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Keywords

statutory derivative action, Singapore, corporate governance, section 216A, section 216B, Singapore Companies Act

THE STATUTORY DERIVATIVE ACTION IN SINGAPORE - A CRITICAL AND COMPARATIVE EXAMINATION

*by Pearlie Koh Ming Choo**

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As a mechanism for shareholder control of corporate wrongs and thus as a tool of corporate governance, the statutory derivative action has had much international attention given to it, particularly in the last 10 years. Singapore introduced its statutory derivative action in 1993 and since then, there have been two reported cases in which the action was invoked. In this paper, I consider the Singapore derivative action as contained in sections 216A and 216B of the Singapore Companies Act. The approach taken is a comparative one as I also look at the statutory derivative actions in Australia and other common law jurisdictions. I then identify possible areas for review, with a view to enhancing the potential effectiveness of the action.

Introduction

Conferring rights on minority shareholders to litigate in respect of wrongs to the company brings several issues to the fore. There are issues of standing, legal duties traditionally running a straight line to the company;¹ of policing the action, since litigious shareholders may not have the most pristine of intentions; and of corporate governance, requiring a fine balancing of shareholder rights and expectations against the prerogative of management to manage.²

At common law, the shareholder's access to litigation to pursue actions rightly belonging to the company (by means of a derivative action) is very restricted. One of the cardinal principles of company law is embodied in the rule in *Foss v*

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1 *Percival v Wright* [1902] 2 Ch 241.

2 In most companies (both listed and unlisted) in Singapore, powers of management and control are vested in the board of directors: Art 73, Table A, Companies Act 1994, Cap 50. In the United Kingdom, one finds a similar division of powers: see Art 70 of Table A. In Australia, see section 198A(1) Corporations Act 2001 and in New Zealand, see section 128 Companies Act 1993.

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*Harbottle*³ - if a company suffers a wrong, then, because it is a separate legal entity from its incorporators, prima facie it is the company that should seek redress for that wrong. Additionally, if the alleged wrong is one that is capable of being approved or ratified by a majority of the shareholders, then no individual shareholder can maintain an action in respect of that wrong.

The rule in itself is logical and can be said to achieve what is socially and economically desirable. For one, it reduces the scope for wasteful litigation. As English judge Mellish LJ explained more than a century ago:

... if the thing complained of is a thing which in substance the majority of the company are entitled to do ... there can be no use in having 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.⁴

The rule also obliterates the potential for duplicative litigation. A wrong that has an adverse impact on a company's financial position committed against the company could potentially also be detrimental for a number of stakeholder groups. In addition to the company's shareholders, who could suffer loss because the value of their equity may be decreased as a result of the wrongdoing, the company's creditors and employees may also have cause for complaint. In the case of the company's creditors, they may worry that there is a higher chance that the company would default on repayment. The employees, on the other hand, may find their jobs in jeopardy.⁵ If all such persons are allowed to sue, the company could literally be 'torn to pieces'⁶ by litigation, the court system will be overly burdened and the defendants will have to face a multiplicity of suits.

The other advantage of the rule lies in the fact that it allows management to decide whether to sue or not, without being second-guessed. Litigation may not always be in a company's best interests and opinions will undoubtedly differ as to what is best for the company. Since deciding whether or not to sue is often a commercial decision, involving as it does a cost-benefit analysis with a necessary consideration of the potential damage to corporate reputation,⁷ it should therefore be a decision which management is qualified and competent to make. The rule also restricts the scope for tactical or vexatious litigation, ie legal proceedings used as a strategic ploy to gain some personal advantage, such as a good price for the litigant shareholder's shares, or to pursue a personal vendetta against the directors.⁸

3 (1843) 67 ER 189, see also *Burland v Earle* [1902] AC 83.

4 *MacDougall v Gardiner* (1875) 1 ChD 13 at 25.

5 See BR Cheffins, 'Reforming the Derivative Action: The Canadian Experience and British Prospects' [1997] *Company, Financial and Insolvency Law Review* 227.

6 *La Compagnie de Mayville v Whitley* [1896] 1 Ch 788 (CA), at 807 (Per Kay LJ).

7 C Hale, 'What's Right with the Rule in *Foss v Harbottle*?' [1997] *Company Financial Insolvency Law Review* 219 at 225.

