SHAREHOLDERS AS WATCHDOGS OF CORPORATE GOVERNANCE IN NIGERIAN PUBLIC COMPANIES

By

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Abstract

Shareholders own large corporations where, typically, there is a separation between management/control of the company's affairs and ownership. This reality throws up corporate governance concerns, a key part of which is how shareholders, as principals, could monitor the activities of senior executives and boards, as their agents, towards guaranteeing that there is constructive convergence in their interests in pursuance of achieving organisational and sustainability goals. The seeming helplessness of shareholders in carrying out this task is all too well known. The purpose of this piece is to contribute to the body of literature which demonstrates that this need not be the case. Shareholders' activism is a choice. There exists tremendous comfort in our statute and case law for shareholders to draw upon in taking deliberate steps to monitor and remediate misfeasance/wrongs committed by their senior executive agents. The challenge for all is to continue the advocacy for enhanced shareholder knowledge of their critical role in the process and the dangers of inactivity. On the reverse side, senior executives need to take on board the value of open and constructive communications with shareholders and internalize the truism that carrying them along is in their collective long-term interests. The ultimate beneficiary of ingrained monitoring of corporate governance is the sustainability and going concern status of the companies, that shareholders invest in.

1. Introduction

The question of how the best interests of shareholders, who are the owners of companies, could be adequately protected by the board of directors who control the business, remains a subject of continuing critical debate. Shareholders appoint boards of directors to run their businesses for them. Boards of directors then appoint and delegate some of their powers to executive management. The board of directors, acting as stewards of the business, are then required to be accountable and held accountable to their shareholders for their stewardship. Given that there is a separation between *ownership* and *management* of the business, it inexorably creates a monitoring challenge for shareholders, who, in order to protect their investment, must devise a mechanism for tracking the activities of the board of directors and senior management (to which executive power is delegated) towards ensuring that the business of the company is conducted with responsibility, integrity and in a result-oriented manner. Unfortunately, that monitoring activity can, sometimes, prove to be extremely difficult or utterly unsuccessful. Nevertheless, monitor and evaluate, what they must do, if they are to position themselves to influence remedial action should things begin to go awry.

The protection of shareholders' rights and privileges by executive management of companies that they own has long been recognised as a corporate governance issue.[1] The manner in which shareholders hold

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boards of directors accountable for their stewardship is of equal significance. Owing to the often-divergent interests between shareholders and directors who run their companies, the long-term goals of these companies may sometimes conflict with the often-short-term objectives of their directors or senior management.[2] These conflicts often prove costly and counter-productive for the company. Consequently, the value of institutionalising an appropriate framework for monitoring the errant or mischievous conduct of directors and senior management cannot be over-emphasised.

Admittedly, except concerning certain fundamental matters, shareholders are generally not required to participate in corporate decision-making scenarios. While on grounds of statutory compulsion and pragmatism, directors are inclined to elicit the opinions of shareholders for certain matters, they are, strictly speaking, not required to either solicit or comply with shareholders' views and preferences. This quandary, which has been foisted on shareholders by the general workings of most large corporations, is a bitter pill which they struggle to swallow.

Thus, the motivation for this piece is to contribute to the debate around how shareholders could continue the efforts at refining and enhancing their inevitable purpose of protecting their investments from directors and managers whose primordial interests are at variance with the long-term profitability and sustainability goals of the companies they own.

2. Corporate Governance in view

Corporate Governance is concerned with practices and procedures for trying to ensure that a company is run in such a way that it achieves its objectives. From a shareholder's perspective, corporate governance can be defined as a process for monitoring and control to ensure that management runs the company in the best interests of shareholders.[3]

It is well established that corporate governance assumes more significance in large or public companies, where the separation of *ownership* from *management* is generally more definitive than in small or private entities. For public companies, the core corporate governance issue relates to the relationship between Shareholders as the "Principal" party and the board of directors as the "Agent" party and how the board of directors are influenced to conduct the affairs of the company to achieve shareholder wealth maximisation in the main and, possibly, also serve the interests of other stakeholders.

