EDOKPOLO V SEM-EDO WIRE INDUSTRIES LTD: REVISITED

By Joseph E.O. Abuga*

The above captioned case, the subject of this review, is a notable decision of the Supreme Court [1] on some fundamental principles of company law. It explores the common law principles on a company's liability for pre-incorporation contracts and the famous rule in *Foss v Harbottle*. It is no gain saying that the Supreme Court's pronouncement on the applicability of settled English principles of common law form a benchmark for the growth of indigenous versions of such principles. This paper analyses the legal basis of the decisions reached by the court of first instance and the appellate courts (Court of Appeal and Supreme Court) in the context of extant principles and the relevance of the decision in light of present day case law and statutory developments. It is contended that whilst the relevant courts concentrated in re-stating settled principles, the facts of the case do not provide the necessary foundation for such exercise. In other words, it is submitted that the decisions and pronouncements were made essentially per incuriam.

The facts of the Edokpolo case are clearly amplified in the lead judgement of Nnamani JSC. The appellant, the plaintiff in the substantive suit filed in the Federal High Court Warri, is a limited liability company incorporated under the Companies Decree 1968 and carrying on business principally in Benin City. Sometime in 1975, the appellant and a German based company SEM Nigerian Holding G.H.B.H. & Co., Hamburg agreed to set up a wire industry in Nigeria. On the 27th October 1975, they entered into an agreement for purposes of incorporating a Nigerian company to carry out the industrial project. Under the agreement, the appellant was to subscribe 40% of the share capital of the proposed company while the foreign partner was to subscribe 60%. This was in accord with the Nigerian Enterprises Promotion Decree 1972 then in force, the activity of the proposed company having fallen within Schedule 2 thereof.

On the incorporation of the company, Sem-Edo Wire Industries Ltd, the 1st Respondent, the provisions of the agreement were incorporated in the

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1 [1984] 7 S.C. 119.

memorandum of association of the company. And in furtherance of the memorandum, the parties who were the only shareholders, adopted the provisions of the said agreements at their general meetings and at the board of directors meetings. The initial capital of N1,000,000.00 was subscribed in the 40:60 % ratio between the appellant and the foreign partner. On 27th February 1976, the two partners, i.e the appellant and the foreign partner entered into another agreement principally for the purpose of increasing the share capital of Sem-Edo Wire Industries Limited from N1,000,000.00 to N1,500,000.00. Following this agreement the company duly passed a special resolution increasing its share capital from N1,000,000.00 to N1,500,000.00. The share capital remained at that level.

Subsequently, the company purportedly allotted 2% and 3½% of the shares in Sem-Edo Wire Industries Limited to the 2nd and 3rd respondents. This allotment was taken out of the 40% of the shares which the appellant was to subscribe. The appellant protested in vain to the managing director of the 1st respondent company (a nominee of the foreign partner SEM Nigerian Holding & Co., Hamburg). It then sought redress in the Federal High Court claiming the following reliefs:

> *"(1) A declaration that the plaintiff is entitled to 40% of the shares in Sem-Edo Wire Industries Limited, incorporated in Nigeria in 1975.*
>
> *(2) A declaration that the share certificate issued to the 2nd defendant as evidence of his shareholding in Sem-Edo Wire Industries Limited is null and void in that the transaction was without the knowledge and/or consent of the plaintiff who is the sole Nigerian partner and owner of 40% of the shares in Sem-Edo Wire Industries Limited.*
>
> *(3) A declaration that the share certificate issued to the 3rd defendant as evidence of his share holding as Nigerian partner in Sem-Edo Wire Industries Limited is null and void in that the transaction was without the knowledge and/or consent of the plaintiff who is the sole Nigerian partner and owner of 40% of the shares in Sem-Edo Wire Industries Limited.*
>
> *(4) An order for specific performance on the 1st defendant company to perform the obligations in the decisions of the board of directors of the company at the board meeting of 30th June, 1975.*
>
> *(5) Any further order or orders which the Honourable Court would consider just and equitable in the circumstances of the case."*

After pleadings have been settled by parties, the defendant brought application to dismiss the suit *in limine* under Order 27 rule 1 of the Federal Revenue Court (Civil Procedure) Rules L.N. 34 of 1976.[2] The trial judge, Ayinde J dismissed the application and ordered that the suit should proceed to trial. It is from this decision of the Federal High court that the suit proceeded to the Court of Appeal and the Supreme Court. A review of the courts' decision presents some interesting pronouncements on the substance of the case viz a viz the issues raised before the courts.

