Advances in Politics and Economics
ISSN 2576-1382 (Print) ISSN 2576-1390 (Online)
Vol. 5, No. 4, 2022
www.scholink.org/ojs/index.php/ape

Original Paper

Demystification of the Organic Theory of Company Law through the Lens of Corporate Governance Jurisprudence: Revisiting Shareholders Activism (A Case Study of Nigeria's Company and Allied Matters Act 2004)

O. OGECHUKWU AJOKU ESQ[1]

[1] O. OGECHUKWU AJOKU ESQ, ajoku.ogez@gmail.com

Received: October 10, 2022 Accepted: November 22, 2022 Online Published: December 1, 2022

doi:10.22158/ape.v5n4p98 URL: http://dx.doi.org/10.22158/ape.v5n4p98

1. Introduction

This paper borders on the case study of the Nigerian company legislation. The choice of this case study is deliberate due to the lessons to be learned regarding residence of company powers. The present company Act was first enacted in 1990. This became known as the Company and Allied Matters Act 1990. Yet in 2004, there was need to excise the sections that provided for company securities. Those sections gave birth to what is now Investment and Securities Act, 2007. This paper shall dwell on the sections of the Nigerian CAMA, 2004 that provides for distribution of corporate powers.

A company is owned, and managed, by two principle organs. These are the "Board of directors" and the "shareholders in general meeting". Therefore, if a company is incorporated, it has become a separate legal entity of its own, and it is different and distinct from the members that incorporated it. Though a legal entity, it is an artificial legal entity that cannot act on its own person. It can only act through human organs, agent, and officers (Note 1) and in most cases through the directors. A company though having a corporate personality is deemed to possess human personality through its officers and agents (Note 2). Therefore, it can only act through human agents and officers (Note 3). Hence, the rule of agency is applicable in the corporate structure. The authority to exercise the company's powers is entrusted to the directors who act as a board, but not as individual directors. This said authority bestowed on the board may be delegated by the board to the managing director or to other officers of the company (Note 4).

The most over whelming aspect of corporate practice is the nature of the relationship between the board of directors and the shareholders (members) in general meeting. Up to the end of the 19th century, in

England, the general rule was that the directors were under the control of the members in general meeting. The directors were usually treated as mere agents of the company, and the general meeting was, therefore, regarded as the company while the board was subject to the overall control of the members in general meeting. The members in general meeting could pass a resolution empowering them to interfere in the ways the directors managed the company, especially where such ways of managing the company by the directors are not for the benefit of the company. (Note 5)

The above view has changed. This was due to the judicial attitude that changed, and the prevailing view that the shareholders cannot interfere with the exercise of those powers vested in the directors by the articles of association, or the companies Act, either expressly or by necessary implication. (Note 6) At best, what the share holders can do is to remove the recalcitrant directors and replace them with persons who agree to their policy. This essentially shows that there is a nexus between the control of the individual corporators and the management of the company itself. The Nigerian Company legislation (CAMA) (Note 7) has provided and stipulated that a company shall act through its members in general meetings or its board of directors, or through officers and agents appointed by or under authority derived from the members in general meeting or the board of directors. Thus, as earlier noted above, the primary organs of a company are the share holders and the board of directors. The managing director is often regarded as third organ. (Note 8) Although the managing director being an appointee of the board of directors, it is in him that the practical executive powers of the company are vested in modern corporate structure. On the other hand, the board concerns itself with policy formulation and decisions, as well as exercise a general supervisory role over the conduct of the managing director. (Note 9) Moreover, the roles of the board and the managing director are subsumed.

2. The Myth of Corporate Personality

Essentially, it is a fundamental principle of modern company law that there is a clear and total separation of ownership and management in companies. This is as a result of two main factors. The first is the very essence of the modern corporation which principal function and Fundamental feature is the pooling together of huge capital which many individual and institutions have contributed for the purpose of investment to be managed by a few managers. The second factor is the prevailing need for efficiency in the running of corporate organizations and the demands of managerial and technical expertise to achieve this goal. The degree to which these factors influence the operations of a company may vary depending on whether it is a private or owner controlled company on the one hand, or a public limited company on the other hand, whether quoted on the stock exchange or not. But for private companies, the growing importance for competent management and technical expertise cannot be ruled out. Theoretically, therefore, the general management of the affairs of the company is vested in its board. For practical exigencies, the board appoints one of its folds as managing director and chief executive officer of the company. The board is generally responsible for making policy decisions in the company while the chief executive or the managing director necessarily sees to their implementation

and oversees the day to day operations of the company. It is a different ball game for owner- controlled companies in which the provision of the necessary capital, the management of the company and the implementation of policy decisions may be vested in the same person or group of persons. Also for large companies there is usually a more elaborate hierarchy of command emanating from the board through the middle management to the employees that constitute the workforce. This same management is also accountable to a potentially inquisitive set of shareholders and the general public, inclusive of regulatory bodies.