Owing to the separation of ownership from management in public companies, the potential that the interests of a principal and those of an agent may not converge is very real. Indeed, because most human beings are disposed to act in a self-interested manner, the incidence of conflict between the principal-agent relationship in corporations is commonplace. The challenge of good corporate governance is, thus, how to develop an enduring framework that best addresses the diverse interests at play between the principal and the agent on the one hand, and other stakeholder groups on the other.

[1] Fabian Ajogwu, *Corporate Governance in Nigeria: Law and Practice* (Centre for Commercial Development 2007)
[2] In his *Convocation Lecture* delivered at the Annual Convocation Ceremony of the Bayero University, Kano on Friday 26th February 2010, the former CBN Governor, Sanusi Lamido Sanusi, listed 8 factors as being responsible for the extremely fragile financial system in 2009, one of which was *major failures in corporate governance at banks*, including insider abuse; key-man risk; unsecured bank lending and weak audit processes.
[3] 'The Debate over the shareholder Model of Corporate Governance' Daniel Fund Ethics Initiative; http://danielethics.mgt.unm.edu

Good corporate governance is not an end in itself. Rather, it may be viewed as a *special purpose vehicle* for foot-holding resource efficiency, financial stability and sustainable growth in a company. Suffice it to mention that it provides an enabling environment for attracting long-term equity investments and demands that the board of directors and senior management be held accountable to shareholders and other stakeholders who contribute to its well-being. Commenting on the numerous corporate scandals in the US in 2001 and 2002, Arthur Levitt, a former chairman of the Securities and Exchange Commission in the UK said in a speech: "*If a country does not have a reputation for strong corporate governance practice, capital will flow elsewhere. If investors are not confident with the level of disclosure, capital will flow elsewhere……Markets exist by the grace of investors……."*[4]

Weak corporate governance has, historically, led to several high-profile corporate scandals and failures. A few examples may illustrate this; Robert Maxwell was Chairman/CEO of Maxwell Communication Corporation and Mirror Group Newspapers. In the early 1990s, his businesses experienced dire financial straits owing to his alleged dominant personality as occupant of the two most influential positions of Chairman/CEO, weak board of directors and questionable accounting practices. Enron, a US conglomerate, was, by 2000, regarded as one of the world's largest companies which operated in the Oil, Gas and Energy space. By December 2001, the company had filed for bankruptcy and investigations into its operation by US regulators revealed that a combination of weak corporate governance, misleading accounting practices, and auditor compromise amongst other failings led to its downfall. The banking failure in Nigeria, which occurred in 2009, has been largely attributed to a weak corporate governance culture. [5]

3. The Nigerian Code of Corporate Governance

It would seem that the major impetus for the emergence of codes of best corporate governance practice and stricter regulation across various jurisdictions is traceable to some of these corporate scandals and failures. Although the UK is generally believed to be the leader in the development of corporate governance regimes, impressive strides have similarly been made in other climes. While the UK Corporate Governance Code applies in the UK, The Sarbanes-Oxley Act contains statutory provisions regulating corporate governance in the US. In South Africa, a code of corporate governance was developed originally by the Kings Committee and this has formed the bedrock for subsequent amendments. On an international scale, the Organisation for Economic Cooperation and Development (OECD), an intergovernmental economic organisation with 38 member states, has published its recommended corporate governance principles for adoption.[6]

In Nigeria, various regulatory entities have issued codes of corporate governance designed to guide appropriate corporate behaviour.[7] The Financial Reporting Council of Nigeria (FRCN) took the unique

[4] Brian Coyle. *The ICSA Study Text in Corporate Governance 2003-4*: (ICSA; 2003).
[5] *Ibid.*
[6] G20 Report on the implementation of the G20/OECD Principles of Corporate Governance, dated 8-9 June 2019.
[7] These codes are the Code for Corporate for the Telecommunications Industry (2016) issued by the Nigeria Telecommunications Commission; Code of Corporate Governance for Banks and Discount Houses in Nigeria Post-Consolidation (2014) issued by the Central Bank of Nigeria; Code of Corporate Governance for licensed Pension Fund Operators (2008) issued by the National Pension Commission; Code of Corporate Governance for Insurance Industry in Nigeria (2009) issued by the National Insurance Commission; Code of Corporate Governance for Public Companies in Nigeria (2011) issued by the Securities and Exchange Commission.

