

# Long Live the Delaware Supreme Court Decisions in *Smith v Van Gorkom*, *Auerbach v Bennett*, and *Zapata v Maldonado*!: Whether the Business Judgment Rule Should Apply in Nigeria

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## ABSTRACT

In making corporate directors observe their duties of care, skill, good faith, and exercising their powers in the best interests of the corporation, along with precedents established in cases such as: *Smith v Van Gorkom*, *Auerbach v Bennett*, and *Zapata v Maldonado*, the Business Judgment Rule (“BJR”) has developed in the United States of America, and statutorily adopted in Australia and South Africa. This Paper posits that Nigeria should expressly adopt the BJR principle. The BJR asserts that in the absence of bad faith on the part of the directors or a gross abuse of discretion, the “business judgment” of directors will not be interfered with by the courts. Further, the burden of showing the existence of bad faith or abuse of discretion rests upon the plaintiff who charges that the corporate action was taken to benefit either the majority shareholders, directors and/or officers, at the expense of the minority. Under the BJR, the acts of the directors/officers are presumptively taken in good faith and inspired for the best interests of the corporation, and a minority stockholder who challenges their *bona fide* purpose has the onus to prove otherwise. Absent intentional misconduct, illegality, and improper benefit, the

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courts will not hold the directors liable for mere errors of judgment. The directors are presumed, in making business decisions, to have acted on an informed basis, in good faith and in the honest belief that their action was in the best interest of the company. While both the 2001 *Australian Corporations Act* and 2008 *South Africa Companies Act* now contain express BJR provisions, neither the extant *Nigerian Companies and Allied Matters Act (CAMA)*, nor the proposed 2018 Amendments to the CAMA contain any such rules. This Paper traces the history of the BJR, its rationale and its application in North America, and makes a case for the introduction of the BJR into the Nigerian corporate lexicon.

## I. INTRODUCTION

Under the extant Nigerian company law statute; the *Companies and Allied Matters Act of 1990* (“CAMA”),<sup>1</sup> directors owe fiduciary duties<sup>2</sup> to the corporations and shareholders, that they serve.<sup>3</sup> These duties include the duty of care and skill,<sup>4</sup> as well as the duty of loyalty,<sup>5</sup> and there are many nuances to each class of duty.<sup>6</sup> The usual fiduciary relationship between the company and the directors considers a breach of these duties as sufficient

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<sup>1</sup> *Companies and Allied Matters Act* (Nigeria), Ch 59 of 2004. CAMA refers to the current operative Companies/Corporations law legislation in Nigeria, known as the Companies and Allied Matters Act. This was formerly referred to as the Companies and Allied Matters Decree, 1990. However, by the consolidation of the Laws of the Federation of Nigeria in 1990, it was re-designated as the Companies and Allied Matters Act, Cap 59, Laws of the Federation of Nigeria, (LFN) 1990. This 1990 Act is now re-consolidated as the Companies and Allied Matters, Act Cap 20, Laws of the Federation of Nigeria (LFN), 2004. For ease of reference, it will be referred to as “CAMA” in this paper.

<sup>2</sup> *Ibid*, CAMA, s 279.

<sup>3</sup> *Floyd v Hefner* (2008), No H-03-5693, 2008 US Dist LEXIS 70922, at \*21 (SD Tex Sept 29); Lori McMillan, “*The Business Judgment Rule as an Immunity Doctrine*,” (2013) 4 *William & Mary Bus L Rev* 521, at 524 (McMillan). McMillan is a reknowned Canadian-American Law Professor with Washington University School of Law, Topeka, Kansas. For a detailed discussion of the BJR, see all the authorities cited in footnote 65, *ante*.

<sup>4</sup> CAMA, *supra* note 1, s 282.

<sup>5</sup> *Ibid*, 280.

<sup>6</sup> Julian Velasco, “How Many Fiduciary Duties Are There in Corporate Law?” (2010) 83 *SCL Rev* 1231 at 1232–33. [Velasco].

grounds for liability.<sup>7</sup> For directors, however, this is not generally the case, because the Business Judgment Rule (“BJR”) – a judicially created doctrine – protects directors from personal liability for decisions made in their capacity as a director, so long as certain disqualifying behaviors, that will be discussed later, are not established.<sup>8</sup> Further, the BJR is now accepted in most common law jurisdictions as a means of measuring the correctness and disinterestedness of corporate directors and officers in carrying out their duties and exercising their powers within the corporate structure.<sup>9</sup> For example, Australia has statutorily adopted BJR via section 180(2) of the *Australian Corporations Act No. 50 of 2001*, with South Africa following suit with *Companies Act of 2008*.<sup>10</sup> Also, in Canada, there are *opinion juris* and case law which support the application of BJR in Canadian jurisdictions. Thus the Canadian corporate law jurist, Bruce Welling noted that:

A common defensive tactic has developed in America to respond to shareholder attempts to bring actions on behalf of corporations. The board of directors of the corporation appoints a committee of the board (now commonly called a 'special litigation committee') and the committee reports on whether the action would be in the corporation's interests. Presumably, if the committee reports that it would, either the board would resolve to have the corporation sue, thus solving the shareholder's problem, or the report would disappear. If the report is negative it will be filed with the court as evidence against the proposed action.<sup>11</sup>

<sup>7</sup> For example, an agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship. *Boardman & Anor v Phipps* [1966] 3 All ER 721; *Robb v Green* [1895] 2 QB 315; *Sanders v Parry* [1967] 2 All ER 803; See, also, Restatement (Third) of Agency § 8.01 (2006). The breach of the duty of loyalty creates liability. Similarly, a director who breaches his duty of loyalty owed to the company will be liable for damages to both the company and the shareholders.

<sup>8</sup> Stephen M. Bainbridge, “The Business Judgment Rule as Abstention Doctrine,” (2004) 57 *Van L Rev* 83 at 90. [Bainbridge].

<sup>9</sup> See, e.g., *South Africa Companies Act No. 71 of 2008*, s 76, online: <<http://www.justice.gov.za/legislation/acts/2008-071amended.pdf>> [perma.cc/U5TZ-DJP5]/; Australia adopted the BJR in statute; *Corporations Act (Aus.)*, No. 50 of 2001, s 180(2) online:<<https://www.legislation.gov.au/Details/C2018C00424>> [perma.cc/J62D-784C].; See, also, H.G. Manne “Our Two Corporation Systems: Law and Economics” (1967) 53(2) *Va L Rev* 259 at 270; McMillan, *supra* note 3, at 524.

<sup>10</sup> *South African Company Law for the 21<sup>st</sup> Century: Guidelines for Corporate Law Reform* GN 1183 in GG 2004-06-23 at para 1.2.

<sup>11</sup> Bruce Welling, *Corporate Law In Canada: The Governing Principles*, 2nd ed (Toronto: Butterworth, 1991), at 530 (Bruce Welling); See also, Robert Clark, *Corporate Law* (Boston, Little, Brown & Co 1986) at 645 (Robert Clark), where he observed that following the

Also, in *Smith v Croft (No. 2)*,<sup>12</sup> Knox, J. recognized the applicability of the BJR under the English common law which extends to Canada, when he held that:

Finally on this aspect of the matter I remain unconvinced that a just result is achieved by a single minority shareholder having the right to involve a company in an action for recovery of compensation for the company if all other minority shareholders are for disinterested reasons satisfied that the proceedings will be productive of more harm than good....I therefore conclude that it is proper to have regard to the views of independent shareholders.<sup>13</sup>

Therefore, with the proposed comprehensive amendments to the extant corporation law main legislation in Nigeria—the CAMA, stakeholders had expected the Nigerian draftsmen to introduce express provisions for the application of the BJR in Nigeria, similar to section 180(2) of the 2001 *Australian Corporations Act* and section 76(4) of the 2008 *South Africa Companies Act*, but the proposed Bill of amendments failed to make the desired definitive BJR provisions.<sup>14</sup> Yet, in Nigeria, according to Viashima Akaayar in their article; the jurisprudential rationale behind the BJR is to protect and promote the responsibility of the directors as the ultimate managers of the company.<sup>15</sup> Earlier this year, on Tuesday, January 22, 2019, the House of Representatives of the Federal Republic of Nigeria, at a plenary session, considered and adopted all the provisions of the *Companies and Allied Matters Act (Repeal and Re-*

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composition of the committee by the board, "The committee would then examine records, conduct interviews, hold meetings, write discussion drafts, and eventually, after a suitable display of investigative activity and collective deliberation, would produce a report that concluded, unsurprisingly, that the committee thought it was in the corporation's best interest not to proceed with the lawsuit. The corporation would then bring a motion to dismiss the lawsuit".

<sup>12</sup> *Smith v Croft (No. 2)*, [1987] 3 All ER 909 (Ch D).

<sup>13</sup> *Ibid* at 957.

<sup>14</sup> See, the Companies and Allied Matters Act (Repeal and Re-enactment) Bill, 2018, SBs 355 and 384. ("CAMA Bill 2018"). The Senate at its plenary session of Tuesday, 15 May 2018, passed the Bill, which seeks to: (a) make provisions for the incorporation of companies, registration of business names together with incorporation of trustees of certain communities, bodies and association; and (b) establish the State Corporate Affairs Commissions for registration of business names.

<sup>15</sup> Viashima Akaayar, "Reconstructing the Interests of 'Other Corporate Constituents' in Nigeria: Perspective From The Shareholder Theory of The Firm," (2016) 2 Com & Ind L Rev 98 at 115 (Akaayar); HW Irwin and BR Aronstam, "Delaware Business Judgment Rule and Varying Standards of Judicial Review for Assessing Directors' in M&A Transactions," (2007) Can Inst P at 7 (Irwin & Aronstam,).

enactment) Bill, 2018 (the “CAMA Bill 2018”), and by this development, the CAMA Bill 2018 received concurrent passage by the two chambers of the National Assembly after having been earlier passed by the Senate of the Federal Republic of Nigeria on May 15, 2018.<sup>16</sup> Thereafter, the CAMA Bill 2018 was transmitted to the President for assent after which it will become the new governing regime for setting up and running business entities in Nigeria.<sup>17</sup> Bashir and Oguntuase describe the Bill and its effect as:

The CAMA Bill is a watershed in the Nigerian business and economic landscape and a big boost to the Ease-of-Doing-Business (“EoDB”) campaign of the Government. By repealing and replacing the Companies and Allied Matters Act, 1990 (“1990 Act”), the CAMA Bill seeks to promote reform of the onerous legal and regulatory framework as well as administrative bottlenecks which, for close to three decades, have made doing business in Nigeria substantially difficult – particularly for Micro, Small and Medium Enterprises (“MSMEs”) – and had made the economy less attractive to investments hence less competitive.<sup>18</sup>

Generally, the BJR concept is a standard of review, providing a means of determining whether a director has met his or her undertakings as stipulated under sections 279-282 of CAMA, and it may be titled “Standards of conduct and review” instead of referring only to standards of conduct.<sup>19</sup> Thus, when a Court invokes the presumption of BJR, it assesses a director’s conduct not by looking at a decision, but the process of arriving at such decision. The BJR was designed to shield the directors from liability arising from unprofitable corporate transactions, unless the decisions were not made in good faith, with due care, and within the directors’ authority.<sup>20</sup>

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<sup>16</sup> Toyin Bashir & Oluwatoba Oguntuase, “Reforming the Business Climate in Nigeria: Critical Changes Introduced by the Companies and Allied Matters Bill, 2018” (4 February 2019) online: *mondaq* <<http://www.mondaq.com/Nigeria/x/777450/Shareholders/Reforming+The+Business+Climate+In+Nigeria+Critical+Changes+Introduced+By+The+Companies+And+Allied+Matters+Bill+2018>> [perma.cc/VV8F-S6NR] (Bashir & Oguntuase).

<sup>17</sup> *Constitution of the Federal Republic of Nigeria*, 1999, s 58 (1999 Constitution).

<sup>18</sup> Bashir & Oguntuase, *supra* note 16 at 1.

<sup>19</sup> Brighton M Mupangavanhu, “Standard of Conduct or Standard of Review? Examination of an African Business Judgment Rule under South Africa’s Companies Act 71 of 2008,” (2019) Vol. 63(1) *Journal of African Law* 1-24 online: <[https://www.researchgate.net/publication/330484365\\_Standard\\_of\\_Conduct\\_or\\_Standard\\_of\\_Review\\_Examination\\_of\\_an\\_African\\_Business\\_Judgment\\_Rule\\_under\\_South\\_Africa's\\_Companies\\_Act\\_71\\_of\\_2008](https://www.researchgate.net/publication/330484365_Standard_of_Conduct_or_Standard_of_Review_Examination_of_an_African_Business_Judgment_Rule_under_South_Africa's_Companies_Act_71_of_2008)> [perma.cc/DD7G-S3NC] (Mupangavanhu I).

<sup>20</sup> Akaayar, *supra* note 15 at 115; See, also, Bryan A. Garner, *Black’s Law Dictionary*, 8<sup>th</sup> ed,

This Paper critiques the BJR concept via a comparative approach covering the United States, Canada, Australia and South Africa, traces the origin of the BJR, examines the BJR's theoretical and jurisprudential basis, critiques the strictures and duties imposed on corporate directors, and attempts to justify the "BJR exception" to the regulatory controls and the statutory/common law corporate governance rules. Finally, the Paper argues for the incorporation of BJR into the Nigerian company law.

## II. DEFINING THE BUSINESS JUDGEMENT RULE (BJR)

The BJR has a long history in United States, dating back to the nineteenth century.<sup>21</sup> Despite its longevity, however, the rule has been called "one of the least understood concepts in the entire corporate field",<sup>22</sup> and is widely misunderstood: "Countless cases invoke it and countless scholars have analyzed it. While the BJR remains poorly understood",<sup>23</sup> there have been several attempts to define the concept with exactitude. In Nigeria, Akaayar defined BJR as:

...the doctrine of corporate governance which presumes that in making corporate decisions, directors act on an informed basis in good faith, and in honest belief that their actions are in the firm's best interest, and without self-dealing.<sup>24</sup>

To Lori McMillan, the BJR is a judicially developed doctrine protecting company directors from personal liability for the decisions they make on behalf of corporations.<sup>25</sup> She argues that:

In today's era of corporate scandals, global financial meltdowns, and directorial malfeasance, it has become especially important in setting the bar for when directors are appropriately responsible to shareholders for their actions. Traditionally the business judgment rule has been regarded as a standard of liability, although it has

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(Thomson West Publishing Co, Texas, 2004) at 212.

<sup>21</sup> Samuel Arsht, "The Business Judgment Rule Revisited", (1979) 8 Hofstra L Rev 93 at 93 (dating the business judgment rule to at least the early 1800s).

<sup>22</sup> Lyman PQ Johnson, "Corporate Officers and the Business Judgment Rule", (2005) 60 Bus L Rev 439 at 454 "Manne's statement about the rule remains as true in 2005 as when first made in 1967: the business judgment rule is 'one of the least understood concepts in the entire corporate field'".

<sup>23</sup> Bainbridge, *supra* note 8 at 83-84.

<sup>24</sup> Akaayar, *supra* note 15 at 115.

