

THE STATUTORY DERIVATIVE ACTION IN MALAYSIA: FILLING IN THE GAPS

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ABSTRACT

In 2007, the Companies Act (Amendment Act) was passed. It included a new provision introducing statutory derivative action that allows action to be brought on behalf of the company by certain 'complainants'. This article highlights certain gaps in the law or the potential misconception that could arise in understanding the new statutory derivative action. Decisions from the UK and other comparable common law jurisdictions that have codified the statutory derivative action discussing the scope of the statutory derivative action will be examined to shed some light on the newly introduced section 181A of Malaysian Companies Act 1965 with the intention of ascertaining whether the principles in some of these decisions could be introduced into Malaysian company law jurisprudence.

Keywords: Companies Act 1965 amendment, statutory derivative actions, minority shareholder, breach of trust or duty.

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TINDAKAN TERBITAN STATUTORI DI MALAYSIA – MENGISI KEKOSONGAN

ABSTRAK

Pada 2007, Akta Syarikat (Akta Pindaan) diluluskan. Ia termasuklah sebuah peruntukan baru memperkenalkan tindakan terbitan statutori yang membenarkan tindakan dibawa bagi pihak syarikat oleh 'pengadu' tertentu. Makalah ini menyerlahkan kekosongan dalam undang-undang atau tanggapan salah yang mungkin boleh timbul dalam memahami tindakan terbitan statutori yang baru ini. Keputusan-keputusan dari UK dan lain-lain negara common law yang telah mengkanunkan tindakan terbitan yang membincangkan skop tindakan terbitan statutori diteliti untuk menerangkan peruntukan baru seksyen 181A Akta Syarikat 1965 Malaysia dengan niat untuk memastikan sama ada prinsip dalam keputusan-keputusan ini boleh diperkenalkan ke dalam jurisprudens undang-undang syarikat Malaysia.

Kata kunci: pindaan Akta Syarikat 1965, tindakan terbitan statutori, pemegang saham minoriti, pecah amanah atau kewajipan

INTRODUCTION

The derivative action in Malaysia can now be brought under the Companies Act 1965. Briefly, section 181A provides locus standi to certain individuals to bring an action on behalf of the company or to intervene in any proceedings on behalf of a company and to take steps on behalf of the company to defend the company against any proceedings. The statutory derivative action, as opposed to the common law derivative action, in Malaysia, enables a wider category of persons to apply for the leave of court. The court is required to take into considerations whether the complainant is acting in good faith and whether it is prima facie in the

best interest of the company that leave be given to the complainant to act on behalf of the company. The Companies Act 1965 has however preserved the common law derivative action, enabling a dual-entry point for bringing a derivative action. As section 181A is still in its infancy, this article highlights the potentially problematic issues that could arise in the implementation of the statutory derivative action

CONCERNS ABOUT LOCUS STANDI

Multiple derivative action

Corporate groups are the norm in the way companies organise business affairs and minimize business risks. The appropriateness of whether the separate legal entity doctrine should continue to be applied without exception to the companies in a group continues to be debated and reviewed. A recognition of the impact of corporate groups can also be seen in relation to a multiple derivative action or a double derivative action as it is known in Australia, (both terms are a convenient but somewhat inaccurate description of the proceedings),¹ which generally involves the minority shareholder in the holding company applying for leave to bring an action on behalf of the subsidiary for the breach of duty within the subsidiary company.

In the UK, this issue was initially deliberated by the UK Law Commission in *Shareholder Remedy*² where the Law Commission stated that:

“6.110. We consider that the question of multiple derivative actions is best left to the courts to resolve, if necessary using the power under section 461(2)(c) of the Companies Act 1985 to bring a derivative action. Accordingly, we do not consider that there should be any

¹ Per Ribeiro J in *Waddington Ltd v Chan Chun* [2008] HKCLA 86; per Campbell J *Oates v Consolidated Capital Services Limited* (2009) 27 ACLC 1,166.

² UK Law Commission *Shareholder Remedy*, LC No. 246.

express provision dealing with multiple derivative actions.”