step of attempting a harmonisation of the various sectoral codes previously in existence, which it issued as *The National Code of Corporate Governance* effective October 17, 2016. However, in January 2018, the operation of this Code was suspended and a Technical Committee was set up by the FRCN to review the suspended Code. Consequently, in the exercise of its powers under sections 11(c) & 51(c) of the FRCN Act to ensure good corporate governance practices in both the private and public sectors of the economy, a new Code – the Nigerian Code of Corporate Governance 2018 ("NCCG") – was approved by the council for issuance. A core expectation of the NCCG is that adherence to its principles would help align the interests of boards and executive management of corporates with those of shareholders and, thus, create a conducive environment for sustainable business operations.

In summary, the NCCG is divided into 7 parts i.e. A-G, and 28 Principles, each accompanied by recommended practices, which exemplify how those Principles could be applied in pursuit of corporate governance best practices. The NCCG is designed to be both flexible and scalable. In being flexible, it accommodates application to a wide range of scenarios. Its scalability demonstrates its ability to apply to companies of varying sizes in a way that's meaningful across the board.

Where required, companies are expected to adopt the "Apply and Explain" philosophy in reporting on compliance with the NCCG. What this means is that the NCCG contemplates that corporates will apply all the principles and then explain how the specific activities they have undertaken best facilitate the achievement of the NCCG's objectives. Being the most authoritative code in its league, the NCCG would enjoy repeated reference in this piece.

Part C of the NCCG deals with "Relationship with Shareholders" and encompasses Principles 21 – General Meetings, 22 – Shareholder Engagement and 23 – Protection of Shareholder Rights. These Principles seek to detail what should characterise the relationship between the company and its shareholders. Principle 21 recognises that General Meetings provide an important platform for the company to engage shareholders and deepen shareholders' understanding of the company's business, governance framework and performance. It also affords shareholders the opportunity to exercise ownership rights and to ventilate their views on any matter of interest to them. Principle 22 speaks to the value of establishing a system of regular exchange of ideas between the company and shareholders and, in the process, striking a balance between their needs, interests and expectations with those of the company. Principle 23 relates to guaranteeing the equitable treatment of shareholders and the protection of their statutory and general rights, including the interests of minority shareholders, in the pursuit of best corporate governance practice.

Part F, which concerns the subject of "Transparency", comprises Principles 27 – Stakeholder Communication & 28 – Disclosures. Principle 27 encourages an atmosphere of regular dialogue between the company and all stakeholders, including shareholders, to enable stakeholders to source important information about the business and position them to make informed decisions. Principle 28 regulates the imperative of the company providing full and comprehensive disclosures of all material matters to investors and other stakeholders, which form the basis for effective monitoring and evaluation of performance, as well as promoting good corporate governance.

Beyond these, there does not appear to be much else in the NCCG to provide guidance for shareholders as to what credible steps they could contemplate or execute towards ensuring that their companies observe the highest standards of transparency, accountability and good corporate governance.

While the concept of an *enlightened shareholder*[8] or *stakeholder-inclusive*[9] approach to corporate governance has been advocated by some, a pre-eminent issue for corporate governance is how directors could be made more accountable to shareholders for the stewardship role they play in managing a company's affairs on their behalf.

4.Corporate Governance Monitoring by Shareholders

4.1 Being financial stakeholders in the way and manner that a company is managed, shareholders should maintain a special interest in developing mechanisms for influencing the conduct of directors to achieve wealth maximisation for them. As we have alluded to earlier in this paper, this task has never proven to be an easy one.

That being said, we now proceed to consider some of the options available to a willing and active shareholder in his earnest quest to circumscribe the potentially injurious conduct of conflicted directors. Some of these avenues are contemplated within the NCCG.

