IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2012

CORAM: ADINYIRA, (MRS) JSC (PRESIDING)
OWUSU, (MS) JSC
DOTSE, JSC
YEBOAH, JSC
BONNIE, JSC

CIVIL APPEAL.
No. J4/40/2011

18TH APRIL,2012

P.S. INVESTMENT LIMITED - PLAINTIFF/APPELLANT

APPELLANT

VRS

1. **CENTRAL REGIONAL DEVELOPMENT CORPORATION**
2. **UNILEVER GHANA LIMITED**
3. **THE ATTORNEY GENERAL OF THE REPUBLIC OF GHANA**
4. **DIVESTITURE IMPLEMENTATION COMMITTEE**
5. **IBRAHIM ADAMS**
6. **OSAM DUODO**
7. **G.D. APATU**
8. **S.A DUAH**
9. **P.M. BOYCE**
10. **NELSON KYEI**
11. **I.K. YEBOAH**
12. **DR. T.E.O YEBOAH**
13. **FRANK BAKU - DEFENDANTS/RESPONDENTS**
14. **TWIFO OIL PALM PLANTATION RESPONDENTS**

LTD.

J U D G M E N T

DOTSE JSC:

In view of the peculiar facts and circumstances of this appeal, we deem it expedient to state in some detail, the facts of the case as we deem it relevant and applicable to the issues germane to the resolution of the appeal herein.

The Plaintiff/Appellant/Appellant, hereafter referred to as Plaintiff is a shareholder in Twifo Oil Palm Plantation Limited (TOPP) a company incorporated under the laws of Ghana and engaged in the cultivation of oil palm at the TOPP who are themselves the 14th Defendants/Respondents/Respondents and together with the other Defendants are hereafter referred to simply as 1st – 14th Defendants as appearing above.

In order to understand the dynamics of the shareholding structure of the 14th Defendant, it is proper to set out in detail the said shareholding structure as provided in the record:

i.	Central Regional Development Corporation (CEREDEC) – (1st Defendant)	-	80.46%
ii.	State Insurance Company (SIC)	-	2.21%
iii.	Paterson Zochonis PLC	-	1.47%
iv.	National Investment Bank	-	0.33%
v.	PS Investments Limited	-	15.53%
vi.	Mobil Oil Ghana Limited	-	0.33%

The fifth, seventh, eighth, ninth, tenth, eleventh and twelfth defendants were at all material times directors of TOPP. The thirteenth defendant reputedly held himself out as a director.

It is to be noted that the shareholders of TOPP are required by the Regulations of TOPP to appoint directors to represent their interest on the board.

At various times, Unilever Ghana Limited (Unilever), the second defendants herein showed interest in the acquisition of shares in TOPP. Unilever discussed the possibility of acquiring the shares of Paterson Simons & Co (African) Ltd. the predecessor of the plaintiff but no deal was concluded. Unilever also attempted to acquire the shares of SIC without success. When Unilever again failed to acquire the shares of Mobil Oil Ghana Limited (Mobil), through its subsidiary GBO Invesments Ghana Limited (GBO) because the Board considered Mobil's offer contrary to Regulation 32 (a) of the Regulations of TOPP, an action was brought by GBO in the High Court, Accra against TOPP and Mobil.

Whilst GBO's action against TOPP and Mobil was still pending, the Chairman of the Board of Directors (Board) of TOPP instructed the Company Secretary of TOPP to write to the shareholders of TOPP about the "Government of Ghana shares" in TOPP. The Board Secretary wrote exhibit '7' dated 29/10/1997 to individual directors of TOPP representing the interest of shareholders of TOPP except CEREDEC.

For ease of reference the relevant part of exhibit '7' is reproduced below:

"Mr. E.R.M. LYNE	-	PS Investment Ltd.
Mr. S. A Dua	-	State Insurance Corporation
Mr. P.M. Boyce	-	Paterson Zochonis (PZ) Ltd.

Dear Sir,

RE: SALE OF GOVERNMENT SHARES IN TOPP

As directed by the Board Chairman (reference Hon. Ibrahim Adam's letter TOPP/BC/97/01 dated 23/10/97, copy attached) interested Shareholders are advised

to submit their offer for Government shares of 643,652,204 in TOPP or proportion thereof in accordance with Clause 32(a) of the Company's Regulations.

The offer should be addressed to the Board Chairman, Twifo Oil Palm Plantations Ltd. for the Attention of the Company Secretary and received by November 30, 1997.

Thank you:
Yours faithfully
Twifo Oil Palm Plantations Ltd
Signed by: (Dr. B. OMANE-ANTWI)
COMPANY SECRETARY

Cc: All Directors, TOPP Ltd.
The Executive Secretary
Divestiture Implementation Committee
Accra

The Hon. Minister
Ministry of Finance
Accra

Upon receipt of Exhibit '7' the plaintiff wrote Exhibit 'E' in response and we quote the relevant part below:

Monday, December 15, 1997

The Executive Secretary
Divestiture Implementation Committee
F35/5 Ring Road East (North Labone)
P. O. Box C 102
Cantonments
Accra

Dear Sir,

RE: SALE OF GOVERNMENT SHARES IN TOPP

I refer to your letter with reference DIC/053/010 of November the 27th 1997, which was went to me by the Company Secretary of TOPP Ltd. Under cover of TOPP letter dated the 28th Novemeber 1997 and referenced TOPP/CS/97/02, in respect of the above.

I wish to inform you that in accordance with the provisions of the Regulations of TOPP Ltd. regarding "Transfer and Transmission of Shares" **my company PS Investment Ltd. may exercise its rights as and when required.**

Thank you,
Yours faithfully
Signed by Edward Lyne

SIC also wrote Exhibit "D" dated 17/11/1997 in response and its reads as follows:-

The Board Chairman
Twifo Oil Palm Plantation Ltd.
P. O. Box 138
Cape Coast

Attention: Company Secretary

Dear Sir,

RE: SALE OF GOVERNMENT SHARES IN TOPP

We acknowledged, with thanks, receipt of your letter referenced TOPP/CS/97/1 dated 29th October 1997 in the above regard.

The Management of SIC hereby indicates its interest in acquiring a proportionate part of the Government's shares of 643,652,204 in TOPP.

It will therefore be appreciated if you can kindly communicate to us the offer price as soon as same has been fixed.

We look forward to hearing from you at your earliest convenience.

Thank you.