<sup>25</sup> McMillan, *supra* note 3 at 521.

never really been explored or enunciated as such. This view determines eligibility for business judgment rule protection of a directorial decision after an examination of certain preconditions. An alternate view has developed that posits the business judgment rule is actually an abstention doctrine, and should be applied automatically absent the establishment of the same preconditions as the liability standard approach, only to be used as nullifying factors, to shield directors from having to account. The difference between the two positions essentially comes down to the order of the requirements, and who has the burden of establishing the existence of the factors that would grant or deny business judgment rule protection.<sup>26</sup>

At least, two other leading scholars agree with Lori McMillan on the understanding that the BJR provides a standard of review to a standard of conduct expected of directors.<sup>27</sup> To Stephen M. Bainbridge, in the United States of America, currently, the BJR is commonly understood as a standard of liability by which courts review “decisions” by boards of directors:<sup>28</sup>

The business judgment rule is corporate law's central doctrine, pervasively affecting the roles of directors, officers, and controlling shareholders. Increasingly, moreover, versions of the business judgment rule are found in the law governing the other types of business organizations, ranging from such common forms as the general partnership to such unusual ones as the reciprocal insurance exchange. Yet, curiously, there is relatively little agreement as to either the theoretical underpinnings of or policy justification for the rule. This gap in our understanding has important doctrinal implications. As this paper demonstrates, a string of recent decisions by the Delaware Supreme Court based on a misconception of the business judgment rule's role in corporate governance has taken the law in a highly undesirable direction.<sup>29</sup>

Another scholar, Douglas M. Branson however questions why the BJR should be considered a rule at all, given that it provides no substantive “do's”

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<sup>26</sup> *Ibid* at 521-522. She goes on to disagree with both of the above approaches, and instead explores the business judgment rule as a type of immunity by comparing it to selected public and private immunities. The policy underpinnings of the business judgment rule mirror those of immunities, as does the practical impact. This means that the business judgment rule, properly construed, would require the director to establish entitlement to protection by proving that all preconditions for application of the rule are met. Much of the confusion between the courts and circuits could be alleviated by approaching the business judgment rule as a type of immunity, where the procedures and philosophies are much more enunciated. This helps place the business judgment rule back as a crucial part in the balancing act between directorial autonomy and accountability, which is especially timely given the current economic climate.

<sup>27</sup> Mupangavanhu I, *supra* note 19 at 2. These authors include Stephen M. Bainbridge, *supra* note 8, and Douglas M. Branson, *infra* note 30.

<sup>28</sup> Bainbridge, *supra* note 8 at 87.

<sup>29</sup> *Ibid* at 83.

and “don’ts” for company officers or directors, but goes on to agree with Bainbridge that the BJR should be seen as a standard of judicial review, entailing only slight review of business decisions.<sup>30</sup> Yet, Branson agrees with McMillan that the BJR as a standard of review would become a defence if the directors have made a business judgment that resulted in an unsatisfactory result for the company.<sup>31</sup>

The common denominator among all these definitions of the BJR is the reality that the BJR involves a standard of review connected to the decisions made by boards of directors. In this construction, the courts obviously have a role in reviewing decisions made in the boardroom, and this is how USA case law has developed the rule.<sup>32</sup>

From the above statements, the BJR can be defined either conceptually or as a regulator of conduct. How the BJR is used in evaluating business decisions will be discussed in further detail below.

### III. TRACING THE EVOLUTIONARY DEVELOPMENT OF THE BUSINESS JUDGEMENT RULE

The development of the BJR was predicated on the understanding that directors have to make decisions on behalf of corporations, with those decisions often entailing an assumption of risk,<sup>33</sup> coupled with the fact that as a separate legal person, a company has all the legal powers and capacity similar to a natural person, except to the extent that a juristic person is incapable of exercising such powers.<sup>34</sup> Thus, a company can make its own decisions

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<sup>30</sup> Douglas M. Branson “A Business Judgment Rule for Incorporating Jurisdictions in Asia?” (2011) *Sing Ac LJ* 687 at 687.

<sup>31</sup> *Ibid.* See, also, Mupangavanhu I, *supra* note 19 at 3.

<sup>32</sup> *Ibid.*, per Mupangavanhu I at 3; See, also, C. Weng “Assessing the Applicability of the Business Judgment rule and the ‘Defensive’ Business Judgment rule in the Chinese Judiciary: A Perspective on Take-over Dispute Adjudication” (2010) *Fordham Intl LJ* 124 at 128 [Wengl].

<sup>33</sup> McMillan, *supra* note 3 at 528.

<sup>34</sup> CAMA, *supra* note 1, at Section 37; See, also, Joseph EO Abugu, *Principles of Corporate Law in Nigeria*, (MIJ Professional Publishers Limited, Lagos Nigeria, 2014) at 181; [Abugu]. Adewale Olawoyin, “Directors’ Personal Liability in Nigerian Corporate Law,” (2016) 7(4) *Gravitas Rev Bus & Prop L* 30-48, at 30 [Olawoyin]. There are decisions of Nigerian superior courts espousing this rule, to wit: *Marina Nominees v FBIR*, (1986) LPELR-SC 112/1984; (1986) 2 NWLR (Pt 20) 40, *Nigerian Deposit Insurance Corporation v Vibelko Nig. Ltd.*, (2006) All FWLR (Pt 336) 386 at 389, *New Nigerian Newspaper Ltd. v Agbomabami* (2013) LPELR-CA/K/137/2011, *New Resources Int’l Ltd & Anor v Oranusi* (2010) LPELR-



affecting its business, *albeit* it can only do this through human agency.<sup>35</sup> Generally, directors and officers are the only legitimate organs in a company authorized to make decisions on behalf of a company.<sup>36</sup> Further, it is recognized that business decision-making is a difficult task, as business does not always involve black and white issues.<sup>37</sup> Thus, at times decisions have to be made under pressure and under imperfect circumstances, given factors such as information asymmetry and bounded rationality,<sup>38</sup> and, it is possible that even well intended decisions may turn out badly, given the vagaries of business.<sup>39</sup> In this construction, the BJR seeks to protect directors in respect of well made decisions even though, with the benefit of hindsight, those decisions may prove to have undesirable consequences for the company.<sup>40</sup> For directors' business decisions to qualify for legal protection against hindsight bias, they should meet a certain criterion developed by United States case law and other

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CA/L/461/08, *NBCI v Integrated Gas Nig. Ltd.* (1999) 8 NWLR (Pt 613) 119 at 129. In South Africa see, the South Africa Companies Act No. 71 of 2008, *supra* note 9 s 19(1)(b)(i); See also, *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* No. 2001 (1) SA 73 (W) 106.

<sup>35</sup> In *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705, Lord Richard Burdon Haldane made a telling remark in this regard, when he said (at 713): "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and center of the personality of the corporation ..." In Nigeria, see, *Omisade v Akande* (1987) 2 NWLR (Pt 55) 155 at 170 (SC); *Erebor v Major & Co Ltd* (2000) 7 WRN 71 (CA); *Gombe v PW (Nig.) Ltd* (1995) 6 NWLR (Pt 104) 402 (SC); *Ejikeme v Amaechi* (1998) 3 NWLR (Pt 542) 456 (CA); *Daily Times (Nig.) Ltd v Akindiji* (1998) 13 NWLR (Pt 580) 22 at 27 (CA); *NIB Invest. W/A vs Omisore* (2006) 4 NWLR (Pt 969) 122 (CA); *Njemanze v Shell BP Port-Harcourt* (1966) All NLR 8; *Agbonmagbe Bank Ltd v General Manager, GB Olivant Ltd.*, (1961) 1 All MLR 166; and *Otuoyemi vs Esso (WA) Co Ltd*, (1961) WNLR 130.

<sup>36</sup> CAMA, *supra* note 1, at ss 63-66; *South Africa Companies Act*, *supra* note 9, at s 66(1), both endorse and confirm this principle.

<sup>37</sup> McMillan, *supra* note 3 at 527.

<sup>38</sup> Mupangavanhu I, *supra* note 19 at 4.

<sup>39</sup> Bainbridge, *supra* note 8 at 113-14.

<sup>40</sup> McMillan, *supra* note 3 at 526.

BJR approaches developed around the world.<sup>41</sup> Their decisions are protected only if they meet their fiduciary obligations in the form of triads.<sup>42</sup>

Under the United States case law, the BJR criteria/triads were stated to be that the directors must have acted on an informed basis, in good faith and in the honest belief that the decision was in the best interests of the company.<sup>43</sup> These criteria were put differently and in detail in *Brehm v Eisner*.<sup>44</sup> Building on the understanding in earlier case law,<sup>45</sup> the *Brehm v Eisner* court stated that the courts will respect directors' business decisions if they do not violate the triads of a fiduciary duty in any of three ways.<sup>46</sup> *First*, directors' decisions will be respected unless they were infected by conflict of interest issues that could have disabled the directors' independence in respect of their decision-making.<sup>47</sup> *Second*, courts will not respect decisions if directors fail to act in good faith or act in a manner that cannot be attributed to a rational business purpose.<sup>48</sup> *Third*, decisions will not be respected if directors reach them by a grossly negligent process that includes failure to take into account all material facts reasonably available.<sup>49</sup>

The BJR ensures that decisions made by directors in good faith are protected even though, in retrospect, the decisions prove to be unsound or

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<sup>41</sup> Mupangavanhu I, *supra* note 19 at 4.

<sup>42</sup> Triads comprise three fiduciary obligations, to wit: the fiduciary duty, duty of care and skill, and duty of loyalty. See L Johnson "The Modest Business Judgment Rule" (2000) *Bus L* 625 at 627.

<sup>43</sup> *Aronson v Lewis*, 473 A.2d 805 (Del 1984) at 812.

<sup>44</sup> *Brehm v Eisner*, 23 746 A.2d 244 (Del 2000) at 264.

<sup>45</sup> Especially in *Shlensky v Wrigley* 237 NE 2d 776 (III App Ct 1968). The understanding established by the court in this case (at 778) was that, "the directors' [board] room rather than the courtroom is the appropriate forum for thrashing out purely business questions." The *Shlensky v Wrigley* court advocated a strong presumption against the judicial review of boardroom decisions.

<sup>46</sup> *Supra* note 44 at 264.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* A good example of this is to be seen in the decision of the Delaware Supreme Court in *Cede & Co v Technicolor Inc* 634A.2d 345 (Del 1993) at 360. The defendant board of directors could not be protected against liability claims because it failed to make a properly informed decision before taking a decision to merge Technicolor into MacAndrew and Forbes Group, Inc.

erroneous,<sup>50</sup> and provides deference to these directors in order to prevent courts from second-guessing business decisions that were made in good faith.<sup>51</sup> Since most people are risk-averse,<sup>52</sup> if directors had to worry about liability for every decision they made, many directors would insist on playing things completely safe,<sup>53</sup> which would stifle the innovation for which American corporations are known, which could affect profits negatively. Since there is a general correlation between risk and return, leading to directors being too concerned about their personal liability rather than taking risks with the corporation's business.<sup>54</sup> It is almost impossible for a court, in hindsight, to determine whether the directors of a company properly evaluated risk and thus made the 'right' business decision,<sup>55</sup> and to impose liability on directors for making a 'wrong' business decision would cripple their ability to earn returns

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<sup>50</sup> Cornell Law School, *Legal Information Institute*, sub verbo "business judgment rule", online:<[http://www.law.cornell.edu/wex/business\\_judgment\\_rule](http://www.law.cornell.edu/wex/business_judgment_rule)> [<https://perma.cc/JKE7-EZYJ>].

<sup>51</sup> *Aronson v Lewis*, 473 A.2d 805, 812 (Del. 1984), overruled by *Brehm v Eisner*, *supra* note 44 (indicating that it is a presumption that in making a business decision the directors act on an informed basis in good faith and in the honest belief that the action was in the best interests of the company).

<sup>52</sup> Experimental Economics Centre, "Decision-Making Under Uncertainty - Basic Concepts", (2006), online: [http://www.econport.org/econport/request?page=man\\_ru\\_basics4](http://www.econport.org/econport/request?page=man_ru_basics4) [perma.cc/AZ42-9CAE].

<sup>53</sup> Kevin LaCroix, "Banking Agencies Challenge California's Business Judgment Rule: Will This Expand Officer and Inside Director Liability?" online: <http://www.dandoddiary.com/2012/04/articles/failed-banks/guest-post-banking-agencies-challenge-californias-business-judgment-rule-will-this-expand-officer-and-inside-director-liability/> [perma.cc/J878-XJQW].

<sup>54</sup> This statement is not without controversy. Some studies have found that it is true that a positive relationship exists, some have found a negative relationship, and some have found none. See Manuel Nunez Nickel & Manuel Cano Rodriguez, "A Review of Research on the Negative Accounting Relationship between Risk and Return: Bowman's Paradox", (2002) 30 *Omega* 1 at 1 online: <<http://www.sciencedirect.com/science/article/pii/S030504830100055X>> [perma.cc/9JNR-SK53].

<sup>55</sup> *Re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 126 (Del. Ch. 2009) (citing Bainbridge, *supra* note 8, at 114-15. "[T]here is a substantial risk that suing shareholders and reviewing judges will be unable to distinguish between competent and negligent management because bad outcomes often will be regarded, ex post, as having been foreseeable and, therefore, preventable ex ante. If liability from bad outcomes, without regard to the ex-ante quality of the decision or the decision-making process, however, managers will be discouraged from taking risks".

for investors by taking business risks.<sup>56</sup> Veasey and di Guglielmo argue that if directors were held responsible for every business transaction that produced poor results:

Negative externalities might decrease, but so would positive externalities, and the society would not have as much technological (and therefore social) advancement, and corporations would not be such a major part of the economy. Accordingly, the business judgment rule evolved to give some comfort to directors that they were not being looked to as guarantors for all corporate actions being taken whilst at the helm.<sup>57</sup>

Therefore, the BJR is meant to prevent armchair judging of decisions made by directors in usual circumstances, while leaving some room for liability in not-so-usual circumstances, usually ones involving a significant degree of malfeasance.<sup>58</sup> For director liability, this necessarily entails balancing the authority inherent to a director's position with accountability from various sources, including shareholder derivative litigation, and so, the BJR is generally the fulcrum used to balance these competing concerns.<sup>59</sup>

#### IV. FOUNDATIONAL COMMON LAW AND NORTH-AMERICAN JUDICIAL AUTHORITIES/CASE UNDER WHICH THE BUSINESS JUDGMENT RULE DEVELOPED

The BJR developed in the United States of America as a common law standard of review and was closely linked to a standard of conduct, namely – the duty of care.<sup>60</sup> Thus, right from its origins, the BJR has been a standard of

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<sup>56</sup> *Re Citigroup*, 964 A.2d at 126.

<sup>57</sup> E. Norman Veasey & Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments", (2005) 153 U Pa L Rev 1399 at 1424–25.

<sup>58</sup> *Ibid* at 1422. In Nigeria, there is a contrary view espoused by Adewale Olawoyin, i.e., that recent developments in Nigeria appear to confirm that where non-executive directors are being held personally responsible for the malfeasance of executive directors. Olawoyin, *supra* note 34 at 30.

<sup>59</sup> *Ibid*.

