

The Nature of Shareholding in Nigeria: Evidence from the Banking Crisis

Wole Iyaniwura

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Abstract

when investors decide to buy shares or stocks in any company, there is the initial presumption that the company would in turn make profits which would then be delivered to them based on their investment. However, more often than not, there are cases where investors are faced with the situation whereby their investments could go down the drain due to bad corporate governance practices of the companies in which the investments are made. Bad corporate governance practices and indeed control fraud have led to insider abuse whereby directors have failed to perform their fiduciary duties in proper management of the companies' assets. These problems could be further compounded by the ignorant or complacent nature of shareholders with regards to their rights and responsibilities. In Nigeria, it can be said that shareholders are mainly faced with the problem of ignorance and in cases where they are actually aware of their rights; there is a passive nature of inexperience as to best approach possible in the circumstances. That notwithstanding, the recent banking crisis in Nigeria which is the subject matter of this paper has created a lot of awareness relating to shareholder activism in the country. These are seen in forms of Policies, Regulations and Scholarly Articles aimed at educating shareholders of their rights and responsibilities in the company. In view of this, it is the focus of this chapter to examine the extent to which shareholders can be said to have contributed to the banking crisis in Nigeria, taking into account the first five banks declared by the CBN as financially unstable. These are Oceanic Bank, Intercontinental bank, Union bank, Afri bank and Finbank. The paper will commence with an analysis of the concept of ownership and control, examining the agency problem associated with director-shareholder relationships. This will then be followed by an investigation of the legal position of shareholders rights and responsibilities in Nigeria, using the Company

Index terms— corporate governance, corporate fraud, shareholder activism, banking crisis, corruption, Nigeria

1 Introduction

When investors decide to buy shares or stocks in any company, there is the initial presumption that the company would in turn make profits which would then be delivered to them based on their investment. However, more often than not, there are cases where investors are faced with the situation whereby their investments could go down the drain due to bad corporate governance practices of the companies in which the investments are made. Bad corporate governance practices and indeed control fraud have led to insider abuse whereby directors have failed to perform their fiduciary duties in proper management of the companies' assets.

These problems could be further compounded by the ignorant or complacent nature of shareholders with regards to their rights and responsibilities. In Nigeria, it can be said that shareholders are mainly faced with the problem of ignorance and in cases where they are actually aware of their rights; there is a passive nature of inexperience as to best approach possible in the circumstances.

3 SEPARATION OF OWNERSHIP AND CONTROL: THE AGENCY PROBLEM

That notwithstanding, the recent banking crisis in Nigeria which is the subject matter of this paper has created a lot of awareness relating to shareholder activism in the country. These are seen in forms of Policies, Regulations and Scholarly Articles aimed at educating shareholders of their rights and responsibilities in the company.

In view of this, it is the focus of this chapter to examine the extent to which shareholders can be said to have contributed to the banking crisis in Nigeria, taking into account the first five banks declared by the CBN as financially unstable. These are Oceanic Bank, Intercontinental bank, Union bank, Afri bank and Finbank. The paper will commence with an analysis of the concept of ownership and control, examining the agency problem associated with director-shareholder relationships. This will then be followed by an investigation of the legal position of shareholders rights and responsibilities in Nigeria, using the Companies and Allied Matters Act, 1990 (CAMA) and the SEC Code for Shareholders, 2007. There will be a discussion of shareholder meetings and voting rights, following which the nature of Share-holder activism in Nigeria will be explored. The paper seeks to argue that apart from ignorance and illiteracy on the part of the shareholders, the general state of corporate governance practice in the country has been influenced by institutionalised political corruption, corporate fraud and regulatory manipulation to which shareholders are victims.

2 II.

3 Separation of Ownership and Control: The Agency Problem

Generally, an organization is more likely to survive when it produces goods to customers at the lowest price possible while still covering costs. ?? Fama and Jensen 2 examines the separation of risk bearing and decision functions observed in large corporations, otherwise known as ownership and control respectively and argue that the contract structures of organizations generally tend to separate the ratification and monitoring of decisions from the initiation and implementation of the decisions. ?? This hypothesis will be analysed in detail below.

They start by referring to the definition of an organisation as posed by Jensen and Meckling ?? to the effect that an organisation is made up of a totality of contracts, whether written and unwritten, among owners of factors of production and customers. According to them, these contracts are the 'rules of the game' and would specify two things: the nature of residual claims and the allocation of the steps of the decision process among agents. ?? The nature of contract of organisations usually tend to limit the risk borne by most agents; and this is achieved by specifying fixed promised payoffs and incentives that are attached to measures of performance. The risk of the probability of cash flows to promised payments to agents (otherwise known as the residual risk), is borne by another set of agents identified by Fama and Jensen as the residual risk bearers or the residual claimants. 6 However, mention must be made of the fact that most agents' contracts explicitly provide that the agent consents that in the exchange of a specified amount, the resources he provides can be used to satisfy the interests of the residual claimants. 7 The effect of having most of these risks borne by the residual claimants would create a survival value whereby lesser costs would be incurred to monitor contracts with the other group of agents. Furthermore, it would lead to more production at lower costs which would not only increase net cash flows, but also contribute to organisation's survival.