4.1.1 Active Engagement by Shareholders

The most fundamental credential for successful monitoring of good corporate behaviour by a shareholder is his preparedness to take an active interest in the goings-on in the company. Shareholders must be ready to regularly seek out information and evaluate it for the purpose of making an informed opinion about the financial position and performance of the company. It is the knowledge derivable from deliberate information gathering that will empower shareholders to respond to directors' stewardship in an appropriate and adequate manner.[10] Indifference towards or ignorance of the company's affairs is a recipe for weak corporate governance.

Although, directors owe the company legal duties and obligations[11], the interest of shareholders, as owners, should also be prioritised. In this respect, the board should keep shareholders well informed of its activities and maintain a healthy dialogue with them. The board has a responsibility to promote good relations with shareholders, and where this is the case, access to accurate and adequate information by shareholders is encouraged.

A common criticism of shareholders is that they are inclined to be indifferent towards their boards and often do not attend meetings. Why this is the case, is a subject for another paper. Suffice it to emphasise that this apparent nonchalance by shareholders needs to change. Historically, it would seem that only institutional shareholders tend to take a keener interest in the affairs of the company and as a result, are

[8] This approach to corporate governance proposes that the board of directors and, by extension, senior management must conduct the company's affairs in the best interests of the shareholders but in an enlightened and all-inclusive manner i.e. taking into account the interests of other stakeholders in the company.
[9] This model of corporate governance contemplates that prioritizing the interests of other stakeholders should be the primary motivation of the board of directors and not merely as an avenue for satisfying shareholders' expectations.
[10] Principles 21 & 22 NCCG.
[11] *Foss v. Harbottle* (1843) 67 ER 189.

more knowledgeable and better positioned to monitor the affairs of the company and the conduct of its directors. Since it is generally believed that a company that is better governed will attract more investment and perform better financially. This potential outcome should incentivise all categories of shareholders to be more deliberate in encouraging corporate governance best practices.

4.1.2 Effective use of an Annual General Meeting ("AGM")

Meetings are a critical element in the framework for forging effective shareholder monitoring of corporate governance.[12] Meetings provide the forum for making very significant and not-so-significant decisions for the company and, consequently, a veritable platform for forging active shareholder participation in the company's affairs. While meetings may be convened for directors, board committees or shareholders, they are crucial for the smooth running of the company. We are, however, concerned here with those meetings that involve shareholder participation.

There are majorly 4(four) types of meetings involving shareholders. Statutory meetings[13] require that within 6 months of incorporation, a public company must hold a statutory meeting at which certain statutory reports must be presented to shareholders entitled to attend. An AGM[14] is a meeting which must be held within 18 months of incorporation in the first instance, and no longer than 15 months apart, subsequently. An Extraordinary General Meeting (EGM)[15] is designed to accommodate matters which did not arise or could not be taken at an AGM but which can only be handled by shareholders.

At shareholder meetings, shareholders could assume a front row in regulating corporate behaviour by demonstrating their disapproval or rejection of policies through the deployment of one or more of the following measures:

i] **Voting against a resolution**: Shareholders could maximise their voting rights to influence decision-making by the board by withholding a vote as appropriate. A reprehensible resolution to increase directors' remuneration could effectively be stopped by shareholder participation in this way.

ii] **Objecting to re-election of directors** The board evaluation report on directors would provide, inter alia, an insight into the measure of time commitment that directors have offered to the company's business. Utilising a balanced board evaluation report, shareholders could make a judgment call on the quality of directors' performance on the board, on the strength of which, re-election of such directors could be torpedoed. Where appropriate changes are effected; it provides an opportunity to refresh board membership and infuse diversity into its composition. Usually, these steps operate to improve the quality of board performance and help to provide better alignment with the sustainability aspirations of shareholders. The ability that shareholders have to remove directors or the fear that they are empowered to do so, is a fundamental tool provided by company law towards ensuring that corporate managers act in conformity with shareholders' best interests. [16]

[12] Principle 21 NCCG.
[13] Section 235 (1&2) Companies and Allied Matters Act (CAMA) 2020.
[14] Section 237 CAMA 2020.
[15] Section 239 CAMA 2020.
[16] Boone Pickens, 'Impact on Corporate America' https:/boonepickens.com accessed 10 March 2020; see also Fabian Ajogwu, 'Shareholders Activism: Any Added Value to Governance?' https://kennapartners.com; accessed 9 March 2020.