In very large companies, as earlier noted which are also quoted companies, there is a diversified nature of shareholding. As a consequence, this has generated a protracted debate and controversy amongst law philosophers and eminent jurists. The debate is whether or not the general meeting can, by resolutions, exercise control over the actions of the directors in the overall condition of the company's affairs. This has resulted to divergent views. One view has contended that the general meeting has a right of intervention in the management matters expressly vested in the board in the company's articles by way of ordinary resolution. (Note 10) A contrasting view, supported by most judicial decisions, and text writers, have concluded that once power have been conferred by the articles to the directors, the general meeting could not give direction to the directors as to what they are to do, nor overrule their decisions except by altering the said articles. (Note 11) A closer look at some articles for clarity is germane. The classical article is Article 80 type of articles which many companies have adopted and hitherto retained that later became principal bone of contentions and subject of litigations for its succinct interpretation. Its interpretation has, hitherto, remained troublesome. The said article 80 provides, inter alia, that:

"The business of the company shall be managed by the directors who may exercise such powers of the company as are not, by the Act or by these regulations required to be exercised by the company in general meeting subject, nevertheless, to any of these regulations to the provision of the Act and to such regulations or provisions as may be prescribed by the company in general meeting, but no regulation made by the company shall invalidate any prior act of the directors which would have been given if that regulation has not been made (Note 12).

The above article 80 adopted by most company legislations is very problematic. The problem of interpretation of the said article results partly from the ambiguity of the above underlined words. The House of Lords interpreted a similar article in Quin and Axtens Ltd v Salmon. (Note 13) The article for interpretation in this case was article 75, which is similar to article 80. The House of Lords in the above case rejected the argument that regulations employed in article 80 type of articles includes directives, whether general or particular, as to the transactions of business of the company. Lord Loreburn, L. J. said inter alia:

"Now it may be a question of argument, but for my part 1 should require a great deal of argument to satisfy me that the word regulations in this article does not mean the same thing as articles having regard to the language of the first part of the article of association" (Note 14).

Construing the underlined words in the case of Scott v Scott, (Note 15) Lord Clauson observed inter

alia:

"To begin with, I do not take the view that those limiting words "subject nevertheless" ……, and so forth, has anything to do with any duty cast upon the directors in the first two lines of the articles to manage the business of the company…… One of the aforesaid regulations for provisions is this provision about the business of the company being managed by the directors, and I find the greatest difficulty in seeing how any resolutions of the company in general meeting controlling the directors in management of the business can possibly be justified under the terms of the articles". (Note 16)

It is humbly submitted that the underlined words are troublesome and equivocal. (Note 17)

Earlier in the history of company law, that is pre-1906 era, to be precise, the directors have been viewed as delegates of the general meeting. This was the position under the common law. By this common law position, the company's Act, and the Articles' were drafted in a manner that the powers of management would remain with the general meeting which could delegate its powers to the board. The board of directors would be delegates of the general meeting and their delegated powers could be withdrawn at anytime by the general meeting. This was the provision under SECTION 90 COMPANIES CLAUSES (CONSILIDATION) ACT, 1845. This section became the forerunner of article 80 type of articles. This section 90 made the exercise of directors' powers "subject to the control and regulations of any general meeting specially convened for the purpose, but not as to render invalid any act done by the directors prior to any resolution passed by such general meeting". In addition to the said section 90 of the Act, the directors were made the governing body, subject to the superior control of the proprietors in general meetings, and as the Act seems to have provided, the proprietors so assembled, have power…… to control the directors in any act which they may have originated. (Note 18) Cotton L. J. expressed a similar view in Isles of Wight Rly Co. V. Tahourdin. (Note 19) In modern times, commercial realities and business convenience seem to be against members being able to control and direct the board. Hence, the view that the directors are mere agents of a majority vote of shareholders in general meetings, and thereby susceptible to their directions was, therefore, judicially rejected. (Note 20)

3. Power Distribution in Companies

In the case of *Automatic Self- Cleansing Syndicate V Cunninghame (Note 21),* the court made it clear that where the management of the company is vested in the directors, it is the directors who can exercise those powers of management. Hence, as a consequence of this judicial pronouncement, it became a trite principle of company law that where the company has an article similar or identical to article 80 the directors, and no other person or group, is responsible for the management of the company except in the matters expressly allotted to the members in general meeting, either by the Act or by the Article. (Note 22) Moreover, modern articles of association of companies hitherto provide that the board shall have powers of management. If this method is adopted, it is the usual view that the board can exercise those powers and not the general meeting. (Note 23) It is therefore argued in this paper that article 80 type of articles was imperfectly drafted, hence the controversy around it.

Due to the imperfection in the drafting of article 80, it is not out of place to argue that the said article 80 does not necessarily make the directors autonomous bodies, in matters of management. In other words article 80 did not vest an exclusive power of management on the directors since such view is at odds with the purpose of the article if considered as a whole. (Note 24) It has been contended by a school of thought, (Note 25) that the article 80 type of articles had given the shareholders a right of intervention in management matters.