<sup>60</sup> United States courts developed the BJR as a common law rule alongside the duty of care. Weng, *supra* note 32 at 128; see, also, BM Mupangavanhu. *Directors' Standards of Care, Skill, Diligence and the Business Judgment Rule in View of South Africa's Companies Act 71 of 2008: Future Implications for Corporate Governance* (PhD thesis, University of Cape Town, 2016) at 142. (Mupangavanhu II).

review distinguishable from a director's standard of conduct.<sup>61</sup> The BJR reviews the fiduciary duty,<sup>62</sup> and the legal competence duty,<sup>63</sup> aka the duty of care and skill.<sup>64</sup> Section 282(1) of the CAMA mandates that the directors act with due care, skill and diligence as reasonable prudent persons in comparable circumstances in the conduct of the corporation's affairs. Earlier on, at common law, the level of competence required of a director was atrociously low,<sup>65</sup> because a director was previously only required to act to the best of his subjective individual ability.<sup>66</sup> This common law rule is now changed.<sup>67</sup> Under current statutory law, the level of competence required is now higher and more demanding. MacCarthy Tetrault had noted:

The level of care required by the statutory standard is determined with reference to the care that would be exhibited by a reasonably prudent person in comparable circumstances. In deciding whether a director has met the statutory standard of care, a court will make an inquiry as to what a reasonably prudent person would have done if he or she had been a director of the corporation in question. A reasonably prudent

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<sup>61</sup> Mupangavanhu I, *supra* note 19 at 2.

<sup>62</sup> CAMA, *supra* note 1, at s 279.

<sup>63</sup> See, generally, Olumide K. Obayemi, *Statutory Derivative Actions: The Locus Standi of a Minority Shareholder to Enforce Corporate Rights in Alberta and Nigeria*, (LLM Thesis, University of Alberta, Canada, 1999) at 33 [Obayemi].

<sup>64</sup> CAMA, *supra* note 1, at s 282.

<sup>65</sup> MacCarthy Tetrault, *Directors' and Officers' Duties and Liabilities in Canada*, (Toronto, Butterworths, 1997) at 15; E. Oladeji Akanki, "Protection of the Minority in Companies", in EO Akanki, ed., *Essays on Company Law* (Lagos, University of Lagos Press, 1992) at 276.

<sup>66</sup> Leo Herzel & Leo Katz, "Smith v Van Gorkom: The Business of Judging Business Judgment" (1986) 41 *Buss Lawyer* 1187.

<sup>67</sup> According to Professor Sealy, company case-law illustrates "the traditional unwillingness of the courts to undertake to review matters of commercial judgment or policy or of internal administration" (i.e. adopts a "hands off approach"). LS Sealy and Sarah Worthington, *Cases and Materials in Company Law 8th ed.* (Oxford University Press, 2008) at 476. This, however, may not be true, especially in the light of s 459 of the *English Companies Act 1985*. See, Leslie Kosmin, "In what circumstances should breaches of directors' duties give rise to a remedy under s 459 - 461 of the *Companies Act 1985*?" (2003) 24(4) *Company Lawyer* 100; See, also, *Re Brazilian Rubber Plantations & Estates Ltd*, [1911] 1 Ch. 425; *Re City Equitable Fire Insurance Co. Ltd.*, [1924] All E.R. 485 (C.A.); *Re Denham & Co.* (1883), 25 Ch.D. 752; *Re Cardiff Savings Bank; Bute's (Marquis) Case*, [1892] 2 Ch. 100 (Ch. D.); *Huckerby v Elliot*, [1970] 1 All E.R. 1 89 (C.A.). On the contrary, Olawoyin is of the opinion that Nigerian directors face more stringent obligations under the CAMA. Olawoyin, *supra* note 34 at 36.

person occupying the position of director would generally be expected to pay careful attention to, and be concerned with, the needs of the corporation. In particular, the duty of care requires that a director bring his or her knowledge, experience and best judgment to bear on the issues of concern to the corporation. It should be noted that a higher standard of care may be expected of persons who in fact possess greater knowledge or skill. Thus, more may be required of directors serving on board committees on the basis that they have some special knowledge or greater access to relevant information and expertise [...] the level of diligence required of a director or officer is also determined with reference to what a reasonably prudent person would do in comparable circumstances. A reasonably prudent person in the position of a director could be expected at a minimum, to attend diligently to the managerial and other duties imposed by statute. The concept of diligence connotes attentiveness, persistence and vigilant activity; it is inconsistent with a merely passive or reactive role on the part of directors.<sup>68</sup>

Directors have a duty to be attentive, active and informed in carrying out their duties.<sup>69</sup> In the United States, there has developed a parallel escape route from directors liability arising from incompetence in the form of the BJR which states that courts should refrain from interjecting judicial impositions on business decisions, and so courts will generally grant significant freedom to businesses to operate as they wish unless there has been a fraud, self-dealing or illegality, and as such they will avoid second guessing or using hindsight to judge the directors legitimate business decisions.<sup>70</sup>

However a director must be attentive, vigilant, laborious, persistent, and concerned, while at the same time paying due attention in managing the corporation's affairs as the presumption of business judgment may be overturned by clear evidence of recklessness.<sup>71</sup>

Generally, where a breach is alleged against the directors, the shareholder must first give notice to the Board of his intention to seek redress before the Court. The next step is for the Board to investigate the nature and correctness of the shareholder's claim. The Board would then set up a Special Independent

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<sup>68</sup> MacCarthy Tetrault, *supra* note 65, at 15-16. See, also, Tamar Frankel, "Corporate Directors' Duty of Care: The American Law Institute's Project on Corporate Governance" (1983-84) 52 *George Washington L Rev* 705.

<sup>69</sup> *Ibid*, per MacCarthy Tetrault, at 15-16.

<sup>70</sup> Robert Clark, *supra* note 11 at 123. See, also, Allen M. Terrell, Jr., "Bricks for the Business Judgment Citadel-Recent Developments in Delaware Corporate Law" (1984) 9 *Del J Corp L* 329; Allen M. Terrell, Jr. & Samuel A. Nolen, "Recent Developments in Delaware Corporate Law" (1983) 7 *Del J Corp L* 407.

<sup>71</sup> *Smith v Van Gorkom*, 488 A2d 858 (Del. S.C. 1985). See also, Leo Herzl and Leo Kartz, *supra* note 66.

Litigation Committee of the Board to review the shareholder's complaint. The Shareholder Litigation Committee is usually set up in two instances:

- A) Where the shareholder informs the Board of his intention to complain of certain injuries; or
- B) Where the shareholder's action is already before the court, upon notice to the board of the suit, the committee is composed by the board to look into the merits of the action.

The committee is usually composed of directors having no financial interest in the impugned transaction and who are not named as defendants in the action, or new directors who joined the corporation after the wrongful act, and outside directors along with the corporation's general counsel. The committee may then bring a pre-trial motion that the court should dismiss the action, if it is meritorious and not in the best interests of the corporation. If the Committee decides that the shareholder's complaint lacks merit, the shareholder may, thereafter, apply for leave to initiate a derivative action against the company and the directors. If the court grants leave to the shareholder, then such suit would be filed via a derivative action<sup>72</sup> initiated by a shareholder, after seeking leave from the court. The derivative action would allege injuries occasioned to both the corporation and the shareholders.<sup>73</sup>

The BJR is central at all stages of review of the directors' conduct being complained about, because the BJR would be used as a *review test* first by the Special Independent Litigation Committee of the Board of Directors in assessing the directors' conduct, and secondly, by the Court.<sup>74</sup> As a result, several theoretical aspects of the BJR application had developed at common law. What follows is a discussion of the defences to be preferred by the Board which may serve to satisfy the BJR requirement, the different elements of the derivative action that the shareholder must comply with before a successful derivative active action, and the step-by-step analysis of the BJR test itself.

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<sup>72</sup> CAMA, *supra* note 1, s 303(1). In *Yalaju-Amaye v AREC*, (1990) 4 NWLR (Pt 145) 422 at 465, the court allowed a minority shareholder to sue on the removal of a managing director in breach of the articles of association.

<sup>73</sup> *Ibid*, s 303(2).

<sup>74</sup> Arguably, they can come under CAMA, *ibid*, s 304.

## A. The Board of Directors' Defences to a Derivative Action

Where a wrong is done within the company and a shareholder decides to bring a derivative action for damages and to correct the wrong, the directors may wish to convince the shareholder to not proceed or they may choose to defeat the derivative action by the setting up of a Special Litigation Committee of the Board towards reviewing the corporate act being complained against. If the Special Litigation Committee decides that no wrong has been committed, the shareholder's claim may be defeated. Further, after an application to file a derivative action has been initiated before the courts, the court may refuse leave to hear the suit on account of the Special Litigation Committee's findings. It is therefore necessary to critically examine the instances wherein the court may refuse leave to the shareholder in bringing the derivative suit on grounds of law, equity, or procedure.<sup>75</sup> More particularly, after the shareholder had complied with all the statutory requirements *vis-a-vis* control by the directors or the majority, service of adequate notice, good faith, and that the action is in the corporation's best interests. This Paper examines the scope of the BJR and the role and powers of the Special Independent Litigation Committee of the Board of Directors in the light of decided cases over the years as is operative in North America.<sup>76</sup>

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<sup>75</sup> *Ibid*, s 304.

<sup>76</sup> For a detailed history and scope of the Business Judgment Rule and the powers of the Special Independent Litigation Committee under the American business corporations laws, see generally Richard C. Brown, "Shareholders Derivative Litigation and the Special Litigation Committee" (1981-82) 43 U Pitt L Rev 601; John C. Coffee, Jr. & Donald E. Schwartz, "The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform" (1981) 81 Colum L Rev 261; George W. Dent, Jr., "The Power of Directors to Terminate Shareholders Litigation: The Death of The Derivative Suit" (1980-81) 75 Nw UL Rev 96; Notes, "Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit" (1959-60) 73 Harv L Rev 746; John S. Martel & Charles M. Sink, "The Derivative Action: Is There Life After Lasker?" in J.S. Martel, ed., *The Investor And The Corporation: New Developments And Tactics in Stockholder Litigation* (New York: Practising Law Institute, 1980) at 197; Stanley Nemser, "Derivative Actions" in Stuart D. Weschler, ed., *New Directions in Securities Litigation* (New York: Practising Law Institute, 1976) at 67; Donald E. Pease, "Aronson v Lewis: When Demand is Excused and Delaware's Business Judgment Rule" (1984) 9 *Delaware Journal of Corporate Law* 39; Gordon Phillips, *Personal Remedies for Corporate Injuries* (Scarborough: Carswell, 1992) at 395; Neil C. Rifkind, "Should Uninformed Shareholders Be A Threat Justifying Defensive Action By Target Directors In Delaware?: Just Say No After *Moore v Wallace*" (1998) 78 BUL Rev (No. 1) at 105; Richard G. Ritchie, "Derivative Actions" in Stuart D. Weschler, ed., *New Directions in Securities Legislation* (New York: Practising Law Institute, 1976) at 91; Robert Clark, *supra*



The common law position, as stated by Knox, J. in *Smith v Croft (No 2)*,<sup>77</sup> had held that where an independent organ of the company (the Special Independent Litigation Committee) does not approve of the minority shareholder's derivative action then the court will not allow the action to proceed. Similarly, the English Law Commission's report on the reform of company law<sup>78</sup> recognized certain situations when the shareholders' derivative rights may be restricted, and these were labelled "Restrictions on Members' Ability to Bring Actions on Behalf of the Company."<sup>79</sup> The universal recognition of the limitations and restrictions on the derivative rights of the shareholder had resulted in some identifiable categories. As a result, even if the Special Litigation Committee decides not to curtail a complaining shareholder, the board of directors may still ratify the act complained about. However, a court may review the act of ratification.

## B. Ratification

At common law, where the board's wrongful conduct does not amount to fraud or an ultra vires act, the court may permit the ratification of the wrongful act once it is approved by the board or the majority shareholders at the general meeting. This is notwithstanding the fact that the erring directors may be voting at the general meeting. Thus, in *North-West Transportation Co Ltd v*

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note 11, at 645-649; Edward P. Welch & Andrew J. Turezyn, *Folk on the Delaware General Corporation Law: Fundamentals*, 1998 ed., (New York: Aspen L & Bus, 1998) at 85 1-858.

<sup>77</sup> *Smith v Croft (No 2)*, [1987] 3 All E.R. 909 (Ch. D.).

<sup>78</sup> The Law Reform Commission (English): *Shareholder Remedies, A Consultation Paper (Consultation Paper No. 142.)* (London: Stationery Office, 1996).

<sup>79</sup> *Ibid.* See particularly Part 5 at 41-47; Notes, "Defenses in Shareholder Derivative Suits-Who May Raise Them?" (1952) 66 Harv L Rev 342.

*Beatty*,<sup>80</sup> the Privy Council held that a sale of a ship to the corporation by its director was binding on it upon ratification.<sup>81</sup>

The CAMA has abrogated the old common law rule which makes the board's ratification of the wrongful act or the abuse of corporate powers by the majority and the corporate managers an effective bar to the minority shareholder to commence a derivative action.<sup>82</sup> Currently, in Nigeria, Section 305 of the CAMA provides that a minority shareholder's derivative action shall not be stayed or dismissed by the shareholders of the corporation via ratification or approval, but evidence of such approval or ratification will be taken into account by the court in making an order under Section 304 of the CAMA. This is the same position in Canada under Section 242 of the Canadian Business Corporations Act ("CBCA").<sup>83</sup> To the Dickerson Committee in Canada, the reason for inserting this into Section 242 of the CBCA (same as Nigerian Section 304 of CAMA) was that such act of ratification should only be of evidentiary value:

[R]ather than set out a specific rule declaring how an act of the directors may be ratified, we think it better to characterize shareholder ratification or waiver as an evidentiary issue, which in effect compels the court to go behind the constitutional

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80 *North-West Transportation Co Ltd v Beatty*. (1887), 12 App. Cas. 589 (P.C.). also, in *MacDougall v Gardiner* (1875) 1 Ch.D. 13, 25, Mellish, L.J. held thus; "In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed?... Of course if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing".

81 *Regal (Hastings) Ltd v Gulliver*, [1967] 2 AC 134.

82 F.H. Buckley, "Ratification and the Derivative Action under the Ontario Business Corporations Act" (1976) 22 McGill LJ 167.

83 *Canadian Business Corporations Act*, R.S.C., 1985, c. C-44 (CBCA); Similarly under the *British Columbia Corporations Code*, S.B.C., 2002, c. 57 (BCCA), section 225(7) provides that: "No application made or an action brought or defended under this section shall be stayed or dismissed by reason only that it is shown that an alleged breach of a right, duty or obligation owed to the company, has been or might be approved by the members of that company; but evidence of that approval or possible approval may be taken into account by the court in making an order under this section." Though this allowance for possible approval under the BCCA, is wider than the position under the CAMA, but in practice may not carry more weight than the provisions in the CAMA.

structure of the corporation and examine the real issues. If, for example, the alleged misconduct was ratified by majority shareholders who were also the directors whose conduct is attacked, evidence of shareholder ratification would carry little or no weight. If, however, the alleged misconduct was ratified by a majority of disinterested shareholders after full disclosure of the facts, that evidence would carry much more weight indicating that the majority of disinterested shareholders condoned the act or dismissed it as a mere error of business judgment.<sup>84</sup>

Even at common law, corporate acts that are *ultra vires* the company's memorandum could not be ratified by an ordinary resolution of the board.<sup>85</sup> As to the weight that the court will attach to resolutions ratifying the breach of directors' duties, in *Winthrop Investments Ltd v Winns Ltd*,<sup>86</sup> it was noted that ascertaining the independence of other shareholders towards ratifying the breach of duty may not be a clear cut case.