8 JH Farrar, *et al*, *Farrar's Company Law* (4th ed, 1998) 431.

Difficulties however arise when a majority of the directors are themselves engaged in conduct detrimental to the company. It is unlikely that the board will take steps to ensure that the company sues the wrongdoers. While it is possible for a majority of shareholders in general meeting to act, this will not be done if the directors themselves are also the controlling shareholders. In such situations, the position for dissenting minority shareholders is particularly bleak, especially if there is no ready market for their shares or if they faced restrictions on the transfer of shares. In companies with a dispersed shareholding, difficulties associated with collective decision-making will in most cases prevent an action from going to court. One could say that the minority shareholder has reached a legal cul-de-sac.

Therefore, if the rule is enforced in every situation, there will be manifest injustice⁹ as wrongdoers go unpunished and managerial wrongdoing not redressed. Investors will be at the mercy of the majority who are advancing their own interests at the expense of the company.¹⁰ Common law recognised this and allowed a shareholder to take action in the company's name if he could establish two elements. First, the wrong is one that cannot be validly ratified by the majority because it was a fraud on the minority and second that the perpetrators of the fraud were in control of the company. This gave rise to the common law derivative action. Unfortunately, the existing English authorities on the question of what exactly amounted to a fraud on the minority have been conflicting and difficult.¹¹ There has in fact been no decision on the fraud on minority exception in Singapore, so that the problems of definition may actually be more perceived than real. Or, it could very well be that potential litigants have been so cowed by the inherent difficulties¹² that no case has ever been brought! Be that as it may, it is accepted that the common law position is far from the ideal. Some idea of the genre of 'affection' common lawyers have for the rule in *Foss v Harbottle* can be had from the comments of the Canadian Dickerson Committee¹³ on the Canadian statutory derivative action:

In effect, this provision abrogates the notorious rule in *Foss v Harbottle* and substitutes for that rule a new regime to govern the conduct of derivative actions... [W]e have relegated the rule to legal limbo without compunction, convinced that the alternative system recommended is preferable to the uncertainties – and obvious injustices – engendered by that infamous doctrine.¹⁴

9 *Nurcombe v Nurcombe* [1985] 1 WLR 370 at 378 (per Browne-Wilkinson LJ).

10 *Ibid*, at 432.

11 See discussion in Farrar, *ibid* at 435; LS Sealy, *Cases and Materials in Company Law* (6th ed, 1996) at 522, 527; RR Pennington, *Pennington's Company Law* (7th ed, 1995) 876-885.

12 As advised by well-taught lawyers educated on a diet of English cases.

13 The recommendations of the Dickerson Committee led to the reform of the Canadian Business Corporations Act in 1975.

14 *Proposals for a New Business Corporations Law for Canada* (1971) vol 1 para 482.

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Some change to the existing rules was therefore necessary in order to give shareholders a significant role in corporate governance.

This was recognised in a number of common law jurisdictions, all of which have either introduced or are considering the introduction of the statutory derivative action. New Zealand carried out major reforms to its company law regime in 1993, and amongst other initiatives, introduced the statutory derivative action to its company law legislation.¹⁵ Singapore also introduced its statutory derivative action¹⁶ in 1993 and since then, there have been two reported cases¹⁷ in which the action was invoked. Australia recently introduced the action into the Corporations Act after nearly a decade of study and deliberation.¹⁸ The UK Law Commission published a report in late 1997¹⁹ recommending that a new statutory form of derivative action be available to shareholders in respect of breaches of duty by directors. The statutory derivative action can also be found in the United States, Canada and South Africa.

The introduction of the statutory derivative action in many of these jurisdictions was prompted by the recognition that an enhanced shareholder role (as owner and investor) is necessary if management's obligations and duties to its shareholders are to constitute more than a precatory body of law.²⁰ In the United States, the derivative action is seen as very much as a regulator of corporate management²¹ and one of the most effective means of enforcing the management's duties and

15 Companies Act 1993.

16 Sections 216A and B Companies Act 1994 Cap 50.

17 *Teo Gek Luang v Ng Ai Tiong and Ors* [1999] 1 SLR 434 and *Re Winpac Paper Products Pte Ltd; Seow Tiong Siew v Kwok Low Mong Lawrence and Ors* [2000] 4 SLR 768. There is one other unreported case *Poh Kim Chwee v Lim Swee Long* (HC Singapore, OS No 376 of 1997).