Yours faithfully,
For: SIC

Signed by W.A.K. FIADZIGBEY
Director, Legal Services

Cc:

Mr. E.R.M. Lyne	-	PS Investments Ltd.
Mr. S. A. Duah	-	State Insurance Corporation
Mr. P.M. Boyce	-	Paterson Zochonis (PZ) Ltd.
Mr. Nelson Kyei	-	National Investment Bank

The Executive Secretary
Divestiture Implementation Committee
Accra

The Hon. Minster
Ministry of Finance
Accra"

It is also recorded in the minutes of the 97th TOPP Board meeting held on March 4th, 1998 (Exhibit 1) as follows:

iii. That Company Secretary was initially asked to invite existing shareholders to bid with a closing date of November 30, 1997. The said closing date was further extended by DIC to December 15, 1997.

iv. That bids were opened on December 30, 1997 with the Company Secretary in attendance.

v. That offers received were

a. Unilever Ghana Limited offered US$7.2 million (Seven Million Two Thousand US Dollars) for 40% equity share holding in TOPP.

b. Siat offered US$3 million (Three million US Dollars) for 40% equity share holding in TOPP.

c. P.S Investment Ltd. advised in a letter that they would make an offer at the appropriate time.

iv. That after evaluation of the Bids, Unilever was ranked first and its offer recommended to the President of the Republic for approval.

v. That the President duly approved the offer of Unilever as advised in a letter before members.

vi. That in accordance with the regulations of the Company, there was the need to ratify the approval of the partial sale of GOG Shares to Unilever Ghana Limited.

The nominee of the plaintiff on the Board of TOPP protested that the procedure used by DIC was contrary to Regulations 32 (a) of the Regulations of TOPP.

By a letter dated March 20th 1998 addressed to the Board Chairman of TOPP and referred to in the minutes of the 99th Emergency Board meeting of TOPP (exhibit 4) Divestiture Implementation Committee (DIC) requested TOPP to issue a share certificate to "Unilever as a matter of urgency". At page 5 of exhibit 4 it is recorded that:

2.03.3 Members indicated strongly:

i. That it would not be in the interest of the Board to issue the share certificate now in the face of mounting reservations and legal issues

At the 100th Board meeting of TOPP held on April 2nd 1998 (exhibit B) the Board purported to have approved "the sale of 40% of capital in TOPP out of the 80.46% shares held by the Government to Unilever" and authorised the transfer of shares to Unilever all with retrospective effect from 4th March 1998. **The protest of the plaintiff's nominees on the Board was ignored because as advised by the Chairman of the meeting, the members representing the Government's interest on the board would not go against the position of the Government.**

The Chairman then advised ***"that P.S. Investments Limited had the right to seek any legal redress if found necessary under the laws of the Republic of Ghana in Court".***

The plaintiff therefore caused the present action to be instituted in accordance with the provisions of the Companies Act, 1963 Act 179 for and on behalf of itself and on behalf of all shareholders of TOPP except CEREDEC. The action is against CEREDEC, Unilever, DIC, The Attorney General and all the directors of TOPP except Mr. John Amakye, the plaintiff's nominee at the time.

The above constitute the board room wranglings that led the plaintiffs to institute this action in the High Court claiming as per their amended writ of summons the following reliefs:-

1. A declaration that the purported sale of the shares of the Central Regional Development Corporation (CEREDEC) in Twifo Oil Palm Plantations Limited (TOPP) amounts to a variation of the plaintiff's rights without its consent.

2. A declaration that the purported sale of the shares of Central Regional Development Corporation (CEREDEC) in Twifo Oil Palm Plantations Limited (TOPP) is contrary to law and inconsistent with the regulations of the TOPP.

3. A declaration that the board resolutions of TOPP purported to have been passed on April 22, 1998 (100th emergency board meeting) approving the sale of 50% of the shares of Central Regional Development Corporation (CEREDEC) in TOPP are void and inconsequential.

4. An order setting aside the purported sale of the shares of CEREDEC in TOPP to Unilever Ghana Limited.

5. An order cancelling the share certificate issued by TOPP to Unilever Ghana Limited.

6. A declaration that the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth defendants who are members of the board of directors of TOPP acted in bad faith by approving of the sale and transfer of the shares in CEREDEC and are also in breach of their duties as directors.

7. A declaration that the Divestiture Implementation Committee had no capacity to sell or transfer the shares of CEREDEC.

8. Perpetual injunction restraining Unilever Ghana Limited from holding itself out as shareholder of the Twifo Oil Palm Plantations Limited (TOPP).

9. A declaration that Unilever Ghana Limited is not a member/shareholder of Twifo Oil Palm Plantation Limited and that the shareholders existing at the time of the purported sale of the shares of CEREDEC in TOPP to Unilever Ghana Limited have equitable interest in the said shares of CEREDEC in

TOPP purportedly sold to Unilever Ghana Limited and in priority to the interest of Unilever Ghana Ltd.

10. An order directing CEREDEC to offer in accordance with the Regulations of TOPP, 40% of the shares held in TOPP prior to the purported sale by DIC to Unilever Ghana Limited, to the shareholders of TOPP existing at the time of the purported sale in the proportion in which such shareholders held shares and at the same price at which the said shares were purportedly sold to Unilever Ghana Limited."

At the trial, the Plaintiff's representative gave evidence and thereafter the plaintiff's called two witnesses and tendered several documents which we will be referring to in this judgment.

The 2nd Defendant testified through its then Chairman, Mr. Ishmael Yamson. The 5th to the 13th Defendants who were at all times Directors of TOPP never attended court and thus did not give any evidence during the trial.

The 4th Defendants, Divestiture Implementation Committee was also represented by Mrs. Yaa Jakobo.

The learned trial Judge, in his judgment dated 21st June 2007 dismissed all the reliefs of the plaintiffs and summarised his reasons for so holding in the following terms:

"From the nature of plaintiff's claim as could be gathered from the reliefs sought, plaintiff is calling for the setting aside of the sale and transfer of the 40% CEREDEC shares to Unilever because there were irregularities in the sale which made it impossible for it to exercise its pre-emptive rights. ***Since it is an action to seek redress on the abuse of its alleged rights, it could***

be said that the action falls within the exception to the FOSS V HARBOTTLE rule and for that matter plaintiff did not falter in coming to Court.

The question however is; can plaintiff succeed in this action?

Plaintiff mentioned two main irregularities. One of the alleged irregularities was that it was not CEREDEC that offered the shares for sale but an agent of the Government (i.e. DIC) when the shares did not belong to Government. That was the reason why plaintiff said it refused to partake in the sale, which it considered irregular.

The second was that the purported sale offended the Code and the Regulations of TOPP because the shares were not offered to the existing shareholders as was provided in the Regulations.