It is clear from the claim that what the plaintiff sought was his right to 40% of the increased capital of the 1st respondent company. The basis of that right was three fold: the 1975 Agreement itself; its adoption at the Board and General Meetings of the company; and its adoption in the Memorandum of Association of the company. These will also form the basis of this review.

The Agreement of 1975

Fundamental to the legal status of this agreement is the concept that it is a pre-incorporation contract and it appears the case was contested on this understanding and the decision of the courts underscored this. The classical rule is that pre-incorporation contracts are not binding on a company when it is formed even if it takes a benefit under it, for before incorporation, a company has no contractual capacity. Neither can anybody contract as agent for it because an agent cannot do something which his principal could not have done. Furthermore, such a contract cannot be ratified by the company after its incorporation. The English locus classicus is *Kelner v Baxter & Ors*.[3] There, a company was being promoted to carry on hotel business. The Plaintiff entered into agreement to sell premises and stock to "A" B and C on behalf of the proposed company and the contract was signed by "ABC on behalf of the company". The goods were handed over to the representatives of the proposed company and were consumed in business. The company was incorporated but collapsed before the money was paid. It was held that if there had been an existing company at the time of the contract, the defendant would have signed as agents of the company but as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. "The rule is that where a contract is signed by one who professes

2 Where a defendant conceives that he has a good legal or equitable defence to the suit so that even if the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him".

3 (1867) L.R. 2 CP 174, particularly Per Erle C.J at p. 183. See also Natal Land Co. V. Pauline Syndicate [1904] A.C. 120.

to be signing "as agent" but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby and a stranger cannot by a subsequent ratification relieve him of that responsibility". When the company came afterwards into existence, it was a totally new creature, having rights and obligations from that time but no rights and obligations by reason of anything which might have been done before.

This case was followed in the Nigerian case of *Caligara Dario v Giovanni Satori & Co. Ltd.*[4] Prior to the incorporation of the company, one Satori obtained a loan from the plaintiff in the name of the company. The cheque was made payable to the company and was cashed by Satori before the company was incorporated. The plaintiff sought to recover the loan with interest from the company contending that it adopted and ratified the contract. It was similarly held that a promoter is not the agent of the company he is promoting and cannot bind the company by acts or contracts purported to have been done or entered into by him on the company's behalf prior to its incorporation. And a company cannot ratify or adopt a contract purported to have been entered into on its behalf by its promoters prior to its incorporation.[5]

It is clear from the cases that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence. In order to do so, a new contract must be made with it after its incorporation on the terms of the old one. After incorporation the company may enter into a fresh contract on the same terms as the old one. However where the contract purports to be made by the company, with the agent signing on its behalf, the agent cannot sue on it. In *Newbornne v Sensolid (Great Britain) Ltd.*[6], the contract on behalf of a non-existent company was signed - "signed Leopold Newborne (London) Ltd." with "Leopold Newborne" written underneath. The company was held to be the principal party to the contract and being non-existent renders the contract void and it cannot be enforced by Leopold Newborne. The distinction between the cases turned on the form of signature. Whereas in Kelner, the promoter signed "for and on behalf of the company" thus implying that the company is primarily liable with the connotation that in the absence of the company, he is the one acting. In Newbourne, the promoter signed the name of the company and only added

4 [1961] 3 All NLR 534. See also Stephen v Buildco Nig Ltd [1968] 1 All N.L.R. 188; Urhobo v Tarka [1976] 1 F.N.L.R. 208; Enahoro & Co. Ltd v Bank of West Africa [1971] N.C.L.R. 180; Edokpolo & co Limited v Sem-Edo Wire.Industries Ltd [1984] 7 S.C. 119.

5 See also Starcola Nig Limited v Adeniji [1972] 1 S.C. 202.

6 [1954] 1 Q.B. 45.

his name for authentication thus implying that the company alone is to be bound.[7]

In this case, it is clear that the agreement of 1975 was not signed for or on behalf of the yet to be formed company. Rather it was executed between the parties in their individual legal capacities. The formation of the company is only the subject of the agreement. It is submitted therefore that this Agreement is simply a Joint Venture Agreement, a specie of shareholders agreement and not a pre-incorporation contract. But the courts missed this point. According to the Supreme Court.