They then examined the way organisations allocate the various steps of decision process across agents as a vital element of survival for the organisation. 8 They explain this through four steps of decision processes. First is the initiation stage which, to them involves the series of proposals which are utilized for structuring of the contracts; this is then followed by the ratification stage where the choice of decision initiatives to be implemented is made. The third stage involves the actual implementation and execution of the decisions so ratified; while the last stage involves monitoring, that is, the measuring the performance of the decision agents and implementation of rewards. 9 They further group the initiation and implementation stage as being performed by the same agents and therefore termed decision management while the ratification and monitoring stage is known as decision control, performed by another set of agents. These two serves as components of an organisations decision process.

At the end, their analysis produced two complementary hypotheses about the relationship between decision systems and residual claims: 1. Separation of residual risk bearing from decision management leads to decision systems that separate decision management from decision control: 2. Combination of decision management and decision control in a few agents leads to residual claims that are largely restricted to these few agents. 10 The above led them to conclude that where decision management and decision control functions effectively in one or more agents, it becomes effective in controlling agency problems that could arise between residual claimants and decision makers because the residual claims are restricted to the decision makers.

This agency problem identified by Fama and Jensen is in relation to 'costs' and is analysed below.

Tricker considers Agency relationship through the lens of the agency dilemma whereby directors seeking to maximize their own personal benefit, take actions that are advantageous to themselves but detrimental to the shareholders. 11 An important element in any agency relationship is trust. Tricker defines trust as an agreement between parties with asymmetrical access to information. 12 This is premised on the fact that directors are well knowledgeable in the conduct of business activities and are professionally trained to do so; therefore the shareholders must trust them to do their job.

Jensen and Meckling 13 define agency relationship as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent. If both parties to the relationship are utility maximizers, there is

good reason to believe that the agent will not always act in the best interests of the principal. ??4 They further examined the ownership structure of a corporation, taking into account how the equity ownership by managers can be said to align their interests with that of the owners.

According to them, the principal is able to limit divergences from his interest through the creation of various incentives to which the agent can benefit from and engaging in monitoring costs aimed at limiting future deviant activities of the agent. ??5 For example, providing bonding costs for the agent to guarantee that he will not harm the principal, and where this happens, ensuring that the principal is compensated. However, more often than not, there will be a discrepancy between the agents' decisions and decisions that would serve to optimize the interest of the principal. This is because it is generally not feasible for either the principal or agent to ensure that the agent will make vital decisions in the interest of the principal at no cost; generally, monitoring and bonding costs are usually incurred. ??6 Agency costs is defined by Jensen and Meckling to include monitoring expenditures incurred by the principal, bonding expenditures incurred by the agent, as well as residual loss. ??7 Going back to Fama and Jensen, organisations that tend to separate residual risk bearing from decision management are generally complex in nature because valuable information are then diffused among many agents of the organisation, therefore what we have in most complex organisations is a sort of 'part' separation because effective decision systems are diffuse. This is because where there are many residual claimants, it becomes a costly exercise for all of them to be involved in decision control; hence, the separation of residual risk from decision control, and this, no doubt creates agency problems residual claimants and decision agents. The separation of decision management and control at all stages in the organisation would ultimately help to control possible agency problems. This is because it would limit the power of individual agents to expropriate the interests of residual claimants. ??8 Thus, the separation of decision management and control would be effective in complex organisations as they would both allow relevant applicable knowledge to be utilised as and at when due because they help to control the agency problems that is posed by diffuse residual claims. Furthermore, in decision control systems where decision agents bear little or no share of the cost effects of their decision, what is seen is a multiple-member board of directors that tend to ratify and monitor important decisions as well as choosing, rewarding and dismissing important decision agents. ??9 This would then make it difficult for any form of collusion between decision management at the top and control agents; and this is what makes separation of ownership (residual risk) and control (decision management) a vital decision of an organisation. ??6 Otherwise known as pecuniary and non-pecuniary costs. See Jensen and Meckling supra. ??7 It is important to note that monitoring goes beyond measuring and observing the agents behaviour from time to time, it also includes practical efforts of the principal to 'control' the behaviour of the agent, such as operational rules, policies, and the likes. Residual loss refers to agency costs incurred despite appropriate monitoring. See Jensen and Meckling supra at p.310-311. ??8 Jensen and Meckling supra at p.323. ??9 Jensen and Meckling supra.

III. Nature of Shareholding Practice and Structure in Nigeria

As the most populated country in West Africa with natural resources ranging from crude oil to agriculture, ??0 Nigeria has one of the largest Stock Exchange Markets in Africa, known as the Nigerian Stock Exchange (NSE). ??1 The Stock Exchange is a self regulating entity set up to support the SEC in supervision of its activities within the security market. The purpose of the NSE is to monitor compliance with the financial requirement of listed companies on behalf of the SEC. ??2 In effect; this requirement measures the level of good corporate governance in any company. It seeks to protect shareholders interest by requiring prior approval of making annual report available to shareholders before the annual general meeting and this approval may be withheld in case of discrepancies in the report in which case it is subject to correction. ??3 The NSE started operations in 1961 with 19 securities listed for trading. The requirement for shares to be quoted on the market initially received a lazy response and as at 1970, only 20 companies had their shares quoted in the market, even though there were about 2000 foreign owned enterprises in Nigeria at the time. ??4 What is known as the Federal Republic of Nigeria was a former colony of Britain. The first companies to operate in Nigeria therefore were British Companies Chattered in England. Foreign companies had foreign ownership status that granted them absolute rights and privileges associated with it. Legal activities began in 1876 when Lagos, the then Federal Capital Territory was ceded to the British Crown. Following the amalgamation of the Northern and Southern protectorates in 1914 and the establishment of a Supreme Court for the whole country, an Ordinance was also promulgated for the whole country. Section 14 of the new Ordinance provided that:

'Subject to the terms of this or any other Ordinance, the Common Law, the Doctrines of Equity and the Statutes of General Application which were in force in England on the 1 st of January 1900, shall be in force within the jurisdiction of the court'.

