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THE RESILIENT MINORITY: THE EVOLUTION OF GHANA'S COMPANY LAW FROM FOSS V HARBOTTLE ONWARDS

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THE RESILIENT MINORITY: THE EVOLUTION OF GHANA'S COMPANY LAW FROM FOSS V HARBOTTLE ONWARDS

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ABSTRACT

The evolution of corporate law in Ghana showcases a dynamic interplay between the tenets of majority rule and the safeguarding of minority shareholders' rights. Historically anchored in the Foss v. Harbottle rule, Ghanaian corporate law has oscillated between reinforcing majority power and introducing protective mechanisms for minority shareholders. Gower's insights reveal that the traditional majority rule, though predominant, is not unequivocal and has its limitations, particularly in instances where actions transcend a company's powers or rights promised to individual members. Post 1960, Ghanaian jurisprudence further underscores this balancing act, as highlighted by several cases that either fortified or challenged the majority rule. The Companies Act, 2019 (Act 992) is emblematic of Ghana's evolving stance on this matter. While it upholds the conventional majority rule, it simultaneously introduces progressive elements that dilute its absoluteness. This Act, through sections such as 218 and 220, equips minority shareholders with legal tools against potential transgressions by the majority. Such provisions act as robust deterrents against unfulfilled corporate promises, elevating the role of fairness and efficiency in corporate governance. Ultimately, Ghana's corporate law trajectory, culminating in the promulgation of Act 992, encapsulates the challenges and strengths of balancing historical precedents with contemporary imperatives, underscoring the necessity of ensuring equity while facilitating corporate growth.

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1.0 INTRODUCTION

In the arena of corporate governance, shareholder rights and company management consistently demand attention. The seminal case of *Foss v Harbottle* from the 19th century stands as a foundational reference for these considerations, with its emphasis on delineating the rightful party to initiate company lawsuits and the supremacy of majority shareholders. As time has progressed, this guiding principle has witnessed various transformations, augmentations, and critiques. This paper ventures into the Ghanaian corporate sphere to discern the nuances associated with the *Foss v Harbottle* rule. Drawing from Gower's erudite observations, Ghana's legislative framework, and judicial decisions, such as the Companies Act, 2019 (Act 992) and *PS Investment v CEREDEC*, the discourse endeavours to elucidate the contemporary relevance of this time-honoured rule in Ghana's corporate governance landscape. Through this analysis, the paper seeks to unravel the relationship between shareholder rights, corporate equitability, and the trajectory of legal developments within Ghana's dynamic corporate legal environment.

2.0 *FOSS V HARBOTTLE AND MACDOUGALL V GARDINER*

The rule arising from *Foss v Harbottle*[1] is fundamental in company law, emphasising the majority's control. It suggests that when there is an injury to the company, the company itself, represented by its majority shareholders, should seek redress. This was demonstrated in a scenario where two shareholders alleged that the company's directors had misconducted themselves with excessive self-compensation. However, the court determined that it was the company's prerogative, not the individual shareholder's, to decide on the legal course of action against the directors.

MacDougall v Gardiner[2] stands as another cornerstone in shareholder rights discussions. The case underscores the importance of proper procedure during company meetings and the majority principle. It affirms the authority of the majority but simultaneously raises concerns regarding minority shareholders' rights. Essentially, *MacDougall v Gardiner* demonstrates the courts' hesitancy to intervene in a company's internal affairs, particularly when perceived anomalies can be addressed by the majority's decision. This stance amplifies the rule in *Foss v Harbottle*, emphasising the relationship between majoritarian governance and a company's independent decision-making process.

The interplay between *Foss v Harbottle* and *MacDougall v Gardiner* merits further examination.

A number of questions arise. Does the judicial deference to the majority, as exemplified by these cases, diminish the robust safeguards that minority shareholders warrant? Or is this deference an essential compromise, upholding both the company's autonomy and the preeminence of the majority?

