# IMPROVING THE DERIVATIVE POWER OF THE MINORITY SHAREHOLDER TO SUE: A COMPARATIVE STUDY OF MALAYSIAN AND NIGERIAN CORPORATE LITIGATION

**Muhammad Rabiu Musa***
LLB, BL, Assistant Lecturer, Department of Private and Business Law, Faculty of Law, Bauchi State University, Gadau, Nigeria

## ABSTRACT
*Derivative action is one of the exceptions to the common law rule of majority control, developed under the common law, and which gives a minority shareholder the power to institute an action on behalf of the company. Various jurisdictions have recognized the need to provide statutory intervention to remove the difficulty brought by the common law stringent qualifications for the validity of derivative action, which rendered the remedy almost nugatory. This work is a comparative legal assessment of the statutory provisions on derivative action under the company laws of Nigeria and Malaysia. The findings of this paper show that even though there are some improvement provided by statutes in these jurisdictions for the derivative power of the minority to sue, more liberality in the law is required as the provisions are not far from mere codification of the common law. The improvement which the statutes set to achieve remains nearly elusive. The two jurisdictions may learn from each other on how to improve their laws on derivative action, as both would also need to learn from other jurisdictions, particularly the United Kingdom, Canada and Australia, where the law has been revisited to give better protection to the minority shareholders; while at the same time maintaining and guarding the sanctity of corporate governance and corporate personality.*

**Keywords:** *Derivative action, shareholder, common law, statutory, Malaysia, Nigeria.*

## 1.0 Introduction
The management power of a company lies in the hands of the Board of Directors, who are entrusted with the power to manage the day-to-day affairs of the company. The shareholders in a General Meeting have the power to check the activities of the directors, so as to avoid abuse of powers. In most instances, the majority shareholders dominate the company through their control over the Board of Directors. Thus, where the Board of Directors make any act or omission that may be detrimental to the company, the Board may still have the sympathy of the majority shareholders; who may ratify the act or omission done by the Board. From the established principle of corporate legal personality laid down in *Salomon v Salomon & Co.*,[1] where a wrong is

[1] [1887] AC 22

done against a company, it is only the company that can commence a legal action against the wrongdoer. This is a common law rule established in *Foss v Harbottle*[2] and known as the 'proper plaintiff rule' or alternatively, the 'rule in *Foss v Harbottle'*. Through this rule, the English law affirmed the fundamental right of a company to make litigation decision through its organs, in relation to a wrong done against it. The law allows this right to be circumvented only in very rare and restrictive circumstances.

The Board of Directors, being the management organ of the company has the power to commence legal action on behalf of the company. However, where the directors by their negligent act or breach of duty; are the wrongdoers against the company, the directors would definitely not commence a legal action against themselves and (where they control the general meeting of the company, through their shares,) may persuade the majority shareholders to ratify the act or breach. In such a circumstance, what would then be the position of the minority shareholders who are aggrieved with the decision of the majority? Would they be subjected to the whims and caprices of the majority without any protection for their interests in the company just because they are minority? The common law provides some protective measures for the minority shareholders as exceptions to the rule in *Foss v Harbottle.* The legislatures in Malaysia and Nigeria embodied the exceptions in *Foss v Harbottle* into statutes, with some modifications in response to the inadequacies of the common law.

This paper sets out to examine one of the remedies available to the minority shareholders; the statutory derivative action, under the Malaysian and Nigerian corporate laws, with the aim of finding out similarities and differences between the two, so as to help in suggesting reform where necessary, in order to improve the protective shield offered to the minority shareholders, while maintaining the corporate objective of the company.

## 2.0 Derivative Action

Derivative action is a legal action, brought by a shareholder or some shareholders of a company in the name and on behalf of the company, on account of wrong done to the company.[3] It is different from personal and representative actions in the sense that derivative action arises when the wrong is done to the company and it is instituted in its name by a shareholder or (some) shareholders. Personal action is an action instituted by a shareholder in his name for breach of his personal interest in the company. On the other hand, representative action is a legal action by a shareholder or some shareholders, in the names and on behalf of some shareholders for the protection

[2] (1843) 2 Hre 261, ER 189

[3]Salim, M. R. & Kaur, D, G, "The Statutory Derivative Action in Malaysia", Vol.24.2 (2012), *Bond Law Review*, p:125

of their interests in the company. Derivative action is called as such because the shareholder drives his power to sue from the power of the company; which is the right party to sue when a wrong is committed against it. His power emanated from the fact that the directors, who have the power to commence a legal action on behalf of the company are themselves the wrongdoers, who would naturally not sue themselves. Thus, the shareholder sues in the name and on behalf of the company.