The above provision laid the foundation of Company Law in Nigeria as the English Common Law and Doctrines of Equity as it applied to English Company Law became applicable to Nigeria. The Companies Ordinance of 1912 was the first Company law in Nigeria, based on the English Companies (Consolidation) Act of 1908.

The independence of the country in 1960 necessitated the need for local control of public infrastructure. In this regard, the government effected a major change in ownership and control structure of Nigerian corporations prohibiting absolute ownership by foreign investors. ??7 The activities of the government in the encouragement of local participation in economic activities led to the enactments of various Acts from 1962 to 1977. Two major legislations passed to this effect were the Foreign Exchange Act of 1962 known as the FX Act and the Nigerian Enterprises Promotion Decree (NEPD) No. 4 of 1972, often referred to as the Indigenization Decree. The purpose

of these Acts was to reserve for Nigerians those areas where they had the experience and capital to run. The FX Act prohibited the transfer of security or interest of security outside Nigeria without the permission of the Minister of Finance. The NEPD on the other hand, in a bid to restrict foreign ownership created three types of enterprises²⁸. First, there are enterprises exclusively reserved for Nigerians, which basically was a reflection of the Nation's economic, financial and corporate needs at the time. There were also enterprises in which Nigerians are not allowed to own more than 40% of shares in which case foreign companies had the opportunity to invest in the country, generating foreign capital and managerial expertise for Nigeria. The third sector was enterprises in which foreigners were not allowed to own more than 60% of shares and this included capital-intensive enterprises.²⁹ The ownership structure of the country prohibiting 100% of foreign ownership made a lot of foreign corporations to divest their shares. However, due to lack of local investment funds at the time, government became the major shareholder of the divested shares, although few local investors bought a small percentage of the shares.³⁰ Subsequently, the government became actively involved in the production sector of the country, either solely or as joint ventures with the foreign or local investors. In reality, the government policy on prohibition of absolute foreign investment in the country only operated to empower foreign investors as major partners with the government, leaving local investors as the minority. This, no doubt created abuse of minority rights as majority shareholders had control. Conflict between majority and minority shareholders remain a dominant problem of most developing countries with concentrated ownership structure.³¹ The independence of the country further envisioned the need to provide a more comprehensive legal framework that better meets the development needs of the country, particularly the promotion of indigenous companies. This necessitated the establishment of a Law Reform Commission to make recommendations on the future of the country's corporate sector while protecting the interest of investors, the general public and the nation as a whole.

The recommendations of the Law Reform Commission saw the birth of the Companies and Allied Matters Decree (now Act) 1990.³² Part 1 and 2 of the Act provides that it shall apply to all companies formed and registered under it, as well as all existing companies, all companies formed or incorporated under other enactments and also all unregistered companies.

4 IV. Shareholders Rights and

Responsibilities under Nigerian Law

Generally speaking, a shareholder is a part owner of any company who is also entitled to take part in the decision making of the company.³³ The Nature of Shareholding in Nigeria: Evidence from the Banking Crisis that the shareholder is also entitled to access information regarding to performance or otherwise of the company as it is contained in its yearly annual report. There is no doubt that a shareholder benefits favourably in form of turnovers and profits, otherwise known as dividends whenever the company is doing well.³⁴ CAMA provides for basic rights relating to shareholders which are highlighted below:³⁵ 1. The right to attend general meetings in accordance with Section 81 of the Act 36 2. Right to speak and vote on any resolution 3. Right to vote in person or in absentia. Likewise, equal effect shall be given to votes whether cast in person or in absentia 4. Right to be furnished with sufficient and timely information regarding the date, location and agenda of the general meetings, as well as full and timely information regarding the issues that will be discussed at the meeting. 5. Right to ask questions from the board and to place items on agenda at the general meeting, subject to reasonable limitations 6. Right to be informed of any resolution appointing or approving the appointment of a director for the purpose of Section 256 of the CAMA 37 7. Right to sue for dividends in accordance with Section 385 of the CAMA This is in the form of capital appreciation when the shares are actually worth more than when they are bought by the shareholders.

5 35

See generally part IV, V and VIII of the CAMA. These are also highlighted in the SEC Shareholders Rights and Responsibilities supra 36 Section 81 of the Act provides that every member of the company shall have the right to attend general meetings and vote provided that all sums payable with respect to their shares have been fully paid.³⁷ Section 256 of the Act gives a restriction on the age of directors to 70, failing which a special notice is required of any resolution appointing a director above the age of 70.

6 38

This defines dividends as special debts due to and recoverable by shareholders within 12 years and which is only actionable when declared.