> *"In its consideration of the appeal before the Court of Appeal, that court treated the agreement of 27th October, 1975 as a pre-incorporation agreement. The majority was of the view that it seemed to be the basis of the appellant's case. In well settled principles of company law the court held that agreement could not bind the company Sem-Edo Wire Industries Ltd after its incorporation, for it was never a party to it. Relying on the cases of Kelner v. Baxter (1967) L.R.2 CP 174; Natal Land & Colonisation Company v. Build Co. Nigeria Limited (1968) 1 All N.L.R. 183 the Court held that the company after incorporation could not ratify the said agreement of 27th October, 1975 such that it became an agreement between it and any of the original parties thereto."*

In *F.A.T.B v Ezegbu*[8], the Court of Appeal, differently constituted, relied on the Edokpolo case and held that a company cannot accept retrospectively a contract made in its name before incorporation either by ratification or by conduct if such contract cannot be accepted by express ratification after incorporation. The major flaw however lies in the fact that the agreement in the Edokpolo case was not made in the name and on behalf of the yet to be formed company. Therefore, even the Court of Appeal in this Ezegbu's case, while stating a correct principle of law, relied on a defective legal authority. The Edokpolo case typically present a shareholders' agreement entered into by prospective shareholders, creating a framework for the regulation of their affairs for the purpose of

7 It is noteworthy that section 72 of the Companies and Allied Matters Act 1990 has changed these statements of the law to the extent that a company can now ratify and adopt a pre-incorporation contract as if it were in existent at the time the contract was made. Prior to ratification by the company, the person who purported to act in the name of or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.

8 [1994] 9 NWLR (Pt.367) 149.

incorporating the company. Until the company is incorporated and the terms of such agreement incorporated in the memorandum or articles of association, it simply remains a agreement between the shareholders, binding on them only. It usually concerns the exercise of shareholders' rights in certain given situations. The key advantage of such agreement is that it is easily enforceable against the parties to the agreement.[9] Being binding on the shareholders/parties thereto, the agreement may, to that extent, may affect the conduct of the affairs of the company, particularly where all the shareholders of the company are party to the agreement. For example, if all the shareholders in a company have bound themselves in an agreement not to increase the share capital of the company, the company though still having its statutory power to increase capital, cannot do so. Where the company itself is a party to the agreement, (though not in the case of company yet to be incorporated), issues of limitation arises where the effect is for the company to contract out powers or functions vested in articles or memorandum of association. The principle which ought to have governed the *Edokpolo case* can be found in the dicta of Brett J.S.C in *N. Stephen v Buildco (Nigeria) Limited.*[10] In discussing the binding effect of an agreement to allot shares between the only two shareholders and directors of the company, the learned justice said:

> *"The Appellant's argument affords a good example of the artificiality of company law, and it is hardly a matter for surprise if Said and Stephen overlooked the fact that a personal agreement made between them before the company was formed cannot by any process of ratification be turned into an agreement between the company acting through its directors, Said and Stephen, who were also to be its only shareholders, of the first part, Said individually of the second part and Stephen individually of the third part."*

However, the court shied away from making a definite pronouncement and instead contented itself with the fact that both parties have assumed the existence of a binding agreement.

The issue presented itself in the English House of Lords in the case of *Russell v Northern Bank Development Corporation.*[11] The House of Lords

9 Several other advantages are listed and discussed in Brenda Hannigan's Company Law, 2003 ed., Lexis Nexis Uk, pp. 131-132

10 [1968] All NLR 187 at 189.

11 [1992] BCLC 431.

considered a shareholders' agreement where the company agreed not to increase the share capital of the company without the agreement of all the parties to the shareholders' agreement. The company did attempt to increase the share capital and one of the shareholders who was a party to the agreement objected and attempted to enforce the agreement. The House of Lords found that the company's agreement not to increase its share capital was contrary to section 11 of the Companies Act which allows companies to increase share capital. However, the court did not declare the whole shareholders' agreement invalid. Only the company's agreement not to increase share capital was so declared. This meant that the shareholders who objected could not enforce it against the company but could enforce it against the other members. As all the shareholders were party to the agreement, this has the same effect as if the company was bound. The shareholders could not vote to increase the share capital.

