Extending the Ambit of Section 311 of the Companies and Allied Matters Act, 2004: The Elasticity of Unfair Prejudice and Oppressive Conduct

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Abstract

The corporate structure is a conglomeration of interests which are diametrically opposed to each other. The directors who are vested with the power to run the affairs of the company at times abuse the power and by law, they owe their duties to the company and not to individual shareholders. Among the investors of capital whose objective is maximization of returns, there are conflicts of interest but the controlling shareholders are not fiduciaries to the company or to the minority shareholders. Nevertheless, companies are regarded in law as democracies to be run on the democratic principle of majority rule and decisions taken by the majority more often than not, affect the minority negatively. The disaffected minority shareholders have to accept the decisions of the majority and even their domination as a fact of business life. The only way out is for the minority to turn to the law for help. But the common law courts had often shown unwillingness to interfere in internal affairs of companies or review matters of commercial judgment. As such, they interpreted Section 201 of the repealed Companies Act 1968 which provided for minority protection narrowly and failed to redress wrongs occasioned on the minority. Using the doctrinal method, this article finds that minority protection has witnessed a twist in the extant law through Section 311 jurisprudence. The section is wide to cover a variety of interests and categories of conduct that will found a petition by an aggrieved minority member of the company. However, there is need for an open-textured assessment and interpretation of the section by the courts to bring succour to minorities. It is also desirable to provide basic guidelines for the grant of some of the remedies the court is given the power to grant when a

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petition is successful, for example, a buy-out order, payment of compensation, and so on. The Act should also prohibit the controllers or majority using the company's funds to defend petitions filed by the minority, and remove winding-up from the orders the court can make.

Introduction

In corporate law, either the directors or the members in general meeting (but generally the directors) have responsibility for the affairs of the economy. The exercise of powers conferred on these bodies is prone to abuse and thus, maladministration which may not concern the particular action taken by the directors or the members, but rather how the majority decision was reached. Companies are regarded in law as democracies to be run on the democratic principle of majority rule. This sanctity of the majority whether of directors or of members (sometimes in the latter case, with added protection of super majorities or segregated class of interest groups), gives rise to disenchanted minorities.

Traditionally, the common law courts have shown unwillingness to interfere in the internal affairs of companies or review matters of commercial judgment. Worse still, controlling shareholders are not fiduciaries to the company or fellow shareholders. In effect, the wishes of the majority would always prevail over those of the minority. This also means that quite substantial power is placed in the hands of those who control majority votes on the board or at the general meeting. Indeed, in the large companies with widely dispersed shares, comparable power can be wielded with a relatively small stake because of the high degree of apathy and inertia on the part of the small 'armchair' investor. In the small companies, the close relationship between the directors and the majority shareholders isolates the minority. Consequently, the minority is placed in a very prostrate position save to turn to the law.

In an attempt to protect the interests of minority shareholders, Section 311 of the Companies and Allied Matters Act

2004 has provided for relief for unfairly prejudicial and oppressive conduct. This article discusses the elastic nature of the provision (as a mechanism for minority protection) with a legislative intent to catch the activities of controllers of companies, whether they conduct the affairs of the company through the exercise of their powers as directors or as shareholders or both. In doing so, the article chronicles the history of the relief, identifies the persons who may seek it and the parties against whom it may be sought, and examines the scope and grounds for the relief. The article also highlights the remedies that the court may grant when the provision is invoked. Finally, it finds that there is the move towards a more open-textured assessment of unfair prejudice and makes recommendations.

Historical Background of the Relief

In the past, the only remedy available to a minority shareholder who was a victim of "oppression" was to petition for winding up of the company. This remedy of winding up on the just and equitable ground is still available under section 408(e) of the Companies and Allied Matters Act, 2004 as a means for redressing a situation which has become intolerable. Winding up could be accompanied with a summary remedy by way of misfeasance summons against any person involved in the criminal acts against the company at any time in its life.[1] However, liquidation may not be in anyone's interest, as it would profoundly affect the parties not before the court and tantamount to throwing away the baby with the bath water.

Against this backdrop, the Cohen Committee[2] recommended that the court should be given unfettered discretion to impose upon the parties to dispute whatever settlement it considered just and equitable as an alternative remedy to the petition for winding up when the aggrieved minority did not desire to terminate the life of

1 CAMA, 2004 Sections 322 and 507

2 The Cohen Committee, Report of the Committee on Company Law Amendment (Cmnd 6659, 1945)

the company but only wished to redress the oppressive situation. This was translated into the so-called 'oppression' remedy enacted in section 210 of the United Kingdom Companies Act, 1948 and adopted as Section 201 of the Nigerian Companies Act, 1968. The Section provided a discretionary remedy but which, by virtue of its drafting, was expressly stated to be only available where the facts of the case justified a winding up order.[3]The provision, therefore, gave rise to two problems. First, it was the inadequacies of its drafting and the second one was that the courts adopted a restrictive approach towards its interpretation. Whereas the remedy itself was conceived purely as an alternative to winding-up, its linkage with winding-up blurred its purpose and made the burden of proof of oppression which would justify putting the company into liquidation a vital requisite.[4]

The difficulty underlying section 210 of the English Companies Act, 1948 was that the term 'oppression' was very narrowly construed. This judicial approach towards its interpretation was the reason that only two cases were successfully brought under the provision in its 32-year history – *Scottish Co-operative Wholesale Society Ltd v. Meyer*,[5] and *Re HR Harmer*.[6] In the former, Lord Simonds stated that oppression was restricted to conduct on the part of the majority which was "burdensome, harsh and wrongful". This was compounded by the view expressed in the latter case that the conduct in question had to be of a continuous nature. Unfairness was, of itself, insufficient to establish a claim under the oppression remedy. Thus, petitions brought on the grounds of directors awarding themselves excessive remuneration[7] and mismanagement were unsuccessful.[8] In Nigeria too, there had been no significant

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3 Allan Dignan and John Lowry, Company Law (4thedn, Oxford University Press 2006), 201

4 TAT Yagba and BB Kanyip and SA Ekwo, Elements of Commercial Law (Tamaza Publishing Company Limited 1994), 271

5 (1959) AC 324 (HL)

6 (1959) 1 WLR 62 (CA)

7 Re Jermyn Street Turkish Baths Ltd (1971) 1 WLR 1194 (CA)

8 Re Five Minute Car Wash Service Ltd (1966) 1 WLR 745

development of case law on the provision, that is, Section 201 of the Companies Act, 1968.