The Company Law Review did not mention this point specifically although it did not raise any specific objection to the Law Commission’s recommendation. In the end the statutory derivative action did not contain a rule enabling multiple derivative action.

While the UK government was reluctant to allow for a multiple derivative action, countries like Australia and Hong Kong have taken the opposite stance. In Hong Kong, a multiple derivative action has been granted by the court under the common law³ despite the fact that Hong Kong statutory derivative action has not addressed this situation. This was possible because the Companies Ordinance has expressly retained the right of minority shareholders to bring an action on behalf of the company at common law. The new Hong Kong Companies Ordinance 2012 has however resolved this oversight with the introduction of section 723.

Under the Australian Corporations Act 2001, section 236(1) provides for what is called ‘double derivative action’ involving an application for leave to sue on behalf of the company for wrongdoings in the company and its related body corporate (i.e companies in a holding-subsidary relationship). This section was considered in *Oates v Consolidated Capital Services Limited*,⁴ where the application for leave was dismissed. The plaintiff, Oates, a former director applied for leave to sue the directors of CCL Australia (i.e the new board) on behalf of the company for breach of fiduciary duties and to cause CCL Australia, in its capacity as a member of CCL UK to sue the defendants for breach of fiduciary duties that they owed to CCL UK. CCL Australia, owned all the shares of CCL UK. Oates alleged that the directors of CCL Australia and CCL UK had misappropriated corporate opportunities and assets of these companies. The case went on appeal to the Supreme Court of New South Wales (the court of appeal in *Oates v Consolidated Capital Services Ltd*.⁵ The Supreme Court of New South Wales held that this was not a double derivative action in the sense that the application

³ *Waddington Ltd v Chan Chun* [2008] HKEC 1498.

⁴ [2008] NSWSC 464; (2008) 218 FLR 73; 66 ACSR 277.

⁵ (2009) 27 ACLC 1,166.

is brought by a non-member of a company to remedy wrong done in a wholly-owned subsidiary of the company. This was because Oates was not a shareholder of CCL Australia, a holding company of CCL UK. However, the appellate court laid down statement of law which should be borne in mind for bringing a double derivative action:

- Oates cannot apply under the statutory derivative action as CCL UK was not a “company” within the meaning of section 236. Even if the common law derivative action is allowed in the UK as the cause of action arose before the introduction of the statutory derivative action in UK, the common law derivative action requires the application for leave to be brought by a ‘member’ of the company.⁶
- There was no double or multiple derivative action available under s 236 to a person whose only claim to standing was that he or she was an officer or former officer of the holding company of a company or of a subsidiary of the company. The section requires that the petitioner be a member, former member, or person entitled to be registered as a member, *of the company or of a related body corporate*. There is no locus standi for an officer or former officer of the company *to bring a double derivative action* as the subsection does not use the word “*related body corporate*” in relation to an officer or former officer.⁷

Section 181A is silent as to leave for bringing multiple derivative action or double derivative action in a subsidiary or any related company. It is possible that since a statutory derivative action does not abrogate the right of a minority shareholder to bring a derivative action under the common law,⁸ under the Malaysian company law framework a multiple derivative action can be mounted, if the reasoning in *Waddington Ltd v Chan Chun*⁹ in Hong Kong is found to be good law in Malaysia. Nonetheless it all depends on policy justification as well as the question

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Section 181A(3), Companies Act 1965.

⁹ [2008] HKCLA 86.

whether *Waddington* was correctly decided on whether a derivative action is available to a member of a holding company in relation to wrongs in the subsidiary. In *Oates*, the court referred to *Waddington* and while Campbell JA stated at the beginning that it was not necessary to decide whether that extension of the general law is correct in principle, he later commented, citing several legal writings as authority,¹⁰ that:

“104. To the extent to which the judgment of Lord Millett NPJ in *Waddington Final Appeal* at [49]-[51] suggests that an application for leave was ever part of the nineteenth century procedure in England it does not, with respect, seem correct.”

There is thus still room for debate.

Minority shareholder or ‘wrongdoer in control’?