18 The Companies and Securities Law Review Committee made the initial recommendation in 1990 in their report, *Enforcement of the Duties of Directors and Officers of a Company by Means of a Statutory Derivative Action* (Report No 12, 1990). Subsequently, the action was discussed in the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders Recommendation 26* (1991); the Companies and Securities Advisory Committee's *Report on a Statutory Derivative Action* (1993); in the Corporations Law Simplification Task Force's *Commentary on Draft Provisions Dealing with Proceedings on Behalf of a Company by Members and Others* (1995); and in the Corporate Law Economic Reform Program (CLERP) Proposals for Reform, above n 29. The Australian statutory derivative action was introduced by the Corporate Law Economic Reform Program Act 1999 and is found in sections 236 and 237 of the Corporations Law.

19 *Shareholder Remedies* (Law Com No 246) (1997). See E Ferran, 'Shareholder Remedies: The Law Commission Report' [1998] *Company Financial Insolvency Law Review* 235 for a discussion of the recommendations.

20 American Law Institute Tentative Draft No 6 at 3.

21 *Cohen v Beneficial Industrial Loan Corp* 337 US 541, 548 (1949).

obligations under the law.²² The private derivative action was seen as a means of complementing and enhancing the existing regulatory capability of social and market forces and the public administration.

In other common law jurisdictions, the introduction of a statutory procedure to govern the conduct of derivative actions was considered necessary to counter the restrictive nature of the rule in *Foss v Harbottle* and to allow the derivative action to function as an effective tool of corporate governance. In Canada, the Dickerson Committee felt that the best means of enforcing a corporation law is to confer reasonable power on the allegedly aggrieved party to initiate legal action to resolve the problem.²³

In New Zealand, the statutory derivative action is seen as a means for the more effective enforcement of the obligations under the constitution of the company and under their Act.²⁴ Australia was motivated by the desire for a more potent and accessible weapon to deter and punish managerial misconduct,²⁵ the state of the existing law being inadequate for this purpose because of the restrictive nature of the rule in *Foss v Harbottle*.²⁶ It is interesting to note that some Australian commentators questioned the need to introduce a statutory form of the derivative action. This was due to the observation that the Australian judiciary appears more than willing to avoid the insidious web woven by the rule in *Foss v Harbottle*.²⁷ In particular, this robust attitude towards minority shareholder rights was manifested in the increasing judicial support for a fifth exception 'in the interests of justice'²⁸ to the rule in *Foss v Harbottle*, and in the expansive view taken of

22 This statement must be seen in the context of the unique environment for derivative actions in the United States. A significant factor is the fact that successful plaintiffs are awarded counsel fees, providing a financial incentive to attorneys to police management.

23 Proposals for a New Business Corporations Law for Canada, above n 14, 476.

24 Law Commission's Report No 9: *Company Law: Reform and Restatement*, para 86.

25 deVere Stevens, above n 25, 127.

26 See the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1999 paras 6.14 – 6.15.

27 See *Ford's Principles of Corporations Law* para 11.250; LS Sealy, 'The Rule in *Foss v Harbottle*: the Australian Experience' (1989) 10 *Company Lawyer* 52; I Ramsay, 'Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action' (1992) 15 *University of New South Wales Law Journal* 149 at 159ff.

28 In *Biala Pty Ltd v Mallina Holdings Ltd* (No 2) (1993) 11 ACSR 785 at 848, Ipp J opined:

Equity is concerned with substance and not form, and it seems to me to be contrary to principle to require wronged minority shareholders to bring themselves within the boundaries of the well recognised exceptions and to deny jurisdiction to a court of equity even where an unjust or unconscionable result may otherwise ensue...The circumstances of modern commercial life are very different to those which existed when *Foss v Harbottle* was decided. The body of shareholders of a public company is ordinarily far greater in number, and the controlling minds of individual shareholders are far more difficult to identify than was the case with the relatively small corporations that existed 150 years ago.

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shareholders' personal rights, which effectively bypassed the procedural difficulties of *Foss v Harbottle*. Nevertheless, it was the considered opinion of CLERP that this attitude of the courts in itself engendered a certain amount of uncertainty,²⁹ and the availability of a 'direct accountability mechanism that can be used by shareholders in an efficient and effective manner' would do much to remove this uncertainty in the interests of enhancing corporate governance and maintaining investor confidence.³⁰

The United Kingdom, birthplace of the Rule in *Foss v Harbottle*, has also put the action under the microscope.