Therefore, it appears that the general meeting can issue directives to the board in matters of management by passing an ordinary resolution so long as the resolution is in consonance with the articles, and the Act, and does not amount to fraud or oppression on the minority members of the company. This paper, therefore, contends that the said article 80 type of articles, examined closely, does not confer exclusive power of management on the board. (Note 26) In *Marshal's Valve v. Manning Case*, (Note 27) Nevile J, decided that when a provision like article 80 applies and the directors will not start proceedings for a wrong done to the company, power to do so reverts to the general meeting. Professor Gower, having studied the above decision of the court, in the above mentioned case, noted that the decision was in recognition of the exercise of the residuary powers of the general meeting. (Note 28) He contended further that the decision was influenced by policy consideration as the directors clearly wanted to use their powers to prevent action being brought by their company to remedy what was apparently a breach of their duties. He also pointed out that the decision violates division of powers. A learned text writer, and scholar, Goldberg, (Note 29) noted that the interpretation Gower gave was wrong and that Marshal's Valve case correctly stated the general rule. Moreover, it is out of place to contend that the three directors in the said case who refused to sue to enforce their obvious breach of directors' duties acted bona fide in what they considered to be the best interest of the company.

In *Logan (Thomas) Ltd V Davis (Note 30)* Warrington J. noted that the company has reserved the right in general meeting to tell the directors what to do. In this case, article 99 gave the board of directors power to appoint one of their own to be the managing director of the company. Article 113 had a provision similar to article 80 type of article. At an extraordinary general meeting of the company, a resolution was passed that a named person should be appointed as sole director. The directors, however, appointed an entirely different person from the board as sole managing director. The court, in a majority, held that the action of the directors were in order.

The purport of these case decisions is, therefore, that as a general rule, members at the general meeting cannot give directions to the board of directors on how to run the company's business, neither can they overrule the decision already arrived at by the directors in the conduct of the company's business unless such matters are specifically reserved for the general meeting either by the articles as originally framed or by the alteration limiting, of course, the powers of directors. In essence, where the articles of association provided the functions between members in general meeting and the board of directors, the members have no power to interfere in functions and powers of the directors, and vice versa. This

shows that the board has freedom to dictate the way and manner in which the general business of the company is to be conducted. This paper contends that this is not absolute freedom, because there resides in the general meeting a residual power of control. Reliance is anchored on the general understanding that the general meeting can alter the articles (Note 31) to curtail, or even remove the directors (Note 32) and appoint new ones. The general meeting, it is contended, is superior and, therefore, possess residual powers in the sense that if the directors are unable to exercise their power in the conduct of the affairs of the company, the power to do so reverts to the general meeting (Note 33). For instance, where there is a deadlock among directors (Note 34), or they are non-existent, power resides in the shareholders in general meeting to do that which under normal circumstances would be within the purview of directors' powers. (Note 35) This position is a remarkable development in corporate governance. Tables A of the old 1929 English companies Act and the 1948 Act (Note 36) having provided that, subject to the Act and the Articles, the business of the company should be managed by the directors who might exercise such powers as were not required to be exercise by the general meeting, went further to qualify this by thus,:

"Subject nevertheless to any regulation of these articles to the provision of the Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the director which would have been valid if the regulation had not been made".

The above provision, in other words, purport that powers of the directors could be curtailed in the future by a resolution in the general meeting but an act already undertaken by the directors cannot be invalidated thereby. The multifarious case decisions on this provision has therefore, failed woefully to proffer any satisfactory explanation for the problematic area of the article so widely debated, till date.

Table A, Article 70 of the 1985 English Companies Act have modified and altered those problematic words thus:

"Subject to the provisions of the Act, the memorandum, and the articles, and to any directions given by special resolution, the business of the company shall be managed by the directors who may exercise all the powers of the company. No alteration of the memorandum, or articles, and no such direction shall invalidate any prior act of the directors which would have been valid if that alteration had not been made or that direction had not been given". (Note 37)

Section 63(3) and (5) CAMA, 2004 of the Nigerian company legislation also modified that article 80, and thereby provides solution to the logjam showing how meaningless that area of the said article 80 had been. Suffice it to contend, therefore, that the general meeting is empowered to curtail the future powers of the directors by a special resolution whether that formally alters the memorandum, or articles, or merely gives "directions". Companies that incorporates under the CAMA, and those incorporated under earlier Acts that adopt new articles are likely to follow this formula. But can it be argued that this new formula will not raise any new questions? For instance, can a "direction" by special resolution

effectively compel the directors to enter or not to enter into a transaction that is clearly part of the general management of the company's business? In this regard, would the members in general meeting then be "director" within the meaning of the Act which defines "Director" as including "any person occupying the position of a director by what ever name called"? (Note 38) It probably might be unless all or substantial part of "management" was removed and vested in the members.