For those invested in the corporate governance field, it is evident that the rule in *Foss v Harbottle* and its relationship with *MacDougall v Gardiner* is not merely black and white. These landmark decisions present a multifaceted panorama of rights, duties, and exceptions. They accentuate the delicate equilibrium between a company's autonomy and the imperative to shield against potential majority overreach.

[1] *Foss v Harbottle* (1843) 2 Hare 461.
[2] *MacDougall v Gardiner* (1875) LR 1 Ch D 13.

In the post-1960 Ghanaian context, these foundational cases interweave with the fabric of corporate governance. Their application in instances like *Pinamang v Abrokwah*[3] and *Luguterah v Northern Engineering Co. Ltd. & Others*[4] exemplifies this relationship, emphasising the judicious balance courts aim to strike: ensuring that while majority rule is respected, minority rights and expectations are not undermined. The Ghanaian perspective manifests as[5]:

1. The proper plaintiff rule – when the company is wronged, only the company, not its members, should act; and
2. The majority rule – when the majority can redress an issue with a straightforward decision, the court won't impose a contrary course of action.

2.1 Exceptions Created in *Edwards v Halliwell*

The jurisprudential tapestry of minority shareholder rights would be woefully incomplete without a mention of *Edwards v Halliwell*[6]. It remains a watershed moment, illuminating the pathways that minority shareholders could tread, even when ensnared by the behemoth that the *Foss v Harbottle* rule is. In the *Edwards case*, a union tried to change fees without following their Rule 19. This rule stated they needed a two-thirds approval from members before making such a change. Jenkins LJ, in his judgment, made it clear that the *Foss v Harbottle* rule is not absolute. There are exceptions. For example, if an action goes beyond what is allowed (*ultra vires*), or there is deceit towards minority shareholders, or there is a clear invasion of personal rights, then the rule does not offer protection. In the *Edwards case*, the key point was that they had ignored a special procedure in their rules. So, relying on *Foss v Harbottle* was misplaced.

The *Edwards v Halliwell* case showed that the *Foss v Harbottle* rule was not unbreakable. Minority shareholders can find hope knowing that they have rights protected by law.

The crux of the *Edwards v Halliwell* verdict lay in recognising the transgression: the rule breakers had brazenly circumvented a special procedure, a sacred majority ensconced in the union's articles. Thus, invoking *Foss v Harbottle* was a red herring, a misplaced reliance. *Edwards v Halliwell*, in its profound wisdom, ushered in an era of reinterpretation. No longer was *Foss v Harbottle* an impregnable fortress. It had its Achilles' heel, and minority shareholders, bolstered by the elucidations in *Edwards v Halliwell*, found solace in the knowledge that their rights were not ephemeral but anchored in the bedrock of justice.

Edwards v Halliwell serves as a beacon, illuminating the exceptions and nuances that prevent the trampling of minority rights in the shadow of the majority's might.

2.2 Other Exceptions to the *Foss v Harbottle* Rule: Venturing Beyond the Façade

The judicial discourse surrounding corporate governance and minority shareholder rights often takes a backseat to the omnipresent rule of *Foss v Harbottle*. The rule's core tenet—that the company, rather than individual shareholders, should be the proper plaintiff in cases of corporate wrongs—has indeed dominated legal thought. Yet, legal principles, even those as entrenched as *Foss v Harbottle*,

[3] *Pinamang v Abrokwah* [1992] 2 GLR 384 (CA).
[4] *Luguterah v Northern Engineering Co Ltd & Others* [1978] GLR 477 (HC).
[5] *PS Investment Ltd v Central Regional Development Corporation and Others* [2012] 1 SCGLR 61.
[6] *Edwards v Halliwell* [1950] 2 All ER 1064 (CA).

often reveal their limitations when tested against evolving circumstances and the tapestry of corporate realities. As such, the exceptions to the rule have become crucial avenues of redress for shareholders, serving as sentinel checks against majority transgressions. The exceptions are:

1. **Irregular Decision-making**: Resolutions made by companies are crucial, reflecting the combined decision of all involved. If these decisions do not follow set procedures, as shown in *Edwards v Halliwell*, then they can be challenged. This is because these procedures ensure companies maintain their core values. Resolutions in corporate entities are not mere administrative exercises; they are solemn affirmations of collective intent, as underscored by the observations of Lord Loreburn LC in *Quin & Axtens Ltd v Salmon*.[7] *Edwards v Halliwell* offers a lucid exposition of this sentiment. The court's refusal to cloak the executive committee's oversight in the veneer of *Foss v Harbottle* served as a judicial proclamation that acts bypassing entrenched procedures or majorities in a company's articles cannot hide behind the rules.[8] Such procedural safeguards exist to prevent the desecration of foundational corporate values.
2. **Actions Beyond Allowed Limits (*Ultra Vires*):** Some actions go beyond what a company is allowed to do. Acts that are *ultra vires* or beyond the company's powers raise a unique conundrum. In *Prudential Assurance v Newman*[9], the court noted that if an action is *ultra vires*, or beyond a company's powers, then the *Foss v Harbottle* rule should not apply. The court intimated that the rule would be a miscellany if applied to acts which the majority, by definition, could not confirm. An *ultra vires* act is an anathema to the very constitution of a corporate entity; thus, its challenge lies outside the ambit of the *Foss v Harbottle* rule.
3. **Fraud on the Minority**: Sometimes, decisions made by the majority might be unfair or fraudulent towards the minority. Cases like *Menier v Hooper's Telegraph*[10] and *Estamanco v Greater London Council*[11] dive into this. In these cases, the court recognised that certain actions, especially those that cheat or misuse power against minority shareholders, need to be checked. In the *Menier case*, minority shareholders took legal action against the majority for making a decision that hurt the company. This case created a new way for minority shareholders to legally act when they felt cheated. In the *Estamanco case*, a local council changed their property sale plans, and this was seen as a misuse of power. An individual who had already bought a flat tried to continue a lawsuit against them. The court agreed, suggesting that even if the majority is not made up of directors, they can still be held accountable for abusing their power. In both instances, the court was confronted with a reality where the majority's might could perpetuate egregious wrongs. The doctrine thus evolved to recognise that certain acts, particularly those tantamount to fraud on the minority or grave misuse of power, demand minority shareholder intervention. Such acts are not merely corporate wrongs; they strike at the heart of corporate integrity.

[7] *Quin & Axtens Ltd v Salmon* [1909] AC 442 (HL) (Lord Loreburn LC) noted the importance of resolutions by stating that directors must act in good faith without conflicts of interest and that important matters, especially those that might diverge from the usual scope of business, require a resolution. This essentially reinforces the gravity and significance of resolutions within corporate entities.
[8] *Edwards (n 6).*
[9] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* (1982) Ch 204.
[10] *Menier v Hooper's Telegraph* (1874) 9 Ch App 350.
[11] *Estamanco (Kilner House) Ltd v Greater London Council* (1982) 1 All ER 437 (HC).

4. **Violation of Personal Rights**: Actions by a company can sometimes harm the personal rights of its members. The case of *Heron International v Lord Grade* [12]shows this. Here, the company claimed that its chairman had signed a bad contract and breached his duties. The court saw this not just as a poor decision but as an invasion of the company's basic rights, which every member relies upon. The case underscored that when corporate actions impinge on the sacrosanct personal rights of its members, *Foss v Harbottle* offers no sanctuary. Such personal rights encapsulate the very essence of shareholder democracy and warrant protection against any infractions. The judicial outcome bore broader implications. By ruling that the plaintiff company was justified in launching a legal action, the court effectively etched a fresh exception into the annals of corporate law.

These exceptions are more than mere judicial aberrations; they are embodiments of the law's commitment to ensuring that corporate entities do not become hotbeds of injustice and that majority dominance does not subsume the voice of the minority.