## 3.0 Derivative Action under the Common Law: The Rule in *Foss v Harbottle*[4]

The rule in *Foss v Harbottle* is a common law rule that was first established on two basic principles: the 'proper plaintiff rule' and the 'majority rule'. The proper plaintiff rule provides that the company alone, being a legal entity separate from its shareholders, should have the right to institute an action for a wrong done to it.[5] The majority rule on the other hand provides that in running the affairs of a company, the wishes of the majority shall prevail over those of the minority. Later, the rule in *Foss v Harbottle* was expanded to also mean that where the company by its own internal mechanism, is competent to condone or ratify the wrong committed against it, then no individual member may institute an action for that wrong.[6] The rule is therefore, important in preventing multiplicity of litigations on behalf of the company, as well as in safeguarding the interest of all shareholders concerned.

## 4.0 Exceptions to the Rule

The rule in *Foss v Harbottle* is not without exceptions. If it were, the rights of the minority in running the affairs of the company would have been sacrificed, and the directors and the majority shareholders would have abused their power against the company and the minority. To amend the anomaly produced by the rule, the courts in some certain situations have allowed the minority to sue for and on behalf of the company. The exceptions to the rule in *Foss v Harbottle* is also called the 'minority protection' and the suit or action filed by the minority on behalf of the company is known as 'derivative action'. The suit is filed in the name of the minority shareholder(s) or director(s) on behalf of the company as plaintiff(s). The erring directors are sued as defendants and the company is joined as co-defendant, so that the outcome of the suit would bind it and make it beneficiary of the court decision.
There are generally four exceptions to the rule, as set out in *Edwards v Halliwell*,[7] where Jankins L.J enumerated the exceptions as follows:

### i. Illegal or Ultra-vires Act

Thus, in *Yalaju-Amaye v Associated Registered Engineering Co Ltd*,[8] a minority shareholder was allowed to sue when the purported appointment of new directors by

[4] *Supra*
[5] Edwards v Halliwell [1950] 2 ALL ER 1064
[6] Salim, M.R. & Kaur, D.G., *op cit.,* p. 127
[7] (1950) 2 ALL ER 1064, 1067

the board was held ultra-vires, as there was no such power granted in the articles of association of the company. In *Sarawak Building Supplies SdnBhd v Director of Forests & Ors*,[9] the court held that it will not interfere with the internal affairs of a company only if it acts within its power. Accordingly, the court struck out the suit filed by a director of the plaintiff company on behalf of the company on the ground that he filed the action without a proper authority given to him by the articles of association or the majority shareholders by a special resolution.

**ii. Where Personal Rights of Members are infringed:**

The articles of association of a company constitute a contract between the company and its members, as well as between the members among themselves. Therefore, where the articles have provided for a right to a member and the company (the Board) infringes that right, the member, even though minority; can sue to enforce his personal right.[10]

**iii. Where Fraud has been committed against the Company and the Wrongdoers are in Control:**

Where a fraud is committed against the company, it is only the company that can sue to remedy the wrong. But because the wrongdoers are the ones in control of the company and will not institute an action against their own selves, the law allows the minority to institute an action on behalf of the company, so as to remedy the wrongful act.[11] For derivative action to be maintained under this heading, the minority shareholder must provide a prima facie proof that the wrongdoers are in control of the company and that they have committed fraud against it. The courts have not provided a precise definition of fraud in this sense, but have accepted that it is wider than its definition under the common law[12]. In *Daniels v Daniels*,[13]Templeman J. was of the view that a minority can sue where the directors have abused their powers intentionally or unintentionally, fraudulently or negligently, in a way that they benefited at the expense of the company.