The leaned trial Judge after recounting the reliefs which plaintiff's claimed before the court continued as follows:-

> *"In the view of this court, plaintiff cannot succeed in any of the reliefs sought. By plaintiff's own admission, the sale to Unilever of the shares of CEREDEC did not amount to a variation of his rights. Again, the evidence before the court does not suggest in any way that plaintiff was prevented from exercising its pre-emptive rights. Plaintiff was giving (sic) every opportunity to either acquire any or all the shares CEREDEC was selling through a procedure plaintiff and other minority shareholders suggested but it failed to exercise that right when given the option."*

The learned trial Judge then proceeded to analyse why in his view the plaintiffs, as minority shareholders should be deemed as having endorsed the bidding process for the transfer of the 1st Defendant's shares, continued the judgment in the following terms:-

> *"Quite apart from the fact that plaintiff is stopped from complaining about a procedure it contributed in introducing in the divestiture of the shares in question to Unilever, and plaintiff himself having admitted during cross examination that the irregular procedure he was complaining of is capable of being ratified by a Special resolution of TOPP in a general meeting and that the vote of CEREDEC alone could pass that Special resolution, there is no need for this court to interfere in what the Company has done as after all, it could do it afterwards."*

To use the words of ***Mellish L.J. in McDoughall v Gardiner (1875) I CHD 13 @ P. 25*** *(quoted by counsel for the 2nd defendant in his written address):*

> ***"If something has been done irregularly which the majority are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use having litigation about it, the ultimate end of which is that a meeting is called and the majority gets its wishes."***

Plaintiff's action therefore failed from the onset and I do not hesitate in dismissing it. It is accordingly dismissed.

Plaintiff to pay costs of ¢5 million to each of the defendants."

An appeal against the said judgment of the High Court was also dismissed by the Court of Appeal per its judgment dated 23rd March, 2010. The instant appeal is

therefore one against this Court of Appeal judgment in which the plaintiff has filed the following as the grounds of appeal.

1. By various erroneous pronouncements, the learned Justices of Appeal misdirected themselves in several respects on the relevant and applicable laws including those regarding the institution of representative action with the result that the appellant's appeal was erroneously and unjustly dismissed.

2. Like the trial judge, the learned Justices of Appeal allowed themselves to be misled by a misquoted statement attributed to Mellish L.J. in the case of McDougal v Gardiner (1875-76) L.R. I ch. D. 13 to erroneously and unjustly dismiss the appellant's appeal.

3. The learned Justices of Appeal erred in law not only in holding that the controversy between the parties had been captured by grounds (1) and (2) of the original grounds of appeal but also in failing to judicially and adequately consider ground (1) and completely ignoring ground (2) of the original grounds of appeal.

4. The holding that the plaintiff/appellant was a signatory to exhibit 5, was factually and legally in error and resulted in substantial miscarriage of justice.

5. The learned Justices of Appeal erred in law and on the facts in holding that the learned trial judge went through the issues set down for trial with a fine tooth-comb and based upon the admissions of the appellant the learned trial judge came to the conclusion that he did.

6. The pronouncement that "we shall not bother with the additional grounds of appeal which were adequately analysed by the learned trial judge and pronounced upon", was in error both in law and on the facts and resulted in a substantial miscarriage of justice.

7. It was an error of law and a miscarriage of justice for the learned Justices of Appeal to have endorsed the conclusions of the trial judge which were largely wrong and sometimes contradictory.

8. The learned Justices of Appeal also erred in law and on the facts in grounding the dismissal of the appellant's appeal on the conclusions of the trial judge which has been challenged separately and sufficiently debunked by the additional grounds of appeal which they did not bother to consider.

9. Additional grounds to be filed on receipt of the record of proceedings.

ADDITIONAL GROUND

On the 14th of March 2011 the appellant filed the additional ground of "The Judgment is against the weight of evidence and was granted leave to argue same on 24th May 2011.

We have perused and analysed the entire appeal record in this case. We have also equally digested the statements of case filed for and on behalf of the plaintiffs, the 2nd and 3rd Defendants.

We have also critically analysed the judgments of the learned trial Judge and of our learned brethren and sister of the Court of Appeal.

In our opinion, the following issues standout from the grounds of appeal and from the statements of case filed by the parties as the issues raised in this appeal.

1.(a) To what extent is Regulation 32 (a) of TOPP relevant and crucial to the determination of this appeal

(b) Flowing from this issue is whether exhibit 7 constitutes a valid offer for purchase of shares that was made to the plaintiff's as shareholders.

2. To what extent does the Companies Act, 1963, Act 179 retain the rule in **Foss V Harbottle**.

3. Whether the plaintiffs as shareholders can be deemed to have waived their pre-emptive rights under the Regulation 32 (a) of TOPP and were thus stopped from claiming under those rights.

4. Whether or not the 2nd Defendant's (Unilever) are shareholders and members of TOPP.

5. Whether the defendants Directors on TOPP Board breached their fiduciary duties to the company.

What appears to be fundamental to an understanding of the rule in the celebrated case of **Foss v Harbottle (1843) 2 Hare, 461** which has been referred to by all the learned Counsel in this case is first and foremost the Regulation 32 (a) of the 14th Defendant, Company TOPP.

This Regulation 32 (a) of TOPP states as follows:

> *"No member shall have the right to transfer all or any of his shares in the company, unless same shall first have been offered to all the existing shareholders of the shares of the class or classes being transferred in proportion as nearly as may be to their existing holdings."*

What this means is that, before any shareholder of TOPP can have the right to transfer any of his shares to a third party, by which we mean a non-share holder of TOPP, that shareholder must first offer the said shares to his co-shareholders, or to the class or classes of the shares that are being offered.

Is there any evidence of any such offer to the other shareholder? There is no clear evidence of this on record. It does therefore mean that, in purporting to unravel the

legality of the transfer of the 1st Defendant's 50% shares in TOPP to the 2nd Defendant, the commencement point should be this Regulation 32 (a) of TOPP.

The plaintiff averred in paragraphs 11, 15, 16 and 17 of the Statement of Claim as follows:-

11. "On or about October 29 1997 the Secretary to the Board of Directors of TOPP without authority and in contravention of the Companies Code 1963, Act 179 and the regulations of TOPP requested shareholders to TOPP to submit bids for the Government of Ghana shares in TOPP.

15. The Shareholders of TOPP have pre-emptive rights under the Regulations of TOPP with respect to the transfer of shares and new issue of shares.

16. The Plaintiff says that not only were the bids and invitations contrary to the Companies Code 1963, Act 179 and the regulations of the company, but also they were irregular.

17. The plaintiff says further that contrary to the Regulations of TOPP and the Companies Code 1963, Act 179 CEREDEC never offered its shares to the existing shareholder in the proportions in which the shares were then held or at all"

Besides, Part B, of the Companies Act, 1963 Act 179 which comprises sections 16 – 23 deals with what constitutes the contents of Regulations of a Company, the Form of the Regulations, how to subscribe to these Regulations, Regulations of existing companies, Effect of these Regulations etc.

No wonder, Taylor J, as he then was, held in his characteristic strong and convincing fashion in the case of **Luguterah v Northern Engineering Co. Ltd. & Others [1978] GLR 477 H.C** *(more of this case later)* that a breach of regulations can

hardly be categorized under mere irregularities. Section 21 (1) of Act 179 states that the Regulations

> *"shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the Regulations, as altered from time to time, in so far as they relate to the company, members, or officers as such."*

It therefore appears clear to us that Regulation 32(a) of TOPP must be thoroughly scrutinized alongside the rule in Foss v Harbottle in order to gain a real understanding of whether the plaintiff can succeed on the reliefs he claims from the court.