It has been well accepted that the derivative action is used more often by minority shareholders. However, the main criteria is not being a minority shareholder, rather it should be on the concept of ‘wrongdoer in control’. In *United Engineers (Malaysia) Bhd (suing on behalf of UEM Genisys Sdn Bhd) v Seow Boon Cheng & Anor.*,¹¹ the High Court decided that the plaintiff being a majority shareholder by virtue of having control over more than 51% shares in the company cannot take action on behalf of the company as only the minority shareholders can bring a derivative action. It was held that the proper plaintiff in this case was the company itself and that it is the company that must decide on its course of conduct against the director. It is unfortunate if students of law read *United Engineers* as laying down an absolute rule that only a minority shareholder can apply for a derivative action. While the decision states so, the reasoning was the fact that the plaintiff had the ability, through

¹⁰ (2009) 27 ACLC 1,166, at para 102 citing B S Prunty, “*The Shareholders’ Derivative Suit: Notes on its Derivation*” (1957) 32 NYU L Rev 980 and A J Boyle, “*The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American History*” (1965) 28 Mod L Rev 317.

¹¹ [2001] 6 MLJ 511.

him possessing the necessary voting power to decide whether or not the company should litigate.

Similarly in *Shamsul Bin Saad (Suing As Minority Shareholder of Petra Perdana Berhad and Bringing This Action for The Interest of Petra Perdana Berhad) v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors.*,¹² the High Court discussed “wrongdoer control” within the context of the common law derivative action and the statutory derivative action under section 181A. The defendant’s application to strike out the derivative action was due to the fact that events subsequent to the filing of the action had negated any wrongdoer control. The court allowed the striking out of the application for leave as the plaintiff was already *in control of the company* via an interlocutory injunction and because the alleged wrongdoer had already been removed by the general meeting.

In the most recent decision in Malaysia *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals*¹³ Ho Hup, a shareholder of Bukit Jalil, brought a derivative action challenging a transaction entered into by the company which was against section 132C, *Companies Act*. One of Ho Hup’s arguments was that it did not have control of Bukit Jalil at the time of commencement of the suit, despite being its majority shareholder by virtue of its 70% shareholding. Further, Ho Hup also alleged that the wrongdoer directors were in control of the company and that the other shareholder Zen Court which held 30% shareholding in Bukit Jalil supported the transaction and was aligned to the wrongdoers. The Court of Appeal did not give leave for the derivative action to be brought by Ho Hup on behalf of Bukit Jalil. The Court of Appeal agreed with the High Court’s view that the crucial question was who had control of the general meeting of Bukit Jalil and not whether the ‘wrongdoer directors’ were in control of the board of Bukit Jalil. The Court of Appeal noted that evidence showed that Ho Hup which held 70% shareholding, was also able to appoint all the board members of Bukit Jalil and had removed the ‘wrongdoer directors’ and

¹² *Shamsul Bin Saad (Suing As Minority Shareholder of Petra Perdana Berhad and Bringing This Action for The Interest of Petra Perdana Berhad) v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors.*[2010] MLJU 837 (judgment on 16 August 2010).

¹³ 3 [2012] MLJ 616.

thus there was no wrongdoer control. As to the allegation that Zen Court was in support of the wrongdoers, the court ruled that since no such argument was raised in the statement of claim, Ho Hup was estopped from raising this issue. Further, the fact that Ho Hup managed to remove the directors showed that they were in control of the company.

Shareholding threshold and minimum holding period

Section 181(4), *Companies Act* is silent on these two points. These questions were deliberated upon by the UK Law Commission and the UK Company Law Review. The main concern raised by those in favour of a shareholding threshold and minimum holding period was that there could be nuisance suits by those who acquire nominal shares. an example is the ‘activist shareholders.’ The UK Government however did not put much value on this concern.¹⁴

In Australia, activist shareholders have been successful in using some provisions in the Australian Corporations Act 2001 to put environmental and occupational safety concerns as an agenda at general meetings, albeit without much success in getting the resolution approved by the general meeting.¹⁵ However, it is noticeable that the Australian statutory derivative action provision did not introduce any shareholding threshold and minimum holding period. Nonetheless, in an Australian decision *Swannson v Pratt*,¹⁶ the Australian court commented on these issues in the context of the ‘good faith’ criterion for granting leave:

“Where the application is made by a current shareholder of a company who has more than *a token shareholding* (emphasis added) and the derivative action seeks recovery of property so that the value of the applicant’s shares would be increased, good faith will be relatively

¹⁴ Hansard Parliamentary Debates, 27 February 2006, col GC13.