The modern approach is to hold such shareholders' approval or potential approval at arm's length, while the court goes behind the corporate resolution to find out the actual state of facts and events at the general meeting where the ratification was passed. The evidentiary value of the shareholders' approval will be very high where such approval was given by an independent and disinterested board of directors or shareholders general meeting. Likewise, the court will accord little or no significance to an approval given by an interested or dominated board, and so it has also been rightly noted that ratification cannot be taken into account in all cases.<sup>87</sup> An example of how the court will regard an approval by the shareholders under the CAMA (based on the similarity between Section 304 of CAMA and Section 242 of CBCA) was shown in *Re Northwest Forest Products Ltd*,<sup>88</sup> where the complainant's motion to commence a derivative action to recover the corporation's property sold at a very low value was earlier on rejected at the shareholders general meeting. While it was true that the erring directors did not hold majority shares in the corporation so that it was not clear whether they dominated the general

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<sup>84</sup> RWV Dickerson, J.L. Howard, and L. Goetz, *Proposal For a New Business Corporations Law For Canada*, Vol. 1 (Ottawa: Information Canada, 1971) at para 487. (The Dickerson Report).

<sup>85</sup> See, CAMA *supra* note 1, ss 38, 50. The Law Reform Commission (English), *supra* note 78 at 42; See also, H. Mason, "Ratification of the Directors' Acts: An Anglo Australian Comparison", (1978) 41 Mod L Rev 161.

<sup>86</sup> *Investments Ltd v Winns Ltd*, (1975) 2 NSWLR 666 (Aus HC).

<sup>87</sup> CAMA, *supra* note 1, s 64 on ratification; See, also, Gordon Phillips, *supra* note 76 at 400.

<sup>88</sup> *Re Northwest Forest Products Ltd*, [1975] 4 WWR 724 (BCSC).

meeting, at the same time there was no evidence before the court as to how many shareholders voted for and against, or how the shares were represented at the meeting. The court found out that it was not clear whether the complainant's motion had been defeated by a majority of disinterested and independent shareholders. Accordingly, Cashman, L.J.S.C. rejected the minutes of the general meeting where the approval was given, and granted the complainant leave to sue derivatively:

At the meeting held pursuant to that requisition that the motion was defeated... [T]his is a factor that 'may' be taken into account by the Court.... On the other hand no minutes have been produced to indicate how many shareholders or how many shares were represented at that meeting.... There is no evidence as to who voted those shares or indeed whether any shares were voted by proxy.<sup>89</sup>

It would appear that the board has the onus to prove that the approval was given by a disinterested and independent general meeting so that the court may give significant evidentiary weight to the approval or ratification.<sup>90</sup>

### C. Inequitable Conduct of the Complainant<sup>91</sup>

A shareholder could be personally disqualified from bringing an action against the will of the majority if he participated or acquiesced in the acts he impeached. The derivative right of the shareholder is grounded in equity and trust, under which the corporate managers are seen as trustees of the shareholders (beneficiaries) capital and wealth.<sup>92</sup> Thus, where there is a breach of trust by the directors, and the shareholder wishes to sue derivatively, then he must come with clean hands, for he who comes to equity must come with clean hands.<sup>93</sup> Equity requires that the complainant who seeks to sue

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<sup>89</sup> *Ibid*, per Cashman, LJSC at 733.

<sup>90</sup> Stein Gudmundseth & Sandra Draiby, "Derivative Actions" in Gordon Phillips, ed, Remedies for Corporate Injuries (Vancouver: The Continuing Legal Education, 1993) at 3.1.O3.

<sup>91</sup> A shareholder could be personally disqualified from bringing an action against the will of the majority if he participated or acquiesced in the acts he impeached. See *Henderson v Strang* (1920) 60 S.C.R. 201; *Fullerton v Crawford* (1919) 59 SCR 3 14; *Griffin v Baker* (1923) 24 OWN 367; *Shiesel v Kirsch* (1930) 66 OLR 41 (C.A.); *Fisher v Saint John Opera House Co* (1937), 4 DLR 337 (NBCA).

<sup>92</sup> Bert S. Prunty, Jr., "The Shareholders' Derivative Suit: Notes on Its Derivation" (1957) 32 NYUL Rev 980.

<sup>93</sup> Justice Louis Brandeis in *Loughran v Loughran*, 292 US 2 16 at 2 19 (1934); *Gill v Lewis* (1956), 2 QB 1 at 13-17 (QB).

derivatively must show that his past conduct regarding the impugned transaction had been fair, honest, and above board. Thus in *Towers v African Tug Co*,<sup>94</sup> the court held that the shareholder could not sue because he himself had participated in the wrongful conduct, by receiving the proceeds of the alleged *intra vires* transaction. Further, in *Nurcombe v Nurcombe*,<sup>95</sup> the shareholder had collected a lump-sum settlement on divorce which had made allowance for some misappropriated funds belonging to the corporation. The court held that his conduct had come short of a fit complainant and as such it amounted to, according to Browne-Wilkinson, L.J., “[A] behavior by the minority shareholder, which, in the eyes of equity, would render it unjust to allow a claim brought by the company at his insistence to succeed.”<sup>96</sup> The underlying fact here is that equity requires the shareholder to represent the injured corporation very adequately, and a tainted member cannot perform this role.<sup>97</sup> Under Rule 23.1 of the United States of America Federal Rules of Civil Procedure, there is an equivalent requirement of adequacy of representation. In *Bartles v Newirth*,<sup>98</sup> a shareholder who has participated in the wrong was held to lack *locus standi*. Similarly in *Courtland Manor v Leeds*,<sup>99</sup> three directors acquired substantially all the shares worth \$90,000 in a company for \$19,000. They also purported to sue another shareholder for executing an unfair contract in which he stood to benefit from. The court refused them relief on the ground that the shareholders from whom they bought their shares had participated and acquiesced in the wrong complained of. In *Hardy v Hardy on Behalf of Mortg Inv*,<sup>100</sup> the court held that it could bar a derivative action on the ground that the shareholder had failed to carry out her corporate responsibilities and had participated in or consented to the wrong alleged.

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94 *Towers v African Tug Co*, (1904) 1 Ch. 558 (Ch. D.).

95 *Nurcombe v Nurcombe*. (1985), 1 WLR 370 (C.A.).

96 *Ibid* per Browne-Wilkinson, LJ at 378.

97 *Barrett v Duckett* (199S), 1 BCLC 243.

98 *Bartles v Newirth*, 24 CCH Fed Sec L Rep \*95.718 (SDNY 1976).

99 *Manor v Leeds*, 347 A.2d 144 (Del. Ch. 1975).

100 *Hardy v Hardy on Behalf of Mortg Inv*, 507 So.2d 404 (Ala 1987).

#### D. Availability of Other More Adequate and Specific Remedies that May Clearly Redress the Complainant's Alleged Injury

In Nigeria and Canada, respectively, both the CAMA and Canada Business Corporations Act<sup>101</sup> contain exhaustive provisions for the protection of the minority shareholder and for guaranteeing his access to the courts. These protections, in addition to derivative rights, include the compliance or restraining order,<sup>102</sup> relief on the ground of oppression and unfairness,<sup>103</sup> and the appraisal right.<sup>104</sup> Each remedy is meant to take care of specific situations. For instance, a dissenting shareholder in a corporate re-organization may wish that his shares be bought by the corporation at a fair market value or a judicially determined price, and in such a situation the most appropriate remedy for him is the appraisal remedy under section 184 of the ABCA. If such a shareholder applies for leave to commence a derivative action, the court will most certainly dismiss the suit without prejudice to his coming before the court under a proper heading later.<sup>105</sup> In the Scottish case of *Barrett v Duckett*,<sup>106</sup> Gibson, L. J. noted that if another adequate remedy is available, the court will not allow the derivative action.<sup>107</sup> Furthermore in *Re Loeb and Provigo Inc. et al.*,<sup>108</sup> Steele, J. held:

[I]f the application is to restrain any merger of the Company with Provigo in a corporate sense, this is dealt with specifically by statute and there is no cause of action as such by one party to such possible merger against the other ... In addition I cannot see how such an action could possibly be one contemplated to be a representative action...(which) contemplates that the action will be on behalf of the Company to enforce a right, duty or obligation owed to the Company.<sup>109</sup>

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<sup>101</sup> Canada Business Corporations Act (CBCA) (RSC, 1985, c. C-44); See, also, e.g., Alberta Business Corporations Act, RSA 2000, c B-9 (ABCA).

<sup>102</sup> *Ibid* s 240.

<sup>103</sup> CAMA, *supra* note 1, s 311; *Ibid*, ABCA, s 234.

<sup>104</sup> *Ibid*, CAMA s 608; *Ibid*, ABCA, s 184.

<sup>105</sup> Bruce Welling, *supra* note 11, at 537-538. On the nature of the appraisal rights under modern legislations see J. E. Magnet, "Shareholders' Appraisal Rights in Canada" (1979) 11 Ottawa L Rev 100.

<sup>106</sup> *Barrett v Duckett*, (1995) 1 B.C.L.C. 243.

<sup>107</sup> *Ibid* at 250.

<sup>108</sup> *Re Loeb and Provigo Inc. et al.*, (1978) 20 O.R. (2d) 497 (Ont HC).

<sup>109</sup> *Ibid* at 499-501.

The availability of a separate adequate remedy for the shareholder is therefore a very strong point for reviewing a BJR decision of the directors or the Special Litigation Committee.

### **E. The Corporation in Liquidation**

That the derivative action is mainly to enforce corporate duties owed by the directors of the corporation has been recognized, and so, where a company has gone into liquidation, there is no need for such a device as the liquidator, an independent third party, would have taken control of the company's affairs from the alleged wrongdoers. If there is a reasonable cause of action against the wrongdoers, the liquidator can cause the company to bring an action. In effect, the shareholder will lose the right to commence a derivative action once the corporation is being liquidated. All the rights in the corporation will be vested in the liquidator and the statutes have made various provisions for dealing with wrongs occurring during liquidation.<sup>110</sup> Similarly, Section 506 of the CAMA provides that if in the course of winding up there has been fraudulent trading, the official receiver, or the liquidator, or any creditor may bring an application to the court against such persons.

### **F. Where the Complainant's Claim is Neither Clearly Defined Nor Distinguished From Other Similar Claims**

Both the Special Litigation and the Court may use the BJR standard to dismiss a shareholder's claim where the complainant's claim is neither clearly defined nor distinguished from other similar claims. In Nigeria, a Personal Action is usually initiated to enforce a right personal to the plaintiff minority

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<sup>110</sup> *Canadian Bankruptcy and Insolvency Act*, R.S.C. 1985, c. 8-3 s 71(2); In the case of Receivership, see also *Canadian Business Corporations Act* (CBCA), R.S.C. 1985, c. C-44 s 96 of the; see also The Law Reform Commission (English), supra note 78, at 47 and at para 5.20. See, also, CAMA, supra note 1, at ss 389-396; Kunle Aina, "Rethinking the Duties of a Receiver and Powers of Directors of Companies in Receivership under Nigerian Law" (2015) 6(2) *Gravitas Rev Bus & Prop L* 60-73, at 67-72. (Aina); See, *SOI Fund Limited v Eheirewe* (1986) 8 NWLR (Pt 465) 248; *TSA Industries Nigeria Ltd v Melwani or Re Adetona* (1994) 3 NWLR (Pt 333) 481; *Fasakin v Fasakin* (1994) 4 NWLR (Pt 340) 597; *Abbas v Ajoge* (1996) 4 NWLR (Pt 444) 596; *Ejiofor v Chief S. Onwuagba* (1997) 11 NWLR (Pt 529) 451; *Dagazau v Borkir International Co. Ltd* (1999) 7 NWLR (Pt 610) 293; *NBCI v Alifijir (Mining) Nig. Ltd.* (1999) 14 NWLR (Pt 638) 176; *Betina Ltd v Intercontinental Bank Ltd* (2003) 5 NWLR (Pt 1173) 540; *Wema Bank Plc v Onafowokan* (2005) 6 NWLR (Pt 921) 410; *Nashtex International Ltd v Habib (Nig) Bank Ltd* (2007) 17 NWLR (Pt 1063) 308; *Oluyori Bottling Industry Limited v Union Bank of Nig. Plc.* (2009) 3 NWLR (Pt 1127) 129.

shareholder as a result of a wrong done to him in his private capacity as a member of the company.<sup>111</sup> A personal right can arise out of a contract, for an example a contract in the articles of association or from a shareholders' agreement.<sup>112</sup> In *Omololu-Mulele v Ijale Properties Ltd & Ors*,<sup>113</sup> the Court of Appeal held that the demands of justice dictates that a shareholder must possess a general right and duty to have the affairs of the company conducted in accordance with the articles of association. Thus, any breach by the company of the articles would be a breach of the shareholder's personal rights.<sup>114</sup>

Also, in Nigeria, on the other hand, a Representative Action is an action initiated by a shareholder on behalf of himself and all other members who have a common interest in the litigation—for example where a wrong has been committed by the company against a class of shareholders.<sup>115</sup> In *Otuguo-Ogamioba & Ors v Oghene & Ors*,<sup>116</sup> the rationale was stated that those joined as co-plaintiffs have a common interest and a common grievance and that the relief sought is in its nature beneficial to them.<sup>117</sup> In *Melifonwu v Egbuj*,<sup>118</sup> the Nigerian Supreme Court held that:

...a representative action is only permissible if more persons than none have a common interest in a suit and the persons interested in suing have given authority to the named plaintiffs to sue on their behalf.<sup>119</sup>

Thus, the court on procedural grounds, may also not grant leave to a complainant, who despite having satisfied all the statutory requirements to file a derivative action, has pleaded the claims on the writ to include intermingled personal claims, class or representative claims, and the corporation's legitimate claims. This is purely a procedural device, and the complainant has the duty

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111 Abugu, *supra* note 34, at 373.

112 *Ibid*, per Abugu at 373; See, also, *Wood v Odessa Waterworks Co.*, (1889) 42 Ch.D. 636; *Bond v Barow Haematite Steels Co* (1902) 1 Ch. 353; *Lee v Sheard* (1956) 1 QB 192.

113 *Omololu-Mulele vs Ijale Properties Ltd & Ors*, (2003) 27 WRN 43.

114 Abugu, *supra* note 34, at 373.

115 *Ibid* at 373-374.

116 *Otuguo-Ogamioba & Ors v Oghene & Ors*, (1961) All NLR 441; *Nsima v Nnaji*, (1961) 11 All NLR 441;

117 Abugu, *supra* note 34, at 374.

118 *Melifonwu v Egbuj*, (1982) 9 SC 142.