It is interesting to observe that, the learned trial Judge after referring to Regulation 32 (a) of TOPP in his judgment, made the following logical deductions:-

> *This section has two imports. The first import is that before any member could transfer any of his shares in the company TOPP, he should first have offered the said shares to all the existing shareholders.*
>
> *The second import is that if the shares to be divested are of special class or class shares then the member selling them should first have offered them to all the holders of the shares of the class or classes being transferred in proportion as nearly as may be to their existing holdings. After stating correctly what regulation 32 (a) constitutes concluded the matter thus:-*
>
> > *"what this section contemplates is what is known in law as a contract of first refusal or pre-emption."*

The above observations by the learned trial Judge were approved by the Court of Appeal when they also stated as follows:

> *"From the foregoing, the inference drawn is the alleged breach of TOPP's Regulations and the fact that the proper plaintiff in this action should have been TOPP. Also the shares, the subject matter of this suit, if at all they were to be offered for sale, should have been offered in the proportions in which the existing shareholders held their shares."*

The learned Judges of the Court of Appeal however like their brother in the trial court were of the view that, being a "derivative action" the right of commencement which belongs only to the company in that the beneficiary of the action is TOPP, citing the rule in **Foss v Harbottle**.

What then is the rule, with its exceptions in **Foss v Harbottle** vis-à-vis our Companies Act, 1963 Act 179?

The rule in **Foss v. Harbotle** or majority rule is one of the common law company law principles which have partly been incorporated into our Companies Code, 1963 (Act 179). By section 7 of the Companies Code, this rule as a common law principles is as co continued in operation in Ghana, except where it is inconsistent with the provisions of Act 179.

In **Foss v. Harbotle,** *supra*, two shareholders of an English company sued the directors of the company. They claimed these directors had fraudulently profited and colluded with others to profit at the company's expense. They also alleged that the directors had raised money in an unauthorised manner, contrary to the company's regulations. It was argued by the directors that the plaintiffs lacked capacity to institute the action because the injury complained of was an injury to the company

at large and not an injury to the plaintiffs. Sir James Wingram famously held at 490 as follows:-

> "It could not successfully be argued that it was a matter of course *for any individual member of a corporation to assume to themselves the right of suing in the name of the corporation. In law, the corporation and the aggregate of the members of the corporation are not the same thing for a purpose like this.*" (e.s.)

This ruling paved the way for other decisions which sought to limit minority protection in company law. Thus in **MacDougall v. Gardiner (1875) 1 Ch. D 13 –** which both the plaintiff and the defendant have discussed in their submissions – Mellish LJ, relying on *Foss v. Harbotle*, *supra* held:

> "In our opinion, *if the thing complained of is a thing which in substance the majority of the company are entitled to do, if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of a company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.* Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the minority in substance shall be entitled to have their will followed? If it is matter of that nature, *it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly;* and that, as I understand it, is what has been decided by the cases of Mozeley v. Alston (1847) 41 ER 833 and Foss v. Harbotle." (e.s.)

Consequently, the rule has come to be applied on two grounds:

1. Flowing from the separate personality doctrine in **Salomon v. Salomon [1897] A.C. 22**, supra, **if a wrong is done to a company, it is only the company and not its members who can bring an action to remedy the alleged wrong. This has also been called the proper plaintiff rule.**

2. **If the wrong complained of is one that the majority can easily remedy by merely passing an ordinary resolution, the court would not interfere to force them to do something against their wishes.** This has also been called the majority rule

Hardly any rule is established without exceptions. Thus with time, the courts laid down exceptions to the application of the rule. The courts will not apply the rule where there is an irregularity in the passing of a resolution which requires a specified majority, see **Edwards v. Halliwell (1950) 2 All ER 1064, or where the wrong complained of is an act ultra vires** the company, see **Prudential Assurance v. Newman (1982) Ch. 204** or where a fraud has been committed on the minority, see **Estamanco v. Greater London Council (1982) 1 All ER 437 and Menier v. Hooper's Telegraph (1874) 9 Ch App 350**. The rule will not be applied where the wrong complained of infringes the personal rights of members, see **Heron International v. Lord Grade (1983) B.C.L.C. 244**

In Ghana, the rule in *Foss v. Harbotle* has been applied in a number of cases. In **Kwan v. Nyieni (1959) GLR 67 CA**, even though the matter was not related to company the court held that in a suit for recovery of family land as a general rule the

head of a family, as representative of the family, is the proper person to institute a suit for recovery of family land. In **Appenteng v. Bank of West Africa (1972) 1 GLR 153, CA**, the court upheld the proper plaintiff rule. Holding (1) of the headnote to the decision reads:

> "(1) as a general rule, *a shareholder cannot sue for a wrong done to a company or to recover money as damages to it, unless the action is taken by the company itself.* The second respondent could therefore not bring an action of negligence against the appellants for the alleged negligent advice given to the company. In any case she was estopped from bringing this action as a similar unsuccessful suit had been brought against the appellants by other shareholders of the same company in respect of the same subject-matter of which the second respondent was aware but did nothing. That action had not been appealed against. Foss v. Harbottle (1843) 2 Hare 461 and Appenteng v. Bank of West Africa Ltd. [1961] G.L.R. 196 applied." (e.s.)

In ***Pinamang v. Abrokwa*** **(1992) 2 GLR 384, CA**, at 388, the court upheld the majority rule in the following words:

> " *… the courts have held that the rule in Foss v. Harbottle (1843) 67 E.R. 189 must be observed by the trial court and it must not inquire into matters of internal management or, at the instance of a shareholder, interfere with transactions which though prima facie irregular and detrimental to the company, are capable of being rectified by an ordinary resolution of the company in a general meeting*. It will be shown in due course that the learned *trial judge fell into the error of inquiring into matters of internal management such as, for*

instance, as the complaint by one of the applicants that he has been demoted and that his post had been downgraded." (e.s.).

See also **Kludjeson International v. Celltell Ltd, HC** (unreported) Suit No FT(IV) 12/2001, delivered on 27th April, 2005 and *Boohene v. Ghana Union Assurance* (unreported) Suit No. ACC 7/2005, delivered on 18th January, 2006.

The Companies' Code, Act 179 contains several relevant provisions, as far as the rule in *Foss v. Harbotle* is concerned. Section 24 of the Act states, inter alia, that a company shall have all the powers of a natural person of full capacity, in furtherance of its objects and powers. Section 137(3) provides that the institution of proceedings in the name of the company can only be done by the Board of Directors of the company. Section 137(5) also permits members to bring an action in the name of the company only if the Board of Directors have neglected or refused to do, but as members acting together in a general meeting.