**iv. Where there is Non-compliance with a Special Procedure required for Performance of an act:**

A minority shareholder can institute an action on behalf of the company where the memorandum or articles of association provide for a special procedure to be followed

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[8] [1986] 3 NWLR (pt 31) 653

[9] [1991] 1 MLJ 211

[10] *Tan Guen Engineering & Anor. v Ng KwengHee & Ors [1992] 1 MLJ 487*. See also: *Edokpolo & Co. Ltd v Sem-Edo Wire Industries Ltd [1984] 7 SC 119*

[11] A.H. Bidin, "Legal Issues Arising from Minority Shareholders' Remedies in Malaysia", Vol.7 (2003),*Jurnal Undang-Undangdan Masyarakat*, p. 58

[12] *Abdul Rahim bin Ali v Krubang Industrial Park (Malaka) Sdn Bhd [1995] 3 MLJ 417, CA*

[13] [1978] Ch. 406

in doing an act or making a decision, but the directors breach the procedure and refuse to comply. In *Cotter v National Union of Seamen,*[14] the court held that a minority shareholder can institute an action on behalf of the company, to stop the majority from breaching the constitution of the company, as that could not be ratified even by the majority. In *Lim Hean Pin v TheanSeng Co. SdnBhd & Ors,*[15] the court was of the view that:

*"The rights of a member to bring an action for a declaration that an alteration of the company's articles is void and of no effect falls within the exception which states that the rule in Foss v Harbottle does not prevent an individual member from suing if the matter in respect of which he is suing is one in which can validly be done or sanctioned, not by a simple majority of the members of the company, but only by special majority, namely; special resolution."*

Beside the four exceptions listed above, a fifth exception which has not been accepted by the English courts[16]has been recognized by both Malaysian and Nigerian courts and would be discussed here;

**v. Where Justice of the Case Demands:**

The Supreme Court of Nigeria recognized an additional exception to the rule in *Foss v Harbottle,* where it held in *Edokpolor & Co. Ltd v Sem-Edo Wire Industries Ltd*[17] that considering all the circumstances of the case, where it is in the interest of justice that the rule in *Foss v Harbottle* be suspended, the court has the duty to suspend its application so as to allow a minority shareholder to sue on behalf of the company. The same position has been maintained in Malaysia, as evidenced in the case of *Abdul Rahim bin Ali v Krubong Industrial Park (Malaka) Sdn Bhd*.[18]

## 5.0 Weaknesses of the Common Law Remedies

Despite the above remedies provided by the common law for the protection of minority shareholders and as exceptions to the rule in *Foss v Harbottle*, the minority do not find it easy to institute a derivative action under the common law. This is because of the thorny and strict conditions stipulated on a minority shareholder to pass before he can succeed in derivative action. As rightly pointed out by a commentator:

*"Despite judicial innovations... there are just too many hurdles to jump before bringing derivative suits. You must identify the wrongdoers, gather sufficient information, show there is fraud, prove the alleged wrongdoers control the company, and discover whether or not the acts complained of are ratifiable by a majority at a*

[14] (1915) 1Ch. 503

[15] [1992] 2 MLJ 10

[16] *Prudential Assurance Co Ltd v Newman Industries (No 2) [1982] Ch. 204*

[17] [1984] 7, SC 119

[18] [1995] 3, MLJ 413 at 432

*general meeting. Then you must somehow fund the action. In the face of all this and more, genuine grievances go unremedied"*[19]

Analyses of decided cases show how difficult is the duty of establishing the exceptions of the rule in *Foss v Harbottle* for a successful derivative action. The thorny conditions for a successful derivative action under the common law include:

**i. Locus Standi:**
The plaintiff has to proof a prima facie case that the action falls within the exceptions to the rule.[20] In *Prudential Assurance Co Ltd v Newman Industries (No 2),*[21] the court held that whether the plaintiff had the requisite locus standi to bring the action would be considered by the court as a preliminary issue. This view was followed by Jemuri Sarjan CJ., in *Alor Janggos Soon Seng Trading SdnBhd v Sey Hoe Sdn Bhd*.[22]The determination of locus standi could be done by the court at the beginning of the trial. The essence of this is to discourage unnecessary litigation, as well as to save time and expenses.