Given the failure of the section to provide adequate relief, the Jenkins Committee[9] which reviewed the operation of the remedy, identified a number of defects which it felt should be addressed if it was 'to afford effective protection to minorities such as those it intended to deal'. The Committee felt that the section 'must extend to cases in which the acts complained of fall short of actual illegality.' It, therefore, recommended its amendment to cover complaints that the affairs of the company were being conducted in a manner unfairly prejudicial to the interests of the petitioner. This recommendation was belatedly put into effect by Section 75 of the English Companies Act, 1980; re-enacted as Section 459 of the Companies Act, 1985 (now re-enacted as Section 994 of the English Companies Act, 2006).[10]

The English jurisprudence of unfair prejudice is now enacted in Section 311 of the Companies and Allied Matters Act, 2004 which has tried to eliminate the procedural obstacles that stood in the way of minorities under Section 201 of the Nigerian Companies Act, 1968. One unique thing about the Nigerian provision is that it has not only retained the term "oppression" in addition to unfair prejudice but has gone further to provide for unfair discrimination.

Who May Apply

As a starting point, Section 310 of the Companies and Allied Matters Act, 2004 expands the range of possible applicants who may bring an application under Section 311 of the Act. The application which has to be by petition may be made by any of the following persons:

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9 Jenkins Committee, Report of the Company Law Committee (Cmnd 1749, 1962) Paras 201-204

10 Allan Dignan and John Lowry, op. cit. p.202; Len Sealy and Serah Worthington, Cases and Materials in Company Law (8thedn, Oxford University Press 2008), 552

(a) A member of the company.

This is defined to include the personal representatives of a deceased member, and any person to whom shares have been transferred or transmitted by operation of law,[11] such as a trustee in bankruptcy. These people can apply to court even though they are not registered as members. This provision is useful in small companies where the directors of the company may exercise the power they have under the articles to refuse to register as a member a person to whom shares have been transferred. However, in the case of persons to whom shares have been transferred, the cases have drawn a line indicating that mere agreement to transfer will not suffice; there must be a proper instrument of transfer executed and delivered to either the transferee or the company.[12]

This liberal definition of a member who can sue has removed the old rule that the petitioner must allege an injury suffered in his capacity as a member.[13] Under the repealed Companies Act, 1968, Section 201 provided for the bringing of the application by a member of a company if the affairs of the company were being conducted in a manner oppressive to some part of the members, including himself. Thus, an immediate concern was to ascertain whether it was necessary to establish unfair prejudice of a member qua member.[14]

The petitioner had to prove that his interest qua member had been unfairly prejudiced as a result of conduct on the part of the company, and these requirements were interdependent so that, for example, the determination of prejudice could not be taken in isolation from the question of what a member's interests are and this, in turn, would set the parameters for deciding the critical issue of whether or not a member's interests had been unfairly prejudiced.[15]

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11 CAMA 2004, Sections 310(2)(a) & (b); 567

12 Re Quickdome Ltd (1988) BCLC 370; Re Mac Carthy Surfacing Ltd (2006) EWHC 832

13 E.O. Akanki, "Protection of the Minority in Companies in E.O. Akanki (ed), Essays on Company Law (University of Lagos Press 1992), 276-305

14 JH Farrar and N Furey and B Hannigan, Farrer's Company Law (2nd edn, Butterworths 1988), 399

15 Allan Dignan and John Lowry, op. cit. p.205

Early case law on the provision took a narrow view of the term 'interests' by placing emphasis on the need to show that the interests of the petitioner qua member had been unfairly prejudiced. Thus, in *Re a Company (No. 004475 of 1982)*,[16] the petitioners, who were executors of a deceased shareholder, were attempting to force the company to purchase the deceased's shares in order to realize the deceased's only asset for the education and maintenance of his children. They alleged that the failure of the directors to formulate a scheme of reconstruction under the relevant extant law amounted to unfairly prejudicial conduct. Lord Grantchester seemed to support such a requirement construing Section 210 of the English Companies Act, 1948 as confined to unfair prejudice of a petitioner 'qua member'.

The point was succinctly made by Peter Gibson J in *Re a Company (No. 005685 of 1988), ex P Schwarcz (No.2)*[17] that the conduct complained of must be both prejudicial (in the sense of causing prejudice or harm) to the relevant interests, and also unfairly.Therefore, conduct may be unfair without being prejudicial or prejudicial without being unfair and in neither case would the section be satisfied.[18] This restrictive qua member requirement endorsed by the courts was one of the reasons for the provisions failure as a shareholder remedy.[19]

More recent case law, however, points to a wide view being taken towards the scope of a member's interests and the House of Lords in *O'Neil v Phillips*[20] stressed that the qua member requirement should not be 'too narrowly or technically construed.' One particular feature of the wording of the new provision is that the use of the term 'interests' is designed to be of expansive effect, thereby effectively avoiding the straight-jacket which terminology

[16](1983) Ch.178; (1983) 2 ALL ER 36; (1983) BCLC 126
[17](1989) BCLC 427
[18]See also Rock Nominees Ltd v. RCO (Holdings) Plc (2004) 1 BCLC 439 (CA)
[19]Elder v. Elder & Watson Ltd (1952) SC 49; Re Lundie Bros Ltd (1965) 2 ALL ER 692; Re Westbourne Galleries Ltd (1970) 3 ALL ER 374
[20](1999) 1 WLR 1092

based on the notion of legal rights would impose on the scope of the provision.[21] This is manifest in Peter Gibson J's judgment in *Re Sam Weller & Sons Ltd*[22] in which the judge observed that: 'the word "interests" is wider than a term such as "rights," and its presence as part of the test of section 459(1) to my mind suggests that Parliament recognized that members may have different interests, even if their rights as members are the same."Against this backdrop, the decision in *Ogunade v Mobile Films (West Africa) Ltd*[23] which decided that neither "wrongful termination of a company member in his capacity as a managing director, general manager or any other treatment of him in his capacity as an employee is pertinent" in an action for oppression, is no longer valid.