¹⁵ Anderson K and Ramsay!, “from the picket Line to the Board room: union shareholder activism in Australia” (2006) 24 *Companies and Securities Law Journal* 279.

¹⁶ [2002] 42 ACSR 313, approved in Malaysia by the Court of Appeal in *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636.

easy for the applicant to demonstrate to the Court's satisfaction."

The learned judge however did not elaborate on what is meant by 'token shareholding'. However, the statement can be taken to indicate that the status of the complainant could have some bearing on ascertaining the complainant's intention i.e acting in good faith, to apply for leave.

As section 181A is silent on a shareholding threshold and minimum holding period, these are not required under the Companies Act. However, it is submitted that the approach of the Australian court in *Swannson v Pratt*,¹⁷ should be relied on. This means that while a shareholder with a single share should not, by this fact alone, be refused locus standi, the more important consideration is ascertaining whether there was an ulterior agenda in applying for leave when there is no obvious financial benefit that the complainant will get.

CAUSE OF ACTION: REPLACING 'FRAUD ON THE MINORITY' WITH 'BREACH OF DUTY OR TRUST'

The success of a *common law derivative action* is crucially tied to the fulfillment of certain criteria; these are, that the wrongdoer has obtained benefit at the expense of the company and has prevented or will be able to prevent any relief being sought against him by the company. We are focusing on the issue of 'wrongdoer benefitting at the company's expense.' Obviously incidents involving allegations of breach of director's fiduciary duties can easily be relied on for the leave to be given, such breaches will involve invariably a breach of the no-conflict, no-profit or/and the no-misappropriation rules. While there has been some attempts to widen the definition of 'benefit' to other than the classic types of breach of fiduciary duties, generally, the approach is still conservative in that if the wrongdoer-director has not benefitted from the wrong he did, there is no 'fraud on the minority.' Thus, in *Pavrides v Jensen*¹⁸ the minority shareholder was not granted standing to sue on behalf of the company

¹⁷ [2002] 42 ACSR 313, approved in Malaysia by the Court of Appeal in *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636.

¹⁸ [1956] Ch 565.

because what was involved was a breach of duty of care without the director benefitting from the undervalued sale of assets to a third party. It was this loophole that was identified as needing change via the introduction of the statutory derivative action.

This gap is supposed to have been remedied by the codification of the statutory derivative action. Nonetheless, a perusal of section 181A shows that the section is conspicuously silent on this. The section has been declared as not creating any new law but only as providing a procedural measure. If this is the case, then the common law rule in *Pavlides v Jensen* is retained. This means that there is retention of the *status quo* which ironically does not resolve the mischief that the statutory derivative action is intended to resolve. However, if that is not the case, then section 181A can be interpreted to allow a derivative action to be brought for any breach of director's duties including negligence.

What is the position in other comparable common law jurisdictions? In contrast to the silence of section 181A of the Malaysian Companies Act 1965, section 261 of the UK Companies Act 2006 expressly provides that:

“(3) A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. The cause of action may be against the director or another person (or both).”

The statutory derivative action as it is drafted in UK means that the cause of action is no longer confined to a breach of fiduciary duty where the directors have obtained personal benefit but also includes a breach of duty of care.