**ii. Fraud on the Minority:**
The courts have not set out a standard of what amounts to fraud on the minority, but they agree that 'fraud' here has wider meaning than its common law definition.[23]Earlier decisions maintained that there must be actual fraud or dishonesty, and mere negligence or gross negligence was not sufficient to qualify as fraud.[24] In *Sparks Electrical Ltd v Ponmile*,[25] the Nigerian Court of Appeal, par Nnaemeka Agu, JCA stated that:

> *"All I wish to say is that it is not every case of fraud on a company that comes within the exceptions. What comes within the exceptions is an act which constitutes a fraud on the minority and the wrongdoers are themselves in control of the company."*

However, in *Daniels v Daniels*,[26] the court held that negligence or breach of duty, which not only harmed the company, but also resulted in a benefit to a director,

[19]J. Corkery,*Directors' Powers and Duties,* (Cheshire: Longman Press, 1987), at p. 172, quoted in M.R.Salim and D.G. Kaur, *op cit.,* p. 128.
[20]M.R. Salim and D.G. Kaur,*op cit.*, p.129
[21] [1982] Ch. 204
[22] [1995] 1, MLJ 241
[23]AbdulRahim bin Ali v Krubong Industrial Park (Malaka) Sdn Bhd.,*supra*. See also: A. Dignam and J Lowry, *Company Law,*(London: Oxford University Press, 2009), p. 184.
[24]*Cookie v Deeks (1916) 1, AC 554;Pavilides v Jensen (1956) Ch 505*
[25] [1986] 8, NWLR (pt. 23) 516
[26] [1978] Ch 408

amounted to fraud on the minority. In *Prudential Assurance*,[27]Vinelot J, was of the view that any act of the majority which conflicted with the interest of the company can be regarded as fraud.

**iii. Wrongdoers in Control:**

The next hurdle to be surmounted by the plaintiff is to prove that the act or omission complained of was done by the directors or shareholders who control the company and who will not bring action against themselves.

The meaning of 'control' has not been certain, but the English courts viewed it to mean that the wrongdoers control the majority of the voting shares.[28] In *Prudential Assurance*[29] however, the court gave a wider meaning of 'control' to include not only those with the majority of shares, but also those who, by their position in the company are capable of manipulating its affairs and can ensure that the majority do not allow a suit to be brought against them.

The task of proving 'control' and that the wrongdoers in control would not allow a claim to be brought against them is, no doubt, a difficult task on the plaintiff to prove.

**iv. Ratification:**

Another problem that a plaintiff minority may face in bringing a derivative action under the common law is that the act or omission complained of against the wrongdoers might have been ratified by the majority. Provided it is not an illegal act, the court would not allow a shareholder to bring a derivative action on behalf of the company, when the majority shareholders at a general meeting could decide to approve the act. There has not been satisfactory delineation as to what can be ratified from what cannot be. In *Smith v Croft (No 2),*[30] the transaction complained of was held to be ultra vires. Yet Knox J. struck out the derivative action filed by the minority on the ground that the majority shareholders were opposed to it. In*Regal (Hastings) Ltd v Gulliver*,[31] it was suggested that shareholders can ratify the breach of duty by directors. But in *Cook v Deeks*,[32] breach of directors' duty was held non-ratifiable. In *TeohPengPhe v Wan*,[33] the Malaysian High Court held that acts within the powers of the directors are ratifiable, while acts which are outside their powers are non-ratifiable. In any event, the power by the majority to ratify the wrong complained

[27] [1981] Ch 257, 316

[28]A.J. Boyle, *Minority Shareholders' Remedies,*(London: Cambridge University Press, 2002), 29, cited in M.R. Salim and D.G.Kaur*, op cit.,*P. 130.

[29]*Supra*

[30] [1988] Ch 114

[31] [1942] 1 ALL ER 378

[32] [1916] 1 AC 554

[33] [2001] 5 MLJ 149

of is, by no means, a hurdle and frustration to the minority's common law remedy of derivative action.

v. Cost:

The cost of instituting and prosecuting derivative action, as well as the cost for damages to the defendants in case of an unsuccessful derivative action lies on the plaintiff. The plaintiff could only be indemnified by the company after discovery and proof that the indemnity is genuinely needed.[34] Thus, the indemnity may not be available in all cases. The company is like a free-rider. If the plaintiff/minority shareholder succeeds, the benefits of the litigation go to the company and not to the plaintiff, but the plaintiff bears the cost. All these have been significant barriers under the common law, to minority shareholders in contemplation of bringing a derivative action.