Clearly, interests of a member can be discerned by reference to the company's constitutional documents (the memorandum and articles of association), the companies' legislation and any shareholders' agreement.[24] It has been held that a member will have an interest in the value of his or her shares which are in the nature of his personal estate.[25] Thus, in *Re Bovey Hotel Ventures Ltd*,[26] Slade J formulated the following test for determining the issue:

> Without prejudice to the generality of the section, which may cover many other situations, a member of a company will be able to bring himself within the section if he can show that the value of his shareholding in the company has been seriously jeopardized by reason of a course of conduct on the part of those persons who have *de facto* control of

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21 Ibid (n15), 206
22 (1990) Ch 682
23 (1976) 2 FRCR 101 at 108
24 Ibid (n21)
25 New Res Int'l Ltd v. Oranusi (2011) 2 NWLR (Pt. 1230), 102; Okoya v. Santilli (1990) 2 NWLR (Pt. 131) 172
26 (1981) unreported, 31 July, 1981 (cited by JH Farrar and N Furey and B Hannigan, 420; Allan Dignan and John Lowry, 206; Len Sealy and Serah Worthington, 568

> the company, which has been unfair to the member concerned.

Akanki[27] submits that rectification of the old anomaly by redefinition of a member is preferable to the mere extension of protection to cover wrongs suffered by a member in another capacity. The advantage of the former over the latter of which Australia and New Zealand provisions are typical examples is that non-members can now seek redress under the law as well.

(b) A director or officer or former director or officer of the company;
(c) A creditor;
(d) The Corporate Affairs Commission; or
(e) Any other person who, in the discretion of the Court, is a proper person to make an application under Section 311 of the Act.

Yagba[28] submits that this extension of the category of persons who may invoke the relief recognizes the diversity of interests which may be affected in different categories of companies. This stretching of the ambit of the section regarding persons who may sue also serves to obviate the problem of *locus standi*. This enlargement of categories of litigants, according to Akanki,[29] has no pararrel elsewhere except Canada as other jurisdictions consider it unwise to extend their *locus standi* provisions without sufficient caution. He quoted Professor Wedderburn's statement with respect to English law thus:

> Indeed, the restriction of remedies to oppressed or prejudiced shareholders qua members forms part of the logical nexus of our company law, the complement of the right qua member to enforce

[27]Ibid (n13), 299
[28]Ibid (n4), 272
[29]Ibid (n13), 297

> the articles. To give a *locus standi* to others (directors, debenture-holders, creditors or employees) as some jurisdictions do is not to overcome a mere technicality or to sweep away something absurd but to effect a shift in the basis of company law.[30]

Akanki furthered that it is desirable to have it this way for compliance with or enforcement of the law, which being faced with various classes of potential petitioners will ensure. Where a member compromises his right, lacksresourcesoristootimidtotakeactionthis enactment makes it possible for others, including the Corporate Affairs Commission, which are free from such fetters, to sue as long as they can establish the same facts as a member would establish to prove injury under the new provisions.[31] The objective of the law is to keep company controllers responsible and fair, and this is achievable through removal of obstacles that are capable of frustrating genuine petitions against transgression. Rather than encourage unnecessary litigation this legislative formula will minimize it by the sufficiently strong deterrent provided against irresponsible and ill-motivated company controllers. As Professor Wedderburn further noted in the passage cited above, the "roof of business life in Canada does not seem to have fallen in after such an enlargement."

The Respondents

Normally, the respondents are the controlling members and/or directors. If the company is made a party, this is usually on a nominal basis.[32] Several cases have held that it is improper for controllers to use the company's funds to fight their case.[33] However, orders can be sought against more respondents. Thus, in *Re Little*

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[30](1983) 46 MLR 643
[31]CAMA 2004, Section 310(1)(b)-(c) and 311(2)(b) & (c)
[32]Len Sealy and Sarah Worthingthon, op. cit. p.559
[33] Re a Company, ex P Johnson (1992) BCLC 701

Olympian Each-Ways Ltd (No. 3),[34] the company's assets had been sold at under value by those in *de facto* control to another company which was also controlled by them. It was held that an order could be made against the second company requiring it to buy out the petitioner's shares at a price which reflected their value before the wrongful sale. Similarly, in *Re a Company*,[35] Hoffman J ruled that an order could be made against a former member, so ensuring that a potential respondent cannot escape liability by transferring his shares away before proceedings are commenced.

Jurisdiction

The court with jurisdiction to hear petitions brought pursuant to provisions of the Act is the Federal High Court by virtue of the powers vested on it by Section 251(1)(e) of the Constitution of the Federal Republic of Nigeria, 1999. The section provides:

> "(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters –
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> (e) arising from the operation of the Companies and Allied Matters Act or any other enactment replacing that Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act."

Scope and Grounds for the relief

A minority member who feels aggrieved that the affairs of the company are being conducted by the majority in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against him or members, or in a manner which is in disregard of his interests or the members as a whole has a powerful avenue for

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34 (1995) 1 BCLC 636

35 (1986) 1 WLR 281

redress in the form of a petition brought under Section 311 of the Companies and Allied Matters Act, 2004.

Section 311(2)(a) of the Act allows a member to complain to the court:

> "(i) that the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is in disregard of the interests of a member or the members as a whole; or
> (ii) that an act or omission or a proposed act or omission, by or on behalf of the company or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be in a manner which is in disregard of the interests of a member or the member as a whole."