It would appear from the provisions above (alone) that Act 179 has given statutory blessing to the *Foss v. Harbotle* rule. **But when read with other provisions, it could be said that Act 179 has significantly chipped away the relevance of the rule in *Foss v. Harbotle* in Ghanaian corporate governance. Section 21 (3)** provides that:

> *"(3) In any action by any member or officer to enforce any obligation owed under the Regulations to him and any other member or officer, such member or officer shall, if any other member or officer is affected by the alleged breach of such obligation, sue in a representative capacity on behalf of himself and all*

other members or officers who may be affected other than any who are defendants and the provisions of section 324 of this Code shall apply."

Section 25(4) further provides that, on application by a member the Court may prohibit, by injunction, the doing of an act or the conveyance or transfer of any property which is ultra vires the company. In relation to directors' see section sections 210(1) and 210 (5), **when read together, have the effect of clothing a shareholder with capacity to institute actions for breach of directors' duties, even if that breach resulted in damage to the company alone**.

Section 217 (1) provides thus:

"(1) The Court on the application of any member may by injunction restrain the company from doing any act or entering into any transaction which is illegal or beyond the power or capacity of the company or ***which infringes any provision of its Regulations****, or from acting on any resolution not properly passed in accordance with this Code and the company's Regulations, and may declare any such act, transaction or resolution already done, entered into, or passed to be void and of no effect …" emphasis supplied.*

Section 218 provides a remedy for the minority, where oppressive conduct is alleged. This remedy extends even to debenture holders. It provides, inter alia, that a member may apply to the Court for an order on the ground that "the affairs of the company are being conducted or the powers of the directors are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders or in disregard of his or their proper interests as members, shareholders, officers, or debenture holders of the company".

The overall effect of these statutory provisions is that the proper plaintiff leg of the rule has been whittled away significantly. A member is allowed to bring an action where it is alleged that the member's right has been violated. The Act even allows members to bring representative actions. Section 324 of Act 179 provides the procedure with which members must comply. Be that as it may, on the basis of decisions like ***Appenteng v. Bank of West Africa*** *and* ***Pinamang v. Abrokwa*****,** *supra*, the courts will still uphold the majority rule, upon a finding that the irregularity or act complained of is one that can be remedied or regularized by an ordinary resolution.

In the circumstances of this case, the question to ask is whether the plaintiff's case is one that can be saved by the modifications of Act 179 or whether on the basis of the cases cited *supra*, this court should choose not to interfere with the internal mechanisms of TOPP. On page 33 of the plaintiffs submissions, the plaintiffs argued that there are three facets to the plaintiff's claim; a personal right under section 21, regarding breach of the regulations by members and officers, a personal claim for declarations, injunctions under 217 and a claim for enforcement of director's duties under section 210. Therefore it was incorrect to say that all these facets derive from the right of the company as the Court of Appeal suggested. The plaintiff further argued that the Court of Appeal erred when it held as follows:

> *"According to the Appellant as per paragraph 15 of its statement of claim, the shareholders of TOPP have pre-emptive rights pursuant to TOPP's regulations with regard to transfer of shares. The appellant avers further in paragraph 17 of the said statement of claim that contrary to TOPP's Regulations, CEREDEC never offered its shares to the existing shareholders of TOPP in the proportion*

in which the shares were held at all. We agree with counsel for the 2nd Defendant/Respondent's submission that based upon this pleading, the Appellant admitted that all it is entitled to by this suit is a percentage of the shares of CEREDEC equal to the proportion of shares it held in TOPP."

It is our considered view that the plaintiff does not in any way lack capacity to bring this action and is entitled, if successful, to its reliefs. The case of *Luguterah v. Northern Engineering Co Ltd & Others* already referred to is instructive. The facts, as stated in the headnote reads thus:

"The Northern Engineering Co., Ltd., hereafter called the company, was incorporated under the Companies Code, 1963 (Act 179), in 1972 with 10,000 subscribed shares, all of which were allotted to its four subscribers—each holding 25 per centum of the shares. On 15 June 1977, the applicant, a director and one of the four shareholders, received by post, a letter dated 7 June and signed by the secretary of the company summoning him to attend an extraordinary general meeting of the company scheduled to take place at the company's premises on 11 June. The only member of the four members of the company who attended the meeting was the sixth respondent, the acting managing director of the company, a holder of only 25 per centum of the shares. The meeting was also attended by all the eight other respondents except the seventh respondent. However all the eight respondents had, before that meeting, paid to the company, various sums of money totalling ¢6,000 as consideration for shares in the company but none of them had his name entered as a member in the company's register of members. The meeting, inter alia, passed a resolution replacing the old board of directors with a new seven member board of directors. The applicant therefore filed the instant

originating motion on notice, challenging the validity of the notice summoning him to attend the extraordinary general meeting and the proceedings of that meeting and also for a declaration, inter alia, that the eight respondents were not members of the company. In his defence, the sixth respondent, the acting managing director, said that the company had in 1975, increased (by special resolution of the board of directors) the shares of the company from 10,000 to 100,000 shares. He however admitted that no prior notice of the alleged increase was served on the applicant."

On the issue of the validity of the membership of the eight respondents, Taylor J (as he then was) held at 502 as follows:

"In any case as I have already pointed out, the eight respondents do not have their names on the register. Furthermore assuming that the N.E.C. had some new or unissued shares, it is, nevertheless, ***by its regulations, as I have already noted herein, prohibited from issuing new or unissued shares to them without first offering the said shares to the existing shareholders in proportion to their shareholding*****.** The eight respondents, from a study of the affidavits, are probably innocent victims of the incompetence of the N.E.C. management. *If the manner of their alleged acquisition of shares in N.E.C. can be said to be a procedural or mere irregularity I think the rule in* ***Foss v. Harbottle (1843) 2 Hare 461****, would have prevented the applicant from maintaining his action. But as Jenkins L.J. impliedly conceded in In re* ***Harmer Ltd. [1959] 1 W.L.R. 62*** *at p. 84, C.A. and Romer L.J. expressly held at p. 87 of the same case,* ***shareholders have a right as members of the company to have the affairs of a company conducted in accordance with the regulations of the company****.* On the

facts of this case what was done was ultra vires the regulations and contrary to the Companies Code." (e.s.)

The facts and holding in *Luguterah v. Northern Engineering*, *supra*, should apply mutatis mutandis, to this case. In this case, the plaintiff has alleged a breach of a personal right under TOPP's regulations. As held by Taylor J (as he then was) a breach of regulations can hardly be categorized under mere irregularities. A breach of a contract cannot be bunched up with mere irregularities, and in which the court therefore should not intervene. In effect, the holding in *Pinamang v. Abrokwa*, supra, would be inapplicable in the circumstances of this case. That case was about the demotion of a member. The facts of this case revolve around a violation of the plaintiff's pre-emptive rights under the Regulations and an alleged waiver of those rights.

To sum up, the rule in Foss v Harbottle can therefore be said to comprise two elements, which are discernible in the classic statement of Jenkins J in the case of **Edwards v Halliwell [1950] 2 ALL E.R 1064** as follows:

1. The proper plaintiff in an action in respect of a wrong alleged to be done by a company is prima facie the company itself.