4.1.3. Review of annual report and audited financial accounts

The singular most important way by which directors make themselves accountable to shareholders is in the quality and robustness of the annual and financial reports they present for review by shareholders and potential investors. For public entities, the financial statements are typically audited by a firm of external auditors which provides a "true and fair view" of the financial position and performance of the company.

The financial statements are a channel of communication from directors to shareholders and a means by which directors are held accountable to shareholders; it is a significant document for corporate governance. Shareholders are thus encouraged to familiarize themselves with the financial reports of their companies and to develop the capacity to read and analyse them effectively. Robust engagement with directors by informed shareholders concerning the contents of financial statements is extremely helpful in signposting their resolve to monitor corporate behaviour and, by that token, incline directors to, at the minimum, take their fiduciary responsibilities more seriously in the knowledge that they would have owners to answer to.

However, it must be stated that the value of this document to shareholders rests on the measure of reliability that can be placed on it.[17] Misleading financial reporting and creative accounting techniques have led to great corporate failures.[18] Consequently, all stakeholders, especially shareholders, should take an active interest in ensuring transparency and accuracy in the financial reports that they rely on for investment decisions.

4.1.4 Acting in concert with other investors

Most shareholders in large public companies hold relatively small shares. Consequently, their ability to individually command the voting majority required to influence certain decisions at meetings is highly limited. Indeed, the resources and time required to organise such dispersed shareholders into a voting majority is tremendous. However, where such small and dispersed shareholders manage to pull this off, it could become a vibrant platform for pushing shareholder-friendly policies and influencing positive corporate behaviour.

Small and dispersed shareholders could opt to form shareholders' associations to constitute a sizeable bloc of investors sufficient to command the attention of the board of directors. This provides an additional vista for monitoring the corporate governance practices of their companies. However, shareholders' associations are encouraged to engage constructively with directors and not to be a pressure group established to truncate the powers of the board or second-guess their every decision.

4.1.5 Role of Institutional Investors

Suffice it to reiterate that the imperative for companies to adopt best corporate governance practices should be as much a concern for the board as it is for shareholders. Institutional investors by their very

[17] The integrity of the company preparing the accounts and the independence and objectivity of the external auditors are key to the quality of financial statements.

[18] Enron used creative accounting methods to inflate its income figures in its bid to posture as a strong brand and influence investors market. In addition, the Houston Office of Arthur Andersen (its external auditors) which relied almost exclusively on Enron for its income appeared constrained to exercise the objectivity and independence required of their audits. Ultimately, Enron filed for bankruptcy owing to these corporate governance failings.

nature i.e. holding large investment portfolios in public companies and, by extension, considerable weight of votes, should feel especially responsible for promoting good corporate behaviour of the companies they invest in. The reasons for this are not far-fetched.

Evidence abounds that companies with good corporate governance culture are generally more likely to be successful than those without it. But, more importantly, Institutional Investors being entities that hold the stocks of individuals and entities, on whose behalf they invest, have a legal and fiduciary responsibility to ensure that they make good returns on the investment choices they make on behalf of their investors. Actively monitoring the corporate governance practices of their companies methodically is one way of ensuring that healthy returns are indeed realised.[19]

Given their level of influence, institutional shareholders, without doubt, represent the best hope for compelling good corporate behaviour by the companies they have invested in. Indeed, the NCCG[20] encourages institutional investors to play a key role in good corporate governance.

4.1.6 Regulatory requirements for involvement of shareholders in corporate governance

Reviewing the UK Disclosure and Transparency Rules, one would find that shareholders are endowed with certain limited powers to influence the decision-making process of the companies they invest in. For example, companies listed in the UK are compelled to provide specified information to the stock market such as changes in major shareholdings, potential alterations in profit projections, changes in shareholdings of directors and so on. In addition to these, UK-listed companies are required to seek and obtain shareholder approval, through voting at general meetings, for related parties' contracts and large ticket transactions.