Although, the post 1906 judicial opinions enhance the position of the board of directors against the general meeting, it is not clear whether such enhancement of the said status is total. In a public limited company such enhanced status may be complete since management cannot be undertaken by a vast body of share holders, nor be undertaken also by large institutional investors. That notwithstanding, there are situations where the companies' Act or the stock exchange (Note 39) requires sensitive transactions to be ratified in general meeting. (Note 40) It is therefore safe to contend that if for any reason the board cannot or will not exercise the powers vested in them, the general meeting may do so. On this basis, action by the general meeting can be effective where there is a deadlock in the board, (Note 41) when there were no directors, (Note 42) when an effective quorum could not be obtained; (Note 43) or the directors were disqualified from voting. (Note 44) In as much as the general meeting cannot abort proceedings commenced by the board in the name of the company, (Note 45) the general meeting can, in some circumstances, commence proceedings or ratify authorized proceedings commenced by someone on behalf of the company if the directors fail to pursue such proceedings. (Note 46) On the other hand, these provisions, and judicial pronouncements, have created an exception to the rule that management of the company is vested in the directors. This has its peculiar problems. (Note 47)

Moreover the board of directors are expected to refer any matter to the general meeting either to ratify what the board had already done or to enable the general meeting to decide on action to be taken. Thus, an act of the directors which is irregular, because, for instance, it is a breach of their fiduciary duties, can be ratified by the company in general meetings if the act is within the powers of the company, and the general meeting acting with full knowledge and without oppression of the minority. (Note 48) On the other hand, if the directors have purported to exercise powers reserved for the general meeting, their actions can be ratified at the general meeting. Is it not awkward if the directors are compelled to take a decision and then ask the general meeting to gloss over them? In other words, it is a convenient course for them to resolve on an action "Subject to ratification" by the company in general meeting. (Note 49)

4. The Company's Management Team

The discussion of company law organic theory will not be complete if due regard is not accorded certain elements among the board of directors. These elements are often a recurring decimal in the modern world corporate governance. They have assumed tremendous influence and finesse. These are known as the "Executive Directors" and their management team. (Note 50) Their position is adequately provided and obtainable in a company that operates a two-tier directorship. Thus, in this regard,

amongst the directors, there are the executive and the non-executive directors. The latter are directors who are expected to do little or nothing other than to attend a reasonable number of board meetings, and perhaps some of the committees that the board may establish. (Note 51) The former are those who, in addition to their roles as directors, hold some executive or managerial position to which, as it is very obvious, they are appointed to the board (Note 52). The board determines their emolument and benefits. (Note 53) Between these persons and the company there must certainly be some sort of contract. Although, in the case of public limited companies, it may be no more formal than a board resolution communicated to them as individual, or exchange of letters. The member directors may work out what each is to do and divide, from time to time, how much the company can afford to pay and how it should be divided amongst them. It is pertinent to note that the most prominent of these executive directors is the managing director. He is also described as "Chief Executive Officer" (CEO) or President. (Note 54) It is not common to find any reference in the articles to a CEO, but it is assumed that a power to appoint a managing director includes a power to address him or her as CEO. It seems convenient to do so. Public limited companies find it convenient to have both executive and non-executive directors and are encouraged to have a reasonable proportion of the latter. In England, one of the goals of the Cadbury Committee on the "financial Aspects of Corporate Governance", 1992, was to strengthen the influence of non-executive directors on the board of quoted companies. The code of Best practice" that accompanied its report required a clearly accepted division of the responsibilities at the head of the company which will ensure balance of power and authority such that no single individual has unfettered powers of decision.

There have been the prevalent cultures of high rewards for these executive directors. This is not surprising because of the fact that many non-executive directors are as well executive directors of other companies. Thus, these executive directors occupy a very prominent position in the company since they incurably know so much about the company's business. They are mostly professional persons occupying strategic managerial, as well as, directorial positions in the company by virtue of their contract of employment with the company. They sit on the board of a company because of their skills and professional training, and, therefore, advice the board of directors on areas of the company's operations in which they possess relevant expertise, and in which the non-executive directors of the company seem ignorant. But some worthy souls still constitute non-executive members of the board even though there must be some limit to which any human can actually be effective. Additionally, it is pertinent to note that the proper position of the law is that only the acts of the general meeting, that of the board of directors, and that of the managing director while carrying on the usual manner of the business of the company shall be regarded as the acts of the company. (Note 55) These are the organs of the company and are the organs of the company and are the directing will and mind of the company. In them, therefore, are vested the company's powers. Company's powers begin and end with them. They are the embodiment of the corporate personality of the company. In addition to the company's organs, there are also officers and agents of the company appointed by or under authority derived from

the general meeting, or the board of directors (Note 56) whose acts are not the acts of the company unless it can be proven that they were authorized by the company through the general meeting or the board of directors. (Note 57) It is safe, therefore, to contend that whereas the powers of the company are vested in the general meeting and the board of directors, and they decide what the company should do, the agents and officers act under delegated power from the general meeting and the board of directors. The implication is that the acts of the general meeting and that of the board automatically bind the company. (Note 58) The same cannot be said of the officers and agents. It is only lawfully authorized acts of the said agents and officers bind the company, albeit, vicariously. (Note 59)

5. Powers of the General Meeting Vis-A-Vis Shareholders Activism

Shareholders exercise control of the company through the instrument of the general meetings of the company. A very pertinent aspect of the powers of the shareholders over the control of the company is what is regarded as the "default powers" of the general meeting. These default powers may be exercised where the directors exceed their powers or exercise them improperly, or fail to or neglect to act in appropriate circumstances in the interest of the company, due to self-interest, or some other reason. (Note 60) In any of these instances, the company in general meeting can take a binding decision affecting the company thereby exercising the role of the directors as provided in the companies Acts or the Articles. The general meeting, as constituted by the shareholders may, on the other hand, ratify acts of the directors improperly done. (Note 61) Moreover, the court has held that where the directors are in a deadlock and cannot exercise their powers as conferred by the company's articles, the shareholders in general meeting has default powers to act in any manner within the domain of directors.