## 6.0 Statutory Derivative Action

The statutory derivative action has been introduced in almost all the commonwealth jurisdictions, with the aim of overcoming the stringent and difficult requirements of the commonlaw, to enhance the role of the shareholders in protecting their interests in the company and to serve as deterrence for managerial misconduct, by imposing the threat of liability.[35]

In Malaysia, the 2007 amendment of the Companies Act, 1965, introduced the statutory derivative action under sections 181A-E of the Act. The Nigerian Companies and Allied Matters Act (CAMA), 2004 has correspondent provisions in sections 303 to 309 of the Act. Rule 2 of the Nigeria's Companies Procedure Rule, 1992 also provides for the procedure for bringing application for derivative action.

The requirements and conditions for instituting statutory derivative action under both the Companies Act, 1965 of Malaysia and the Companies and Allied Matters Act, 2004 of Nigeria will now be considered.

### i. Who May Bring the Action:

Section 181A of the Malaysian Companies Act, 1965, provides that:

a) *A complainant may, with the leave of the court, bring, intervene in or defend an action on behalf of the company.*
b) *For the purpose of this section and section 181B and 181E, "Complainant" means-*
c) *a member of a company, or a person who is entitled to be registered as member of a company;*

[34] Smith v Croft (No 1) [1986] 2 ALL ER 551

[35] P.K.M.Choo, "The Statutory Derivative Action in Singapore: A Critical Examination", Vol. 13, No 1 (2001),*Bond Law Review,* p. 64.

*d) a former member of a company, if the application relates to circumstances in which the member ceased to be a member;*
*e) any director of a company; or*
*(d) the Registrar, in case of a declared company under part IX.*

On the other hand, section 303 of the Nigeria's Companies and Allied Matters Act (CAMA), 2004, provides that:
*(1) Subject to the provisions of subsection (2) of this section, an applicant may apply for leave to bring an action in the name or on behalf of a company, or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company*.
The list of the persons that can bring derivative action in Nigeria is provided by section 309, which provides that;
*"applicant" means-*
*(a) a registered holder or a beneficial owner and a former registered holder or beneficial owner of a security of a company;*
*(b) a director or an officer or a former director or officer of a company;*
*(c ) the Commission; or*
*(d) any other person who, in the discretion of the court, is a proper person to make an application under section 303 of this Act.*

From the foregoing, it is clear that the Nigerian legislation is broader in its coverage on who can apply for derivative action. Unlike the Malaysian Companies Act,1965, the Nigerian CAMA, 2004, recognizes:
i. a former director;
ii. an officer; or
iii. a former officer of a company, as potential applicants.

In fact, section 309 (d) of the Nigeria's CAMA, 2004, allows an application by any person, who, in the discretion of the court, is a proper person to make an application. Nevertheless, the courts in Nigeria have refused to recognize the all-encompassing nature of the provisions of section 309 (d) of CAMA, 2004, and maintained that before a party is allowed to bring a derivative action, she must show sufficient interest in the matter, a condition which the legislature has never provided. In*Adenuga v Odumeru*,[36]the Supreme Court of Nigeria, Par Belgore JSC, reiterated that:
*"The mere fact that appellants are financial members of the eighth defendant has not conferred on them Locus Standi, because; that alone would not disclose sufficient interest for them to bring this action. Looking at the statement of claim, the appellants have not disclosed sufficient interest to justify their bringing this action. A party must, in his statement of claim, aver enough facts to indicate what his interests are in the*

[36](2002) 8 NWLR (pt.821) 163

*matter and how those interests stand threatened if the action was not brought. It is not enough to blandly state that he has an interest; there must be an averment that the interest is threatened."*

The plaintiff in derivative action is all or any of the persons described as 'complainant' and listed under section 181A (4 (a)–(d)) of the Companies Act, 1965 of Malaysia, or the 'applicant' in the case of Nigeria's Companies and Allied Matters Act, 2004, listed under section 309 (a)-(d). On the other hand, the defendants are usually the wrongdoing directors or the controlling shareholders and the company. Thus, even though the action is instituted in the name and on behalf of the company, the company must be made a defendant for the technical requirement of ensuring that the company benefits and also to be bound by the judgment of the court.[37]