What then is the position in Malaysia? The recent decision in Malaysia, *Lembaga Tabung Angkatan Tentera v Prime Utilities Berhad*¹⁹ indicates the court's willingness to replace the “fraud on the minority” with “breach of directors' duties.” In the case an application for leave was brought by the plaintiff, LTAT, which held 10% shares in Prime Utilities and had board representation. Prime Utilities had invested

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[2012] 2 AMCR 521.

a substantial amount of money, i.e. RM112 million with an investment company, Boston. However, the return on investment was not lucrative as Prime had only received RM4 million and the remaining RM104 million which was profit from the investment as stated in Prime's annual report was still owed by Boston. LTAT had inquired about this remaining profit and whether Prime was taking any actions to recover the amount. The annual reports did not contain any information about the status of this amount or whether there were any litigation initiated to recover the outstanding profit. Subsequently, LTAT wrote to Prime inquiring whether the legal action had been initiated but was informed that a letter of demand had been issued to Boston. LTAT then sent a letter in June 2008, followed by another in September 2008 to Prime's lawyers inquiring about this but was informed to contact the company directly. When this was done, the company's board responded that they will reply to the query but eventually none was given to LTAT. In the meantime, Prime had taken actions against Boston but these two petitions did not result in any litigation. The petition was struck out due to Prime's delay or failure to pursue the case. In one petition, Prime did not take any step to serve the writ out of jurisdiction since Boston was a foreign investment company. The action was brought by LTAT to obtain leave to sue the directors of Prime on the basis of their failure to exercise due care, skill and diligence in recovering Prime's money from Boston. There was allegation that when Boston was wound up, Prime did not seek to file proof of debt in Boston's winding up on the basis that there was no judgment obtained against Boston. The court granted leave as there was evidence that the directors' had failed to diligently pursue the recovery of the amount due from Boston by the series of legal action that were not followed through and by their failure to file proof of debt. They had also failed to explain their reluctance to file proof of debt against Boston to LTAT which was acting in good faith and it was in the best interest of the company that leave be granted.

The Malaysian court incorporated the UK approach through the 'criteria for leave' under section 181(4) which provides:

"In deciding whether or not leave shall be granted the Court shall take into account whether:

- (a) the complainant is acting in good faith; and
- (b) it appears prima facie to be in the best interest of the company that the application for leave be granted."

Nonetheless this decision did not address the issue whether leave would be granted for the company to *sue a third party who is not an insider*, i.e., who is not the wrongdoer who is able to control decision making in the company. In the UK, despite the UK company law allowing a derivative action to be brought for a director's breach of duty of care, there is limitation as to the locus standi given to a minority shareholder for suing a third party on behalf of the company where the directors decided not to commence litigation. In explaining section 261(3) of the UK Companies Act 2006, Kershaw LJ has cautioned against thinking that the words "or another person" as referring to a third party *unconnected* to the director.²⁰ He distinguished between a wrongdoer who has caused loss or damage to the company who is an insider as opposed to the third party who is an outsider.

Section 261(3) in the context of whether leave should be granted to the company to sue a third party who is an outsider was considered in *Iesini and Others v Westrip Holdings Limited and Others*.²¹ The application for leave was brought by Iesini and some shareholders of Westrip Holdings Ltd which was incorporated to raise and provide funding for the development of a mineral exploration licence of an area in Australia. The mining exploration licence was given to an Australian company, Rimbal but it required a separate licence to extract the minerals. The shareholders of Rimbal at the time were Mr Barnes and Ms Walker who held her single share as Mr Barnes' nominee. Westrip was incorporated in England and Wales and Iesini, Barnes and Janine became the directors of the company. Another director was Ieseni's brother. Westrip contracted with Rimbal on the terms of two licences given to Rimbal. The plaintiffs were no longer directors of the company when the application was filed.

The plaintiffs alleged that the defendants were in breach of their duties as directors as they had deliberately engaged in a course of conduct which has led to Westrip losing ownership and control of a very valuable mining licence. They argued that the breach of duty was the new board's failure to investigate a possible defence based on estoppel to prevent the rescission of the contracts. The plaintiff contended that there was a trust

²⁰ David Kershaw, *Company Law in Context Text and Materials* (2009) Oxford University Press, London, at 556.

²¹ [2009] EWHC 2526(Ch).

held by Rimbal on behalf of Westrip and applied to the court under section 261 of the Companies Act 2006 for permission to continue a derivative claim on behalf of Westrip seeking to rescind the alleged asset stripping and also claiming declarations about Westrip's ownership of certain assets.