Similarly to above, where the number of directors falls below the number requisite for a quorum, the shareholders were held capable of filling vacancies on the board. (Note 62) The default powers of the shareholders also include the power to institute legal proceedings in the name and on behalf of the company if the directors refuse or neglect to do so. (Note 63) They can also make recommendation to the board regarding action to be taken by the board. (Note 64) Although, the directors are not bound to accept the recommendation of the shareholders in general meeting, a rejection thereof places them at risk of dismissal and replacement with others who are amenable to their (Shareholders) wishes.

The default powers of the shareholders cannot be effective if the transaction is ultra vires; (Note 65) constitute fraud on the minority; (Note 66) or depends upon the alteration of the articles which, therefore, requires a special majority. (Noe 67) It is, therefore, obvious that the default powers of the shareholders were originally the powers of the directors, which they have failed, or neglected, to exercise in appropriate circumstances, or have improperly exercised. For instance, the powers of directors to transfer or otherwise dispose of company's securities must be exercised in the interest of the shareholders. Where this power is improperly exercised, apart from constituting a basis for an action against the directors for breach of fiduciary duty to the company; (Note 68) it seems that the shareholders may set aside such transaction or refuse to be bound by them. (Note 69) Thus, the

directors must not exploit any piece of information known to them by virtue of their office as directors to the detriment of the general body of shareholders. (Note 70) Fiduciary duties of directors are owed to the company and not to an individual shareholder, but sound ethical standards demand that a better view of their responsibilities to the shareholders should be taken. It should be well noted that a speculative profit made as a result of special knowledge not available to the general body of shareholders in the company is improperly made. The directors, hitherto, owe the duty of disclosure in respect of dealings in company's securities. This has been adequately dealt with by the courts (Note 71). THE CAMA (Note 72) also provides that every company shall keep register of directors' shareholding indicating in what capacity such shares are held. The directors are duty bound to furnish notice of such interest. (Note 73) The rules prohibiting insider trading enunciated in the CAMA are designed to prevent the use of valuable confidential and price sensitive information by a person who acquires such knowledge by virtue of his connection or position with the company to his own advantage and to the detriment of other parties who do not posses such knowledge. (Note 74) It is thus contended that the general meeting, in the exercise of their residual powers, should be entitled to set aside, or refuse to sanction, or be bound by improper dealings in company's securities amounting to insider dealings. Even though all profits ultimately belong to the shareholders, the distribution of such profits falls within the discretion of the directors. The directors should bear in mind that in distributing profits, the interest of the company must be of paramount consideration. They should also contemplate that when they transfer money to reserve, they are temporarily withholding from shareholders money which should otherwise be distributed as dividends. Shareholders are perfectly entitled to ask for reasons of such transfer. In addition, where the directors deem it necessary to engage in certain activities with good prospects of profit, the shareholders are entitled to be consulted. They are not allowed to use surplus profits for general investment purposes unless the company's objects include the holding of investments. Thus, with respect to company's meetings, for such pertinent issues, the directors should make it an occasion, rather than a formality.

From the forgoing analyses, the members of a company in general meeting make up the company. They are the only effective authority until the directors are appointed. Moreover, the power to appoint and remove directors is the function of the general meeting. But having noted all these, there is no doubt that there are imminent limitations on the exercise of these powers. These limitations usually render these powers of shareholders nugatory. This circumstance possesses the tendency of the directors' domination of the corporate landscape. In other words, it is sincerely conceded that there are constraints to the effective and efficient exercise of shareholders' powers over the control of the company, that signposts shareholder activism. Obviously, smaller companies, or even private companies, may not suffer these constraints. But large companies are susceptible to these constraints. Thus, the large companies, with a dispersal of shares, comprise the board of directors that will generally control the proceedings of the company's general meetings because they posses the tendency to control the proxy machinery. (Note 75)

5.1 Shareholders Power Constraints

Such constraints to shareholder activism are as follows, viz:

a. General apathy to company meetings and affairs.

b. Over reliance on professional managers and technocrats by the company directors.

c. The Presence of Multinational Companies.

There is general apathy of members to attend general meetings. These shareholders rarely attend company's general meetings due to distance and, perhaps, financial handicaps. But here in Nigeria, this constraint has been alleviated some what. Hence, shareholders' groups such as "shareholders' solidarity Association" and the "Association for the Advancement of the Rights of Shareholders have been formed. These sundry shareholder associations, one way or the other, have made it possible for companies to convene general meetings at venues where there are large concentration of shareholders of the company, or even rotated, rather than held in the head office or registered office of that company. (Note 76) Additionally, the measures of these shareholders associations to cushion the effect of this constraint is the holding of regional shareholders meetings where they appoint proxies amongst them to attend general meetings. This is as a result of the economic recession in the country where most shareholders cannot afford transport fare from their place of residence. We should not also rule out advanced technology where general meetings are monitored via internet and contributions made with audio visual technology, such as skypes and webcam among sundry others.