**ii. Pre-action Notice**

The Malaysian law requires the plaintiff to give a 30 days' notice to the directors, of his intention to apply for leave to file a derivative action.[38]The purpose of this notice is to give the company an opportunity to first seek redress for itself, and to advert the minds of the directors to the course of action, in case that they had not thought of it. It is only when they do not take diligent action after the notice that the minority shareholder/plaintiff may file the application. Although the Companies Act provides for a 20 days' notice, the courts in Malaysia allow the plaintiff to give shorter notice if that would not prejudice the defendants. Thus, in *Ng Hoy Keong v Chua Choon Yang*,[39] the plaintiff gave a 9 days' notice and the court took that as a mere irregularity that can be dispensed with. The court held that an applicant need not necessarily be shut out from obtaining a relief provided by the Act merely because it had not complied with the time specified for the giving of the relevant notice. The court pointed out that the Act has empowered the court to grant abridgement of time in such circumstances.[40]

In Nigeria, the law also requires the plaintiff to compulsorily give 'reasonable' notice to the directors for his intention to apply for leave.[41] However, unlike the Malaysian legislation that specifically requires 30 days' notice, the Companies and Allied Matters Act, 2004, does not provide specific timeframe for giving the notice and which would constitute the 'reasonable notice' required by the Act. Section 303 (2) (b) of CAMA, 2004, provides:

*(2) No action may be brought and no intervention may be made under subsection (1) of this section, unless the court is satisfied that-*

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[37]*Wallersteiner v Moir No. 2 [1975] QB 375*, See also:*Agip (Nigeria) Ltd v AgipPetroli International [2010] 5 NWLR 348 at 393 para H.*

[38] S: 181B (2), Companies Act, 1965, Malaysia.

[39][2011] 4 CLJ 545

[40] See S: 181E (1) of the Companies Act, 1965 (Malaysia).

[41] S: 303 (2) (b) of CAMA, 2004 (Nigeria).

*(b) the applicant has given **reasonable notice** to the directors of the company of his intention to apply to the court under subsection (1) of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action.*
The section is therefore vague, imprecise and needs to be redefined.

The Companies Act, 1965 and the CAMA, 2004 do not provide for what the notice must contain. At any length, the notice should contain sufficient details that could enable the directors know the specific action complained of, so as to know what action to take. There is no exception for giving the notice under the two legislations. It is therefore necessary requirement that notice must be given in any circumstance. In other jurisdictions however, the courts are empowered by the law, to exercise discretion in granting leave to file derivative action even where notice was not served on the directors, if the court is satisfied that it would be appropriate to do so.[42] Thus, where the directors, whose actions are complained of, are served with the notice, it may be unlikely that they would take any reasonable action to sue themselves, and the notice may only give them an opportunity to organize their affairs and to ensure that they cover up their wrong. There is need therefore for the two legislations to make provisions for exception to the giving of notice in some exceptional circumstances.[43] This would also be in tune with the current position in other common law jurisdictions.[44]

### iii. Application for Leave of Court:

After the plaintiff serves the notice of intention to sue on the directors and the directors do not take any reasonable action, the plaintiff must apply to the court for grant of leave to file a derivative suit.[45] The procedure for leave application in Malaysia is specifically provided by section 181B (1) of the Companies Act, 1965. The section provides that the application shall be made ex parte, by way of Originating Summons. In Nigeria however the Companies and Allied Matters Act (CAMA), 2004, does not specify the procedure to be followed in making the application. The procedure is contained in the Companies Proceedings Rules, 1992. Rule 2 requires the application to be made by Originating Summons. But the Rules itself does not provide whether the application shall be ex parte or on notice. The practice generally among the commonwealth jurisdictions is that the application is

[42] For example, section 237 (2) (e) of the Corporations Act, 2001, of Canada.
[43] M.R.Salim and D.G.Kaur,*op cit.* PP. 150-151
[44] e.g Section 237 (2) (e) of the Canadian Corporations Act, 2001 & sections 216A (3)(a) & (4) of the Singaporean Companies Act, 1967. See also: *Prendergast v Daimler Chrysler Australia Pacific Pty Ltd [2005] NSWSC 131, [100].*
[45] See Section 181A (1) of the Malaysian Companies Act, 1965, and section 303 (1) & (2) (b) of the Nigeria's Companies and Allied Matters Act, 2004.