It is obvious that the section, by referring to the conduct of the company's affairs, is wide enough to catch the activities of controllers of companies, whether they conduct the business of the company through the exercise of their powers as directors or as shareholders or both. Controlling shareholders are not in terms excluded from using the section but normally any prejudice they are subject to will be remediable through the use of the ordinary powers they possess by virtue of their controlling position, and so the conduct of the minority, cannot be said to be in such a case unfairly prejudicial to the controllers.[36] Thus, in *Re Legal Costs Negotiators Ltd*[37] the court refused relief to a petitioner who was complaining about a situation which he could remedy by using his own votes

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36 Paul L. Davies (ed), Gower and Davies Principles of Modern Company Law (8thedn, Sweet & Maxwell, 2008) 282

37 (1999) 2 BCLC 17 (CA)

while in *Parkinson v. Eurofinance Group Ltd*,[38] a majority shareholder, removed from the board, not able to use his shareholding to obtain redress in respect of a sale of the company's assets by the directors to the company controlled wholly by them, was able to use the unfair prejudice provisions.

The section operates as a mechanism for minority protection, or, at least, for the protection of non-controlling shareholders, for petitions could be brought where there is unequal division of shares in the company among two persons. The section even applies to the extent of corporate groups. Although the conduct of a shareholder, even a majority shareholder, of its own affairs is excluded from the section, where a parent company has assumed full control over the affairs of its subsidiary and treats the financial affairs of the two companies as those of a single enterprise, actions taken by the parent in its own interest may be regarded as acts done in the conduct of the affairs of the subsidiary; and in some cases conduct of the subsidiary's business may amount to conduct of the business of the parent. The "outside" shareholders in the subsidiary may, therefore, use the section to protect themselves against exploitation by the majority – shareholding parent company.[39]

From the language of Section 311 of the Act, it is wider than the equivalent provisions of Section 994 of the United Kingdom Companies Act, 2006. The latter talks of unfairly prejudicial conduct which presumably covers oppressive conduct. No doubt, unfair fair prejudice is wider concept and when considered along with the supplementaries, like unfairly discriminatory conduct or disregard of interest, the Nigerian provisions cover a much wider variety of conduct than English law.[40]The Nigerian provision contains four types of conduct which may found a petition, namely, oppression,

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38 (2001) 1 BCLC 720

39 Ibid (n36)

40 EA Akanki (ed), Essays on Company Law, op. cit. pp.289-291; KD Barnes, 'Protection of Minority Shareholders: A Critique of Sections 310-311 Companies and Allied Matters Decree 1990' [1991] (2) (4) Justice, 56 at 68; TAT Yagba and BB Kanyip and SA Ekwo, op. cit. p.272

unfair prejudice, unfair discrimination or disregard of interests which in fact overlap in meaning. This provision is similar with the Ghanaian,[41] Canadian,[42] Australian,[43]NewZealand[44] and Jamaican[45] provisions on the issue.

Interpreting a similar provision in New Zealand, the Court of Appeal observed in *Thomas v. NW Thomas Ltd*,[46] that:

> "These expressions overlap; each in a sense helps to explain the other, and read together they reflect the underlying concern of the sub-section that conduct which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only is a legitimate foundation for complaint under (Section 209)"[47]

However, these words are not to be taken as coterminous or synonymous. The very choice of different phrases connected by an adjective suggests that the legislature contemplates possible situations where the wrong complained of may be described as one but not the other.[48] It is submitted that the provisions are aimed at providing a more effective way of remedying harms which, independently of unfair prejudice, are unlawful.

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41 Ghana's Companies Code Act 1963, Section 79.
42 Canadian Business Corporation Act 1975, Section 234
43 Australian Companies Code (as amended by the Companies Act 1981), Section 320
44 New Zealand Companies Act 1955 (as amended by Section 11 Companies (Amendment) Act 1980, Section 209
45 Jamaican Companies Act 2004, Section 213A
46 (1984) 1 NZLR (Pt. 5) 686
47 Ibid (n 44)
48 EA Akanki (ed), op. cit. p.293;TAT Yagba and BB Kanyip and SA Ekwo, op. cit. p.273

Meaning of "the Company's Affairs"

The complaint must be about the conduct of the company's affairs, not the conduct of the affairs of a member or director in private capacity. Thus, in *Re Unisoft Group Ltd (No.4)*,[49] and in *Re Leeds United Holdings Plc*,[50] relief under section 459 of the English Act was refused where the respondent was alleged not to have honoured a shareholders' agreement relating to transfer of shares. However, the leading case of *Scottish Wholesale Co-operative Society Ltd v. Meyer*,[51]shows that a broad view may also be taken of this view, and in *Re City Branch Group Ltd*,[52] it was held that "the affairs of the company could be interpreted widely, and could extend to the affairs of a subsidiary company, especially where, as in that case, the directors of the holding company and the subsidiary were almost identical.

Meaning of "Interests of Members"

Under Section 311, the conduct must be oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members or in disregard of his interests or the members as a whole. The term "interests" is certainly wider than "rights", and the cases demonstrate that regard can be had to "legitimate expectations"[53] especially in a small company that the members will be employed by the company, or have a say in its management, or receive some return in the form of dividends.[54]However, Warner J remarked in *Re JE Code & Sons Ltd*[55] that a judge does not sit under a palm tree" so, although the court may have regard to wider equitable considerations beyond the parties' strict constitutional and

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49 (1994) 1 BCLC 609
50 (1996) 2 BCLC 545
51 Ibid (n5)
52 (2005) 1 WLR 3505 (CA)
53 O'Neill v. Phillips (n20)
54 Len Sealy and Sarah Worthington, op. cit. p.560; Paul L. Davies (ed), op. cit. pp.691-692
55 (1992) BCLC 213 at 227

statutory rights, it cannot simply add still further rights and obligations arising from its own concept of fairness.