Another constraints to shareholders' powers is the over reliance on professional managers and technocrats. These crops of individuals have wielded enormous influence in the modern corporate structure. These are the executive directors and their management team. Their resurgence has escalated to shareholders' apathy to company matters. These individuals are virtually on ground and in the mainstream of corporate politics and as a result, they exhibit certain manipulative tendencies. It has, thus, become impossible to inquire into high sensitive corporate issues which the shareholders need cogent answers.

There is the recent overwhelming presence of multinational corporations in the Nigerian, and global economy. Most of these multinational corporations are controlled from their home countries abroad. These multinational corporations are the biggest companies ever in the world. The local shareholders most times are not in control of these corporations. Policy decisions are usually handed down from their home base. Thus, to what extent does the link between the multinational corporations and their local affiliates guarantee the directors and shareholders of these local affiliates the power to exercise independent control in the affairs of the local affiliates? This is a fundamental question. It is, therefore, noteworthy, the improvements in the communication industry that has made the centralization of policy and integration of key operations amongst the affiliates possible. Thus, major decisions of these multinational corporations are made at the home of domicile such as New York, London, Paris, South Africa, Switzerland, among others, and handed to their various subsidiaries worldwide which made things in strict adherence to plan developed in these cities. Therefore, these local subsidiaries do not

participate in drawing policies of the company. The role of the local management and shareholding appears predetermined.

In spite of the above constraints, the quest for accountability by shareholders, from management continues and widely recognized. The traditional methods of seeking to secure it have mainly been by an increase both in the information that has to be disclosed to shareholders and in the matters that need to be ratified by them in the general meetings. These methods can be effective only if members:

i. are sufficiently knowledgeable to understand the information;

ii. possess large enough shareholding to be able to influence decisions; and

iii. are able, as well as willing to resort to the courts if need be.

Moreover, there are some other notable factors that may deter members to take action, whether in a personal capacity or a derivative capacity. An instance is that in most cases the transaction in issue may be so intricate which the shareholders may not easily comprehend. They can rarely identify its precise character. In other words, at the general meetings, the directors might decline to answer probing members on the basis that it is premature to disclose confidential information. Such a situation certainly leaves members helpless as to the basis upon which to proceed and the way forward. It is pertinent to note that even where the shareholders are able to identify a basis for action, the route to establish this in court is another set of complex hurdle. Moreover, there is the traditional reluctance of the court to interfere in the internal management of the company. This has resulted to most of the directors' breaches going unpunished and unchecked. (Note 77) The cost of litigation has also become a restraining factor. But this, to some extent, has been mitigated by the CAMA that provides that an applicant shall not be required to furnish security for costs in any application, or action brought in a derivative capacity. (Note 78) Hence, the court has power to order payment of interim cost to such applicants by the company. (Note 79) But this has not helped matters. The shareholders rarely opt for litigation. Rather, they prefer to opt for a less cumbersome alternative which is to withdraw their investment by disposing their shares in the said company. If this fails because of securing ready and willing market, the shareholders resort to general apathy to company matters.

In large companies, shareholding has become so dispersed that it is usually not worth the while of most shareholders to devote time, effort, and resources to seeking to change the policies of the board and management which they find unsatisfactory. It has become common with shareholders not to be interested in using the rights and powers which the laws and the company's articles confer upon them to hold the board and management to account. But all hope is not lost yet. Oppressed and aggrieved shareholders may also resort to petition for winding up of the company on the just and equitable ground. (Note 80) They can also apply for relief on ground of unfairly prejudicial conduct of the board and management. (Note 81) In achieving these, the interests of other stakeholders, such as creditors and employees of such company must be considered. It has now become safer to move investments around. They move their funds to safer and more secure corporate havens thereby denying their previous company required funds for growth. This results to the consequence of corporate collapse of the

affected company. In other words, shareholders that resort to these above options have become rationally apathetic towards their enforceable rights.

6. Conclusion

In summary, it is abundantly clear that both under the law and the articles of companies, managerial powers are vested in the board of directors. But, in practice, this is different. The affairs of modern companies are under the firm grip of high executive officers and managers. The two, identified, organs of the company (i.e., members in general meeting and board of directors) are compelled by the prevalent complexities of company management to relinquish management powers to the cream of executive directors who are technocrats obligated to manage the affairs of the company daily. The board therefore, as of necessity now rely on these executive directors and their management team for information and initiative in decision making as it affects the business and operations of the company.