The NCCG[21] prescribes that the Board of every company should ensure that dealings with shareholder associations are always transparent. Guidance on this could also be found in the Code of Shareholder Association published by the SEC.[22]

4.1.7. Protection afforded minority shareholders

4.1.7.1 The rule in *Foss vs Harbottle*[23] is to the effect that only a company can sue for a wrong done to the business and not its shareholders. The principle in *Foss vs Harbottle* is predicated upon the rationale that since the rectification of a wrong or irregularity is intra vires the company, which rectifies the act complained of through the majority who has powers to do so, becomes an exercise in futility for a court of law to interfere. However, very often, the persons who commit these wrongs are the persons who are in control of the company and who are unlikely to allow the company to sue. In realisation of this, exceptions have been provided to the rule in *Foss vs Harbottle*, in that a common law right is therefore

[19] Institutional investors in the UK and US have been known to exhibit shareholder activism aimed at promoting good corporate governance practices. For example, in the UK, representative organisations of Institutional investors provide voting guidelines for their members to follow where such institutional investors find certain decisions of the company objectionable.
[20] Recommended Practice 22.3 of NCCG.
[21] Recommended Practice 22.4.
[22] Section 26 of the Code of Corporate Governance for Public Companies in Nigeria.
[23] (1843) 2 Hare 461, 67 ER 189.

reserved for minority shareholders to take appropriate action to remedy such wrongs/misfeasance under limited circumstances. See *Elufioye vs Halilu*.[24] These exceptions are as follows:

(a) actions to restrain the company from committing an illegal or ultra vires act;

(b) actions to prevent fraud on a minority e.g. to recover the company's property from persons who have taken it for themselves;

(c) actions to restrain the company, which has the power to do an act sanctionable by a special resolution from doing the same through an improperly passed resolution; and

(d) actions to protect and preserve an individual member's rights. In this respect, an individual shareholder is entitled to sue in his name.[25] See *Elufioye vs Halilu.*

Instructively, the above principles which set out the rule in *Foss vs Harbottle* have since been made part of Nigerian law and embodied in the Companies and Allied Matters Act (CAMA)[26]. Please see also the Supreme Court decision in *Agip (Nig.) Ltd vs Agip Petroli International*[27]

4.1.7.2. PART X – CAMA deals generally with the protection of minorities against illegal and oppressive conduct and the nature of actions that may be initiated by or against the company. Specifically, sections 341 through 356 of CAMA 2020 establish the remedies available to minorities, while sections 357 to 373 speak to the powers of investigation of companies and their affairs. In summary, CAMA 2020 affords minority shareholders/members three categories of actions which they can institute in pursuit of remediation for wrongs committed against the company or their personal rights. These are important tools that minority shareholders could deploy to compel the board and executive management to adhere to corporate governance best practices. These classes of actions are as follows:

i. Personal action;

ii. Representative action; and

iii. Derivative action

Where a member opts to seek redress for any irregularity or wrong through personal or representative action, the only reliefs that the court is empowered to grant are injunctive and declaratory ones. The court is not at liberty to grant damages for the acts complained of- sections 343 and 344 of CAMA 2020. However, the courts are invested with wider latitude in the nature of reliefs they can grant where an action for redress is initiated by means of a derivative action - sections 346 and 347 of CAMA 2020, and in doing so, they are empowered to make one or more of the following orders:

a. authorize the applicant or any other person to control the conduct of the action being questioned;

[24] (1993) 6 NWLR (Pt. 301) 590, paragraphs F-H; 598, paragraphs, A-C.
[25] 590 paragraphs F-H; 598, paragraphs A-C.
[26] Particularly Sections 341 – 346 of CAMA 2020.
[27] (2010) 5 NWLR (Pt. 1187) 392, paragraphs A-B;G.