Sealy[56] submits that it follows that the more clearly and fully the parties have spelt out their arrangements, the less scope there will be for the court to find that there were other, unrecorded, "legitimate expectations,' and if the company is a public company (more particularly if it has made a public issue of its shares) the court is most unlikely to take note of any alleged arrangement that is not recorded in the company's published documents, for to do so would fly in the face of the principle that all material information must be disclosed to potential investors. Thus, in *Blue Arrow Plc*,[57] the court refused to grant any relief to a petitioner who alleged an agreement that she should remain in office as chairman, and in *Re Tottenham Hotspur Plc*,[58] it declined to give effect to an alleged understanding that Terry Vernables, the Team Manager, would continue to have a say in the company's management even after he ceased to be 50% shareholder.

Informal arrangements among the members is a category of legitimate expectation or equitable consideration that arises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form.[59] This principle recognizes that the totality of the agreement for arrangements among the members of the company may not be captured in the articles of association for a number of reasons but principally, because of a desire to void transaction costs when incorporating a company or when admitting a new person to the membership of the company.[60]It is therefore cheaper to adopt some standard, or slightly modified, form of articles rather than to set out in detail and then incorporate into the articles a customized set of rules dealing with every aspect of the company's present and likely

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56 Ibid (n54), 561
57 (1987) BCLC 585
58 (1994) 1 BCLC 655
59 Paul L. Davies (ed), op. cit. p.692
60 Ibid, 692-693

future of operation, the future being inherently unpredictable. This is especially in the case of small companies where the incorporators know each other and may have worked a successful method of operation when trading in unincorporated form whose translation into a formal document they would consider as a needless expense.[61]Based on the understandings among the members, when things eventually go wrong, and small companies emulate marriages in frequency and bitterness of their breakdown, the precise provisions of the articles may seem almost irrelevant to the petitioner's sense of grievance. Importantly, the understandings upon which the members of the company operate includes the assumption that, where powers are conferred on the board, those powers have to be exercised in accordance with the fiduciary duties of directors, so that breaches of fiduciary duty may be tied in this way to the shareholders' arrangements as well.[62]

In *Ebrahimi v. Westbourne Galleries Ltd*,[63] Lord Wilberforce recognized that where, in a commercial enterprise, the relationship between the members is governed by comprehensively drafted articles of association, to this, shareholder arrangements and service contracts should be added, than the superimposition of equitable considerations would require 'something more'. It follows that the scope for the courts to find legitimate expectations which go beyond their strict contractual rights under the constitution, yet, which nevertheless fall within the protection of section 311 of the Companies and Allied Matters Act, 2004, is subject to limitation.

In *Re a Company (No. 004377 of 1986)*,[64] the majority, including the petitioner, voted for a special resolution to amend the company's articles so as to provide that a member, on ceasing to be an employee or director of the company, would be required to transfer his or her shares to the company. To remedy a situation of

[61]Ibid 693
[62]Ibid
[63](1973) AC 360 (HL) (1987) BCLC 94
[64](1987) BCLC 94

management deadlock, the petitioner was dismissed as a director and was offered £900 per share. When he declined this offer his shares were valued by the company's auditors in accordance with the pre-emption clause. He petitioned the court under Section 459 (in *parimateria* with Section 311) to restrain the compulsory acquisition of his shares, arguing that he had a legitimate expectation that he would continue to participate in the management of the company which, he argued, was in essence a quasi-partnership company. Dismissing the petition, Hoffman J held that there could be no expectation on the part of the petitioner that showed relations breakdown, the article would not be followed; to hold to the contrary would not be to superimpose equitable considerations on the rights under the articles but to relieve him from the bargain he made.

Therefore in applying equitable restraints to the exercise of a power by the majority, the courts will seek to strike a balance between recognizing the supremacy of the company's constitution on the one hand, that is, the statutory contract under Section 41 of the Companies and Allied Matters Act, and a member's extraneous expectations on the other. At its crux the issue lies with the proper determination of at which point a member's interests or expectations are totally subsumed in the company's constitution. The scope of finding expectations which are supplementary to a member's strict legal rights is obviously greater in small quasi-partnership types of private companies where the joint venturers enter into business on the basis of certain fundamental understandings about management participation, than in public limited companies.[65]

Meaning of Unfair Prejudice

As a vital requisite for the application of the section, the conduct complained of must be both unfair and prejudicial, not

[65] Allan Dignan and John Lowry, op. cit. p.209;

merely unfair nor merely prejudicial.[66] In determining unfair prejudice, the test is an objective one so that emphasis is not so much on the motive or intention of the controllers, as on the effect that the conduct has had on the aggrieved member.[67] In *Re Guidestone Ltd*,[68] Jonathan Parker J remarked that *O'Neill v. Phillips*[69] established that:

> "…'unfairness' for the purposes of section 459 is not judged by reference to subjective notions of fairness, but rather by testing whether, applying established equitable principles, the majority has acted, or is proposing to act, in a manner which equity would regard as contrary to good faith."

Examples of unfairly prejudicial conduct include the following:

(i) Exclusion from management in a small private company or a company formed as a quasi-partnership.[70] One of the most commonly protected is the petitioner's expectation that he or she would be actively involved in the management of the company through having a seat on the board. The starting point is for the court to discern if the basis of association is adequately and exhaustively laid down in the articles. This category of protected expectations is almost wholly confined to small, very small companies where the courts infer informal arrangements.[71]In Nigeria, even before the repealed Companies Act of 1968 came into practice, the court had recognized that there could be exclusion from management in close corporations such as family concerns or private

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66 Re D Harrison & Sons Ltd Plc (1995) 1 BCLC 14 at 19 (CA); Rock Nominees Ltd v. RCO (2004) 1 BCLC 439; Re London School of Electronics Ltd (1986) Ch 211; Nicholas v. Soundcraft Electronics Ltd (1993) BCLC 360.