15. Right of shareholders vis-a-vis a prospectus that is being issued in an offer for subscription of shares by an issuer 16. Right to be represented in an audit committee of the company 17. Right to seek remedy in the case of aggrieved shareholders.³⁹ SEC, in the 2007 Code for Shareholders Rights and Responsibilities further sets out basic principles developed to promote shareholder voting rights and to help enhance shareholder value in Nigeria. These principles are discussed below:⁴⁰ To start with, as explained above, there exists a distinct relationship between shareholders and directors. This relationship is distinguished from normal contractual relationships with contractual protection.⁴¹ Ordinarily, shareholders do not have contractual protection of their interests, but rather 'rely' on their elected board of directors and it is their responsibility to monitor and oversee the

conduct of this board. As agents of the company, each director represents all shareholders and shareholders are entitled to expect that each director is acting in the interest of all shareholders and not in the interest of any majority shareholder or dominant stakeholder. Shareholders should be able to develop and maintain effective communication with directors through formal means. The board in turn, is responsible for representing the interest of the shareholders and when the board of directors fail to fulfil this fundamental obligation, shareholders are entitled to challenge the board based on this.

Flowing from the above, it can be rightly said that there exists a stewardship relationship between the board and shareholders. This relationship is based in accountability of directors on their performance and conduct in the company and use of company's assets and resources, although the articles of association usually reserves powers to the board of directors in the fulfilment of their duties. The collective responsibility of enhancing effective corporate governance lies in the hands of the board and this would normally mean a form of balancing relationship between the board, shareholders and stakeholders of the company.

An important and fundamental measure of the stewardship role of the board lies in the company's annual financial statement, which is simply an account of the financial performance of the company and management of its assets. Statutorily, all directors of quoted companies are required to provide annual financial statements. ??2 It must be mentioned that the board and ??9 Remedy can be sought through the Investment and Securities Tribunal (IST) and the Administrative Proceedings Committee (APC) of the SEC. ??0 See SEC Shareholders Rights and Responsibilities supra at p.13-14 ??1 For instance, customer-supplier relationships. ??2 See Section 331 -334 of CAMA.

not the external auditors is responsible for ensuring that the financial statements give a 'true' and 'fair' view of the company's financial situation for the year in question. ??3 The board should therefore ensure that copies of the financial statements are sent to every shareholder and persons entitled to it.

Furthermore, there is the principle of one share to one vote with regards to shareholders. ??4 This would mean that every member shall be entitled to vote on proportion to their economic stake and each share of ordinary stock should have one vote. In like manner, shareholders should be able to vote by proxy in an independent and confidential manner; this is to protect them from any possible undue influence and control. It is worth mentioning, that, although shareholders are very well entitled to proxy votes as an important tool by which they can perform their role in the governance of the company, where institutional investors have been entrusted with the investment funds of others, it is appropriate that they become active shareholders and help enhance effective corporate governance in the company in the exercise of their rights. As stated by SEC, institutional investors should also ensure that the internal corporate governance practices of the company come to terms with the global standards of accountability, transparency and judicial responsibility. ??5 Also, SEC provides for the principle of simple majority which applies to mean that shareholders should have the right to approve matters brought before the meeting by a simple majority of the shares voted. The procedure for voting is provided for in Section 224 of the Act, and is generally made with a show of hands. ??6 The board is not ordinarily expected to impose super majority voting requirements unless this is done where there is a dominant shareholder in order to protect the interest of the minority shareholders. Voting should be made on each and every issue and done separately; the board is not to combine lump issues to be presented for shareholders' single vote. Also, approval of increase in the authorized number of shares shared should be brought before shareholders who are to ensure that such increases are made with their corporate interests in mind. 47 43 Section 335 of the Act. It is worth mentioning that financial statements and accounts were discussed in detail in the preceding chapter. ??4 See SEC supra at. P.11. ??5 See SEC supra at p.12. Institutional investors are financial intermedia-ries between lenders and borrowers charged with the role of acting as highly specialized investors on behalf of others. They include banks, insurance companies, pension funds and mutual funds. See <http://www.investopedia.com/terms/i/institutionalinvestor.asp> Last accessed 17.10.13. ??6 By Section 224 (2), unless a poll is demanded, upon declaration by the chairman that a resolution has, on a show of hands been carried unanimously, or by a particular majority shall be conclusive evidence of the face, without proof of the number or proportion of the votes recorded in favour of, or against the resolution. 47 See generally Section 224 of the Act.

V.

7 Shareholder Meetings

One avenue where shareholders can exercise their rights especially when acting as a group is in a meeting. Shareholders' meetings are generally classed as 'General Meetings' to which all shareholders have the right to attend and vote. ??8 CAMA identifies three types of meetings which are the Annual General Meetings (AGM) ??9 , the Extraordinary General Meeting (EGM) ??0 and the Class meeting (CM). ??1 It is important to note that only persons with requisite authority can convene a meeting, without which a meeting would be said to have been convened in error, and the notice issued for such meeting would be said to be invalid, while the resolution passed would be said to be null and void. ??2 The authorised persons that could convene a meeting include the board of directors, two or more shareholders with not less than 10 percent of the issued share capital of the company, shareholders with not less than 10 percent of the paid up share capital of the company and also any director in the case of an Extra Ordinary General Meeting upon requisition. ??3 By section 18 of the Act, the issuance of a notice is fundamental prior to the holding of any meeting and this is to be sent to all shareholders within 21 days from the date of the meeting. service of the notice can be done personally or by post to their