Under the 1975 agreement in the Edokpolo's case, the appellant was to subscribe 40% of the share capital of the proposed company while the foreign partner was to subscribe 60%. The appellant and the German foreign partner were the only shareholders of Sam-Edo Wire Industries Ltd and having agreed to subscribe its capital in the ratio of 40:60%, are bound by that agreement even though the company was not a party to the contract because at the material time, it had not come into existence. To the extent that they were the only shareholders to the company, they cannot vote or take a decision inconsistent with that Agreement.

Adoption at the Board and General Meetings

"By paragraph 14(a) of the statement of claim, the plaintiff pleads that the provisions of the 1975 agreement were adopted by the company after its incorporation at its general meetings and at the board of directors' meetings. The same paragraph also pleads that the minutes of the company would be relied upon in proof of the allegation in the paragraph.

It is instructive that the merits of this case was determined by way of an application brought by the defendant in the lower court under Order 27 rule 1 of the Federal Revenue Court (Civil Procedure) Rules L.N. 34 of 1976.[12] The court of first instance, Ayinde J was of the view that the application <u>in limine</u> failed and the matter should proceed to trial on its merits. In the Court of Appeal, only Agbaje JCA was of the view that the

12 Where a defendant conceives that he has a good legal or equitable defence to the suit so that even if the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of tact being required from him".

suit should proceed to trial to determine if indeed the 1975 Agreement was incorporated into the Memorandum of Association. Again even on this point, the learned justice ignored the fundamental nature of an application under the said Order 27. Such an application presumably admits the averment of the Plaintiff. Rule 11 of Order 27 provides that *"For the purposes of such application, the defendant shall be taken as admitting the truth of the plaintiff's allegations, and no evidence respecting matters of fact, and no discussion of questions of fact shall be allowed".*

Therefore notwithstanding that the Court of Appeal erroneously treated the 1975 Agreement as a pre-incorporation contract, they ought to have considered the incorporation of that agreement in the memorandum of association and declared its binding effect on the company and its members under the extant Companies Act. Under section 16 of the 1968 Companies Act, the memorandum and articles of association as altered from time to time bind the company and its members *inter se* as a contract under seal.[13]

Before the Supreme Court, Chief Gani Fawehinmi for the appellants relegated the issue of a pre-incorporation contract to the background and based his one ground of appeal on the adoption of the parties agreement into the memorandum of association and the decision of the Board of the company adopting the agreement and contended that from the nature of the respondents application under Order 26, this was a triable issue. Chief Rotimi Williams on the other hand asserted that the agreement was a shareholders agreement and not a pre-incorporation contract and thus did not bind the company. He similarly relegated the existence of a contract in the memorandum of association to the background.

From the stated briefs before the Supreme Court, it ought to have been clear that the 1975 agreement is not a pre-incorporation contract but a shareholder's agreement. Notwithstanding, Nnamani JSC in his lead judgement categorically asserted the application of the Pre-incorporation rule to the case. Quoting him in extenso, he said

> *"....It is now a well settled principle of company law that a company is not bound by a preincorporation contract being a contract entered into by parties when it was not in existence to bind. It is also settled that after incorporation a company cannot ratify such*

13 See Hickman v Kent or Romney Marsh Sheep Breeders Association [1915] 1 Ch. 881; Eley v The Positive Life Assurance Co. Ltd (1876) 1 Ex D 88; Beattie v. Beattie Ltd. (1938) CH.

a contract purported to be made on its behalf before incorporation.

In *Kelner v. Baxter (1866)* L.R. 2. C.P. 174, Erle C.J. explaining the rationale of the principle said:

> *"...... as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendant personally .... Where a contract is signed by one who professes to be signing as 'agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by a subsequent ratification relieve him from the responsibility".*

See also *Natal Land and Colonisation company v. Pauline Syndicate (1904) A. C. 120: Caligara v. Giovanni Sartori & Co. Ltd (1961) 1 All N.L.A. 534. Also Stephen v. Build Co. (Nig). Ltd. (1968)1 All N.L.R.* 188 where this Court upheld the same principle even where the parties to the preincorporation agreement became the only directors and shareholders of the new company. But there is nothing preventing the company after incorporation from entering into a new contract to put into effect the terms of the pre-incorporation contract. This new contract can be in express terms or can be implied from the acts of the company after incorporation as well as from the minutes of its general meetings and board meetings. *Touche v. Metropolitan Railway Warehousing Co, (1871) 6 CH. App. 671. In Howard v. Patent Ivory manufacturing Company (1888)* 38 CH.D. 156, 164 Kay J. quoted with approval a dictum of sir George Jessel, M.R. in which the principles were fully set down. This was in *Re Empress Engineering Company* 16 CH.D 125, 128. He said:-

> *"The contract between the promoters and the so-called agent for the company of course was not a contract binding upon the company, for the company had then no existence nor could it because it has been decided and as it appears to me well decided that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made because the ratifier was not then in existence .... it does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle". See also Firgos*

(Nig.) Ltd. v. Zetters (Nig.) Pools Ltd. 1965 N.L.R 113......"