made ex parte.[46]Rule 19.9A (3) of the UK's Practice Direction on Derivative Claims, Civil Procedure (Amendment) Rules, 2007, provides that
: *'The claimant must not make the company a respondent to the permission application.'*
Unfortunately, in *AGIP Nigeria Ltd v AGIP Petroli International & Others*,[47]the Supreme Court of Nigeria held that the Originating Summons for the leave application must be served on the respondents, to enable them respond to the application, so that the directors must be heard in the application for leave, and failure to do this offends the constitutional provision of fair hearing.[48]
In deciding whether to grant leave or not, the court has to consider certain conditions:
(a) that the plaintiff is acting in good faith;[49]
(b) that it appears to be in the best interest of the company that the leave be granted;[50] and
(c) that the wrongdoers are the directors who are in control and will not take necessary action[51].
In Malaysia, where the leave is granted by the court, the plaintiff must commence the action within 30 days from the grant of the leave.[52] The Nigerian legislation does not provide any specific period for commencement of action.

### iv. Ratification

We have seen that under the common law, one of the challenges that plaintiff/minority faced was that the court would not allow him to bring a derivative action on an act or omission which the majority shareholders have ratified or was capable of being ratified by them. To relieve the minority shareholder from this challenge and frustration, the Malaysian legislation removes the 'ratification shield' and allows the plaintiff/minority to bring his action even if the majority shareholders of the company ratify or approve the conduct complained of. This is a good innovation for the better protection of the minority shareholders. Section 181D of the Companies Act, 1965, provides:

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[46]M.Beekahn,,"The Derivative Action in Australia and New Zealand: Will the Statutory Provisions Improve Shareholders' Enforcement Rights?", Vol. 10, No 1, (1998)*Bond Law Review*. See also: Section 181A (1) of the Malaysian Companies Act, 1965,
[47] [2010] 5 NWLR 348

[49]Section 181B (4) (a), Malaysian Companies Act, 1965, and Section 303 (2) (c), Nigeria's CAMA, 2004.
[50] Section 303 (2) (d) of Nigeria's CAMA, 2004;In Malaysia, it is enough if it appears, prima facie, to be in the best interest of the company that the application for leave be granted. See section 181B (4) (b) of Malaysian Companies Act, 1965
[51]Section 303 (2) (a) of Nigeria's CAMA, 2004. There is no such requirement under the Malaysian Companies Act, 1965.
[52]Section 181B (3) of the Malaysian Companies (2007 Amendment) Act, 1965.

*If members of a company ratify or approve the conduct, the subject matter of the action-*
*(a) the ratification does not prevent any person from bringing, intervening in or defending proceedings with the leave of the court;*
*(b) the application for leave or action brought or intervened in shall not be stayed or dismissed by reason only of the ratification or approval; and*
*(c ) the court may take into account, the ratification or approval in determining what order to make.*

A similar provision is provided by the Companies and Allied Matters Act (of Nigeria), 2004. By section 305, an application, action or intervention under section 303 of the Act will not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company has been or may be approved by the shareholders. But evidence of such approval by the shareholders may be taken into account by the court in making an order. This means that the shareholders' approval is not a conclusive bar to derivative action. An action by the minority in respect of breach of a right or duty or abuse of power by the directors or the majority will be entertained by the court whether or not such breach is ratifiable. It is for the court to decide whether or not ratification or approval by the majority can validly put an end to the minority's complaint.[53]

**v. Cost**

Cost of action has been one of the challenges of the minority shareholders to bring a derivative action under the common law. To improve his derivative power to sue, the legislation in Nigeria provides that a plaintiff/minority shareholder in a derivative action (unlike in other interlocutory applications,) will not be required by the court to give security for costs in any application made or action brought or intervened in.[54] On the other hand, the court may at any time order the company to pay to the plaintiff/minority, interim costs before the final disposition of the application or action, including legal fees and disbursements.[55] In Malaysia, where leave is granted, the law also gives wide discretion to the court to make orders it thinks appropriate, including an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action, and also an order as to indemnification for costs.[56] The Malaysian court's discretion to make an order for costs however, can only be made when the court grants leave for the plaintiff.[57] It is therefore possible, that where the application for leave is unsuccessful,