registered address. It is also paramount to state that for shareholders entitled to receive additional notice, it is the duty of the company to make sure that such notice is given to them and by Section 222 of the Act, additional notice must be given via 2 daily newspapers at least 21 days before any Section 213 of the Act. Section 213 (1) of the Act provides that the AGM must be held each year, in addition to any other meeting in that year within a company's first 18 months of incorporation, following which it must be held once a year, in not more than 15 months after the last AGM or not more than 6 months after the end of its financial year. The EGM's are specially convened meetings designed to discuss matters that are too urgent to wait till the next AGM. By Section 215 (2) of the Act, an EGM may be requisitioned by any shareholder(s) holding at the date of the requisition not less than one-tenth of the paid up capital of the company as at the date of the deposit carrying the right of voting, or in the case of a company not having a share capital, shareholders of the company representing not less than one-tenth of the total voting rights of all the shareholders having at the said date a right to vote at general meetings of the company. Class meetings refer to meetings held by holders of a particular class of shares, for example income shares, preference shares, etc and they are basically held with regard to the variation of rights that are attached to the class of shares. Failure to give notice of any meeting to any person entitled to receive it, invalidates such a meeting, unless such failure is based on an accidental omission. See generally Section 221 of the Act. See Section 215 of the CAMA. Registered address refers to any address which the shareholder has supplied for notice to be served to him. (Section 220 (5) of the Act). Where a notice is sent by post, by the provision of Sub Section 2 of the Section, this service is effected by properly addressing, preparing and posting the letter of service in the ordinary course of post, which is then deemed to have been effected after the expiration of 7 days.

The Nature of Shareholding in Nigeria: Evidence from the Banking Crisis general meeting. Section 18 of the Act also specifies the content of the notice which must include the name, type of meeting, place of meeting, date and time of the meeting, as well as an overview of the nature of business to be discussed in the meeting so as to enable the shareholders to decide whether or not to attend, and in the case where a special resolution is to be considered at the meeting, the terms of this resolution shall be set out in the notice. It is important to also state that attendance of annual general meeting is to be taken rather seriously by the shareholders as this responsibility creates an avenue for shareholders to exercise their rights. The responsibility of the shareholders to act as watchdogs over the directors and managers of the company as a means to safeguard their investments is exercised through attendance of meetings where questions can be raised.

It is also worth noting that the shareholders are to ensure that the necessary quorum of meetings is attained and appropriate resolutions are passed during the meeting. Section 233 of the Act distinguishes an ordinary resolution from a special one when it states that an ordinary resolution is one passed by a simple majority of votes cast by such members of the company that are being entitled to do so and who have voted either in person or by proxy at a general meeting. A special resolution on the other hand, is one that has been passed by not less than three-fourth of the votes cast by every member of the company entitled to do so, either in person or by proxy at a general meeting to which 21 days notice was adequately given, specifying the intention to propose the resolution as a special resolution.

Every meeting is to be presided over by a chairman who is to oversee the smooth conduct of the meeting. The chairman is to act in the bona fide Failure to give additional notice to such members that require it shall also invalidate the meeting as provided for in Section 221 above. The term 'special resolution' is defined subsequently in the course of the chapter. By Section 232 (1), unless otherwise provided in the Articles of Association, no business is to be transacted at any general meeting unless a quorum of members (i.e. shareholders) is present at the beginning of the meeting and throughout such meeting. Furthermore, the quorum of the meeting shall be one third of the total number of members of the company or 25 members, (whichever is less) present in person or by proxy (Subsection 2), and where there is a quorum at the beginning, but no quorum at the end due to any of the shareholders leaving for whatever reason, the meeting shall be adjourned for a week to the same place and time, and if there is no quorum still at the adjourned meeting, the members present then shall be the quorum and any decision made at the adjourned meeting shall bind other shareholders and where only one member was present, he may seek the direction of the court to take a decision. (S. 232(2)). See generally Section 240 of the Act. Where the chairman is not present within one hour of the meeting or where he is unwilling to act, the directors shall choose one of its members to act as chairman and in case where no director is present within one hour of the meeting or interest of the company, ensuring that the true intentions of the meeting are carried out with regards to all the issues raised before it. The chairman has the power to adjourn a meeting pursuant to Section 239 (1) of the Act. VI.

8 The Banking Crisis, Shareholders and the cbn

The global financial crisis in Nigeria which began in mid-2008 saw an adverse effect on all sectors of the economy, particularly the banking sector and Nigerian Capital Markets. Subsequently, there was an immediate deterioration in value of assets owned by banks which posed liquidity issues across the affected banks. This led the CBN to conduct special investigations on all the 24 banks in the country at the time. It was not surprising that the investigations of the CBN confirmed peculiar challenges in the capital base requirements of these banks, owing to fraudulent practices and bad corporate governance. The CBN also injected a total of N420 bn (\$2.8m) of government funds into the five banks for stabilisation and finally nationalised some of the

banks in 2011. The nationalisation saw the acquisition and birth of new banks while the CBN delisted the old banks from trading at the NSE. The result of this created panic and distress on the part of the shareholders as some of them merely woke up, only to realise that the banks have been acquired with new names of management and boards announced and as a result, many shareholders were left putting up their shares for sale. The NSE claimed that the CBN had not consult the Exchange at any point during the recapitalization and takeover. It also expressed concern on the fact that the decision of the CBN did not take into account neither of majority or minority shareholders' interests who were gravely affected by the sudden takeovers. Treats were being made by shareholders to sue the CBN for their action and also the NSE for not fighting to protect their interests, therefore making their shares worthless.