He then proceeded to examine whether there was a subsequent adoption of this pre-incorporation contract by the company. The learned justice then held that the issue of adoption at Board and General meetings of the company was a triable issue. It is noteworthy again, that the learned justice misdirected the court on the issue of pre-incorporation contract because of his reliance on the case of *Stephen v. Build Co. (Nig). Ltd.*[14] where the Supreme Court, had held erroneously, it is submitted, that an agreement entered into by parties who subsequently became the only directors and shareholders of the company was a mere pre-incorporation agreement. The issue of a binding shareholders agreement on the parties was not canvassed or considered by the court. The same error was thus repeated by the court in that case. It seems, with the greatest respect, that these conclusions arise from the fact that the Court of Appeal did not give due consideration to the case of the appellant which is that there is a new contract between it and the 1st respondent subsequent to its incorporation. The court's whole consideration of the case appears to have been limited to the pre-incorporation contract.

The Memorandum & Articles of Association

Nnamani JSC held that the inclusion of the terms of the agreement in the memorandum of association is only a signification of the serious desire of the parties to be bound by the agreement and is a matter to be taken at the trial in considering whether as a fact, the agreement was adopted subsequent to incorporation. According to the learned Justice, the contractual effect of the memorandum is only binding on the company in the sense that it cannot repudiate the object clauses but not in the sense that the company must carry practically every objects clause. The object clauses are no more than a list of the objects which the company may lawfully carry out, he said.

Whilst this is a correct statement of the nature of list of objects in the objects clause such that a company may not carry out every of its objects,[15] members may nonetheless compel the carrying out of its principal or main objects in accordance with the terms of the objects clause. The court simply ought to have considered the binding effect of the memorandum as altered from time to time on the company and its

14 [1968]1 All N.L.R. 188

15 See National Investment & Properties Co. Ltd v The Thompson Organisation & Ors [1969] All NLR 134 at 141.

shareholders. At that point, the shareholders agreement is elevated to a contract binding on the company and its members in the sense that until it is duly amended or abrogated, members can compel compliance.[16] On this point the Court of Appeal was right. Where the objects clause is specific as to the main purpose of the company, observance can indeed be compelled. That is the very basis of the decision in *Re German Date Coffee Co.*[17] and allied cases which would ground a winding up order where the substratum of the company has failed. In exploring the line between a plurality of objects and their binding nature, Kay LJ held:

> *"I take the line to be this, that where on the face of the memorandum you see there is a distinct purpose which is the foundation of the company, then, although the memorandum may contain other general words which include the doing of other objects, those general words must be read as being ancillary to that which the memorandum shows to be the main purpose, and if the main purpose fails and fails altogether, then, within the language of Lord Cairns in the Suburban Hotel Company's case ..., and within the decision of Baring v. Dix ..., the substratum of the association fails."*

It is clear in the Edokpolo case that the main object of the company is to establish a joint venture company in Nigeria, Sem-Edo Wire Industries Limited, whose capital shall be subscribed in the manner prescribed in the 1975 Agreement and the objects clause of the company. It is submitted that any of the two shareholders can compel observance of this object as it is binding.

The Rule in Foss v Harbottle

It was contended on behalf of the defendant that the plaintiff/appellant had no locus to sue on the claim as the shares allegedly allotted to the 2nd and 3rd Respondents belong to the company and have never been allotted to the appellant. If any wrong has been committed, it is only the company that can sue thereon. So it was argued and accepted by the Court of Appeal. In addressing this issue, Nnamani JSC had this to say:

> *"the contention that the company ought to sue touches on the wider principles usually referred to as the rule in Foss v. Harbottle (1843), 2 Hare 461. By it the court will not interfere with the internal management of companies acting within their powers. If there is a wrong done to the company for*

16 See Yalaju-Amaye v A.R.E.C Ltd [1990] 4 NWLR (Pt 145), 422.

17 (1881-82) L.R. 20 Ch.D. 169; See Baring v Dix 1 Cox 213; Re Suburban Hotel Co., L.R. 2 Ch. 737.

which redress is needed it is the company that must sue. The principle is based on a recognition of the implications of corporate organization and management which must include, subject to well laid down exceptions which have been of the majority. These exceptions which have been developed in several authorities include:

(a) an act which is ultra vires the company or illegal

(b) an act which constitutes a fraud against the minority and the wrongdoers are themselves in control of the company

(c) a resolution which requires a qualified majority but has passed by a simply majority.