According to the Corporations Law Simplification Task Force,³¹ the overall objective of introducing a statutory derivative action to confer rights on shareholders should be to provide an incentive for management to exercise its powers appropriately and discharge its functions for the ultimate advantage of the shareholders.

In Singapore, the Select Committee clarified that the primary purpose for the inclusion of section 216A is to provide minority shareholders with greater remedies, thereby strengthening the rights of the minority shareholder. In the first reported decision on the section, *Lai Kew Chai J* stated that 'such derivative... actions are intended to improve the standards of private corporate governance since directors who breach their duties to the company could be made accountable.'³²

In essence, it can be said that the statutory derivative action has primarily a deterrent objective – by empowering the shareholders and others, it serves to deter managerial misconduct by imposing the threat of liability. This deterrent effect of the action, because it does not result in positive actions, cannot be measured empirically. It is important to acknowledge this because there have been a number of empirical studies in the United States that show that derivative actions produce little financial benefit, both to the shareholder litigant in the

These developments and the complexities and sophistication of modern shareholding make it often very difficult to bring derivative claims within the established exceptions. To the extent that policy may be relevant in determining whether a fifth and general exception to the rule should be recognised, I consider it to be desirable to allow a minority shareholder to bring a derivative claim where the justice of the case clearly demands that such a claim be brought, irrespective of whether the claim falls within the confines of the established exceptions.

29 Corporate Law Economic Reform Program (CLERP) Proposals for Reform, Paper No 3, *Directors' Duties and Corporate Governance* (1997) at para 5.3.2.

30 *Ibid.*

31 Corporations Law Simplification Task Force, *Commentary on Draft Provisions Dealing with Proceedings on Behalf of a Company by Members and Others* (1995) (CLSTF Report (1995)).

32 *Teo Gek Luang v Ng Ai Tiong and Ors*, above n 17, 438.

sense that there is little positive impact on share prices,³³ and to the company.³⁴ A corollary objective would be to ensure that directors pay heed to their legal duties. Although directors' duties are owed formally to the company and not to individual shareholders, it is essentially shareholders' interests that are protected by the imposition of these duties.³⁵ The imposition of duties sets bounds to the directors' exercise of corporate powers, and attempts to control the exercise of managerial discretion and self-interested behaviour. However, the effectiveness of such duties and controls depends on there being realistic enforcement, or at least the prospect thereof. However, as alluded to earlier, there are difficulties with this because, circuitously, the directors owe these duties to the company and the company's decision to call the directors to account is made for it by the board. As Parkinson observed in his thesis:

[I]t is conceptually inelegant that the duties designed to control management should be enforceable only by management itself; the right to enforce the apparatus of control is surely distinguishable from the power to make decisions about the operation of the business and as such should not be regarded as a matter falling within the exclusive discretion of the board.³⁶

Whilst the general meeting has the residual power to remove the board and/or litigate in such situations, this is unlikely, in the case of closely-held companies because the majority shareholders are likely themselves to be the directors and in the case of public widely-held companies, to garner the support required to launch such actions would be a Herculean task in itself. Duty-based controls therefore depend very much on shareholder enforcement. Indeed, in Singapore, cases in which the company itself calls directors to account are relatively rare.³⁷

The Singapore Provisions - A Comparative Consideration

The Singapore derivative action is modelled after the statutory derivative action in the Canadian Business Corporations Act and is found in sections 216A and 216B of the Companies Act Cap 50. Section 216A allows a complainant to apply to the court for leave to bring an action in the name of and on behalf of the company, or to intervene in an action to which the company is a party. In this part, the

33 D Fischel and M Bradley, 'The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis' (1986) 71 *Cornell Law Review* 261.

34 R Romano, 'The Shareholder Suit: Litigation Without Foundation' (1991) 7 *Journal of Law, Economics and Organisation* 56.

35 The main fiduciary duty owed by directors is the duty to act bona fide in the interests of the company and these interests have time and again been equated with the interests of the shareholders a whole.

36 JE Parkinson, *Corporate Power and Responsibility - Issues in the Theory of Company Law* (1993).

37 I did a search on Lawnet (<http://www.lawnet.com.sg>) and found 7 reported cases since 1993 in which the company sued its directors for breach of duties.

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requirements of and issues raised by the provisions are considered with a comparative perspective.