2. Where the alleged wrong is a transaction which might be made binding on the company and all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action against the company for the simple reason that, if the majority members of the company are in favour of what has been done, then as was said in the *Edward v Halliwell* case, "Cadit Quaestio" – end of matter.

The rule therefore as a common law rule, appears basically simple. As was stated also in the case of Barrett v Duckett [1995] 1 BCLC 243 at 249 -250

> *"The proper plaintiff is prima facie the company. Where the wrong or irregularity can be made binding on the company by a simple majority, no individual shareholder is allowed to maintain an action in respect of that matter."*

Even though, there appear to be some advantages to the rule, there certainly are a lot of drawbacks. For example, if the wrong complained of is by the majority of the members of the company, who may not wish to sue, then the net outcome of their refusal to sue is that the wrong doing would go unpunished and the minority shareholders would be at risk and the majority can therefore loot the company with impunity. The exceptions to the rule have therefore been developed in order to give a remedy for wrongs or infringements which would otherwise go without redress. By the statutory interventions contained in our Companies Act, 1963 Act 179, the following may be said to be the statutory provisions, which as we have noted already, has whittled away the scope of the proper plaintiff rule in Foss v Harbottle rule.

1. Personal rights – if the personal rights of an individual has been invaded the rule will not apply.

2. Fraud on the minority – by this the minority can bring what is known as a derivative action to control the activities of wrongdoers

3. Special Procedure – If as is stated in regulation 32 (a) of TOPP, the transfer of shares can only be done in a certain way, then failure to comply will entitle the affected members to take action as has happened in this case. There are

many provisions in Act 179 which provide for this, and have been referred to already.

4. Ultra Vires Acts – If an act is ultra vires the Companies Act or Regulations, a member can sue.

It is therefore clear that, both the learned trial Judge and those of the Court of Appeal erred in failing to appreciate the statutory interventions made by the companies Act, 1963 Act 179 on the applicability of the rule in **Foss v Harbottle** in Ghana.

WAS THERE A VALID OFFER MADE TO PLAINTIFFS

Another issue which is closely related to the validly and effect of Regulation 32 (a) of TOPP which we have discussed is the issue of whether there has been a valid offer of sale or transfer of shares to the plaintiffs?

As has been stated elsewhere in this judgment, both the learned trial judge and the Court of Appeal found as a fact that Exhibit 7 was not an offer letter, and for that matter does not qualify to be accepted as a valid offer in contact law.

It must be noted that, it is a basic principle of contract that there must be an offer before there can be an acceptance. Once there has been no valid offer, then quite clearly the plaintiffs could not have been expected to accept the offers.

Nevertheless, the plaintiff's by their exhibits 'D' and 'E' expressed interest in the said shares and relied on their rights in Regulation 32 (a). This regulation is not an ordinary contract which can be wished away.

On the authority of **Luguterah v N.E.C** already referred to supra, we are of the considered view that, there being no valid offer, no contract for sale and or purchase of shares had been made to the plaintiffs.

WAIVER OF PLAINTIFF'S PRE-EMPTIVE RIGHTS AND ESTOPPEL

At this stage, it is perhaps important to consider the contention of the 2nd Defendant that the plaintiff and the other shareholders waived their pre-emptive rights under Regulation 32 (a) of TOPP's regulations.

The basis of this contention is Exhibit 5, a letter written by the minority shareholders of TOPP in 1995, allegedly requesting for a tendering process in contrast to the position as is stated in Regulation 32 (a) of the Regulations of TOPP, already referred to supra.

The issue before this court is not whether the plaintiff's pre-emptive rights were side-lined per se. The trial judge held that the bidding process used by the respondents did not amount to an offer of shares to the existing shareholders. The learned trial judge held on this matter as follows:

> "From the wording of Exhibit 7 no offer, properly so- called or understood under Contract Law was made to the existing shareholders to purchase Government or CEREDEC shares in TOPP. Rather the existing shareholders were invited to make offers for the shares that they could purchase. *It therefore amounted to an invitation to treat as counsel for the plaintiff rightly dilated in his written address.* The question however, is; was that procedure contrary to section 32(a) of TOPP's Regulations and if yes, is it fatal to render the transaction pertaining to the sale and transfer of the shares to Unilever void?
>
> *To the first question, the answer is 'yes', because the procedure adopted in divesting the shares to Unilever is contrary to the provision of section 32(a) but to the second as to whether or not it is fatal to render the transaction void, I would say No. I say No because, records before the Court indicate*

overwhelmingly that it was the minority shareholders themselves, including the Appellant who were to benefit under the sale of the said shares, who in a letter addressed to the Executive Secretary of DIC over the divestiture of CEREDEC shares in TOPP, suggested that the procedure under section 32(a) should be waived since the best approach in divesting the said shares in TOPP was to follow normal tendering procedures. This letter was tendered in evidence by the defendants as Exhibit '5'. It was signed by the Appellant and other minority shareholders and it is dated 5th May, 1995."

The learned trial Judge continued thus:

" *… It does not therefore lie in the mouth of either the plaintiff or any of the minority shareholders to turn round to say that the very procedure they themselves had suggested should be used in the divestiture procedure is wrong and for that matter the whole sale and transfer should be declared null and void.*" (e.s.)

Since the holding of the trial judge that there had been no offer of shares to the existing shareholders as envisioned by TOPP's regulations has not been challenged, it follows that the only issue left to determine is whether Exhibit '5' amounts to a waiver of its pre-emptive rights, in the circumstances of this case.

The 2nd and 3rd defendants have argued that Exhibit '5' had the effect of a shareholders agreement and therefore the plaintiff, whose predecessor was a party to the contract, was bound by their own agreement. Exhibit 5 is clear in meaning. At a meeting in 1995, the minority shareholders at the time requested for a discussion of the possibility of resorting to the normal tendering process.

The concern was that, the normal process of offering shares was dragging on and so in order to speed things up and in the interest of TOPP, their decision was to discuss tendering as an option to the offer of shares. The defendants contend that Exhibit 5 was not a mere opinion but a binding agreement of the minority shareholders. Assuming, *arguendo*, that that proposition was right, the subsequent conduct of the plaintiff, prior to the actual sale of CEREDEC's shares would also lend credence to the position that the plaintiff had changed their position on tendering. First Exhibit E: a letter written by the representative of the plaintiff, already referred to supra.