where none is willing to act, the shareholders are entitled to choose one of them to preside over the meeting as the chairman. Duties of the chairman also include: ensuring that proceedings are conducted in a regular manner as well as making sure that all issues brought before the meeting are promptly decided. See Section 240 (3) (a-e) of the Act. This is done with the consent of members present at the meeting which must also be in a quorum. See Subsection 1-4 of Section 239. Another major sector affected was the Oil and Gas sector. Details of the investigation have been explained in previous chapters. However, for the purpose of illustration, relevant aspects will be utilised to explore shareholders' activities as it affects the banks in question. Source: <http://www.thenigerianvoice.com/nvnews/57904/1/nationalised-banks-shareholders-to-sue-cbn-ndic-am.html>. last accessed 18.10.13. Source <http://www.thenigerianvoice.com/nvnews/57904/1/nationalised-banks-shareholders-to-sue-cbn-ndic-am.html> Last accessed 18.10.13.

Series of opinions were given in reaction to the issue. Notably, the MD of Resource Trust and Company Limited (RTC) explained that the NSE had failed in its fundamental duty of protecting investors, concluding that the NSE could, indeed be said to be complicit in the series of events that have led to the banks' abuses and problems that created the nationalisation of these banks.

The ultimate losers in the banking crisis were investors who lost significant amount of money at the NSE on a weekly basis. In one day, investors lost N141.96 billion as the total value of all the shares listed at the Exchange dropped from 7.203 trillion from N7.345 trillion to 7.203 trillion. Furthermore, the All Share Index dropped from 22,963.11 points to 22,519.32 points, a decline of nearly 1.93 per cent. The NSE Banking index also declined by 4.22 per cent; from 317.33 points to 303.93. This decrease was brought about by the massive decline in the share price of majority of the banks.

The question which then comes to mind is whether or not one or more of the shareholders could have been part of the activities that led to the banking crisis and problems in the NSE. Evidence published by the CBN reveals that companies and individuals owe the five banks a total of N348.409 billion. It is important to emphasize that many of these non performing loans were granted to companies, some of which were wholly or partly owned by the CEO's themselves and the rest by customers of the banks. There is no evidence on the list published by the CBN to suggest that individual shareholders were part of the debtors. It therefore suffices to say that majority of the non-performing loans were granted to customers and CEO's of the banks (In the name of their companies), who, by all indication would have been part of the ongoing control fraud.

What is also not surprising is that the CBN published list of debtors includes names of renowned dignitaries, top politicians and business men across the country. However, what is shocking is the revelation of two presidents of the Nigerian Stock Exchange as major debtors in these banks. First is Forbes rated richest man The RTC is a company that helps to provide support and advisory services to Market clients within various sectors of the economy. See <http://www.resourcesandtrust.com/services.html> last accessed 15.10.13. Figures of the 9 th of August 2011. Source: <http://www.thenigerianvoice.com/nvnews/57904/1/nationalised-banks-shareholders-to-sue-cbnndic-am.html> Last accessed 18.10.13. Source: CBN list of debtors available at: http://www.cenbank.org/Out_publications/pressRelease/GOV/2009/ADVERTORIAL2.pdf last accessed 15.10.13. See the CBN list of debtors supra. It is important to state that the CBN had identified most of these debtors as Shareholders and Directors of the companies by which they borrowed these monies and most of these companies were owned by CEO's and employees of the banks. Others were monies borrowed by customers.

in Nigeria and the then NSE president, Aliko Dangote who, according to the CBN has a non-performing loan of N2.5 billion with oceanic bank which was secured through Dangote Industries Limited; Second is Mr Oba Otudeko, an immediate past president of the NSE owes N1.6 billion to Oceanic bank through his company, Honeywell Group. Questions that would come to mind at this stage is: How come the shareholders did nothing to stop the fraud? One possible answer would be that they were probably ignorant of these frauds. As the banks showed no apparent sign of distress, publishing financial statements that suggested economic boom, it is possible that the shareholders were indeed unaware of the insider abuse. However, it remains to be said whether they their ignorance is due to their passive nature where they were unaware of their rights and responsibilities.

The revelation of the CBN upon its special examination of these banks triggered questions by the shareholders to the CBN, NSE, directors and management of these banks, demanding that due process be followed to ensure that the relevant persons are held accountable for their actions.

One case is that of Afribank, now known as Mainstream Bank Limited.

Upon the initial sacking of the CEO's of the five banks in 2009, a number of Afribank's shareholders, namely; Igbrude Oke, Rasak Mumuni, Akinsanya Sunday, Suleiman Babatunde and Igba Olatomide, in a bid to request

9 VII. SHAREHOLDER ACTIVISM IN NIGERIA

for the result of the special examination, had, on behalf of themselves and other shareholders of the bank 72 challenged the CBN's action at the Federal High Court in Lagos where the Trial Judge, Justice James Tosho, held in a ruling that the CBN did not have the absolute power to hire or fire bank directors without disclosing findings of the so called 'special examination' conducted into the financial statements of these banks and their affected directors. 73 The court further held that although the CBN had power to regulate and control the business activities of these banks under Section 35 of 74 the BOFIA, disclosure should and must be made when such powers would substantially affect interested parties as in this case. 75 However, an appeal was launched by the CBN and its governor contending the decision, with a motion for stay of proceedings pending the determination of the appeal. However, while the matter was still pending in the appeal court, the CBN, in collaboration with the Nigerian Deposits Insurance Commission (NDIC) and the Asset Management Corporation of Nigeria (AMCON) nationalised Afribank. 76 The shareholders then filed a motion to nullify the nationalisation, claiming that it was done pending an appeal and also in disrespect to the court and that the CBN had filed the motion for stay of proceedings in order to frustrate the diligent prosecution of the case.