Standing

A 'complainant' is defined as meaning any member of a company; the Minister for Finance in respect companies under investigation;³⁸ and 'any other person who, in the discretion of the Court, is a proper person to make an application' under the section.³⁹ This is similar to the position in Canada although the Canadian definition is slightly broader. The Canadian Business Corporations Act⁴⁰ and most of the provincial cognate statutes⁴¹ also have a catchall 'proper person' category but include in their express pool of 'complainants', past and present shareholders, past and present directors or officers, and security holders. Nevertheless, the Singapore derivative action is potentially available to a wider class of applicants than the New Zealand, Australian and proposed United Kingdom provisions respectively allow, and definitely wider than that which existed at common law.

In New Zealand, only current shareholders and directors are included in the pool of potential applicants. The Australian provisions⁴² confer standing on a member, a former member and a person entitled to be registered as member of the company or of a related company, as well as an officer or former officer of the company. The proposed UK provisions are available only to existing members, which is the position at common law. There is no catchall class in the derivative actions of these jurisdictions and the respective lists of persons who can apply to bring a derivative action appear exhaustive.

At first blush, a wide grant of standing accords with the deterrence aim of the derivative action. Certainly, if the directors and management know or believe that their actions can be taken to task by a larger class of interested stakeholders, they will, in theory, be deterred from acting without care and/or without regard for their duties. The English Law Commission, however, is unconvinced of the merits of a wide grant of power,⁴³ and indeed there are practical problems associated with too wide a grant. Former shareholders and directors are more likely to be acting in their own interests rather than in the company's interests, given that they are no longer directly associated with the company. Certainly, there is justification for not granting standing to debenture holders as this could be providing them with

38 Under Part IX of the Companies Act Cap 50 which defines the situations in which the affairs of a company may be subject to an investigation authorised by the Minister for Finance.

39 s 216A(1).

40 See s 238.

41 Including s 245 Ontario Business Corporations Act.

42 S 236 Corporations Act 2001.

43 'We feel that there can be no point in extending the derivative action to former members, since there is bound to be a current member who (if the wrong has not been ratified) could maintain proceedings.'

the means to interfere with management. Although the other pre-requisites to the bringing of the action should and are meant to take care of the obviously unmeritorious cases, there may be cases that may slip through the net, notwithstanding and in spite of an improper motive. In such 'borderline' cases, there will probably be a need for more vigilant supervision of the conduct of the proceedings.⁴⁴

The judiciary in Canada appears to agree. In practice, most of the applications reviewed in one study were brought by current shareholders.⁴⁵ But where the applications were made by former shareholders⁴⁶ or former directors,⁴⁷ these were denied primarily because the judges felt that such applicants lacked 'sufficient interest' in the outcome of the derivative action. This was notwithstanding the fact that these classes of applicants have a prima facie right conferred by legislation to bring the application. In *Jacobs Farm Ltd v Jacobs*,⁴⁸ Blair J opined that 'it could not have been the intention of the Legislature ... to clothe every former shareholder and every former director with the status of a complainant for the purposes of bringing a derivative action'. Baynton J of the Saskatchewan Court of Queen's Bench explained the necessity for this 'sufficient interest rule' as follows:

Such a rule is required to distinguish between applicants who have a bona fide potential financial stake through the corporation in the outcome of the derivative action and applicants who seek leave for an improper purpose. The latter category of applicant has no right to meddle in the affairs of the corporation regardless of whether or not the derivative action is in the interests of the corporation. It is for this reason that the sufficient interest rule respecting an applicant is distinct from the best interests test respecting the corporation.⁴⁹

This seems rather a strict position to take as it would exclude persons who are genuinely pursuing the action for 'the principle of the matter', who would have no 'financial stake' in the outcome of the action, rare though admittedly this might be.

Preconditions to the grant of leave

Section 216A sets out the preconditions to the court granting leave for the bringing of such an action. These preconditions constitute a screening mechanism

44 L Taylor, 'The Derivative Action in the Companies Act 1993' (1999) 7 *Canterbury Law Review* 314 at 316. [In *Schafer v International Capital Corporation* [1997] 5 WWR 99 (Sask QB), an application by an ex-director was declined because personal vendetta was the primary reason.]

45 Cheffins, above n 5, 239.

46 Eg *Jacobs Farms Ltd v Jacobs* (1992) OJ No 813 (Ont Gen Div).

47 *Schafer v International Capital Corporation* [1997] 5 WWR 99 (Sask QB).

48 (1992) OJ No 813 (Ont Gen Div).

49 *Ibid*, at 104.