This letter dated 15th December 1997 suggests that the plaintiff was considering exercising its rights in accordance with the regulations, a deviation from the perceived agreement to use the tender process. Since no offer was made, the plaintiff was not able to exercise his right. Again, the comments by the plaintiff's representative at Board meetings also suggests that the plaintiff strongly protested the sale of CEREDEC shares to Unilever in the manner that it was carried out. Evidence on record shows that at the 99th and 100th Board meetings (Exhibit 4), Mr. Lyne, the plaintiff's nominee on the board strongly contested the sale. It is hard to find, in the face of all these objections which occurred immediately prior to the sale, that Exhibit 5 was still operative. Another convincing piece of evidence is Exhibit F, the 88th Board Meeting of TOPP. It shows that in the sale of shares to Mobil, the Board of Directors gave effect to clause 32(a) of TOPP's regulations. In this regard, the plaintiff argued on page 110 of his submissions thus:

> "Exhibit '5' was written in 1995. Between 1995 and 1997 October when Exhibit '7' was written certain developments in TOPP about the sale of shares in that company made it impossible for anybody to believe in Exhibit '5' or even act on it. The truth which was known to all the alleged representees and even the

purchaser, Unilever, was that shares in TOPP would not be sold in breach of Regulation 32(a). The directors of TOPP including the persons who signed Exhibit '5' refused to register a transfer of shares from Mobil Oil Ghana Ltd to GBO Investment Limited (GBO) resulting in GBO bringing a suit against TOPP and Mobil. *It is submitted that even if Exhibit '5' was a representation of fact, there would be no estoppel because by being parties to the board decision against the registration of the transfer of shares from Mobil Oil to GBO a subsidiary company to Unilever, the authors of Exhibit '5' had by their conduct withdrawn the representation before Exhibit '7' was written. The action instituted by GBO against TOPP and Mobil Oil was still pending during the hearing of this suit.*" (e.s.)

The above constitute the exact chronology of events and necessary deductions that had to be made in a common sense approach. We agree with it.

It is submitted that on the basis of the evidence on record, exhibit 5 could not be said to operate as a waiver at the time of the sale of CEREDEC's shares to Unilever.

It appears to us that, the conduct of the 2nd Defendants, Unilever in the entire transfer of shares in TOPP was in very bad faith. Having been made aware of Regulation 32 (a) of TOPP on the clear procedure for transfer of TOPP shares, the 2nd Defendants acted not only in clear breach of the Regulation 32 (a) but were in indecent haste to acquire TOPP shares no matter the consequences. As matters stand now, they must be made to face the music by losing all that they had acquired unlawfully.

Under the circumstances, this court has no option other than to declare that the sale of the 40% CEREDEC shares in TOPP to the 2nd Defendants is void. Membership of TOPP cannot therefore be bestowed on the 22nd Defendant.

CAPACITY OF DIC TO DEAL WITH CEREDEC SHARES

Now, we have to consider the capacity of the DIC to deal with CEREDEC shares with TOPP.

The plaintiffs contention is that the Divestiture Implementation Committee (hereinafter "DIC") lacked the capacity to sell CEREDEC's shares in TOPP to Unilever Ghana Limited. It relied on this court's ruling in **Ampratwum Manufacturing Co. Ltd v. Divestiture Implementation Committee (2009)** SCGLR 692 where it was held that " As a matter of law (founded on the Divestiture Implementation Committee Act, 1993 (PNDCL 326), ss 3(1) and 4(1) and on of fact and practice, the DIC was a mere advisory executive agent of the Government of Ghana without authority to take decisions of finite nature; and it had no capacity to sue or to be sued in its own right. As such agent of the state, civil proceedings against it must be instituted against the Attorney-General." The plaintiff canvassed this point in his submissions extensively by arguing that the DIC has no capacity to contract and also that the Government of Ghana had no shares in TOPP. The plaintiff argued that the trial judge erred in finding that the Government of Ghana had shares in TOPP, by virtue of the fact that it wholly-owned CEREDEC.

It is clear, on the basis of this court's decision in **Ampratwum Manufacturing Co. Ltd v. Divestiture Implementation Committee**, supra, that the DIC does not have legal personality to enter into contracts etc. However, the evidence on record is clear that the DIC did not purport to sell the shares in CEREDEC on its own volition. The DIC, per section 2 of PNDCL 326, is an agent of the Government. Acting in such agency capacity is clearly distinguishable from cases where the DIC sought to clothe

itself with legal personality. Exhibit G is the Share Sale and Purchase Agreement dated the 30th day of March, 1998. It states clearly that the Agreement is between:

1. **DIVESTITURE IMPLEMENTATION COMMITTEE**, a statutory body with headquarters at F35/5 (check) Ring Road East North Labone, Accra, Ghana ("DIC") in its capacity as the agent of the THE GOVERNMENT OF THE REPUBLIC OF GHANA ("GoG");

   and

2. **CENTRAL REGIONAL DEVELOPMENT CORPORATION**, a statutory corporation, formed by GoG whose place of business is at Cape Coast, Central Region, Ghana (CEREDEC);

   and

3. **UNILEVER GHANA LIMITED**, a company registered in Ghana incorporated as a company limited by shares under the Companies Code 1963 (Act 179) whose registered office is at Swanhill, Kwame Nkrumah Avenue, P.O. Box 64, Accra, Ghana ("the Buyer") …"

This document was signed by and authorised on behalf of all the parties.
We are therefore of the considered view that, the ordinary rules of the **principal-agent relationship** would therefore apply in these circumstances. It is a well established principle of agency law that contracts entered into by an agent are binding on the principal, as long as the agent acted intra vires. Legal personality, per se is not a sine qua non for the capacity of an agent to act for a principal.

As regards the Government of Ghana's status, vis-à-vis the shareholding structure in TOPP, one need not belabour the point. CEREDEC is a statutory corporation with separate legal personality, whose shares are wholly owned by the Government of

Ghana, another legal entity. If CEREDEC owned 80.64% of shares in TOPP, another legal entity, the correct deduction to make is that the Government of Ghana controls the shares in TOPP, through CEREDEC. It is our opinion that this deduction does not detract from the legal status of all the actors involved in the sale. Our decision therefore is that, the DIC had the capacity to deal with the shares of the 1st defendant.

BREACH OF DIRECTORS' DUTIES

The last issue to consider is the breach of Directors duties to the company. The learned trial Judge stated in the judgment as follows:

> *"As a Court, I do not see anything untoward on the part of either the company TOPP or its Board of Directors collectively or individually with regard to the sale of the 40% CEREDEC shares of Unilever. The company or the Board neither misconducted itself nor did act ultra vires the powers granted it by the Regulations to the detriment of the company in the course of the transaction." (e.s)*

The plaintiff claims that the board of directors (with the exception of its own nominee) breached their fiduciary duty to the company. In its submissions, it argued that by passing a resolution which they knew to be against the Regulations of the company, they had not acted in good faith. The defendants claim otherwise.

It must be noted that the fiduciary duties of directors are owed to the company. Section 201(1) of Act 179 makes it clear. Section 201(2) further provides that:

> 2) *"A director shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director*

would act in the circumstances." It is only when the director is determining what is in the best of interest of the company that he may consider the interests of members and employees and other actors in the company, section 201(3)."