119 *Ibid* at 163.



to specify his claim as clearly as possible and so distinguish them from each other.<sup>120</sup> Thus Bruce Welling noted that:

... cases in which judicial permission to proceed ought to be refused despite the prerequisites being satisfied, is a slightly more complex one. A given incident may give rise to legal claims by more than one plaintiff. This is true in any area of law. In corporate law, a wrong may cause injury, meaning compensable legal harm, to one or more shareholders and also to the corporation itself. A single shareholder may sue to redress the legal wrong to himself. [...] No corporate law rules are involved here, though certain rules of civil procedure must be followed. [...] In a relatively unusual, though hardly rare. [...] A shareholder may seek to sue on his own behalf, bring a class action on behalf of his fellow shareholders with undifferentiated claims, join to that a representative action on behalf of shareholders with differentiated claims and, finally, seek judicial permission to join with those a [derivative] action on behalf of the differentiated claim of the corporation itself. [...] It is the responsibility of the plaintiff to adequately differentiate these various claims so that those opposing his action can efficiently group and explain their objections for judicial comprehension. Where the plaintiff seeking to bring a statutory (derivative) action on behalf of a corporation has failed to be sufficiently clear in his statement of claim, permission to proceed under the section should be, and has been, refused.<sup>121</sup>

It has been argued that there are grey areas between derivative and personal (class or individual) rights of the shareholder and that care should be taken to avoid pleading a claim as personal when it is actually derivative, and vice versa.<sup>122</sup> This was evident in *Hoskin v Price Waterhouse Ltd.*,<sup>123</sup> where the complainant's action was dismissed because of insufficient characterization of the claims. Similarly in *Farnham v Fingold et. al.*,<sup>124</sup> the Ontario Court of Appeal on an application by the defendants to dismiss the plaintiffs' claims as disclosing no reasonable cause of action, held that the plaintiffs' claims cannot be totally classified as a class action, and that:

[C]ertain parts of the statement of claim and in particular all or parts of para 22 [...] are concerned with rights, duties or obligations owed to the defendant Slater Steel Industries Limited or with damage allegedly suffered by that corporation as a result of

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<sup>120</sup> B. Welling, W. B. Rayner, C. Jordan & L. Smith, eds, *Canadian Corporate Law: Cases, Notes, and Materials* (Toronto: Butterworths, 1996) at 363-370.

<sup>121</sup> Bruce Welling, *supra* note 11 at 538-539.

<sup>122</sup> Stanley Nemser, *supra* note 76 at 70.

<sup>123</sup> *Hoskin v Price Waterhouse Ltd.*, (1982), 136 DLR (3d) 533 (Ont. HC).

<sup>124</sup> *Farnham v Fingold et al.*, [1973] 2 OR 132, 33 DLR (3d) 156 (Ont. CA); *rev'g* on other grounds [1972] 3 OR 688 (Ont. HC).

the actions of the other defendants. Such matters are properly the subject of a derivative action rather than a class action.<sup>125</sup>

After identifying some claims as derivative, the court went on to dismiss the action since no leave was earlier obtained amongst other reasons.<sup>126</sup> Also in *Goldex Mines Ltd v Revill*,<sup>127</sup> the court underscored the necessity of carefully drawing up the writ and statement of claim:

The trouble with endorsement is that it disclosed no attempt to differentiate between claims personal to shareholders and claims which are derivative. As already indicated, the sub-clauses of claims E and G intermingle 'grounds' that are clearly derivative in nature with some that are not. We do not think it is our function to suggest a redraft of the endorsement so as to bring it into conformity with the principles enunciated herein ... We have concluded that the Facts set out in the material would support an endorsement making some claims for relief that are personal and are not derivative, if properly pleaded, but they are inextricably woven into the derivative claims, in the present endorsement.<sup>128</sup>

### **G. The BJR as a Standard for Reviewing the Board's Special Independent Litigation Committee's Business Decision**

As stated earlier, the Shareholder Litigation Committee is usually set up in two instances:

- A) Where the shareholder informs the Board of his intention to complain of certain injuries; or
- B) Where the shareholder's action is already before the court, upon notice to the board of the suit, the committee is composed by the board to look into the merits of the action.

The committee, as usually the case, may then bring a pre-trial motion that the court should dismiss the action, as it is meritorious and not in the best interests of the corporation. The committee is usually composed of directors having no financial interest in the impugned transaction and who are not named as defendants in the action, or new directors who joined the corporation after the wrongful act, and/or outside directors along with the corporation's general

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<sup>125</sup> *Ibid.*, J.A [1973] 33 DLR (3d) 156 at 158-159 (Ont. CA).

<sup>126</sup> *Ibid.*, LA. 33 DLR (3d) 156 at 161-162 (Ont. CA).

<sup>127</sup> *Goldex Mines Ltd v Revill*, [1973] 3 O.R. 869 (Ont. Div. Ct.); [1973] 1 O.R. 659; *aff'd* in (1974) 7 O.R. (2d) 216; 54 D.L.R. (3d) 672 (Ont. CA).

<sup>128</sup> *Ibid.*

counsel. The concept of "Special Litigation Committee"<sup>129</sup> has its origin in the United States of America, where the board, on notice of the shareholder's complaint concerning the corporate wrong, may set up a special independent litigation committee ("the committee") of disinterested and independent directors with the corporation's counsel to advise the board on the propriety of the proposed action. Where the committee decides that it is in the interest of the corporation that the action be taken, then the corporation "might" sue. But where it is decided that the action is not in the best interests of the corporation, then the action is abandoned and where the shareholder has initiated the action in court already, the committee can move that the action be dismissed." As to the efficacy of the use of the committee where the shareholder has not yet instituted an action before the court, Bruce Welling has noted:

A common defensive tactic has developed in America to respond to shareholder attempts to bring actions on behalf of corporations. The board of directors of the corporation appoints a committee of the board (now commonly called a 'special litigation committee') and the committee reports on whether the action would be in the corporation's interests. Presumably, if the committee reports that it would, either the board would resolve to have the corporation sue, thus solving the shareholder's problem, or the report would disappear. If the report is negative it will be filed with the court as evidence against the proposed action.<sup>130</sup>

In *Smith v. Croft (No. 2)*,<sup>131</sup> Knox, J. recognized the applicability of this rule under the English common law, when he held that:

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<sup>129</sup> For a detailed information about the Special Independent Litigation Committees, see the various articles and legal textbooks in *supra* note 76; According to Ernest L. Folk, III, in *The Delaware General Corporation Law* (Boston: Little, Brown & Co., 1972) at 75: "the controlling principle is that the substance of a business decision or transaction made by a corporation's board of directors will not be reviewed or scrutinized by a court so long as 'the acts of the directors objected to were performed in good faith, in the exercise of their best judgment, and for what they believed to be the advantage of the corporation and all its stockholders'"

<sup>130</sup> Bruce Welling, *supra* note 11 at 530; see also Robert Clark, *supra* note 11 at 645 where he observed that following the composition of the committee by the board: "The committee would then examine records, conduct interviews, hold meetings, write discussion drafts, and eventually, after a suitable display of investigative activity and collective deliberation, would produce a report that concluded, unsurprisingly, that the committee thought it was in the corporation's best interest not to proceed with the lawsuit. The corporation would then bring a motion to dismiss the lawsuit".

<sup>131</sup> *Smith v Croft (No. 2)*, [1987] 3 All E.R. 909 (Ch. D.).

Finally on this aspect of the matter I remain unconvinced that a just result is achieved by a single minority shareholder having the right to involve a company in an action for recovery of compensation for the company if all other minority shareholders are for disinterested reasons satisfied that the proceedings will be productive of more harm than good....I therefore conclude that it is proper to have regard to the views of independent shareholders.<sup>132</sup>

Considering the pre-trial motion, Welch and Turezyn noted that:

... [A]n independent committee may be appointed to investigate the allegations of wrongdoings against the corporation as contained in the complaint. After a thorough and objective investigation, the committee may cause the corporation to file a pretrial motion to dismiss the derivative suit. The basis for the motion is the best interests of the corporation, as determined by the committee. The motion must be supported by a thorough written record, which must delineate the investigation by the committee, the findings of the committee and the committee's recommendation.<sup>133</sup>

To the courts, the nature of the committee's pre-trial motion for dismissal is:

a hybrid one, derived by analogy to a motion to dismiss a derivative suit based on a voluntary settlement reached between the parties and to a motion brought...whereby a plaintiff unilaterally seeks a voluntary dismissal of the complaint subsequent to the filing of an answer by the defendant, As such, it is addressed necessarily to the reasonableness of dismissing the complaint prior to trial without adjudicating the merits of the cause of action itself.<sup>134</sup>

The court is then faced with two issues in assessing the motion of the committee. *First*, it determines whether the committee has the power to dismiss or request a dismissal, in which case, the court should pay deference to the committee's business decision. *Second*, the court has to determine what the scope of the judicial review of the special committee's recommendation will be.<sup>135</sup> On the scope of the committee's power, historically the power of the board to use the committee to decide whether or not to bring a suit or request a dismissal by the court can be traced back to Justice Brandeis' dictum in *United Copper Securities Co v Amalgamated Copper Co*:<sup>136</sup>

Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other questions, ordinarily a matter of internal management, and is left to the discretion of the directors, in the absence of instruction by vote of the

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<sup>132</sup> *Ibid* at 957.

<sup>133</sup> Edward P. Welch & Andrew J. Turezyn, *supra* note 76 at 852-853.

<sup>134</sup> *Kaplan v Wyatt*, 484 A.2d 501 at 506-507 (Del Ch 1984), *aff'd* 499 A.2d 1184 (Del SC 1985).

<sup>135</sup> Robert Clark, *supra* note 11 at 646.

<sup>136</sup> *United Copper Securities Co v Amalgamated Copper Co* 244 U.S. 261 (1917).

stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of Judgment.<sup>137</sup>

Generally, the board has the power to delegate the power to commence corporate litigation (which is a natural aspect of the general managerial powers conferred on the board under most modern corporation statutes) to the committee, and once the board has effectively and legally delegated its litigation powers to the committee, then any decision reached by the committee is a business Judgment decision binding the board and the company. According to Sarah Stegemoeller in *Derivative Actions and the Business Judgment Rule: Directorial Power to Compel Dismissal*; this delineates the role which the court will play in disputes between the shareholders and the directors over corporate management decisions and so, a court confronted with a challenged business decision will normally defer to the directors judgment in the absence of a clear showing of serious misconduct.<sup>138</sup> Generally, the court is apt to respect the business decision of the board, thus in *Warshaw v Calhoun*,<sup>139</sup> it was held that:

In the absence of bad faith on the part of the directors or a gross abuse of discretion the business judgment of directors will not be interfered with by the courts. The burden of showing the existence of bad faith or abuse of discretion rests upon the plaintiff who charges that the corporate action was taken to benefit the majority at the expense of the minority. The acts of the directors are presumptively acts taken in good faith and inspired for the best interests of the corporation, and a minority stockholder who challenges their *bona fides* of purpose has the burden of proof.<sup>140</sup>

However in *Abella v Universal Leaf Tobacco Co*,<sup>141</sup> it was held that a derivative suit could proceed notwithstanding the recommendation of the

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<sup>137</sup> *Ibid* at 263-264.

<sup>138</sup> Sarah M. Stegemoeller, "Derivative Actions and the Business Judgment Rule: Directorial Power to Compel Dismissal" (1980-81) 69 Ill BJ 338, at 338-339.

<sup>139</sup> *Warshaw v Calhoun*, 221 A.2d 487 (Del SC 1966); See, also, *Smith v Van Gorkom*, 488 A2d 858 (Del SC 1985) where it was held that absent intentional misconduct, illegality and improper benefit, the courts will not hold the directors liable for mere errors of judgment. They are presumed, in making business decisions, to have acted on an informed basis, in good faith and in the honest belief that their action was in the best interest of the company.

<sup>140</sup> *Warshaw v Calhoun*, 221 A2d 487 at 492-493 (Del SC 1966).

<sup>141</sup> *Abella v Universal Leaf Tobacco Co*, 495 F Supp. 7 13 (E.D. Va. 1980); see also *Miller v Register & Tribune Syndicate, Inc*, 336 N.W.2d 709 (Iowa 1983), where two corporations' directors who were named parties to the suit were barred from composing or delegating to a special

committee for dismissal, because the facts showed genuine issues as to the Board's independence. Even with this, most corporation laws require the court to pay deference to the committee's decision. Therefore, Sarah Stegemoeller had proposed four main policy reasons behind the court's approach of paying deference to the committee's business decision.<sup>142</sup> *First*, if the court were to be holding every director's decision not measuring up to standard as culpable, then highly qualified managers will not like to serve on the board since they will be required to exhibit a higher degree of responsibility and so can be held for mere errors in their judgment. *Second*, it is recognized that the corporate financial resources is an aggregation of shareholders' resources and that such is to be used by the directors for the corporate objectives of the shareholders under the assumption of risk. Thus courts have refrained from questioning the business management decisions of the managers by reasoning that those who seek to benefit from corporate profitability have impliedly agreed to be bound by the business judgment of their elected managers. *Third*, courts have over the years recognized that they are fundamentally ill-equipped to take business decisions for corporations or even to question such business decisions and that such decisions are best left to the opinion and reasoning's of seasoned managers who are most suited to act in that capacity. The courts have accepted that "invariably, such decisions must be predicated upon factors which do not lend themselves to judicial scrutiny: 'questions of policy of management, expediency of contracts or action, adequacy of consideration, lawful appropriation of corporate funds to advance corporate interests'"<sup>143</sup> are best within the managers' role and duties. *Finally*, it is necessary to pay deference to managers business judgment so as to serve as an efficient bar against unmeritorious, frivolous and vexatious strike suits that are not in the interest of the corporation thus conserving the court's time, resources and energy as well as the corporation's funds and resources.<sup>144</sup>

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committee the power to bind the corporation as to the conduct of the suit.

<sup>142</sup> For a detailed information on the rationale behind the Business Judgment Rule and the attitude of the court, see Sarah M. Stegemoeller, *supra* note 138 at 339.

<sup>143</sup> *Ibid.*

<sup>144</sup> AG Anderson, "Conflicts of Interest: Efficiency, Fairness and Corporate Structure" (1978) 25 UCLA L Rev 738.