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to sift out cases that are without merit. The court must be satisfied as to three things: First, that the complainant has given 14⁵⁰ days' notice to the directors of the company of his intention to apply to the Court, if the directors of the company do not bring, diligently prosecute or defend or discontinue the action. Second, that the complainant is acting in good faith; and third, that it appears to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued.

Notice

The requirement to give notice is a compulsory requirement, the objective being to give the company the opportunity, through its board of directors, to consider its rights and course of action. This is recognition that the cause of action rightly belongs to the company, and it should therefore have the first option of pursuing its own rights. Indeed, this precondition is common in other jurisdictions.⁵¹ Under the Australian provisions,⁵² as it also is under the English Law Commission's recommendations,⁵³ notice to the company (although the precise period differs) is a precondition to the grant of leave for a shareholder to pursue the statutory derivative action.

One of two possible consequences may result from the giving of the notice.⁵⁴ The directors may decide that the company should shoulder the responsibility for the suit, thus making the derivative action unnecessary. Or the directors may take such steps as to correct or remedy the situation⁵⁵ that formed the basis for the derivative action. Section 216A is silent on the precise form of the notice and how much information is required. Presumably, the notice must contain at least sufficient information to allow the directors to decide what to do. The Canadian authorities have not taken a technical view of this requirement. Thus, a written request that the board takes action together with details of the claim comprised in a letter to the board appears sufficient.⁵⁶

50 For arguments in favour of a longer notice period, see J Poole and P Roberts, 'Shareholder Remedies – Corporate Wrongs and the Derivative Action' [1999] *Journal of Business Law* 99 at 104.

51 Section 216A(4) allows the court to make such interim order as it thinks fit where the complainant establishes that it would not be expedient to give notice as required (such as where the directors are hostile or under the domination of the wrongdoers).

52 S237(2) Corporations Law: the notice period is 14 days, and the applicant must give written notice of the reasons for the application.

53 Draft Rule 50.4(1), Appendix B to LCR 246: the notice period is 28 days.

54 Cheffins, above n 5, 245.

55 Including internal sanctions such as dismissal or demotion of a defendant employee: see American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* 1994 at 55.

56 See B Welling, *Corporate Law in Canada* (2nd ed, 1992) at 527- 528.

Section 216A(4) allows the court to make such interim order as it thinks fit where the complainant establishes that it would not be expedient to give notice as required. Presumably, this envisages situations where the directors are hostile, under the domination of the wrongdoers, or where timeous litigation is of the essence. In a similar manner, section 237(2)(e) of the Corporations Act 2001 gives the court the discretion to grant leave, even where notice was not given to the company, if it is satisfied that it would be appropriate to do so. The proposed UK procedure too, authorises the court, on application, to dispense with the notice requirement for reasons of urgency.⁵⁷

The position is broadly similar in the United States. A shareholder in the United States must provide the board of directors with a demand to sue prior to the pursuit of derivative litigation. In most United States jurisdictions, demand is excused when it is futile to expect the directors to make a reasoned and unbiased decision on the matter, as where the directors are themselves interested in the challenged transaction.⁵⁸ A complex and inexact jurisdiction has arisen out of what constitutes 'futility' that excuses demand. To simplify the prevailing law, the American Law Institute has recommended that demand be made a universal requirement. Under the recommendations, demand should be 'excused only if the plaintiff makes a specific showing that irreparable injury to the corporation would otherwise result, and in such instances, demand should be made promptly after commencement of the action'.⁵⁹

Good Faith

The requirement that the shareholder is acting in good faith is said to be necessary in order to preclude personal vendettas and vexatious actions. Questions have been raised as to whether this requirement has a valid and independent role to play,⁶⁰ for if the case is itself meritorious, good faith of the applicant is likely to be present in any event. That the good faith requirement has little import appears to be borne out implicitly by the first reported decision on section 216A.

In *Teo Gek Luang v Ng Ai Tong*,⁶¹ the applicant was a shareholder and director in a company known as Transcity Cargo System Pte Ltd. She applied for leave to commence a derivative action in the name and on behalf of the company, the object of which was to recover a sum allegedly owed by the company's managing director to the company. Lai J accepted that the applicant did not, at the time of

57 Law Commission Consultation Paper No 142, Paras 16.15-16.17; Law Commission Report 246 on Shareholder Remedies, 24 Oct 1997 para 6.58 - 6.59. Draft Rule 50.4(3), Appendix B to LCR 246.