In the circumstances of this case, the board of directors claimed to have laboured under the belief that the plaintiff and the other minority shareholders had waived their pre-emptive rights under the Regulations. However, it is difficult to subscribe to this belief, in the face of all the protests and reservations with regard to the application of 32(a) of the Regulations. In those circumstances, diligent, skilful directors would, in the interest of the company and in loyalty to its regulations, stay any attempts to sell shares before the resolution of the protests. Instead, the sale was hurried and presented to the board for approval. It would be our opinion therefore that the directors breached their fiduciary duty to the company. This is more so when it is considered against the background that due to similar disagreements about the transfer of GBO shares to the same Unilever, the matter was sent to court for the interpretation of Regulation 32 (a) of TOPP's Regulations. That suit was still pending when this instant one was instituted.

Having therefore been apprized about the non-observance to this Regulations 32 (a), it was a clear breach of the fiduciary duties of the said Directors to the company to have acted recklessly in the transfer and or sale of the 1st Defendants shares to the 2nd Defendants.

The appeal herein therefore succeeds in its entirety.

INTERFERENCE WITH CONCURRENT FINDINGS OF FACT

It should be noted that we are not unaware that both the trial and appellant courts have all made findings of fact in favour of the Defendants.

We are also aware of the principles of law involved in justifying interference by the Supreme Court in the findings of fact by both the trial and appellate courts.

The conditions under which this court finds itself in the determination of this appeal, in that we had to depart from the concurrent findings by both the trial and appellate courts have been settled in the case of **Gregory v Tandoh IV and Hanson [2010] SCGLR 971** where the Supreme Court spoke with one voice through Dotse JSC and laid down the guidelines, relying on celebrated cases **like Achoro v Akanfela [1996-97] SCGLR 209** and **Fosua & Adu Poku v Dufie (Deceased) and Adu Poku Mensah [2009] SCGLR 310 at 313** among other cases**.**

Based on the authority of the above cases and several others, we are of the firm view that some of the findings of fact by the learned trial Judge and concurred in by the Court of Appeal are not only perverse but also inconsistent with the totality of evidence on record.

For example, when the learned trial Judge stated in the judgment that the plaintiff's action *"falls within the exception to the Foss v Harbottle rule and for that matter plaintiff did not falter in coming to court",* he was perfectly right*.*

Then, the learned trial Judge in his concluding remarks stated that, *"Plaintiff's action therefore failed from the onset and I do not hesitate in dismissing it."* How can the learned trial Judge be so inconsistent? And these are the finding of facts the Court of Appeal said were arrived at by a fine comb.

Secondly, the learned trial judge and the Court of Appeal all found that exhibit 7 did not amount to an offer of sale or transfer of shares to the plaintiffs. However, the learned trial judge made a somersault and concluded *"that plaintiff was giving (SIC) every opportunity to either acquire any or all the shares CEREDEC was selling through a procedure plaintiff and other minority shareholders suggested but it failed to exercise that right when given the option."*

There could not have been any contradiction and inconsistency other than the two scenarios just referred to. We could have given many more examples, but the above suffice to establish the fact that this court indeed had good and solid grounds to interfere with the findings of fact made by the trial and appellate courts and depart from them because they were perverse and inconsistent.

In conclusion, there will be judgment for plaintiffs as follows:-

In the result, the plaintiffs succeed with their appeal, and the judgment of the Court of Appeal, dated 23rd March 2010 is hereby set aside, and by necessary implication, that of the trial High Court, dated 21st June 2007 is also set aside.

Instead, there will be judgment for the plaintiffs in respect of their amended writ of summons as follows:

1. The plaintiffs are entitled to the grant of relief I of the endorsement as the sale of the shares of the 1st defendants in TOPP amounted to a variation of the rights of the plaintiffs without their consent.

2. There is a further declaration that the sale of the 1st defendant's shares in TOPP is contrary to the Companies Act, 1963 Act 179 and Regulation 32 (a) of the 14th Defendants, TOPP.

3. A further declaration that the Board resolutions of TOPP purported to have been passed on April 22nd 1998 (100th emergency board meeting) approving the 50% sale of the shares of the 14th Defendant company is void and of no effect, as that Board resolution is incapable of amending Regulation 32 (a) of TOPP's Regulation and the protection afforded minority rights under the Companies Act, 1963 Act 179.

4. From the analysis made in the judgment, it follows that the purported sale of the shares of 1st Defendant's to 2nd Defendant's must be set aside and they are indeed hereby set aside.

5. Relief five (5) of the amended writ is granted in its entirety.

6. In view of the conduct of the 5th, 6th 7th, 8th, 9th, 10th, 11th, 12th and 13th defendants, who are were at all material times directors of TOPP, which conduct has been held to have been in bad faith, in the transfer and sale of the shares of the 1st Defendants to the 2nd Defendants, the said Directors must be deemed to have acted in breach of their duties as directors.

7. In view of our comments in the judgment, relief (7) seven of the amended writ of summons is dismissed as inapplicable as it is inappropriate.

8. Reliefs (8) eight and (9) nine of the amended writ of summons are accordingly granted.

9. In granting relief (10) ten of the amended writ of summons, we are of the opinion that, the relief should be granted in respect of the first part of Regulation 32 (a) which is that the said shares shall not be transferred unless the existing shareholders, which includes the plaintiffs shall first have been offered their right, failing which the second leg of the Regulation which is a transfer of the class or classes in the proportion of their existing shareholding structures shall be considered.

Whilst this judgment, might be deemed to have been a logical sequence to the advice proffered by the Board Chairman of TOPP at all material times to the plaintiff in the following words:-

> **"that P.S Investments Limited has the right to seek any legal redress if found necessary under the Laws of the Republic of Ghana in Court",**

which was an apparent response to the protest of the plaintiff's nominee on the TOPP Board to the indecent and hasty sale of the 14th Defendants shares to the 2nd Defendant, we still believe that all is not lost for the purposes of having a settlement in this matter.

We will on our part advice the parties to resort to ADR.

(SGD) **J. V. M. DOTSE**
JUSTICE OF THE SUPREME COURT

(SGD) **S. O. A. ADINYIRA (MRS)**
JUSTICE OF THE SUPREME COURT

(SGD) **R. C. OWUSU (MS)**
JUSTICE OF THE SUPREME COURT

(SGD) **ANIN YEBOAH**
JUSTICE OF THE SUPREME COURT

(SGD) **P. BAFFOE BONNIE**
JUSTICE OF THE SUPREME COURT

COUNSEL:

FELIX NTRAKWA WITH HIM KWADWO GYASI NTRAKWA FOR THE PLAINTIFF/APPELLANT/APPELLANT.
NII ODOI ODOTEI WITH HIM MARTIN KPEBU FOR THE 2ND DEFENDANT/RESPONDENT/RESPONDENT.
CECIL ADADEVOR (SENIOR STATE ATTORNEY) FOR THE 3RD DEFENDANT/RESPONDENT/RESPONDENT.