b. give directions for the conduct of the action being complained of;

c. directing any amount adjudged to be paid by the individual or company; or

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

4.1.7.3. In order to enable the courts grant any of the reliefs indicated under sections 343 and 344 of CAMA 2020 – relating to personal and representative actions, CAMA 2020 has established the limited circumstances in which shareholders may by way of a declaratory or injunctive relief restrain the company from embarking upon wrongful acts against their interests. The circumstances so specified are as follows:

i. entering into a transaction which is illegal or ultra vires;
ii. purporting to do by ordinary resolution any act which by its constitution or by CAMA 2020 is required to be done by special resolution;
iii. any act or omission affecting a shareholder's personal rights as a member;
iv. committing fraud on either the company or the minority shareholders where the directors fail to take appropriate action to redress the wrong done;
v. impracticable to call a company meeting in time to redress the wrong done to the company or to the minority shareholders; and
vi. where the directors are likely to derive a profit or benefit, or have profited or benefited from their negligence or from their breach of a fiduciary duty.[28]

With respect to derivative actions, the provisions of section 346(a) – (d) are to the effect that no action may be brought unless the court is satisfied that:

a. the wrongdoers are the directors of the company who will or have refused to take necessary action;

b. reasonable notice has been given by the applicant to the directors to take the proposed action;

c. the applicant is acting with bona fides;

d. it is in the best interest of the company to do so.

The principles relating to the right of members to institute a derivative action in appropriate instances have been distilled in the case of *Agip (Nig.) Ltd v Agip Petroli International*[29] where the court held as per Adekeye, JSC, (delivering the leading judgment), stated as follows:

[28] Section 343(a)-(f) of CAMA 2020.

[29] *Agip (Nig.) Ltd v Agip Petroli International* 392-393, paragraphs H-D; paragraphs D-F.

"……Derivative actions are unique because, under traditional corporate law, management is responsible for bringing and defending the corporation against suit. The two basic requirements at common law for a derivative action are:

1. that the alleged wrong or breach of duty is one that is incapable of being ratified by a simple majority of the members, and

2. that the alleged wrongdoers are in control of the company, so that the company which is the claimant cannot claim by itself.

A derivative action may only be brought where the wrong complained of:

(a) amounts to a fraud on the minority and the wrongdoers are in control of the company;

(b) activities by the directors, officers and employees causing harm to the company, breach of duty etc. that cannot be ratified by ordinary resolution; or

(c) is outside the company's objects and so cannot be ratified under any event."

4.1.8 Evoking Public Empathy

Shareholder activism has been known to generate significant public interest in the way companies are managed by their boards. Generally, most public companies are concerned about the perception that the investing public holds of their operations because of their capacity to affect the market price of their shares. If the investing public maintains a negative impression about the integrity and corporate behaviour of a particular company, it could lead existing investors to consider offloading their shares or potential investors looking elsewhere to invest.

Any serious-minded board would take active steps to manage any potentially negative narrative about the operations of its company. The most proactive way of averting negative public perception in the first place is to constantly engage shareholders about the strategic direction of the company and the critical steps required to be taken to achieve organisational goals. Succinctly put, the board should as much as is practicable carry majority shareholders along, especially regarding policies that are price-sensitive.

5. Limitations on the role of shareholders as watchdogs

5.1. Lack of majority control

The capacity of shareholders to hold managers accountable for their actions and the use of company assets is often constrained by their small holdings and relatively insignificant voting rights. Some have argued that the core reason why shareholders do not play as active a role as they otherwise would, is that they just do not recognise their powers and, when they do, do not use them constructively. While there may be some merit in this proposition, it is also worthy of mention that without a voting majority, shareholders are hamstrung in effecting desired changes in the way their companies are run. Mobilising a sufficient number of votes to persuade and influence decision-making has often led to a scenario where the shareholders *have their say but the boards have their way.* Some of the instruments open to shareholders with relatively small stocks have been previously discussed above.

5.2. Actual control or executive powers are in the hands of Boards of Directors and senior management and not shareholders

The separation of ownership from control of the company has made it such that shareholders only manage to intervene in the decision-making process through meetings, which for their purposes, are too few and convened too far apart. The executive and day-to-day decisions relating to the company are taken on behalf of shareholders by managers and directors. A lot of shareholders of public companies have neither the time nor resources[30] to constantly monitor the activities of managers and directors who get paid to run the company's affairs. Even where shareholders are sophisticated enough to challenge directors on corporate governance issues, directors usually have their way because, in practical terms, they are in control of the company.