3.0 GOWER'S INSIGHT INTO THE APPLICATION OF THE *FOSS V HARBOTTLE* RULE[13]

Section 217 of the repealed Companies Act, Act 179, though replicated in Section 218 of Act 992, harbours in its text a profound departure from the traditional majority rule. But the journey is not always smooth and the journey of the protection of minority rights did not end with section 217 of Act 179 as seen in the next section. Gower clearly notes that Section 217 was not just about supporting the power of the majority. Instead, it stood up for the rights of members to ask for legal help when the company faced harm. He clearly states that the *Foss v Harbottle* rule has its limits. For example, it does not work in cases where actions are illegal or go beyond a company's powers. Also, if a matter concerns rights promised to individual members, this usual rule does not apply.

Gower points out that the application of the Minority rule; acts that might not follow the rules, but can be fixed with a normal decision, stop individual members from taking legal action.

Gower questions this application of the majority rule. He believes that just because a wrong action can be fixed does not mean it should not face legal challenges. Why, asks Gower, should such wrongs be safe from challenge, especially when a member clearly sees the need to question them?

3.1 Application of *Foss v Harbottle* post 1960

The ever-evolving jurisprudence in corporate law has witnessed an intriguing progression in the application of the seminal *Foss v Harbottle* principle. Notably, while one meanders through the intricate maze of the legal landscape, it is prudent to revisit the implications of Section 217 under the erstwhile Companies Act, which, rather than bolstering the majority rule, conferred upon members the right to initiate legal proceedings when the company suffered a detriment. Yet, an assortment of Ghanaian cases, including *Pinamang v Abrokwah*[14], *Luguterah v Northern Engineering Co. Ltd. &*

[12] *Heron International Ltd v Lord Grade, Associated Communications Corp PLC and* Others [1983] BCLC 244 (CA).
[13] Gower's Report & Cases, "Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana" (The Republic of Ghana, 1958).
[14] [1992] 2 GLR 384 (CA).

Others[15], *Appenteng v Bank of West Africa*[16], *Kludjeson International v Celltell Ltd*[17], and *Boohene v Ghana Union Assurance*.[18], have to some extents sought to maintain the majority rule principle.

In *Pinamang v Abrokwah,* the court fortified the majority rule, emphasising the impropriety of courts delving into the internal machinations of a company, particularly when the alleged irregularities could be redressed by an ordinary resolution. A stark contrast emerges in *Appenteng v Bank of West Africa*, where the court underscored the "proper plaintiff rule," positing that shareholders are typically bereft of the right to litigate for damages accruing to the company, save for instances when the company itself is the litigant.

But perhaps one of the most intricate portrayals of this doctrine finds its genesis in the case of *Luguterah v Northern Engineering Co Ltd & Others*. Here, amidst a backdrop of unserved notices, unregistered memberships, and purportedly increased shares, the court ventured beyond mere procedural regularities. Taylor J lucidly articulated that what transpired was not a mere sidelining of procedure, but a blatant transgression of the company's regulations and the overarching Companies Code. Such wrong actions were seen as beyond the company's powers. Such actions were deemed *ultra vires*, thus breathing life into the exception that permits shareholders to champion the cause of ensuring the company's operations remain tethered to its regulations.

It is clear that Ghana's courts value the rule that the majority holds power. However, they will take a closer look at the peculiar circumstances of each to determine whether any particular situation demands its application. The *Foss v Harbottle* rule is well established, but it is not set in stone. The rule must align with the broader goals of fairness and proper company management.