The court decided that leave will not be granted on the allegation that there was breach of duty of care in failing to consider possible defences to rescind the contract. This was because there was no breach of directors' duties as they had followed the advice of their legal advisers in relation to the enforceability and validity of the transactions. Regarding the question whether the minority shareholder can apply for leave to sue a third party who is not an insider, the court emphasised the fact that although the statutory derivative action is not confined to claims against wrongdoers who are insiders, any claim against the wrongdoers who are outsiders must arise out of the breach of directors' duties. What this means is that the minority shareholder cannot be authorised to sue an outsider wrongdoer on behalf of the company where the cause of action against the third party is not one that is the result of the directors' breach of duties.

This was clearly formulated by the court in the following statement:

“A derivative claim, as defined by section 260 (3) is not, however, confined to a claim against the insiders. As the concluding part of that sub-section says, the cause of action may be against the director or another person (or both). Nevertheless the cause of action must *arise from* an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust *by a director* of the company. A derivative claim may “only” be brought under Part 11 Chapter 1 in respect of a cause of action having this characteristic (although this restriction does not appear to apply to a derivative claim brought in pursuance of an order made under section 994). Thus the section contemplates that a cause of action may arise from, say, the default of a director, but nevertheless is a cause of action against a third party. A claim against a person who had dishonestly assisted in a breach of fiduciary duty or who had knowingly received trust property would be paradigm examples. It is also to

be noted that it is not a requirement that the delinquent director should have profited or benefited from his misconduct. He may be guilty of no more than negligence in managing the company's affairs. However, since the cause of action must arise from his default (etc.) a derivative claim brought under Part 11 Chapter 1 will not allow a shareholder to pursue the company's claim against a third party where that claim depends on a cause of action that has arisen independently from the director's default (etc.)."²²

The learned Lewison J referred to and followed²³ the following view laid down by the Law Commission in its report *Shareholders' Remedies*:

"6.31 So far as the second situation is concerned, one respondent gave the following example. A profitable company is a victim of a tort by a third party, and the board, although otherwise committed to the well-being of the company, have ulterior motives of their own for not wishing to enforce the remedy for the tort. Although the board would in those circumstances be in breach of duty, their breach would not have given rise to the claim.

6.32 We accept that in this type of situation an individual shareholder would have no right to bring a derivative action against the third party tortfeasor under our proposals. (There would of course be a potential claim for damages against the directors themselves, although this may give rise to difficulties of causation or quantification, and it is possible that the directors may not have sufficient funds to meet the claim). However, we do not consider that this is an issue which needs to be addressed for two main reasons.

6.33 First, we are not aware of any cases under the current law where a derivative action has been

²² at para 75.

²³ *Ibid.*

successfully brought in circumstances such as those described in paragraph 6.31.

6.34 Secondly, (and more importantly) it is consistent with the proper plaintiff principle which we endorsed in the consultation paper and which received virtually unanimous support on consultation. The decision on whether to sue a third party (ie someone who is not a director and where the claim is not closely connected with a breach of duty by a director) is clearly one for the board. If the directors breach their duty in deciding not to pursue the claim then (subject to the leave of the court) a derivative claim can be brought against them. To allow shareholders to have involvement in whether claims should be brought against third parties in our view goes too far in encouraging excessive shareholder interference with management decisions. This is particularly important as we are proposing that derivative actions are to be available in respect of breaches of directors' duties of skill and care. A line has to be drawn somewhere and we consider that this is both a logical and clearly identifiable place in which to draw the line." (at para 75)

The court pointed out that despite the statutory derivative action enabling a shareholder to apply for permission to take over a claim that the company has already brought, it does not mean that the minority shareholders can take over the litigation pursued by the company. The learned judge quoted the Law Commission on this point:

"6.63 ... We do not want individual shareholders to apply to take over current litigation being pursued by their company just because they are not happy with the progress being made. The provision is intended to deal with those situations where the company's real intention in commencing proceedings is to *prevent* a successful claim being brought." (at para 80)