67 Re Sam Weller & Sons Ltd (n 22)

68 (2000) 2 BCLC 321 at 355

69 Ibid (n 20)

70 Len Sealy and Sarah Worthington, op. cit. p.568; Allan Dignan and John Lowry, op. cit. pp.214-216; Paul L. Davies (ed), op. cit. pp.693-696

71 Re OC (Transport) Services Ltd (1984) BCLC 251; Re RA Noble & Sons (Clothing) Ltd (1983) BCLC 273

companies of a few friends. Thus, in *Re Stevedoring (Nig.) Co. Ltd*,[72] the petitioner was one of the six directors who, by virtue of the articles of association, were to hold office for life. However, due to the fact that he criticized and accused his colleagues of wrong doing, the articles were altered so that he eventually lost his position on the board. He petitioned for winding up and the court held that the fact that the petitioner was excluded from participation in the business of the company was a ground for the making of a winding up order.

Beyond such companies it becomes increasingly difficult to demonstrate that all the members of the company were parties to the informal arrangement, and if they were not, the court is unlikely to enforce it, on the grounds that the non-involved members are entitled to rely on the registered constitution of the company. Therefore, in companies with outside investors it will be rare for the petition alleging exclusion from management to be successful because the expectations of such members rarely go beyond the hope for obtaining a return on their investment.[73]

(ii) Taking Excessive Remuneration and failure to pay dividends

A company's articles of association generally provides that the directors' remuneration shall be set by the general meeting. In practice, however, the power to determine remuneration for directors is delegated to the Board.[74] In that case, such provisions form part of the statutory contract between the shareholders and the company. Although generally, the court is not inclined to interfere with the business judgment of the board provided it has honestly and genuinely determined the level of remuneration (and it will

[72] (1962) LLR 164
[73]Re Blue Arrow Plc (1987) BCLC 585; Re Tottenham Hotspur Plc (1994) 1 BCLC 655
[74]Allan Dignan and John Lowry, op. cit. p.218; Paul L. Davies (ed), op. cit. p.296-297

not inquire about its reasonableness),[75] it may be an obvious ground for a successful petition if the directors fixed their remuneration in disregard to the provisions of the articles governing the matter.[76]

With regard to dividend, although minority shareholders have no legitimate expectation that dividends will be paid just because they are shareholders in a quasi-partnership company,[77] there may be particular circumstances in which the payment of no dividends or only derisory dividends will amount to unfair prejudice, for example where directors, under an arrangement, award themselves excessive remuneration, whereby leaving little or no surplus profits for distribution by way of dividends to shareholders who are not directors and are deprived any share of the profits.[78] Thus, in *Re Sam Weller & Sons Ltd*,[79] Peter Gibson J refused to strike out a petition alleging that the refusal of the majority shareholders to increase the dividend yield which had remained the same for 37 years despite the company's positive performance in recent years, while continuing to draw directors' remuneration and accumulating cash reserves, amounted to unfairly prejudicial conduct. Although the courts in Nigeria do not interfere in the matter of dividends to order directors to pay dividends to shareholders, this may probably form the basis of a winding up petition on the just and equitable ground under Section 408(e) of the Companies and Allied Matters Act, 2004, or even a complaint of unfairly prejudicial conduct under section 311 of the Act.

(iii) Breach of Directors' Fiduciary duties:

Misuse of fiduciary powers by directors is another basis for a successful allegation of unfairly prejudicial conduct. There

[75]Re Halt Garages (1964) Ltd (1982) 3 All ER 1016, Ch D.
[76]Irvine v. Irvine (No.1) (2007) 1 BCLC 349; Re Ravenhart Services (Holdings) Ltd (2004) 2 BCLC 375
[77]Ibid
[78]Ibid (n73)
[79]Ibid (n22)

> have been a number of successful petitions where the allegation has centred on directors acting in breach of their fiduciary duties. For example, in *Re London School of Electronics Ltd*,[80] the allegation was that those in control of the company had misappropriated its assets by diverting them to another business owned by them. It was held that this conduct was unfairly pre-judicial to the interest of the petitioner as a member of the company.

In *Re Elgindata Ltd*,[81] the misapplication of company assets by the respondent for his personal benefit and for the benefit of his family and friends was the decisive factor in the court's finding that his conduct was unfairly prejudicial to the interests of minority shareholders. Further, in *Re Little Olympian Each-Ways Ltd (No.3)*[82] the directors sold the company's business at substantial undervalue to another company as part of a wider transaction from which they derived significant personal benefits, and the court found such conduct of the company's affairs to be unfairly prejudicial to the petitioner's interests.

Therefore, allegation of breach of directors' fiduciary duties may be used to obtain a personal remedy despite the rule in *Foss v Harbottle*.[83] In this direction, petitions brought under Section 311 of the Companies and Allied Matters Act 2004 will include allegations that directors have made secret profits as in *Re a Company (No. 005278 of 1985)*[84] and *Re Baumler (UK) Ltd*;[85] have exercised their powers to issue and allot shares for an improper purpose in order to reduce the petitioners shareholding, that is proposing or making a right issue which the minority cannot afford to take as in *Re Cumana*

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80 Ibid (n66)
81 (1991) BCLC 959
82 (1995) 1 BCLC 636
83 (1843) 2 Hare 461 (Chancery); (1843) 67 ER 189
84 (1986) BCLC 68
85 (2005) 1 BCLC 92

Ltd,[86]*Dalby vBodilly*;[87] have diverted a corporate opportunity as in *Re Baumler (UK) Ltd*;[88] and have abused their powers by recommending shareholders to accept the lower of the two offers for the shares of the company without disclosing that they were the promoters of the company making the lower offer, that is, failure on the part of the directors to advise the shareholders impartially on matters of rival takeover bids (in one of which the directors were personally interested) as in *Re aCompany (No. 008699 of 1985)*.[89]

(iv) Mismanagement: This is limited in scope as the courts have ordinarily shown reluctance to find that management decisions could amount to unfair prejudice. In *Re Elgindata Ltd*,[90] Warner J observed that the risk of poor management is an incident of share ownership given that managerial competence will generally determine the value of the shareholder's investment in the company. In that case, it was alleged *inter alia,* that the controlling director had managed the company incompetently. Warner J refused to grant the relief.Further in *Nicholas vSoundcraft Electronics Ltd*,[91] it was held that the courts will not interfere with a *bonafide* business decision made by a company's board or its majority shareholders (the internal management rule), except where there is a clear conflict of interests.However, mismanagement will found a petition for unfairly prejudicial conduct if it is exceptionally significant and serious. Thus, in *Re Macro (Ipswich) Ltd*,[92] an allegation of mismanagement resulting to economic loss to the company was found to amount to unfairly prejudicial conduct. Evidence of the events giving rise to the claim span a period of some 40