Over the years, the BJR was applied to effectively shut out the shareholders legitimate claims,<sup>145</sup> and in many decisions,<sup>146</sup> the court upheld the committee's business pre-trial motions to dismiss the shareholder's suit. Gordon Phillips thus noted that it is notorious that those 'disinterested' directors almost always decided in every case that the company ought not to sue and the result was an application by the company to have the derivative action dismissed.<sup>147</sup> Bruce Welling too noted that where the committee's report supports an action against the wrongdoers the report would disappear, or if the report is negative, it will be filed with the court as evidence against the proposed action.<sup>148</sup> By the 1970s and 1980s, the derivative action which had originated in equity to assist the minority shareholder had become a dormant force in the regulation of intra-corporate acts, and thus Coffee and Schwartz submitted that:

The Shareholder derivative suit today faces extinction. Long considered the 'chief regulator of corporate management,' and a recognized form of litigation in American courts at least since 1855, it now confronts the second great challenge of its history.<sup>149</sup>

In solving the tension created by the committee's dismissal motion and the shareholder's derivative right, the American courts have evolved two approaches. In effect, the scope of the court's judicial review of the directors and committee's pretrial motion for a dismissal, for resolving the friction between the managers and the shareholders, and the evaluation and application of the business judgment rule revolves between the *traditional minimal review* approach as was enunciated in *Auerbach v Bennett*,<sup>150</sup> and the *two-step moderate review* of *Zapata Corporation v Maldonado*.<sup>151</sup>

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<sup>145</sup> See John C Coffee, Jr. & Donald E Schwartz, *supra* note 76 at 261, where they proffered various reasons why the court should not pay unnecessary deference to the special committee's business decisions. These are examined later in this Paper.

<sup>146</sup> *Haws v Oakland*, 104 US 450 (1881); *Corbus v Alaska Treadwell Gold Mining Co*, 187 US 455 (1903); *United Copper Securities Co v Amalgamated Copper Co*, 244 US 261 (1917); *Dodge v Woosley*, 59 US (18 How.) 331 (1855); *Ashwander v Tennessee Valley Authority*, 297 US 288 (1936); *Grossman v Johnson*, 89 FRD 656 (D Mass 1981) *aff'd* 674 F2d 115 (1<sup>st</sup> Cir 1982); *Cramer v General Tel & Electronics Corp*, 582 F2d 259 (3d Cir.) cert denied, 439 US 1129 (1978).

<sup>147</sup> Gordon Phillips, *supra* note 76, at 397.

<sup>148</sup> Bruce Welling, *supra* note 11 at 530.

<sup>149</sup> John Coffee, Jr. and Donald Schwartz, *supra* note 76, at 261.

<sup>150</sup> *Auerbach v Bennett*, 393 NE2d 994 (NYCA 1979).

<sup>151</sup> *Zapata Corporation v Maldonado*, 430 A26 779 (Del SC 1981).

### ***1. The Traditional Minimal Review Approach***

The traditional minimal review approach simply requires that after the committee recommends dismissal, the plaintiff shareholder may show that the committee members were not truly independent or disinterested, or did not act in good faith, or that their investigations and deliberations were not sufficiently diligent. Thus in *Auerbach v Bennett*,<sup>152</sup> the New York Court of Appeals held that the business decision and the pre-trial motion of the committee to dismiss the derivative action will be upheld only where the following points could be proved.

- A) where the committee was disinterested in the act complained of;
- B) where the committee members are independent of the alleged wrongdoers; and,
- C) where the investigative procedures and techniques adopted by the committee were thorough and adequate.

Accordingly, Jones, J. held in *Auerbach v Bennett*, that:

In the present case we confront a special instance of the application of the business judgment rule and inquire whether it applies in its full vigor to shield from judicial scrutiny the decision of a three-person committee of the board not to prosecute a shareholder's derivative action.... Nothing suggests that any of the other directors participated in any of the challenged first-tier transactions....The business Judgment rule does not foreclose inquiry by the courts into the disinterested independence of those members .... We turn then to the action of the special litigation committee itself which comprised two components. First, there was the selection of procedures appropriate to the pursuit of its charge, and second, there was the ultimate substantive decision, predicated on the procedures chosen and the data produced thereby, not to pursue the claims advanced in the shareholders' derivative actions. The latter, substantive decision falls squarely within the embrace of the business Judgment doctrine, involving as it did the weighing and balancing of legal, ethical, commercial, promotional, public relations, fiscal and other factors familiar to the resolution of many if not most corporate problems. To this extent the conclusion reached by the special litigation committee is outside the scope of our review. Thus, the courts cannot inquire as to which factors were considered by that committee or the relative weight accorded them in reaching that substantive decision. [...] As to other components of the committee's activities, however, the situation is different, and here we agree with the Appellate Division. As to the methodologies and procedures best suited to the conduct of an investigation of facts and the determination of legal liability, the courts are well equipped by long and continuing experience and practice to make determinations. In fact they are better qualified in this regard than are corporate directors in general.... At the same time those responsible for the procedures by which

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<sup>152</sup> *Supra* note 150..



the business Judgment is reached may reasonably be required to show that they have pursued their chosen investigative methods in good faith.... may be expected to show that the areas and subjects to be examined are reasonably complete and that there has been a good faith pursuit of inquiry into such areas and subjects.<sup>153</sup>

It is clear from the above that all the court requires to uphold the committee's decision is that the committee members are independent and disinterested, follow a thorough and adequate investigative procedure, and act in good faith.<sup>154</sup> To this end, Professor Robert Clark submitted that if the plaintiff can prove either lack of independence, committee members' interest in the impugned transaction, or lack of adequate information and bases for the committee's decision, then the committee's motion for dismissal will be rejected. Whereas if the shareholder cannot prove any of the above grounds, then the committee's business decision and pretrial motion will not be scrutinized, and the court will treat it as shielded by the business Judgment rule.<sup>155</sup> Bruce Welling has likened the American courts' "traditional minimal review" approach to an administrative tribunal review whereby the committee's decision-making process and not its substantive decision is evaluated by the court, and so long as the committee complies with the formal requirements in arriving at its decision, such decision is precluded from judicial review.<sup>156</sup>

Richard Brown has similarly submitted that the role of the court in administering the BJR under this approach is limited to an examination of the credentials of the committee members and the investigative procedures which they have adopted, and not the substance of their decision,<sup>157</sup> and in which circumstances the traditional approach's effect will not be a very profitable weapon in the hands of the shareholder where the committee members were independent, disinterested, acted in good faith, and had adopted a reasonable procedure, but had reached a decision that was not in the best interest of the corporation based on some covert but inimical interests, or where some other

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<sup>153</sup> *Ibid* at 1000-1003.

<sup>154</sup> This approach has been followed in *Gaines v Haughton*, 645 F.2d 761 (9<sup>th</sup> Cir 1981); *Lewis v Anderson* 615 F.2d 778 (9<sup>th</sup> Cir 1979); *Genzer v Cunningham*, 498 F.Supp 120 (SDNY 1981); *Breezy Point Cooperative Inc. v Young*, 506 NYS2d 366 (1986); *Hasan v Clevetrust Realty Investors*, 729 F.2d 372 (1984); *Citytrust and Citytrust Bancorp Inc v Joy*, 460 US 1051 (1983).

<sup>155</sup> Robert Clark, *supra* note 11 at 646.

<sup>156</sup> Bruce Welling, *supra* note 11 at 531.

<sup>157</sup> Richard C. Brown, *supra* note 76 at 632-633.

subtle but compelling and germane corporate interests necessitate that the shareholder's derivative action be heard.<sup>158</sup>

## **2. The Moderate Two-Step Review Approach**

Following the problems encountered with the application of the traditional approach, the Delaware Supreme Court in *Zapata Corporation v Maldonado*<sup>159</sup>, adopted a *two-step moderate* test for reviewing the committee's pre-trial motion to terminate a shareholder action, and consequently, the court held that it must first of all ascertain that the committee of uninterested directors acted independently, in good faith and followed a proper procedure. In doing so it should examine the bases for the conclusions of the committee. Second, even if the committee meets the first step, the court will apply its own business judgment by considering other factors like the corporation's best interests, the shareholders' interests and the public interest. The trial judge, Quillen, J. held that:

We are not satisfied, however, that acceptance of the 'business judgment' rationale at this stage of Derivative action is a proper balancing point. While we admit an analogy with a normal case respecting board judgment, it seems to us that there is sufficient risk in the realities of a situation like the one presented in this case to justify caution beyond adherence to the theory of business judgment. Moreover, notwithstanding our conviction that Delaware law entrusts the corporate power to a properly authorized committee, we must be mindful that directors in the same corporation and fellow directors, in this instance, who designated them to serve both as directors and committee members. The question naturally arises whether a 'there but for the grace of God go I' empathy might not play a role. And the further question arises whether inquiry as to independence, good faith, and reasonable investigation is sufficient safeguard against abuse, perhaps subconscious abuse.. .The Court should apply a two-step test to the (defendant's) motion. First, the Court should inquire into the independence and good faith of the committee and the bases supporting its conclusions. Limited discovery may be ordered to facilitate such inquiries. The corporation should have the burden of proving independence, good faith and a reasonable investigation, rather than presuming independence, good faith and reasonableness. If the court determines either that the committee is not independent or has not shown reasonable bases for its conclusions, or, if the Court is not satisfied for other reasons relating to the process, including but not limited to the good faith of the committee, the Court shall deny the corporation's motion. If however, the

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<sup>158</sup> *Lasker v Burks*, 567 F.2d 1208 at 1202 (2d Cir. 1978), the court noted that since those directors composing the committee will at various times and at later times deal with the impugned directors, then the assumption that they were acting independently is questionable.

<sup>159</sup> *Zapata Corporation v Maldonado*, 430 A.2d 779 (Del. S.C. 1981).

Court is satisfied ... that the committee was independent and showed reasonable bases for good faith findings and recommendations, the Court may proceed, in its discretion, to the next step. The second step provides, we believe, the essential key in striking the balance between legitimate corporate claims as expressed in a derivative stockholder suit and a corporation's best interests as expressed by an independent investigating committee. The Court should determine, applying its own independent business Judgment, whether the motion should be granted. This means, of course, that instances could arise where a committee can establish its independence and sound bases for its good faith decisions and still have the corporation's motion denied. The second step is intended to thwart instances where corporate actions meet the criteria of step one, but the result does not appear to satisfy its spirit, or where corporate actions would simply prematurely terminate a stockholder grievance deserving of further consideration in the corporation's interest. The Court of Chancery must carefully consider and weigh how compelling the corporate interest in dismissal is when faced with a non-frivolous lawsuit. The Court of Chancery should, when appropriate, give special consideration to matters of law and public policy in addition to corporation's best interests.<sup>160</sup>

In support, Professor Robert Clark submitted that this approach provides for a moderate scrutiny, as the court will *first* inquire into the independence, good faith and the bases for supporting the committee's conclusions, and the committee has the burden of proving the above requirements. Where the court either finds that the committee cannot prove its independence, good faith or reasonable bases for its conclusion, or if for any other reason relating to the process by which the committee reached its decision the court is not satisfied, then it should deny the committee's pre-trial motion. *Second*, even if the court is satisfied that the procedural grounds have been met, it may proceed, in its discretion, by applying its own business Judgment, to see whether the motion should be granted. The court may consider matters of law and public policy in addition to the corporation's best interest, and should try to balance legitimate corporate claims as expressed in a stockholder suit against the corporation's best interest as expressed by an independent investigatory committee.<sup>161</sup>

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<sup>160</sup> *Ibid* at 787-789.

<sup>161</sup> Robert Clark, *supra* note 11 at 646-647; also according to Edward Welch & Andrew Turezyn, *supra* note 76 at 853: "The court applies a two-step test analysis to the motion. First, it inquires into the independence and good faith of the committee in making its investigation and the reasonableness of the bases relied on by the committee to support its conclusions. In this step, the corporation has the burden of proving dependence, good faith, and a reasonable investigation. The corporation's burden is the same as under a Rule 56 motion for summary Judgment; to show that there is no genuine issue of material fact and that it is entitled as a matter of law to have the complaint dismissed. If the corporation fails to meet its burden, its motion is denied. If the corporation has borne its burden under the first step, the court may either grant the motion and dismiss the derivative suit or, in

There have been various criticisms of the *Zapata* approach. First, it was condemned as giving the court open-ended flexibility instead of laying down clearly identifiable and determinative parameters as to the scope of judicial review, and since legal rules are always required to be clear, exact and succinct, its profitability was seriously doubted. Second, it was denounced as an avenue for generating more corporate litigations due to legal and procedural issues left untouched in the *Zapata* decision.<sup>162</sup> Third, it was argued that courts are not competent to make the relevant business decisions on behalf of more qualified managers, as a decision to institute corporate action is a business decision which is predominantly and exclusively within the board's powers.<sup>163</sup> Fourth, it was stated that the impact of the action on the public, employee, and commercial relations may militate against the corporation's interest on the long run.<sup>164</sup>

Notwithstanding the above criticisms, this paper supports the two-step approach in *Zapata Corporation v Maldonado*, as it gives the court a more active role to play by examining in detail the committee's decision while it seeks to ascertain the corporation's best interests and spirit in the light of the shareholder's grievance which deserves further beneficial favourable consideration towards deciding whether to dismiss the derivative action pursuant to the committee's pre-trial motion.<sup>165</sup> In this connection, the

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its discretion, proceed to *Zapata's* second step [...] the court applies its own dependent business judgment [...] in addition to the corporation's best interests, give special consideration to matters of law and public policy".

162 Dennis J. Block & H. Adam Prussin, "The Business Judgment Rule and Shareholder Derivative Actions: Viva *Zapata*" (1981) 37 *Business Lawyer* 27; George W. Dent, Jr., *supra* note 76 at 96.

163 Daniel R. Fischell, "'The Race to the Bottom' Revisited: Reflections on Recent Developments in Delaware's Corporation Law" (1982) 76 *Nw U L Rev* 913 at 938 noted that: "A decision whether or not to sue is conceptually identical to other business decisions that management must make. A wide variety of factors must be considered before the decision is made. Management must determine whether the corporation has a valid claim against the alleged wrongdoer, and if so, what the likelihood and magnitude of recovery are expected to be. Management also must decide whether it can take any steps other than litigation against the alleged wrongdoer. If the alleged wrongdoer is an insider, for example, a reduction in salary or bonus may be a preferable alternative to litigation".

164 *Ibid.*

165 The two-step test has been applied in *Joy v North*, 692 F.2d 880 (2d Cir. 1982) cert denied, 460 US 1051 (1983); *Lewis v Fuqua*, 502 A.2d 962 (Del. Ch. 1985) interlocutory appeal refused in 504 A.2d 571 (Del. SC 1986); *Abbey Computer v Computer & Communications Technique Corp*, 457 A.2d 368 (Del. Ch. 1983); *Kaplan v Wyatt*, 484 A.2d 501 (Del. Ch.

traditional approach is not a profitable weapon for the shareholder as it ties the hands of the court and reduces the court's role to a passive one, and according to Richard Brown:

[I]n applying the *Zapata* two-step test, the trial court is required to play a very expansive and undefined role ... [u]nder the Delaware formulation, however, the court, in making its own Judgment, is not restricted to just a consideration of whether the best interests of the corporation will be saved by the maintenance of the litigation. Matters of law and public policy may also be taken into account.... The Delaware approach to derivative litigation makes the court, in the exercise of its own independent Judgment, the ultimate arbiter of whether a shareholder should be allowed to litigate a corporate claim. The private litigation decision of a special committee may always be superseded by the independently made litigation decision of the court. In this sense, the function of the court under Delaware rules is not primarily that of reviewing the privately made litigation decision of a special committee; rather, the basic function of the court is to make its own litigation decision and then impose this publicly made decision upon the parties.<sup>166</sup>

The widened role of the Court under the *two-step* test, will certainly do more substantial justice than the limited role of an administrative tribunal.<sup>167</sup> For instance, in *Greenfield v Hamilton Oil Corp.*,<sup>168</sup> the court held that a special litigation committee's negative recommendation did not bar a shareholder's derivative claims as the committee was only given the power of recommendation, and since the ultimate decision as to whether or not to initiate corporate litigation was retained by the accused directors, the court will uphold the minority shareholder's action.