Thus, in the UK, the statutory derivative action does not allow a shareholder to sue a third party on behalf of a company where the cause of action arose independently of the director's breach of duty. In *Ieseni*,

the learned judge gave as an example a cause of action against a third party that arose out of director's breach of duty. This was where a director has breached his fiduciary duties by misappropriating or diverting company's assets and the third party has dishonestly assisted in a breach of fiduciary duty or who had knowingly received trust property. The Law Commission report on *Shareholders' Remedies* gives an example of a situation where although there was a breach of duty by the directors in not suing a wrongdoer who has caused loss or damage to the company, the derivative action should not be allowed. In this example, the cause of action *against the third party did not arise from* the directors' negligence. The Law Commission's view is given below:

“6.35 There may be situations where the line is not quite so easy to draw. For example, a company may have a claim in negligence against an auditor who fails to spot that the directors have misappropriated corporate assets. The factual background to the claim against the auditor is the breach of duty by the directors, but the auditor has neither participated in the fraud nor received corporate assets. Our view is that it is not appropriate for a derivative action to be brought against the auditor in these circumstances, and we do not consider that it would be possible to bring such an action under the terms of our draft bill. The cause of action against the auditor does not arise as a result of the directors' act, but rather their act is merely the setting against which the auditor's (separate) default operates.”

Similar question was raised in Singapore but the court did not deal with this issue directly and instead sidestepped the question. In *Re Winpac Paper Products Pte Ltd; Seow Tiong Siew v Kwok Low Mong Lawrence & Ors*,²⁴ the decision seems to imply that leave to sue an outsider wrongdoer will not be granted. The plaintiff in this case raised the argument that the board's decision not to sue a third party was influenced by the fact that a director of the third party, ABC Packing & Carriage Co Pte Ltd (ABC), was an alternate director for the company.

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[2000] 4 SLR 768.

However, the court found that this alternate director arrangement came into existence only after the Board made the decision against taking any action against ABC. Leave was refused as the court also doubted the bona fide of the plaintiff due to personal hostilities between the plaintiff and the alternate director in a separate dispute in another company. It must be noted that in the Malaysian case, *Lembaga Tabung Angkatan Tentera v Prime Utilities Berhad.*,²⁵ the minority shareholder LTAT did initiate leave application to sue the third party on behalf of the company but that due to the third party's liquidation, LTAT had withdrawn the case. This was a missed opportunity to consider *Ieseni's* relevance. Assuming that Boston was not wound up, it is possible that the leave to sue the third party outsider wrongdoer may not be given as this is the kind of situation envisaged by the UK Law Commission and mentioned by Lewison J in *Iesini* as not intended by the UK legislator.

It is worth noting that section 181A was introduced to enable the minority shareholder to sue the wrongdoer on behalf of the company in situations where the company *would not and could not do so due to the wrongdoer being in control*. Where the wrong is done by a third party and the board has decided not to sue the third party wrongdoer *without the interference or influence of the wrongdoer*, the decision by the board should stand. This is because the company is not improperly being prevented, or refraining, from suing. If leave is allowed, it will create uncertainty as far as third parties are concerned and from a policy perspective will undermine the authority of the board to make decisions on behalf of the company.

CONCLUSION

Within a span of five years since the introduction of the statutory derivative action in Malaysia, seven cases have been decided in Malaysia with four of them involving the same parties. This article has identified two areas of concerns relating to the understanding and application of the new statutory derivative action. It is not clear whether these areas are deliberately left as they are by the legislator so as not to expand the

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[2012] 2AMCR 521.

statutory provision to the issues raised or whether they were inadvertent oversight.

Regarding the availability of multiple derivative action, since this is not addressed by section 181A, a derivative action cannot be brought by a complainant for wrongs in the subsidiary company. Even with *Oates*, this is not available within the Malaysian legislative provision. At common law, if *Waddington* is correctly decided, a member of a holding company in Malaysia has to commence a derivative action under the common law to remedy a wrong in its subsidiary. Where the board has decided not to sue the third party wrongdoer, the UK decision in *Iesini* should be followed. Malaysian lawyers should also be aware of the danger in thinking that the derivative action is not available to a petitioner *merely* because he is a majority shareholder and lastly the minimum shareholding period and shareholder threshold are not requirements of section 181A although they could be relevant for the court in deciding whether leave should be given.