The organic theory of company law seems hollow. This is because the prevailing corporate structure, as been noted in this paper, does not encourage shareholder activism emanating for the theory. The company meetings seem to be the only avenue shareholders are reckoned. It is in the company meetings that the company directors are expected to furnish a report of their stewardship for the past year to the shareholders. The shareholders are availed the opportunity to comment on the performance of the board. The shareholders also exercise the power of appointment and removal of directors, as they are entitled to remove director(s) if unsatisfied with company's performance. If this shareholder control mechanism is allowed to flourish, it may be possible for the shareholders to extend their sphere of influence and operation. This conduces to exercising management powers in the company. Unfortunately, the directors possess the tendency to fetter the unrestricted managerial powers of the shareholders. The directors are in the habit of curtailing the powers of the shareholders by the fact that the shareholders lack the competence and expertise in managerial matters.

Finally, in contemporary times, the sphere of corporate management has far assumed a terrain of tremendous legal and political dimension. In other words, directors are availed their way because they invariably control majority equity holding in the companies. On the contrary, nothing is achieved where the atmosphere is devoid of democratic ideals This paper advocates corporate democracy in the mould of shareholder activism. There is no democracy where the minority is not availed an opportunity to be heard. This portends that shareholders ought to be encouraged to show some interest in company affairs, as opposed to what is now the prevalent practice. Unfortunately, company legislations have not deeply encouraged shareholder activism. This gas has resulted to schemes and scams often perpetrated by the board to remain in dominion of company's affairs. Thus, due to incompetence of some members of the board, there are incidences of corporate collapses and poor investment returns. Whenever there is corporate collapse, the board usually smile home richer than they were earlier, while the shareholders bemoan the loss of their investment. There is therefore the prevailing need to encourage shareholder activism for improved returns and corporate democracy.

References

Farrah, F. (1988). *Hannigan: Company law, Butterworths (London/Edinburgh)*. United Kindom, and Second Edition, 1988.

Gower, L. C. B. (n.d.). *In Principles of modern company law sweet and Maxwell London* (3rd ed.), UK. Gower, L. C. B. (1992). Principles of modern company law sweet and Maxwell London (5th ed.), UK.

Dennis, K. (1996). *Smith and keenan's Company Law, pitman publishers* (London).

Davis, P. L. (1997). *Prentice D. D. Gower's principles of modern company Law, sweet and Maxwel* (6th ed.)

Sofowana, M. O. (1992). *Modern Nigeria Company Law soft Associates* (Yaba Lagos).

Bakingga, D. J. (1988). Directors' Duty to Exercise power for a proper purpose. *GRBPL*, *2*(10), 16.

Bakingga, D. J. (1989). Directors, Duty to the Company and shareholders. *GRBPL*, *2*(12), 22.

Bakingga, D. J. (1989). Corporate Irregularities and shareholders right. GRBPL, *2*, 151.

Bishop, M. (1994). Corporate Governance Survey. *The Economist*.

Emmot, B. (1992). Step forward shareholders" the world in 1992, London. *The Economist publishers*, 117.

Golderg, G. D. (1948). Article 80 of table A of the companies Act, 1948. *33 M.L.R.*, 188. https://doi.org/10.1111/j.1468-2230.1970.tb01264.x

Hindle, T. (1993). *Of board stiffs and petrocks*. The world in 1993, The Economist publications.

Mark, R. (1993). Some Difficulties in corporate structure in Germany. *Japan and the United states", Yale law Journal 1993*.

Mintzberg, H. (1994). Who should control the corporation. *California management Review*, *23*(1), 90-115, 103. https://doi.org/10.2307/41165115

Makubua, G. T. (n.d.). "Appointment of company power Between the Board of Directors and the General meeting. *An Analysis of the Debate and Case* (Unpublished). Commercial Law Department, A. b. u. Zaria

Neubower, F. (1993). The Burning Issue of corporate Governance: The Guinness Syndrome. *International programmed for board members*.

Pound, J. (1994). *The Rise of the political model of corporate Governance and Corporate control*. New York Universit Law Review, 1994, March.

Sullivan, G. R. (1977). *The Relationship between the Board of Directors and the General Meeting*. 1977, 93, LQR, 569.

Notes

Note 1. Lennards carrying company V. Asiatic company Ltd (1915) AC 705.

Note 2. Per Aniagolu J. SC. (Rtd) in Trenco Nig Ltd V. African Real Estate Ltd (1978) LRN 146.

Note 3. Lennards carrying company V. Asiatic company Ltd (1915) AC 705.

Note 4. Paul L. Davis and D. D. Prentice: Gower's Principle of Company Law, sweet and Maxwell (6th Edition) London, 1997, International students' edition.

Note 5. ISLE of wright V. Jahoudin (1883) 25 CH.D 320, Dictum of V. cotton L.J.

Note 6. Sofowora M. O. Modern Nigerian company, soft Associates (Yaba-Lagos) 1992, PP 153-154.

Note 7. Section 63(1) CAMA, 2004.

Note 8. Section 64(6) Ibid.

Note 9. Gower: Principles of modern company Law, Sweet and Maxwell, London (1992) 5th Edition, pp. 160-161.

Note 10. Sullivan G. R. "The Relationship between the Board and the General Meeting" (1977) 93 LQR, 569 at 571.