[86](1986) BCLC 430
[87](2004) EWHC 3078
[88]Ibid (n 84)
[89](1986) PC 296
[90]Ibid (n81)
[91]Ibid (n66)
[92](1994) 2 BCLC 354 (Ch D)

years. The crux of the complaint about mismanagement was that the sole director of the two associated companies in question neglected his management responsibilities and this was exploited by dishonest employees who stole commissions earned by the estate agency department of the business. It was successfully argued by the petitioners that substantial financial losses were suffered by the companies which unfairly prejudiced them. In granting the relief Arden J noted that the facts before the court were analogous to the example formulated by Warner J in *Re Elgindata Ltd*[93] to the effect that absent breach by a director of his duty of care and skill, the court might nevertheless find that there was unfair prejudice to the minority shareholders where the majority, for reasons of their own, persisted in retaining in charge of the management of the company a family member who was demonstrably incompetent. In *Re Medipharm Publications (Nig.) Ltd*,[94] George J found, inter alia, that the respondent had mismanaged the company's affairs with the result that the company was unable to pay its debt. As a result, the petition for winding up of the company succeeded.

(v) Failing to allow minority shareholders independent representation on the board when all control is in the hands of the majority faction which has potentially conflicting interests as in *Re Macro (Ipswich) Ltd*.[95]

Remedies

Finally, the Companies and Allied Matters Act, 2004[96] has spelt out the powers of the court when a petition is brought under Section 311 of the Act. This power is an expansive one which gives the courts the liberty to decide on the merits and justice of each case.

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93 Ibid (n 81)
94 (1971) 1 UILR 421
95 Ibid (n92)
96 CAMA 2004, Section 312(1)

However, in spite of this subjective discretion, the Act itself has assisted the courts by drawing up a list of possible orders, whether interim or final, which a court may make to grant relief to aggrieved petitioners under the provisions.

Section 312 has enumerated ten specific orders or combination of orders that a court can make. These include an order:

(i) For winding up of the company;

(ii) For regulating the conduct of affairs of the company in future;

(iii) For the purchase of shares of any member by other members of the company;

(iv) For the purchase of the shares of any member by the company and thus, the reduction of the company's capital;

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

(vi) Varying or setting aside a transaction or contract to which the company is a party and compensating the company or party to the transaction or contract;

(vii) directing an investigation to be made by the Corporate Affairs Commission into the affairs of the company;

(viii) appointing a receiver or a receiver and manager of property of the company;

(ix) restraining a person from engaging in specific conduct or from doing a specific act or thing;

(x) requiring a person to do a specific act or thing.

Finally, the Act,[97] has given the court power to direct a company, where necessary, to alter or add to its memorandum or

[97] Ibid, Section 312(4)

articles of association. Such an alteration shall have effect as if it had been duly made by a resolution of the company.

Yagba,[98] submits that this clear specification of the scope of possible orders indicates the liberal intent of the provisions so, Nigerian courts should be guided more by legislative intent than by some of the surprising precedents in the United Kingdom that insisted on the qua member requirement for a petition for unfairly prejudicial conduct. Of course, that was a brilliant and good advice to Nigerian courts to depart from the stark conservatism of the English judges of the prevailing time on minority protection. However, in recent times, English courts have shifted ground in handling the issue which suggests that there has been some sort of revolution in their judicial attitudes.[99]

The second value of drawing up the range of orders that may be made by the court under the section is that it alerts the petitioner on the nature of reliefs available. This is crucial because the petitioner must seek some particular relief in his petition.[100] In *Meyer v. Scottish Textile Manufacturing Co. Ltd*,[101] Lord Cooper put the matter succinctly thus: "We have not been constituted an earthly paradise in matters of this kind and it is for the petitioners to state what they primarily want."More so, it is a well-known rule of procedure that a court will not grant a relief not asked for by the parties to an action; it is not a donor of charities. This boils down to the fact that despite their wide discretion in this area, our courts cannot be called upon to perform an inquisitorial or Salvationist role. This should not however deter them from making any order apart from the one sought for by the petitioner.[102]

It is submitted that this scholarly counsel to Nigerian courts is apt. This is more so that the Act has catalogued possible orders without more. For instance, one of the orders that can be made by the

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98 TAT Yagba and BB Kanyip and SA Ekwo, op. cit. pp.273
99 See for example, O'Neil v Phillips (n20); Re Sam Weller & Sons Ltd (n22)
100 Ibid
101 (1954) SC 381 at 392
102 Ibid, (n96); Kiser D. Barnes [1991] (2) (4) Justice, 67

court, upon a successful petition, is an order for the purchase of shares of a member by other members (probably the controlling members) or by the company itself. Three questions arise. First, at what date should valuation of the shares be made? Secondly, on what basis should the shares be valued and, in particular, should the share-holding be discounted to reflect the fact that it is a minority holding? Thirdly, should the conduct for the parties be taken into account in making the valuation? The Act has not given any guidance on this.

Obviously, the courts have reserved to themselves a discretion as regards the first two questions, and have also held that the parties' conduct, and in particular, their relative blameworthiness in the events leading to the breakdown in good relations between them, is a factor to be taken into account. In *ReBird Precision Bellows Ltd*,[103] the only issue before the court was the issue of valuing shares when (in this case pursuant to an order made by consent) the petitioner's shares were to be purchased by the majority under section 75 of the English Companies Act 1980 (now Section 994 of the Companies Act, 2006). Nourse J, at first instance held that the conduct of the parties could be relevant in determining whether the shares of the respective parties in the company were to be valued *pro rata* or whether the minority's interest should be discounted.On appeal, the Court of Appeal declined to interfere with the judge's approach, which was a matter of discretion.