4.0 THE COMPANIES ACT, 2019 (ACT 992) AND THE RULE IN *FOSS V HARBOTTLE*

In the web of corporate law, the Companies Act, 2019 (Act 992) emerges as a seminal legislation which recontextualises the time-honoured rule in Foss v. Harbottle. An analysis of Act 992 paints a vivid picture of a statute that consciously retains the traditional majority rule, but also, simultaneously, inculcates progressive elements that manifestly dilute its unyielding nature. The foundational tenets of Act 992 are encapsulated in Section 18, which bestows upon a company the capacity akin to a natural person of full stature, thereby underscoring its distinct legal personality. Yet, in order to ensure an orchestrated and cohesive corporate governance, section 144(3) vests the management of the company's business with the board of directors encompassing legal pursuits. Section 144(5) also allows members, when they meet, to take legal action. An intuitive reading of these sections seems to reaffirm the sanctity of the rule in *Foss v Harbottle* within the Ghanaian corporate landscape. Yet, as one delves deeper into Act 992, it becomes palpably evident that Act 992, much like its predecessor, has made several nuanced departures from the traditional rule.

[15] [1978] GLR 477 (HC).
[16] *Appenteng v Bank of West Africa* [1972] 1 GLR 153 (CA).
[17] *Kludjeson International v Celltell Ltd* HC (27 April, 2005).
[18] *Boohene v Ghana Union Assurance* HC (18 January, 2006).

5.0 STATUTORY EXCEPTIONS TO THE *FOSS V HARBOTTLE* RULE

A quintessential illustration of an exception to the *Foss v Harbottle* rule is section 29(3) which fashions a unique remedy, allowing a member or officer to enforce obligations under the constitution in a representative capacity.

Section 19(5) lends the court a formidable tool, the power to enjoin the company from executing acts or transactions that traverse the company's powers, or which are ultra vires by way of injunction.

Section 200(1) and 200(5) in Act 992 are pivotal, granting a shareholder the locus standi to initiate proceedings for breaches of directors' obligations, even if the breach inflicts damage exclusively on the company. This paradigm shift, undeniably, punctures the very marrow of the traditional majority rule.

Another noteworthy provision is section 218, which allows a member to wield the powerful legal instrument of injunction to restrain the company from actions breaching either the Act or the company's constitution as discussed in this article.

Section 219 carves out a niche remedy for minority shareholders, an acknowledgment of the potential for oppressive conduct by the majority. By extending relief even to debenture holders, Act 992 cements its stance on bolstering the rights of stakeholders often relegated to the peripheries.

Section 220 of the Companies Act, 2019 (Act 992) is a poignant manifestation of Ghana's commitment to fortify the protective mechanisms available to minority shareholders. This provision distinctly carves a balance between facilitating corporate actions that may be essential for the company's progress, whilst ensuring that such actions do not unduly prejudice the rights of dissenting shareholders. Thus, it balances company growth with protecting shareholders. A standout part, subsection (5), says if a company does not follow through on its plans within a year, a member can get his/ her/ its shares back. This stops companies from making empty promises. It is probably the most progressive aspect of the provision. It recognises that corporate ambitions, no matter how well intentioned, might not always materialise. If the company fails to execute the proposed objectives or business activities within a year of the special resolution, members have the right to apply for the reinstatement of their shares. This acts as a safeguard against potentially speculative or overly ambitious corporate endeavours.

6.0 CONCLUSION

Corporate law's dynamism is both its strength and its challenge, and Ghana's journey in this sphere epitomises this characteristic. The journey began with the ideas in *Foss v Harbottle*. It is all about finding the right mix between majority power and protecting minority shareholders. This mix shows how companies are run and how justice plays a role.

In Ghana, while the majority rule is key, there is also a willingness to change. This is especially true when there is unfairness or when majority decisions hurt minority rights. The Companies Act, 2019 (Act 992) is a key part of this. It does not just stick to old ideas. It brings in new ones, aiming for a fair and efficient way of running companies.

Sections such as 218 and 220 show Act 992's careful approach to protecting minority interests. These sections provide tools and solutions against any unfair actions by the majority. In the event that

company plans do not happen in time, shares can be returned. This shows the Act's focus on fairness and responsibility.

Ghana's corporate law journey depicts growth. It is a story of balancing old and new ideas, where majority power is important but not sacrosanct. The goal is always to match the spirit of the law with how companies are run today.