The above scenario was further compounded when the CBN filed another suit at the Federal High Court in Lagos, winding up the bank. Justice Charles Archibong, in his decision, wound up Afribank on the ground that the bank had been delisted by the CBN and therefore had no licence to continue to operate. 77 Further efforts of the shareholders to challenge the decision have proved abortive till date.

From the above, it can be said that the shareholders of Afribank were ignorant of the insider abuse and control fraud in the bank and the revelations of the CBN triggered their demand for questions. However, these attempts of shareholders to demand for answers have been frustrated and while it can be rightly said that the CBN acted ultra vires its powers in sacking the CEO's without publishing the results of its special investigations, and subsequently winding up the bank, the judiciary is also to blame for turning a deaf ear to all the cries of the shareholders and ultimately carrying out a grave miscarriage of justice. The shareholders argued through their counsel, Mr Onyebuchi Aniakor, that the winding up order was made by Justice Archibong when the matter was stated for mention and not hearing. 78 Furthermore, upon the winding up petition brought by the CBN, the shareholders had made a preliminary objection to the petition, claiming that there was a pending suit before Justice Tosho of the same court and also arguing that the winding up petition is a calculated effort by the CBN to overreach the pending suit. What is surprising is that this preliminary objection was struck out by the court. A number of issues would arise, 79 See http://ngrguardiannews.com/index.php?option=com_content&view=article&id=51578:court-dismisses-sanusi-others-objection-toafribank-shareholders-suit&catid=1:national&Itemid=559 last accessed 12.10.13. 80 The nationalisation of Afribank was done with two other banks: BankPhB and Spring Bank which saw the birth of Mainstreet Bank, a newly formed bank. 81 questioning the independence of the judiciary and the power and manipulation exhibited by the CBN.

However, in the case of Oceanic Bank Plc, now known as Ecobank, the shareholders, in an Extra-Ordinary General Meeting held with Ecobank on 23 rd December 2011 approved the proposed resolution to merge both banks, transferring all assets, liabilities and undertakings of Oceanic bank, including real and intellectual property to Ecobank Nigeria. In consideration for the transfer of all assets, liabilities and undertakings of Oceanic Bank to Ecobank, the shareholders of Oceanic Bank are to receive a total of 16,111,111,111 billion new shares in Ecobank Nigeria, credited as fully paid-up; and N2, 600,000,000 to be credited to Oceanic Bank shareholders as deposit for shares in Ecobank Nigeria issued to Oceanic Bank shareholders as equity at N2.34 per Ecobank Nigeria share at a date to be mutually agreed by the shareholder of both banks. 82 Perhaps what is seen in the case of Oceanic bank is management agenda control where the incentives offered for the merger led to its approval. However, what is seen is a situation where the shareholders were given an opportunity to vote for or against the resolution at the EGM, as opposed to the imposition of a decision.

9 VII. Shareholder Activism in Nigeria

Corporate governance embodies the totality of systems by which companies are directed and controlled 79 and this involves promoting fairness, accountability and transparency within the organisation, the frictions that arise due to this are sometimes expressed through shareholder activism.

Following the banking crisis in Nigeria, coupled with the activities of CBN, CEO's and the threat of collapse of the Nigerian Stock Exchange, shareholders have been awakened to their rights and responsibilities in Nigeria. A number of shareholder associations have been developed by shareholders as avenues for exercising their rights as a group. These include Proactive Shareholder Association, the Nigerian Shareholders' Solidarity Association and the Independent Shareholders' Association of Nigeria.

Adegbite and Amao consider the extent to which a country's local shareholder activism is a reflection of its brand of politics. 80 They describe shareholder activism as a corporate governance accountability mechanism, whether at the managerial or board level. 81 Shareholder activism consists of a variety of activities through which shareholders influence the management 78 Source: <http://www.vanguardngr.com/2011/12/ecobank-oceanicshareholders-okay-merger/> Lass accessed 17.10.13. 82 This definition is generally attributed to Sir Adrian Cadbury. 83 Adegbite, E. And Amao, K. 'The Politics of Shareholder Activism in Nigeria' (2012) Journal of Business and Ethics 105: 389-402. 84 Adegbite, E. And Amao, K. supra at p. 391. and board. This can be in form of meetings, letter writing or associations as the case may be. 85 Gillian and Starks considers

a shareholder activist as an investor who, thorough his voice, endeavours to change situations of concern, while not necessarily resulting to change in the firms control. ??? There is no gainsaying that shareholder activism is peculiar to target firms and rationales for shareholder activism differ according to countries. However, contrary to the general view that shareholder activism is driven by the desire to maximize shareholders' wealth; there is evidence to suggest the need for responsible ownership as inclination to shareholder activism. ??? Having said that, it follows that shareholder activism in Nigeria has been influenced by the political culture of the country. Corruption has mainly been a drawback for Nigeria since Independence and seemed to have eaten deep into as spheres of the economy, including the corporate sector. Adegbite and Amao, in their survey of the politics of shareholder activism in Nigeria, also considered the link between politics and pursuit of corporate interests and found that companies bidding for government contracts are forced to play by the rule of politicians. ??? The success of any business is therefore dependent upon its level of political will and support. Going back to the case of Afribank's shareholders, the level of political and power influence utilised to frustrate shareholder activism is shocking. While shareholders are constantly demanding accountability and transparency of directors, management and regulatory bodies, their activities are constantly undermined even at the judiciary level where justice is meant to be done.