It is very evident that corporation law will serve its purposes in a system that allows the court to closely scrutinize the business decision of the committee for the following reasons.

First, the committee members being internal members of the impugned board are likely to be biased. Where there are few outside directors in the

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1984); *Grafman v Century Broadcasting Corporation*, 762 F.Supp. 215 (N.D. Ill. App. 1991) (applying Delaware law.); *Abramowitz v Posner*, 672 F.2d 1025 (1982); *Stotland v GAF Corporation*, 469 A2d 421 (Del. S.C. 1983); *Re General Tire & Rubber Co Securities Litigation*, 726 F.2d 1075 (6th Cir. 1984); *Watts v Des Moines Register and Tribune*, 525 F.Supp 1311 (1981).

<sup>166</sup> Richard C. Brown, *supra* note 76, at 642-643; John Coffee, Jr. & Donald Schwartz, *supra* note 76, at 281-283.

<sup>167</sup> Bruce Welling, *supra* note 11, at 53 1-533; Gordon Phillips, *supra* note 76, at 397 and Gudmundseth & Draibye, *supra* note 90 at 3.1.10.

<sup>168</sup> *Greenfield v Hamilton Oil Corp*, 760 P.2d 664 (Colorado Ct. App. 1988).

committee, they are susceptible to bias and empathy in their decision. Commenting on this line of reasoning, Brown noted:

This is the problem of bias. The provenance of special committee always raises the spectre of committee members being consciously or sub-consciously prejudiced in their deliberations. Judicial techniques for the detection of bias are at best superficial. Being a state of mind, bias and particularly subconscious bias are rarely susceptible of objective proof in the usual judicial manner. [...] The recognition of this fact is crucial to the development of an appropriate judicial approach to special committees.<sup>169</sup>

Second, it has also been noted that since the committee's members, particularly, the outside directors are usually selected by the board controlled by the wrongdoing majority, their independence and impartiality can be compromised. This flows from the fact that they will invariably owe some allegiance to their impugned colleagues.<sup>170</sup>

Third, the fact that the suit is being opposed by the committee on the usual ground of "best interests of the corporation" should not be a boot-strap argument to keep the court out from examining the actual facts of the case. Thus George Dent has argued:

Even a meritorious suit may be detrimental to the corporation. In the decided cases, special litigation committees have often pointed to the costs of litigation, the interruption of corporate business, and the undermining of personnel morale as reasons for not bringing suit. To some extent these reasons could justify opposing a derivative suit. Although certain steps by the corporation, such as demanding security for expenses or seeking a protective order from the court, can sometimes diminish these problems, they cannot always be eliminated ... in sum, the quantifiable monetary costs to the corporation of a particular suit are unlikely to harm the corporation substantially, and in general these costs probably do not greatly exceed the quantifiable monetary benefits of derivative suits. Moreover, the total benefits of derivative suits far outweigh their detriments. Accordingly, the directors' decision that a derivative suit against their colleagues should be halted because of its potential costs outweigh its potential benefits should only be considered as one relevant factor when a minority of directors is sued and should be disregarded when a majority is sued.<sup>171</sup>

Fourth, unlike normal business decisions often made under pressure of time and uncertainty, a decision to terminate litigation is made under a more relaxed atmosphere, and so uncertainty is less a factor since it permits greater time for investigation and the relevant facts now exist in history both in the

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<sup>169</sup> Richard C. Brown, *supra* note 76 at 647.

<sup>170</sup> *Ibid.*

<sup>171</sup> George W. Dent, *supra* note 76 at 142-144.

court's records and corporate files. Thus the court must refuse to be bound by the committee's decision on grounds of expediency.<sup>172</sup>

Fifth, it has also been suggested that the judicial immunity usually accorded intra-corporate business decisions because of the need to free directors from fear of liability for errors in judgment ought not be given to the committee's pre-trial dismissal motions. This is because at this stage the directors face little risk of liability as is the case when making business decisions.<sup>173</sup>

Finally, unlike an intra-corporate business decision which relates to the future and is therefore predictive, a pre-trial dismissal motion is retrospective, and the court is able to sift and balance the same evidence as was presented to the board and committee. The necessary facts and records will be available for the court to scrutinize and make its own decision.<sup>174</sup>

While some other legal writers have advocated that the final decision should lie with the shareholders as a whole, Robert Clark has submitted that because of the optimal cost and the need to prevent strike suits and unmeritorious claims, it may not be fashionable to place power over and control of corporate litigation with the shareholders general meeting. Thus while supporting the *Zapata* two-step tests, he further suggested a possible alternative, i.e. the use of "court appointed committees" in that when requested by the board, the court might in its discretion, appoint a special committee of independent and knowledgeable persons to determine whether the continuance of the suit would be in the corporation's best interest.<sup>175</sup> This court appointed committee procedure is similar to the provisions of Sections 800(b)(2) and 626(c) of the California General Corporation Law<sup>176</sup> and New York Business Corporation Law,<sup>177</sup> respectively. The court-appointed committee's decision would thereafter be reviewed by the court to determine

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<sup>172</sup> John Coffee, Jr. & Donald Schwartz, *supra* note 76 at 281.

<sup>173</sup> *Ibid* at 281-282.

<sup>174</sup> *Ibid* at 282-283; See, also, Daniel R. Fischell, *supra* note 163, at 913; F.A. Gevutz, "Who Represents the Corporation: In Search of a Better Method for Determining the Corporate Interest in Derivative Suits" (1984/85) *U Pitt L Rev* 265; Ronald J. Gilson and Reiner Kraakman, "Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?" (1989) 44 *Business Lawyer* 247.

<sup>175</sup> *Miller v Register and Tribune Syndicate Inc*, 336 NW 2d 709 (Iowa 1983).

<sup>176</sup> *California General Corporation Law*, ss 800(b)(2) (West, 1990).

<sup>177</sup> *New York Business Corporation Law*, (McKinney 1996).

whether it followed the tests laid down in *Auerbach v Bennett*,<sup>178</sup> regarding independence, good faith and sound bases for its judgment. In this way, the court is saved from making business decisions, and at the same time the committee will be less pro-defendant biased.<sup>179</sup>

## V. EXERCISING BJR DURING MERGERS AND ACQUISITIONS (M&A) TRANSACTIONS<sup>180</sup>

In the United States, Merger & Acquisition practice requires that, in making a business decision, the directors (through the Board's Special Litigation Committee)<sup>181</sup> are disinterested and are acting on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company, i.e., the BJR presumption, with a stockholder challenging the board's decision bearing the burden of rebutting the rule's applicability. In essence, absent a showing that the board breached its fiduciary duties, courts will not substitute its judgment for a board decision that can be "attributed to any rational business purpose."<sup>182</sup> In the context of the sell or hold decision, a board's decision to hold is entitled to a "strong presumption" in its favour, and its "decision not to pursue a merger opportunity is normally reviewed within the traditional business judgment framework."<sup>183</sup> Despite this positive jurisprudence, directors must be mindful of their bedrock duties of care and loyalty in the context of the sell or hold decision, as the analysis of a board's "hold" decision under the business judgment rule is two pronged "First, did the board reach its decision in the good faith pursuit of a legitimate

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<sup>178</sup> *Supra* note 150.

<sup>179</sup> Robert Clark, *supra* note 11 at 645-649. See also J. Schnell, "A Procedural Treatment of Derivative Suit by Minority Directors" (1981) 69 *Cali L Rev* 885.

<sup>180</sup> Olumide K. Obayemi, "Recent Developments Regarding the Scope of Directors' Duties During Mergers And Acquisitions Transactions: Lessons for Nigeria" (2018) 2(1) *Obafemi Awolowo ULJ* 215, at 235.

<sup>181</sup> Bruce Welling, *supra* note 11, at 530; Robert Clark, *supra* note 11, at 645.

<sup>182</sup> *Unocal v Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (quoting *Sinclair Oil v Levien*, 280 A.2d 717 (Del. 1971)).

<sup>183</sup> *Gantler*, 965 A.2d 695 (Del. Supr. 2009); See also *Kahn v MSB Bancorp*, (Del. Ch. 1998) 24 *Del J Corp L* 266.



corporate interest? Second did the board do so advisedly?"<sup>184</sup> The business judgment of the Board's Special Litigation Committee goes thus:

The committee would then examine records, conduct interviews, hold meetings, write discussion drafts, and eventually, after a suitable display of investigative activity and collective deliberation, would produce a report that concluded, unsurprisingly, that the committee thought it was in the corporation's best interest<sup>185</sup>

Thus, as Nigeria continues in its efforts to open up its corporate sector to foreign investors while liberalising its trade laws, which will invariably lead to expansion in M&A activities, efforts must be made to confer independence of judgment and security of tenure upon Nigerian corporate directors, while making the decisions as to whether to hold, reject offers, or sell. The best means of balancing competing needs during M&A transactions is to adopt the contemporary BJR standard of review that has been adopted in developed western nations.

## VI. A REVIEW OF APPLICABLE LEGISLATION AND POLICIES

Prior to the introduction of the 2008 South African Companies Act, the duties of company directors were governed by South African common law, and this dictated that directors must act in the utmost good faith and in the best interests of their companies and includes the need to exercise care, skill and diligence so as to promote company success through independent judgment, with failure to properly perform the common law duties rendering a director personally liable to pay monetary damages.<sup>186</sup> The 2008 South Africa Companies Act now codifies the common law position and further makes a few notable additions (which do not alter the common law position significantly), by extending the duties of directors and increasing the

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<sup>184</sup> *Ibid* Gantler citing *In re TW Servs. Sholder Litig.*, (Del. Ch. 1989) 14 Del J Corp L 1169.

<sup>185</sup> Robert Clark, *supra* note 11 at 645; Welch & Turezyn, *supra* note 76 at 852-853.

<sup>186</sup> See, generally, Tshepo H. Mongalo, *Modern Company Law - For A Competitive South African Economy* (Juta Books, South Africa, 2010); See, also, J.T. Pretorius, P.A. Delpport, M. Havenga, and M. Vermaas, *Hahlo's South African Company Law Through the Cases: A Source Book* 6th ed. (Juta Books, South Africa, 1999; James Thomas Riley Gibson, *South African mercantile and company law* 6th ed. (Juta Books, South Africa, 1988); and Werksmans Attorneys, "Companies Act No. 71 of 2008 Duties and Liabilities of Directors," at 2, online: <<https://www.werksmans.com/wp-content/uploads/2013/04/Director-duties-and-liabilities-FINAL-updated-electronic.pdf>> [perma.cc/C9FW-QRRY] (Werksmans).

accountability of directors to the shareholders of the company.<sup>187</sup> Section 76 of the 2008 South Africa Companies Act addresses the standard of conduct expected from directors and further extends it beyond the common law duty of directors by compelling the directors to act honestly, in good faith and in a manner they reasonably believe to be in the best interests of, and for the benefit of, their companies, within section 76(3) stating that a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director.<sup>188</sup>

Further, Section 76(4) provides that in respect of any matter arising in the exercise of the powers or the performance of the functions of a director, a director will have satisfied the obligations contained under Section 76(3) of the Act, if the director:

- (a) has taken reasonably diligent steps to become informed about the matter;
- (b) has made a decision, or supported the decision of a committee or the board with regard to that matter; and
- (c) had a rational basis for believing, and did believe, that the decision was in the best interests of the company.<sup>189</sup>

Finally, in further compliance with this section, the director is required to communicate to the board, at the earliest practicable opportunity, any material information that comes to his or her attention, unless he or she: (a) reasonably believes that the information is publicly available or known to the other directors; or (b) is bound by a legal or ethical obligation of confidentiality.<sup>190</sup>

Under Delaware law, the business judgment rule is the offspring of the fundamental principle, codified in 8 Del. C. § 141(a), stating that the business and affairs of a Delaware corporation are managed by or under its board of directors, and this business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors.<sup>191</sup> Thus, 8 Del. C. § 141(a) provides that

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<sup>187</sup> Werksmans, *ibid.*

<sup>188</sup> South Africa Companies Act No. 71 of 2008, *supra* note 9, s 76(3).

<sup>189</sup> South Africa Companies Act No. 71 of 2008, *ibid* s 76(4); Werksmans, *supra* note 186.

<sup>190</sup> Werksmans, *ibid.*

<sup>191</sup> E. Norman Veasey & Christine T. Di Guglielmo, "What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments," (2005) 153 U Penn L Rev 1399 at 1422.

(a) The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

One of the clearest definition of the BJR and the definition that may serve as a model one for Nigerian law-makers, is that given in the American Law Institute (ALI)'s *Principle of Corporate Governance* thus:

Section 4.01(c) "A director or officer who makes a business judgment in good faith fulfills the duty [of care] in the director or officer:

Is not interested in the subject of the business judgment;

Is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and Rationally believes that the business judgment is in the best interests of the corporation."<sup>192</sup>

There is also the American Bar Association (ABA)'s Revised Model Business Corporations Act (RMBCA) which does not attempt to codify the BJR at all. Section 8.30(a) sets forth the general duty of due care (including the requirement that the director act in a manner "he reasonably believes to be in the best interests of the corporation").<sup>193</sup> The official Comment to Section 8.30 of the RMBCA states that the elements of the BJR and its impact on the duty of due care, are left to the courts.<sup>194</sup>

Further, for research purposes, Section 76(4)(a) of the 2008 South Africa Companies Act subsumes a South African version of BJR and provides:

In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company

(a) will have satisfied the obligations of subsection (3)(b) and (c) if

(i) the director has taken reasonably diligent steps to become informed about the matter;

(ii) either

(aa) the director had no material personal financial interest in the subject matter of the decision, and had

<sup>192</sup> American Law Institute (ALI)'s *Principle of Corporate Governance*, at s 4.01(c).

<sup>193</sup> American Bar Association (ABA)'s *Revised Model Business Corporations Act* (RMBCA), at s 8.30(a).

<sup>194</sup> Steven L. Emmanuel, *Emmanuel Outlines: Corporation*, 3<sup>rd</sup> ed. Emmanuel Publishing Corp, Larchmont, NY 1997, at 180.

- no reasonable basis to know that any related person had a personal financial interest in the matter; or
- (bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and
- (iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company.”