5.3. Directors owe duties to the company

Under company law, directors are required to exercise their powers in the interests of the company.[31] However, Gower and Davies (both renowned authors in the field of company law) have expressed the view that it would amount to providing imprecise guidance to directors by suggesting that their duties are exclusive to the company.[32]

The principle that directors are primarily accountable to the company was underscored in the *Rule in Foss v Harbottle* i.e. that only a company can sue for a wrong done to the business and not its shareholders. The principle in *Foss vs Harbottle* is predicated upon the rationale that since the rectification of a wrong or irregularity is intra vires the company, which has capacity to rectify the act complained of through the majority who has powers to do so, becomes an exercise in futility for a court of law to interfere. Given that the ultimate authority is rooted in the decision of the majority, it could always have its way. In consequence, in so far as incorporated companies are concerned, the court would not interfere with their internal management provided that they are acting within their powers, and lack the jurisdiction to do so. Any wrong perceived to have been committed to the company should prima facie be initiated by the company itself. In this regard, please see the Supreme Court decision in *Elufioye vs Halilu*,[33] in which, by a majority of 6 to 1, (Omo, J.S.C. as he then was) delivering the leading judgment; (Ogundare, J.S.C. (as he then was), (dissenting), the court laid down the ambit of the rule in *Foss vs Harbottle* as follows:

"The rule in *Foss v. Harbottle* has two limbs, viz: -

(a) that in respect of any wrong against the company ……., only the company ……can sue in its own name; and

[30] Institutional shareholders, owing to their scale of shares and weight of voting rights have developed the necessary wherewithal to monitor corporate governance.
[31] LCB Gower and PL Davies, *Principles of Modern Company Law* (Sweet; 9th Revised edn, 2012).
[32] *Ibid*. The authors have posited that under common law, the ultimate beneficiaries of directors' duties are the members of the company as a whole (not individual shareholders), the members being the persons who created it, or who have subsequently become members, normally by buying shares in it.
[33] (1993) 6 NWLR (Pt. 301) paragraphs E-F 590; paragraphs H-A597-598.

(b) the court will not interfere in any transaction where it is within the power of the majority of shareholders to ratify or undo such transaction……"

The net effect of this principle is to, ordinarily, constrain and circumscribe the powers that an aggrieved shareholder could otherwise wield in seeking succour from oppressive conduct by directors and managers. However, as has been explained above, there are some exceptions to the Rule.[34]

5.4 Limited knowledge of the business in which they invest

It is generally believed that shareholders do not have the expertise or experience to advise corporate managers about technical corporate decision-making. It is also contended that shareholders' activism tends to distract institutional investors from their core responsibility of protecting the investments of beneficiaries.[35]

Conclusion

Shareholders are the owners of companies and these companies rely on their investments to thrive and operate as responsible corporate citizens. Consequently, they have both a self-interested and public-interest basis for taking an active interest and assuming a watchdog role in the way and manner in which they are managed. In recognition of the agency costs that arise from the separation of ownership and management in public companies, adherence to best corporate governance practices is critical for ensuring that shareholder investments are preserved and expanded. The prosperity of corporates is also key to helping them serve the interests of other stakeholder groups who have interests in their affairs, and in the process, position to become responsible corporate members of their communities.

Suffice it to state that, in addition to the several tools for monitoring corporate governance already discussed herein, shareholders must remain aware of their pivotal role and key responsibility in monitoring corporate governance in the entities they invest in. They should also continue to develop new tools for keeping boards and executive management on their toes and ensuring that they are accountable for the use to which they deploy the resources of their companies. This is especially so because these companies do not exist for themselves alone, they play and continue to play a constructive and catalysing role in the development of the environments within which they operate.

[34] (a) Ultra vires or illegal actions; (b) Commission of fraud; (c) An act purporting to abridge or abolish the individual rights of a member; and (d) An irregularity in the passing of a resolution which requires a qualified majority. See also - *Fanning v. Murtagh Ors* [2008] IEHC 277.

[35] SL Gillan and LT Starks, 'Corporate Governance Proposals and Shareholder Activism' *Journal of Financial Economics* (2007) 57 (2) 279.