[53] P.E Oshio, "The True Ambit of Majority Rule under the Companies and Allied Matters Act, 1990 Revisited", Vol.7 No. 3-4,*Modern Practice Journal of Finance and Investment*, *Lagos,*Pp. 386-403
[54] Section 307 of CAMA, 2004
[55]*Ibid*, sections 304 (2) (d) & 308
[56] Section 181E (1) (d) & (e), Companies (2007 Amendment) Act, 1965
[57]*Ibid,* section 181E (1) (e)

the plaintiff/minority shareholder may have to bear not only his, but the defendant's costs as well. It might be preferable for the legislation to specifically provide that costs be granted as of right to a successful applicant, but even where leave is refused the courts should still have discretion to grant costs where appropriate.[58]

Provision for (interim) costs in favour of the complainant is another way in which the law ensures that serious violations of shareholder rights and breaches of directors' duties to the company are not left without redress on account of lack of funds to prosecute derivative actions.

**vi. Evidence**

The minority shareholder was faced with the difficulty of proving his case under the common law, as he could not get access to the relevant company's records that could help him prove his case; the records being in the hands of those in the helm of affairs of the company, whose actions or omissions he complained against, and who would be unlikely to cooperate in providing him the records. To relieve him from this difficulty, the statutes empower the courts to make orders directing the company to supply information, records or any evidence relevant to the suit. The court may order for adjournment of hearing of the matter for that purpose. On this, section 181E of the Malaysian Companies (2007 Amendment) Act, 1965, provides:

*181E (1) In granting leave under this section and sections 181B and 181E, the court may make such orders as it thinks appropriate, including an order-*

*(b) giving directions for the conduct of proceedings;*

*(c ) for any person to provide assistance and information to the complainant, including to allow inspection of company's book.*

The Nigerian Companies and Allied Matters Act, 2004, on the other hand, provides in section 304 that;

*304 (1) In connection with an action brought or intervened under section 303 of this Act, the court may, at any time, make any such order or orders as it thinks fit.*

*(2) Without prejudice to the generality of subsection (1) of this section, the court may make one or more of the following orders, that is an order-*

*(a) authorising the applicant or any other person to control the conduct of the action;*

*(b) giving directions for the conduct of the action;*

Comparing the provisions of the two statutes, one would not but agree that the Malaysian law is more specific on the issue of court's power to direct the supply of relevant information or evidence, so as to avoid the withholding of evidence by the company. It would therefore, be good if the Nigerian legislation on this point is amended to make the powers of the court more specific and clearer, as it is under the Malaysian legislation.

[58]M.R. Salim and D.G.Kaur,*op cit.,* P. 154

**vii. Withdrawal of Action**

It is possible that after the minority shareholder files the derivative action on behalf of the company and the court grants him leave to commence the action, the directors or the majority shareholders may decide to consult him with the aim of appeasing him and appealing to him to withdraw the matter. The statutes therefore provide for such situations where the parties have agreed to settle and withdraw the matter out of court. The court must look critically into the matter to ensure that the rights of any applicant that may be affected by discontinuance, dismissal or stay of the suit as a result of settlement by the parties be put on notice. This will also prevent some collusive settlement between the parties for the benefit of the complainant and the defendants at the expense of the company. Section 306 of the Nigerian legislation provides:

*'An application made or an action brought or intervened in under section 303 of this Act shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit and, if the court determines that the rights of any applicant may be substantially affected by such stay, discontinuance, settlement or dismissal, the court may order any party to the application or action to give notice to the applicant.'* [59]

Similarly, section 181C of the Malaysian law provides that;

*'Any proceedings brought, intervened in or defended under section 181A, shall not be discontinued, compromised or settled, except with the leave of the court.'*[60]

It may be suggested here that once the court has approved the filing of a derivative action, there should be no reason why such action should be discontinued with or without the approval of court. If the applicant is no longer interested, especially if he has been compromised, the court should be given the power to appoint an independent person or organization like the Commission to continue the due prosecution of the matter.

**7.0 Conclusion**

It is clear from the foregoing discussion, that the minority shareholders have enjoyed more protection of their interest in the company through the statutory power of derivative action, provided by both the Companies Act of Malaysia 1967, and the Companies and Allied Matters Act of Nigeria, 2004, compared to their position under the common law. Nevertheless, the comparative discussion reveals that each of these two legislations has some gaps which need to be filled in, in order to provide more and better protection to the minority shareholders, while at the same time promoting the interest of the company as paramount.

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[59] Companies and Allied Matters Act (CAMA), 2004

[60] Companies (2007 Amendment) Act, 1965

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