Note 11. Boyles A. J. et al (ed): Gore-Brown on companies, Jordan & Sons, London (1972) 4 2nd edition, pg 719; Automatic self-Cleasing Syndicate co. V. cunning hame (1906)2 CH. 34CA; Bam ford V. Bam ford (1970) CH. 212; Scott V. Scott (1943)' All ER 5&2; SHOW & Sons (Salford) ltd V. show (1935) 2KB 113 at 134.

Note 12. Formerly Table a Article 80 company's Act, 1968. All emphasis above made for further deliberation.

Note 13. (1909) AC442.

Note 14. Ibid at pg 444.

Note 15. Op. cit. n. 25. In this case it was article 71.

Note 16. Ibid, at pg 585.

Note 17. Boyle J. A. et al (ed): Gore-Brown on companies, opcit, n.25, pg 125.

Note 18. Per Wigram V. C. in foss V. Harbottle (1843) Harc 461, at 472; ER 189 at 203.

Note 19. (1884) 25 CH.D at 330.

Note 20. Op. cit, n. 25.

Note 21. Ibid.

Note 22. EF., Alexander and ward co. Ltd V. Samyang Navigation co. Ltd (1975) WILR. 673.

Note 23. For D. H.A.J.: Principles of company law, Butter worth's, Sydney (1974) pp.287 – 288.

Note 24. Sullivan G.R., Opcit, no 23 p. 572.

Note 25. Ibid.

Note 26. Marshal's value Gear co. V. manning and co. ltd (1909) 1 CH.267.

Note 27. Ibid

Note 28. Gower C.C.B. opcit., n. 23, p.127.

Note 29. Goldberg G.D., "Article 80 of Table A of companies Act 1948" 33 MCR, 188.

Note 30. (1911) 104 Lt, 94. Affirmed by the court of Apeal, 105 LT, 419.

Note 31. Section 46 CAMA, 2004.

Note 32. Section 262 Supra.

Note 33. Barron V. Potter (1914) CH. 895.

Note 34. Foster V. Foster (1916) CH. 532

Note 35. Section 63(3)-(5) CAMA; 2004, op.cit, n. 34.

Note 36. This is the Article 80 under scrutiny.

Note 37. Sec also section 63(1) CAMA, 2004.

Note 38. Section 567(1) CAMA, 2004.

Note 39. Nigerian stock exchange is established and empowered under the investment and securities Act, 2007.

Note 40. Op. cit., n. 51.

Note 41. Quin & Axtens V. Salmon (1909) AC. 442.

Note 42. Alexander ward & co. V. Samyang Navigation 10. (19 75), WLR 673.

Note 43. Foster V. Foster (1916) CH. 532.

Note 44. Irvin V. Union Bank of Australia (1877) 2, App. CAS. 366 PC.

Note 45. Section 63(6) CAMA, 2004

Note 46. Section 63(5) (b) supra; marshal's value case

Note 47. Re-Argentum Reductions (Uk) ltd (1975) W.C.R. 186 at 189

Note 48. Banford V. Bamford (1970) CH. 135 CA.

Note 49.Grant V. Switch back Rlys (1888) 40 CH. D 135, CA.

Note 50. Section 282 (4) CAMA, 2004.

Note 51. Section 64(a) supra.

Note 52. Ibid.

Note 53. Re Richmond Gate Pty co. (1965), W. C. R. 335.

Note 54. In USA, they are so referred.

Note 55. Section 65 CAMA, 2004.

Note 56. Section 63(1) supra.

Note 57. Section 66(1)(a) and (2) supra.

Note 58. Section 65 supra.

Note 59. Section 66(3)supra.

Note 60. Section 63(5) company and Allied matters, Act. 2004.

Note 61. Re Argertum Reduction (UK) Ltd (1975) 1 WLR 186.

Note 62. Barron V. Porter (1914) 1 CH. 895.

Note 63. Foster v. Foster (1916), CH. 532.

Note 64. Ibid.

Note 65. Section 63 (5) (d) supra.

Note 66. Bamford v. Banford (1970) CH. D. 135 CA.

Note 67. Ibid.

Note 68. Grant v. switch back RIHS (1888) 40 CH. D. 135 CA.

Note 69. Breiss V. Wooley (1954) Ac 333 WLR 832.

Note 70. Allen v. Wyatt (1914) 30 TLR 444.

Note 71. Percival V. Wright (1902) 2 CH 421.

Note 72. Section 280(1)-(6) CAMA, 2004.

Note 73. Section 275 supra.

Note 74. Section 2765 Supra.

Note 75. Sections 614-619 Supra now excised from CAMA to 15A, 2004.

Note 76. Gower L.C.B.: Modern principle of company Law, Sweet and Maxwell (London) 4th Edition, 1999, p. 553.

Note 77. Orji V. Progress Bank (unreported) Suit No. FHC/148/91.

Note 78. Section 303 (2) (a) (d) CAMA, 2004.

Note 79. Section 304, 306, 307, Supra.

Note 80. Ibid.

Note 81. Section 408 (e) CAMA, 2004.