That notwithstanding, there is also a fundamental problem of misconception and misuse of shareholder activism by members to the extent that they are gradually being conceived as a threat to the organisations' day to day management. ??? This is based on the manner by which shareholder associations tend to comport themselves in the exercise of their rights, such as bullying and boycotting of AGMs. Commenting on this, Adegbite and Amao noted that some members of shareholder associations have expressed their ??? Adegbite and Amao supra at. P. 396. ??? Adegbite and Amao supra.

concern on the way some of their members conduct themselves through negative publicity arising from threats and disruptions of meetings. ??? Perhaps this action is triggered out of frustration and as a means of cry for help, but to whom?

10 VIII. conclusion

This paper examined the Nigeria's shareholding structure and investigates the activities of shareholders in the banking crisis. It can be said that although adequate legal provisions exists in the CAMA and SEC Code for Shareholders as to educate shareholders of their rights and responsibilities, it was not until the crisis that shareholders actually started exercising these rights. They can therefore be said to have been passive and more concerned with the financial turnovers of the company as opposed to activities of the board, thus, providing a perfect environment for control fraud.

Black identifies legal rules, conflicts of interests and manager agenda control as factors that can create shareholder passivity. ??? According to him, many institutional investors depend on the management and board for the business of the company; they therefore face conflicts of interests if they monitor corporate managers. Managers, on the other hand, mostly control shareholders' voting agenda especially on decisions that can have substantive outcomes. ??? Despite the legal rules in place emphasizing shareholders' voting rights and also prohibiting management agenda control, shareholder activism in Nigeria is still emerging and it can be said that under a more facilitating regulatory and judicial environment, associations might do much more.

In view of this, some shareholder associations have developed a list of problems encountered by shareholders which can be said to be contributory factor to the crisis experienced in the corporate economy.

Their findings were published by the House of Representatives Report of the Ad-hoc committee on the investigation into the near collapse of the Nigerian Capital Market, most of which are highlighted below: ??? -Manipulation of the market using delisted companies -Regulatory failure of the financial sector regulators - Sensitive banking reforms -Investors' ignorance -Lack of co-ordinated relationship between shareholders and the SEC ??? Adegbite and Amao supra. ??? The Committee, while evaluating the above issues raised by the associations, noted that ignorance of the investors provided a vacuum for the board of directors, managers and regulators to effect a sustained control fraud. Corruption and incompetence remains apparent in the financial system and capital markets with the government a mere observer. 91 Although, it can be said that effective shareholder activism can promote effective corporate governance, in Nigeria, while shareholder activism tends to be emerging and should be encouraged, the level of corruption and power influence exhibited during the banking crisis suggests a more institutionalised problem in the country.

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¹This will be analysed subsequently in detail.²Fama, E.F., Jensen, M.C. 1983. "Separation of ownership and control", Journal of Law and Economics, 26, 301-25.

²Residual risk bearing is otherwise known as 'Ownership', while decision management refers to 'control'. See Fama and Jensen supra at p. 322-323.

³Boniface Ahunwan 'Corporate Governance in Nigeria 2002 journal of Business Ethics 37: 269-287. 28 Ss 4, 5, and 6 of the NEPD.

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Figure 1: 38 8 .

[Note: 15 Supra at p.310.]

Figure 2:

However, today there are 260 Securities listed on the Exchange, made up of 10 Government Stocks, 55 Industrial Loan (Debenture/Preference) Stocks and 195 Equity / Ordinary Shares of Companies, all with a total market capitalization of N875.2 billion. 25 Most of the listed Companies in Nigeria have foreign affiliations and cuts across various sections of the economy ranging from Agriculture to manufacturing and services. The largest Plc listed on the exchange, Dangote Cement has an asset value of \$2.1 Billion and a Market value of \$12.5 Billion. Being the richest company in Nigeria, it ranks 1434 position in the list of the World's Biggest Public Companies. 26

20 The 2009 estimates revealed that the country's total population is in excess of 154 million,

[Note: 23 NSE Website supra.24 Elewechi N. M. Okike, *Corporate Governance in Nigeria: the status quo*, 2007 Volume 15 Number 2 March p.173 -193. 25 Figures as at 2003. Source: *The Nigerian Stock Exchange* available at: http://www.nigerianstockexchange.com/quoted_companies.jsp Last Accessed 06-08-2011. 26 See http://www.forbes.com/global2000/#p_144_s_acompanyRank Overall_All_All_All Last accessed 06.08.2011.]

Figure 3:

Figure 4:

[Note: 77 See Vanguard News, 16 th July 2012 supra.]

Figure 5:

[Note: 89 Black, supra.90 See the Report of the Ad-hoc committee on the investigation into the near collapse of the Nigerian Capital Market. P.11-14 Available at: www.proshare.com Last accessed 18.10.13.]

Figure 6:

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