On the other hand, Section 180(2) of the 2001 Australian Corporations Act which also provides for the BJR, states thus:

**180 (1) Care and diligence – directors and other officers.**

A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- (a) were a director or officer of a corporation in the corporation's circumstances; and
- (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

**180(2) Business judgment rule.**

A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

- (a) make the judgment in good faith for a proper purpose; and
- (b) do not have a material personal interest in the subject matter of the judgment; and
- (c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
- (d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

**180(3) [“business judgment”]**

In this section:

‘business judgment’ means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.<sup>195</sup>

This Paper adopts the Australian version as a model to guide Nigerian law makefrs, based on the fact that the most comprehensive statutory BJR provisions under Section 180(1),(2)&(3) of the 2001 Australian Corporations Act is highly comprehensive. Therein, Section 180(1) states the general rule of

<sup>195</sup> Australian Corporations Act, *supra* 9, ss 180(1)(2)(3).

the duties of care, diligence, loyalty, and to act in the best interest of the company, as a comparable director or officer of a similar corporation in the corporation's circumstances would have acted, if he were occupying the office held by, and had the same responsibilities within the corporation as, the director or officer. Section 180(1) therefore states both the subjective and objective standards to be observed by the director/officer.<sup>196</sup>

A second reason for recommending the Australian rule to the Nigerian legislators is that Australian Section 180(2) contains the *rebuttable presumptive* BJR standards that should be used to measure whether the director/officer has met his statutory standards of duties of care, diligence, loyalty, and the duty to act in the best interest of the company. Under Section 180(2), there are exhaustive provisions that a director or other officer of a corporation who makes a business judgment is taken to meet the requisite standards in accordance with Section 180(1), as well as their equivalent duties at common law and in equity, in respect of the judgment provided the director

1. make the judgment in good faith for a proper purpose; and
2. do not have a material personal interest in the subject matter of the judgment; and
3. inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and
4. rationally believe that the judgment is in the best interests of the corporation.

In addition, Section 180(2) states that the director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

The final salutary lesson of the Australian BJR provision is that it provides a succinct definition of the concept of 'business judgment,' under Section 180(3), by stating that it means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.

With the Nigerian business stakeholders agreeing to be interested in creating a more business/investment atmosphere which is saturated with ease of doing business, Section 180 of the 2001 Australian Corporations Code provides a perfect BJR model for clear and unambiguous rules for regulating the conduct of corporate directors and officers.

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<sup>196</sup> These provisions should replace ss 279-282 of CAMA, *supra* note 1. They are concise, direct, and succinct.

## VII. SUGGESTIONS AND RECOMMENDATIONS

In Nigeria, corporate directors and officers need to be aware of the increased obligations and potential exposure to liability as set out under the extant CAMA, the 2018 CAMA Bill and under the various Corporate Governance Codes,<sup>197</sup> and they should also consider the level of insurance required to provide cover for potential claims.<sup>198</sup> As seen above, in South Africa, just as in Nigeria, directors are to make important decisions on company issues at board level, and so, directors who allow companies to trade in breach of their newly constituted duties of good faith, or in situations of financial distress, or in insolvent circumstances, must recognise that such trading may be the subject of review and examination either by a Special Litigation Committee, or, a business rescue practitioner or, if the company is

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<sup>197</sup> Financial Reporting Council of Nigeria's Code of Corporate Governance (2018); Security and Exchange Commission (SEC) Code of Corporate Governance (2003) addressed to public companies listed in the Nigeria Stock Exchange (NSE) (i.e., "SEC Code 2003"); Central Bank of Nigeria (CBN) Code OF 2006 for banks established under the provision of the bank and other financial institution ACT (BOFIA), (i.e., "CBN Code 2006"); National Insurance Commission (NAICOM) Code OF 2009, directed at all insurance, reinsurance, broking and loss adjusting companies in Nigeria ("NAICOM Code"); Pension Commission (PENCOM) Code OF 2008, for all licensed pension operators ("PENCOM Code"); Securities and Exchange (Nigeria) Code of Corporate Governance of 2011 ("SEC Code 2011"); Central Bank of Nigeria: Code of Corporate Governance for Banks and Discount Houses in Nigeria (May 16, 2014) ("CBN Code 2014"); Criminal Code Act ("the CCA") Cap C28, LFN, 2004; The Economic and Financial Crimes Commission (Establishment, etc.) Act, ("the EFCC Act") Cap E1, LFN, 2004; Corrupt Practices and Other Related Offences Act (ICPC Act) Cap C31, LFN, 2004; Money Laundering (Prohibition) Amendment Act, 2011; The Foreign Corrupt Practices Act, enforced by the Government of the United States of America on December 19, 1977 (as amended in 1988 by the International Anti-Bribery Act); The Bribery Act 2010, enforced by the United Kingdom Government on April 8, 2010; and The 2010 Federal Sentencing Guidelines Manual & Supplement, released by the United States Sentencing Commission on November 1, 2010. See, also, The Sarbanes-Oxley Act of 2002 (Pub.L. 107-204, 116 Stat. 745, enacted July 30, 2002), 2002 U.S.C.C.A.N. (116 Stat.) 745 (codified in scattered sections of 15 and 18 U.S.C.), also known as the "Public Company Accounting Reform and Investor Protection Act" (in the Senate) and "Corporate and Auditing Accountability and Responsibility Act" (in the House) and more commonly called Sarbanes-Oxley, Sarbox or SOX, is a United States federal law that set new or expanded requirements for all U.S. public company boards, management and public accounting firms. There are also a number of provisions of the Act that also apply to privately held companies, for example the willful destruction of evidence to impede a Federal investigation.

<sup>198</sup> Werksmans, *supra* note 186 at 6.

placed into liquidation, at insolvency inquiries in the post liquidation period.<sup>199</sup> Directors should therefore undertake a frank and realistic review of the manner in which their companies' trade, as this will be essential to avoid personal liability.<sup>200</sup> Worldwide, directors' duties to their companies are being elevated to ensure that correct decisions are made for the financial benefit of companies at all times, and failure to maintain a particular level of knowledge of these issues can result in directors being severely criticised or being held liable for company debts as a result of reckless and negligent behavior.<sup>201</sup> For instance, in *Re City Equitable Fire Insurance Ltd*,<sup>202</sup> it was held that where a director honestly, with care, skill and diligence, he may not be held liable for losses arising therefrom, unless the director is guilty of gross and culpable negligence in a business sense,<sup>203</sup> a common law rule is applicable in Nigeria.<sup>204</sup>

From the above study, it appears that the only aspect that will present some novelty to Nigerian courts is the American courts approach in the use of the Special Independent Litigation Committee's business decision or the review of the committee's pre-trial motion to terminate the shareholder's derivative suit based on the company's best interests. It is proposed that when faced with the task of determining the corporation's best interest between the shareholder and the litigation committee's positions, Nigerian courts should adopt the moderate two-tier approach in *Zapata Corporation v Maldonado*.<sup>205</sup> It affords the courts ample opportunity to scrutinize both the substantive suit and motion, and prevents meritorious shareholder suits against unscrupulous managers from being dismissed on flimsy technical grounds.<sup>206</sup> Therefore, Scott Turner noted thus:

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<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*

<sup>202</sup> *Re City Equitable Fire Insurance Ltd*, (1925) Ch. 407.

<sup>203</sup> Akaayar, *supra* note 15 at 115; See, also, ss 173 and 174 of the *UK Companies Act of 2006*.

<sup>204</sup> Akaayar, *ibid* at 115.

<sup>205</sup> *Zapata Corporation v Maldonado*, 430 A2d 779 (Del. S.C. 1981).

<sup>206</sup> Scott Turner, "Derivative Actions" in Shareholders' Remedies (Materials Prepared for The Continuing Legal Education Society of British Columbia Seminar, New Developments in Shareholders' Remedies, held in Vancouver, BC on November 28, 1996) at 1.1.18. It may be noted that some Canadian courts have applied the independent committee business decision rule, for example in *Bellman v Western Approaches Limited* (1981), 33 BCLR 45

Leaving aside procedural differences, it is submitted that there is room in B. C. (as well as all other Canadian jurisdictions) for courts to consider the views of the independent directors in deciding whether or not to grant leave. If this approach is to be taken, for example in the case of larger, public companies, then great care should be taken in the selection of the independent committee. The latter should, as appropriate, probably retain independent counsel to assist in its deliberations. If, at the conclusion of these deliberations, an independent committee were to decide that it is not in the interests of the company to proceed, then it is suggested that it would be appropriate for the committee to prepare some written memorandum of its deliberations and decisions, if a court is to give any weight at all to those views. Of course, if an independent committee structure is to work, the company must have proper notice of the claims advanced and, as indicated above, as much detail as possible, to assist it in its deliberations.<sup>207</sup>

Generally, any country that decides to adopt a new concept needs models.<sup>208</sup> When South Africa needed models from which to learn when developing its BJR law, tailor-made to suit the needs of South Africa, it went to the United States,<sup>209</sup> since as an originator of the rule, the USA was an obvious model from which to learn, as was Australia given her experience of adopting the US-style BJR in its legislation.<sup>210</sup> Therefore, it is proposed that Nigeria must learn from the models that emanate from the United States, Australia and South Africa, and so adopt international company law principles such as the BJR which must be in line with Nigerian corporate law reform objectives, as well as meeting some of the Nigerian company law's stated purposes, because harmonization of law with the best practice jurisdictions internationally is one of the goals of law reform in Nigeria. Historically, it was not only the western legislatures that had to intervene by replacing the English corporation law with statutory rules.<sup>211</sup> In 1988, the then Hon Minister of Justice and Attorney General of the Federation of Nigeria, Prince Bola Ajibola, SAN, K.B.E. had appointed the Nigerian Law Reform Commission on the Reform of Nigerian Company Law (hereinafter "the Law Reform Commission"), which prepared the CAMA. It was recognized that in order to

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(C.A.); and *Benarroch v City Resources (Can) Ltd.* (1991), 54 BCLR (2d) 373 (CA).

<sup>207</sup> Scott Turner, *ibid* para 1.1.18.

<sup>208</sup> Mupangavanhu I, *supra* note 19 at 5.

<sup>209</sup> South African Company Law for the 21<sup>st</sup> Century: Guidelines for Corporate Law Reform GN 1183 in GG 2004-06-23, para 1.2.

<sup>210</sup> Australia adopted BJR into statute through s 180(2) of the *Corporations Act 50 of 2001*.

<sup>211</sup> Obayemi Alberta Thesis, *supra* note 63 at 63.



keep pace with the growing and tremendous industrial and commercial development engendered by the sudden oil boom wealth of 1970-80s, there had to be a reappraisal of the Nigerian corporation law which had become outdated.<sup>212</sup> The Law Reform Commission recognized that:

the protection of the minority has always been the concern of company law and lawyers....Questions have been asked as to how long the rule in *Foss v Harbottle* will continue to be an obstacle to shareholders who feel they have good cause to complain about how the affairs of the company are being run.<sup>213</sup>

After examining the state of the laws in many North American and Commonwealth countries, particularly the United States of America and Canada, on the subject of derivative actions, the Law Reform Commission deduced that:

Derivative actions have been developed to a high degree in both the United States and Canada to ensure the enforcement of corporate rights not only within the exceptions to the rule in *Foss v Harbottle* but also as a means of remedying wrongs done to the company which fall outside the scope of the exceptions. A complainant under the Canadian jurisdiction may apply for leave to bring an action on behalf of a company or any of its subsidiaries or to intervene in an action to which anybody corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.<sup>214</sup>

The result of this was the enactment of Section 303 of the CAMA. However it must be noted at this stage that the Nigerian corporation law is a hybrid of the English contractarian model and the North American division of powers model, in that it makes provisions for the common law exceptions in Section 300 (a) to (f) and at the same time recognizes the shareholder's statutory right to a derivative action separate from the common law judge-made rules.<sup>215</sup> In the view of the Nigerian Law Reform Commission:

There was a forceful argument that the shareholders have a general right to enforce all the provisions in the articles....the fact still remains that non-observance of the terms of the articles and the provisions of the Companies Act is a wrong done to the

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<sup>212</sup> *The Nigerian Companies Act Decree No. 51 (1968)*, which was a reproduction of the *English Companies Act of 1948*.

<sup>213</sup> Nigerian Law Reform Commission's Working Papers on the Reform of Nigerian Company Law, (Review and Recommendations) Vol. 1 (Lagos: NRLC, 1988) at 232.

<sup>214</sup> *Ibid* at 238 paras 22-23.

<sup>215</sup> Obayemi Alberta Thesis, *supra* note 63, at 66-67.

company itself except in certain circumstances where an individual shareholder is wronged personally.<sup>216</sup>

Along the same line, Professor Oladeji Akanki had suggested that:

To tap the potential of this provision for redress of injury to the company minority, we must start with the true meaning of the old law that was lost through premature definition and consider the new extension in the light of similar provisions elsewhere.<sup>217</sup>

Akanki then showed where to look in interpreting the provisions of CAMA:

In the interpretation of the new deal for company minorities in Nigeria, it is Canada, more than anywhere else, that Nigerian courts must look for comparisons and, or persuasive precedents. The two provisions are not only similar but also the most comprehensive. They are not circumscribed by the doctrine of non-interference. Besides, Canada has about fifteen years' experience to borrow from.<sup>218</sup>

Therefore, with a rich history of borrowing from the developed nations, Nigeria can further borrow BJR provisions from United States, Canada, Australia and South Africa in *further* amending the CAMA. This objective can be twinned with one of the purposes of the Nigerian company law, i.e., the need to promote the use of companies in a manner that enhances the economic welfare of Nigerians as a partner in the global economy. The CAMA, Nigerian economic policy,<sup>219</sup> and the Nigerian Constitution encourage ensuring global competitiveness of company law and companies. In this regard, one of the purposes of the Nigerian company law is to ensure that interpretation and application of company law promotes wealth and surplus.

## VIII. CONCLUSION

This Paper argues that Nigerian courts of law and other adjudicating authorities must consider the persuasive value of relevant foreign company law and other international principles when applying and interpreting statutory

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<sup>216</sup> Nigerian Law Review Commission's Working Papers, *supra* note 212, at 232-233 and at para. 4.

<sup>217</sup> E. Oladeji Akanki, "Reformulating the Law Against Oppression in Companies" (1990/91) 13, 14 & 15 J Pri & Prop L19 at 28.

<sup>218</sup> *Ibid* at 31.

<sup>219</sup> The CAMA has always been a watershed in the Nigerian business and economic landscape and a big boost to the Ease-of-Doing-Business ("EoDB") campaign of the Government.

provisions, as this will provide Nigeria's justification for having used international models when crafting the Nigerian company law rules, and also provide justification for the comparative value of foreign company law. The Paper reiterates that Nigerian lawmakers must make express statutory provision for BJR under extant Nigerian corporation laws, so that a director who asserts that he is protected by the BJR must prove three (3) things, to wit:

1. That he was not "interested" (i.e., that he had no conflict of interest, no personal stake in the outcome that was different from the corporation's stake);
2. That he gathered the reasonably needed information;
3. That he honestly, and rationally, believed that his decision was in the company's best interest.<sup>220</sup>

Thus, under the proposed Nigerian BJR, assuming that the director has no conflicts and gathers adequate information, the essence of the of the BJR is that mere rationality is all that is required – as long as the decision is not entirely crazy or outside the bounds of reason, the fact that (when judged by reference to the facts known to the director) it was very unwise, will not be enough to make the directors liable.<sup>221</sup> As stated earlier, the Paper advocates for a verbatim reproduction of Section 180 of the Australian Corporations Act of 2001, *albeit*, with supplemental additions stating the principles and objectives more fitting for the Nigerian terrain. Globally, the world is moving, Nigeria must join the advancement in the corporate world.

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<sup>220</sup> Emmanuel, *supra* note 194 at 180.

<sup>221</sup> *Ibid.*

