) Before making any such regulations the Secretary of State shall consult such persons as he considers appropriate.

(7) Regulations under this section are subject to affirmative resolution procedure.

Application for permission to continue derivative claim brought by another member

264.-(1) This section applies where a member of a company ("the claimant")–

(a) has brought a derivative claim,

(b) has continued as a derivative claim a claim brought by the company, or

(c) has continued a derivative claim under this section.

(2) Another member of the company ("the applicant") may apply to the court for permission (in Northern Ireland, leave) to continue the claim on the ground that–

(a) the manner in which the proceedings have been commenced or continued by the claimant amounts to an abuse of the process of thecourt,

(b) the claimant has failed to prosecute the claim diligently, and

(c) it is appropriate for the applicant to continue the claim as a derivative claim.

(3) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission(or leave), the court–

(a) must dismiss the application, and

(b) may make any consequential order it considers appropriate.

(4) If the application is not dismissed under subsection (3), the court–

(a) may give directions as to the evidence to be provided by the company, and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(5) On hearing the application, the court may–

(a) give permission (or leave) to continue the claim on such terms as it thinks fit,

(b) refuse permission (or leave) and dismiss the application, or

(c) adjourn the proceedings on the application and give such directions as it thinks fit.

994 Petition by company member

(1) A member of a company may apply to the court by petition for an order under this Part on the ground—

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

(3) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, "company" means—

(a)a company within the meaning of this Act, or

(b) a company that is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991 (c. 58).

995 Petition by Secretary of State

(1) This section applies to a company in respect of which—

(a) the Secretary of State has received a report under section 437 of the Companies Act 1985 (c. 6) (inspector's report);

(b) the Secretary of State has exercised his powers under section 447 or 448 of that Act (powers to require documents and information or to enter and search premises);

(c) the Secretary of State or the Financial Services Authority has exercised his or its powers under Part 11 of the Financial Services and Markets Act 2000 (c. 8) (information gathering and investigations); or

(d) the Secretary of State has received a report from an investigator appointed by him or the Financial Services Authority under that Part.

(2) If it appears to the Secretary of State that in the case of such a company—

(a) the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members, or

(b) an actual or proposed act or omission of the company (including an actor omission on its behalf) is or would be so prejudicial,he may apply to the court by petition for an order under this Part.

(3) The Secretary of State may do this in addition to, or instead of, presenting a petition for the winding up of the company.

(4) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, "company" means any body corporate that is liable to be wound up under the Insolvency Act 1986 (c. 45) or the Insolvency(Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)).

996 Powers of the court under this Part

(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

(2) Without prejudice to the generality of subsection (1), the court's order may—

(a) regulate the conduct of the company's affairs in the future;

(b) require the company—

(i) to refrain from doing or continuing an act complained of, or

(ii) to do an act that the petitioner has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.