It is submitted that the issue of valuation of shares of a member for purpose of a buy-out ordered by the court is a professional matter beyond mere judicial discretion with emphasis on the conduct of the parties. It needs professional expertise which ought to be statutorily prescribed to aid the court in the exercise of discretion. Finally, the listing of winding up as one of the orders that a court can make is not commercially sagacious. This is more so that the relief on the ground of unfairly prejudicial and oppressive conduct was developed as an alternative remedy to winding up.

[103](1986) Ch 658 (CA)

Every shareholder, including the minority, is driven primarily by the motivational value of a prosperous life to invest in the company, that is, maximization of wealth. Therefore, what an aggrieved shareholder needs and what the law should give him is protection of his investment, not termination of the life of the company.

It is submitted that Nigerian courts have demonstrated some level of pragmatism in this regard. In *SHO Williams (Junior) & Another v Olabode Williams*,[104] the Supreme Court of Nigeria, deciding on Section 201 of the repealed Companies Act, 1968 (now Section 311 of the Companies and Allied Matters Act, 2004), held that the relief afforded by the section is clearly an alternative remedy to the winding up of a company and has the enormous advantage over winding-up because it is less drastic and more flexible. Instead of "killing" the company outright, it confers jurisdiction on the court to impose whatever solution it considers just and equitable. That upon presentation of a petition by any member of the oppressed minority, the court may make such order as it thinks fit for ending the matters complained of. The section does not give the courts unlimited jurisdiction to intervene in the affairs of the company and they can exercise their jurisdiction only if the requirements of the section are satisfied.

Further, in *Josiah Cornelius Ltd & Others v Chief Cornelius OkekeEzenwa*,[105] the Supreme Court of Nigeria held that the trial court acted in accordance with the law not to allow winding up proceedings to take off and to seek refuge under Section 321 of the Companies and Allied Matters Act (which empowers the Corporate Affairs Commission to institute civil proceedings on the company's behalf based on the report submitted to it by inspectors appointed to investigate the affairs of the company) after satisfying itself that the best option on examining petition under Section 310 or 311 thereof was to keep the healthy companies in business and whoever is not

104 (1995) 2 SCNJ 26 at 38-39
105 (1996) 4 SCNJ 124 at 142

ready to go along should have his shares sold to the majority shareholders.

Summary, Recommendations and Conclusion

This discourse on the legal parameters of Section 311 of the Companies and Allied Matters Act, 2004 has discreetly examined the provision and found that it is indeed a legislative breakthrough in the protection of minority interests in registered companies. The jurisprudence of the section is broad to encompass a variety of interests and provide open-ended protection. The Nigerian provisions have expanded the categories of persons that can seek relief under the Act, it has also expanded the interests to be protected and obviated the problem of *locus standi* that plagued the provision in the repealed Companies Act, 1968. Fundamentally, broad categories of conduct – oppressive or unfairly prejudicial, or unfairly discriminatory conduct – which will found a petition by an aggrieved minority member have been provided to make it difficult for either controlling directors or majority shareholders to escape from breaches of their conduct in the conduct of the company's affairs and abuses of power. The provisions also cover both isolated transactions and omissions to act by those in control. It also covers actual acts of oppression or unfair prejudice or unfair discrimination and gives a window of opportunity for relief against threatened acts.

Further still, the link with winding up, which is rather a drastic and less valuable step towards protecting minorities, has been jettisoned. The provision is open-ended and thus elastic in nature and Nigerian courts can key in to the legislative breakthrough and demonstrate a revolution in judicial attitudes towards protection of minority interests in companies. The non-interference approach in matters of commercial and business judgments has been rendered anachronistic by Section 311 jurisprudence. Against this backdrop, it is recommended that Nigerian courts should adopt a pragmatic and purposeful interpretation of the provision with regard to what constitutes company affairs, interests of a member or members

(including legitimate expectations), oppressive or unfairly prejudicial or discriminatory conduct, to reflect the open-textured or elastic nature of the provision.

In addition, it is recommended that the legislature should go a step further in giving flesh to the orders the court is given the power to make by providing some guidance. It is not enough to merely catalogue orders for the court to make. For example, the court is to make an order for the purchase of shares of any member by other members (controlling members) or the company. This is a complex transaction that presents a lot of questions begging answers especially with regard to valuation of the shares. As such, the provision of the Act should be amended to include a stipulation on how the shares should be valued if the court orders a buy-out particularly, the date and basis of valuation. Perhaps the provision should also include the involvement of experts with sound knowledge on securities transactions and stock market operations.

The Act should also prohibit the controllers or majority using the company's fund to defend petitions filed by the minority. In addition, the Act should stipulate who should bear the cost of litigation when the court makes an order directing the company to institute, prosecute, defend or discontinue specific proceedings or authorizing a member or members or the company to institute, prosecute, defend or discontinue specific proceedings in the name or on behalf of the company. It should further specify the criteria for payment of compensation to the company or a party when the court makes an order varying or setting aside a transaction or contract to which the company is a party.

Lastly, since winding up is not in the best interest of any one including the minority, its prescription as one of the orders to be made by court under Section 312 of the Act is not apt because it is not commercially wise to terminate the life of the company without realizing the investment objectives of the shareholders. The linkage between winding-up and unfairly prejudicial and oppressive conduct is, therefore, inappropriate and should be jettisoned from our

companies' statute by an amendment of Section 312 of the Act that lists the orders which the court can make sequel to a successful petition. The courts have shown the way and the legislature should follow and use legislation, which is an instrument of change, to preserve companies and investments.

In conclusion, barring the linkage of winding-up with the relief provided under Sections 310 – 313 of the Act, the provisions offer a good window of opportunity to aggrieved minorities to redress wrongs done to them by majorities in companies. It seems, however, that minorities have not really taken advantage of these provisions that have given them protection because at the moment, there is paucity of case law in Nigeria on the provisions.