(d) Where the rights of the shareholders are infringed or about to be infringed.

A fifth exception appears to have developed from the cases. An individual minority shareholder can also sue where the interest of justice demands that he be so allowed to sue."

Though a well established principle of English company law, the restatement of the rule and its exceptions in this case by Nnamani JSC without a detailed examination of the relevant case law and recent developments thereon certainly creates a precarious basis for a fifth exception under Nigerian law. English case law and dicta on the "interest of justice" exception prevaricates just as scholastic expositions of the rule are divergent.[18] The learned Justice did not state or discuss authorities from which this exceptions "appears to have developed". Chief Fawehinmi cited notably three authorities in addition to *Foss v. Harbottle.* These were the decisions in *Edwards v. Halliwell*[19]; *Heyting v. Dupont*[20] and *Burland v. Earle.*[21] None of these is an authority for the existence of a fifth exception. In *Edwards & Anor. v. Halliwell & Ors,*[22] Jenkins L.J. merely opined that the established exceptions show that the rule is not an inflexible rule..[23] Relaxation or elasticity of the ambit of the exceptions in clear cases of injustice does not necessarily create a new exception. Muhammed Bello JSC in his concurring judgement was very definite in holding that rule in Foss v Harbottle was inapplicable on the ground that the wrong alleged was done to the appellant, a minority shareholder. In

18 See Wedderburn "Shareholders' Rights and the Rule in Foss v Harbottle" (1957) C.L.J. 194; continued in (1958) C.L.J. 93.

19 [1950] 2 All E.R. 1064 at 1067.

20 [1964] 1 W.L.R. 843 at 851.

21 [1902] A. C. 83 at 93 (P.C).

22 [1950] 1 All E.R.1064, 1067

23 See also Swinfen Eady L.J. in Baillie v. Oriental Telephone Electric Co. Ltd. [1915] 1 CH. 503. and Romer J. in Cotter v. National Union Seamen [1929] 2 CH. 58, 69.

other words that the case fell within one of the established exceptions to the rule. Justice Aniagolu appears to have confused "in the interest of justice exception" with the justice in allowing a minority to sue where he has suffered a personal injury under the established exceptions. In his words *"It appears to me that this is a clear case in which a minority shareholder should, in the interest of justice, be allowed to sue as one of the exceptions to the rule in Foss v Harbottle..."* Yet he recognised that the allegations show that some personal wrong has been done to the plaintiff. This same confusion is evident in the judgement of Nnamani JSC. He asserted that the appellant was an individual shareholder whose rights have been violated. He was therefore in a wider foray when he invoked "the interest of justice" as a fifth exception to the rule in *Foss v Harbottle* and went on to apply same to the case.

On this issue, lower courts have not felt bound to follow the Edokpolo case, recognizing as it were, that the statement of the fifth exception rule was a statement made obiter. In *Elufioye & Ors v Halilu & Ors*,[24] the Court of Appeal in stating the exceptions to the *Foss v Harbottle* rule, did not allude to the existence of a fifth exception. It relied on the old cases of *Edwards v Halliwell*[25], *McDougall v Gardiner*[26] and *Heyting v Dupont & Anr.*[27] *Edokpolo v Sam-Edo Wire Industries Ltd* was not cited nor relied upon, even though it's a Supreme Court decision on the issue. The same consideration was given to the case in the recent case of *Erebor v Major & Co. Nig Ltd.*[28] The Supreme Court itself in *Yalaju-Amaye v A.R.E.C Ltd*,[29] stated the rule relying on the case of *Edwards v Halliwell* without alluding to its earlier foray into the fifth exception in Edokpolo's case. According to Karibi-Whyte JSC:

> *"... the company or association is the proper plaintiff in all actions in respect of injuries done to it. No individual will be allowed to bring actions in respect of acts done to the company which could be ratified by a simple majority of its members. Hence the rule does not apply where the act complained of was ultra vires the company or illegal - See Parke V. Daily News D Ltd. (1962) Ch. 927 or constituted a fraud on the minority and the wrongdoers are in the majority and in control of the Company, See Birch v. Sullivan (1957)1 W.L.R. 1247. And finally where a resolution requiring a qualified majority has been*

24 [1993] 6 NWLR Pt301, 570 at 590.
25 [1950] 2 All E.R. 1064.
26 [1875] Ch.D. 13.
27 [1963] 3 All E.R. 97.
28 [2000] 7 W.R.N. 71.
29 [1990] 4 NWLR Pt 145, 422.

passed by a simple majority - See Edwards v. Halliwell (supra). These last mentioned circumstances are the generally recognised exceptions to the application of the rule in Foss v. Harbottle (supra)." (underlined emphasis, mine)

Indeed in the light of statutory intervention in the formulation of the rule in Foss v Harbottle and its exceptions,[30] the so called "interest of justice" exception has withered away in considering the rights of minorities to initiate legal process in the face of corporate wrongs by the majority. By virtue of more liberal provisions in sections 310 and 311 of the Companies and Allied Matters Act 1990, an aggrieved minority may petition the court for relief on the ground that the affairs of a company are being conducted in a manner that is "oppressive, unfairly prejudicial, or unfairly discriminatory" against him. These grounds are certainly wide enough to subsume any wrong which may be done to a member with regard to his personal rights or any corporate wrong alleged to have been perpetuated by a majority in control.[31] If the court is satisfied that the petition is well founded, it may make such orders as it thinks fit for giving relief in respect of the matter complained of.

Conclusion

In the final analysis the Supreme Court erred firstly in applying the rule on pre-incorporation contracts to the facts of the case which are indeed different from those of a a contract made for and or behalf of a non-existent company. Secondly, the Court of Appeal and the Supreme Court could and should have remitted the case for trial on its merits in the light of Order 27 Rule 11 of the Federal Revenue Court (Civil Procedure) Rules. Whilst the Supreme Court eventually ordered remission, its exposition of the surrounding applicable principles were faulty. Thirdly, if the appellate judges had adverted their minds properly, the issue of the incorporation of the 1975 agreement in the memorandum of association and the binding effect thereof, would have formed a proper basis of pronouncement from the court of first instance. The appeals could have been determined without considering substantive issues. Fourthly, while the Supreme Court attempted to re-state the exceptions to the rule in *Foss v Harbottle*, its ready acceptance of the existence of a fifth

30 See sections 299 and 300 of the Companies and Allied Matters Act 1990; Omololu-Mulele v Ijale Properties Co. Ltd & Ors [2003] 27 W.R.N. 43 (Court of Appeal).

31 See Re A Company [1986] BCLC 376; and Hoffman J in Re A Company (No.8699 of 1985) [1986] BCLC 382 at 387; Re a Company Ex. Parte Glossop [1988] 1 W.L.R 1068.See also, Jenkins Report of the Company Law Committee, Cmnd. 1749 (1962), Para. 206.See also Gower and Davies' Principles of Modern Company Law, 17th ed., Sweet & Maxwell, London 2003, pgs.512, 516.

exception is faulty. Legal researchers need to be wary of the court's pronouncement on this fifth exception as the court had subsequently abandoned that road, though without expressly overruling itself. Moreover, more recent remedies for redressing individual or corporate wrongs have rendered any effort at further developing a fifth "unfairness" exception unnecessary.

Finally, it important to stress that in view of more recent legal developments, the principle in *Kelner v Baxter & Ors*[32], followed in *Caligra Dario v Giovanni Satori & Co Ltd*,[33] which the Court of Appeal and Supreme Court readily embraced in treating the 1975 Agreement as a pre-incorporation contract, is no longer good law. Under section 72 of the Companies and Allied Matters Act 1990, any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto.[34] Prior to ratification by the company, the person who purported to act in the name of or on behalf of the company shall, in the absence of express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.[35] Of course, this came into being after the Supreme court decision. Consequently, if the same facts present themselves today to the courts concerned, they would certainly not hold the 1975 Agreement unenforceable on account of its being a pre-incorporation contract.

32 (1867) L.R. 2 CP 174.
33 [1961]3 All NLR 534 and other cases cited in fn 5 above.
34 Subsection (1).
35 Subsection (2).