58 See American Law Institute, see above n 55, 54-57.

59 Ibid, para 7.03(b).

60 Welling, above n 56, 528: 'I have no idea what this means [I suspect that it is meaningless], and I get the sense that no one else does either.'

61 [1999] 1 SLR 434.

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the application, have a happy relationship with the board, and indeed had personal disputes with the managing director, but held that these matters taken together did not constitute bad faith. Although the applicant may not be completely neutral and objective in her view of things, there was nevertheless substance in her complaint that the directors should not have allowed the managing director's loans to remain outstanding for so long without a reasonable and realistic schedule for repayment. Her application was therefore granted.

The applicant in the unreported case of *Poh Kim Chwee v Lim Swee Long* (OS No 376 of 1997) had personal disputes and had also fallen out with the defendant. Similarly, in the later case of *Seow Tiong Siew v Kwok, Fung & Winpac Paper Products Pte Ltd*,⁶² the relationship between the applicant and the defendant was acrimonious. In both of these cases, the applications were dismissed, primarily because of the lack of merit in the claims themselves. The court however, made specific reference to evidence that the respective applicants had been motivated by considerations other than the interests of the company. It appears therefore that if the action itself is meritorious, the court is not overly concerned that the applicant's self-interest or other considerations may have motivated the application. On the other hand, where the claims are not in the interest of the company, the lack of good faith on the part of the complainant reinforces the case for dismissal. In truth, there are probably too few cases on section 216A to conclude how the Singapore courts will approach the good faith requirement. But the road the courts have thus far chosen to tread appears a sensible one. An applicant may benefit commercially if he succeeds in the derivative action, and can thus be said to have an ulterior motive in bringing it. But if the case is a meritorious one and if the court considers that the applicant is an appropriate person to bring the action, there seems little reason not to allow the action to be brought. The motives of the applicant should take a backseat role in such cases.

In Canada, there have been cases on both sides of the fence. Some cases suggest that the good faith requirement will likely be met if the derivative action appears to be in the interest of the company.⁶³ But there have been other cases in which the good faith requirement was considered a serious issue to be considered so that a lack of good faith was ground enough for denying an application for leave.⁶⁴ In the latter cases, the onus to demonstrate good faith is one that must be discharged by the applicant.

The good faith of the applicant is also a criterion that the Australian court must be satisfied in respect of before making a decision to grant leave, and is one designed to prevent proceedings being used to further the purposes of the applicant, rather than the company as a whole.⁶⁵ There is no directly equivalent requirement in the

62 [2000] 4 SLR 768.

63 Cheffins, above n 5, 249.

64 Ibid.

65 Corporate Law Economic Reform Program (CLERP) Proposals for Reform, above n 29,

New Zealand statutory derivative action, whilst the UK proposals do not put good faith as an independent condition to be satisfied for leave to be granted but merely as a relevant factor to be considered.

Interest of the Company

A third precondition that the applicant must also establish is that the action is prima facie in the interest of the company.⁶⁶ A similar precondition to leave exists in Canada and in Australia. The Canadian courts have often equated the likelihood of success at trial with the interests of the corporation although this approach is clearly open to criticism.⁶⁷ In Australia, this criterion is said⁶⁸ to allow the court to focus on the true nature and purpose of the proceedings, giving due recognition to the reality that there may be sound business reasons for the company's decision against pursuing a course of action that is open to it. To this end, section 237(3) of the Corporations Act 2001 provides that a rebuttable presumption that granting leave is not in the company's interests arises if it is established that:

- the proceedings are by the company against a third party or vice versa;
- the company has decided not to bring or be otherwise involved in the proceedings; and
- all the directors who participated in that decision acted in good faith for a proper purpose; did not have a material personal interest in the decision; are themselves appropriately informed about the subject matter of the decision; and rationally believed that the decision was in the best interests of the company.⁶⁹

The English Law Commission's initial proposal put the company's interests as a factor to be considered by court when deciding whether to grant leave or not but this is now specified additionally as a pre-requisite⁷⁰ in accordance with the responses to the Consultation Paper received. The New Zealand approach is

para 5.3.2 See also Paras 6.34-6.48 of the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1999.

66 See eg Koh, 'For Better or For Worse - The Statutory Derivative Action in Singapore' (1995) 7 *Singapore Academy of Law Journal* 74; Ramsay, above n 27, 149; Maloney 'Whither the Statutory Derivative Action?' (1986) 64 *Canadian Bar Review* 309.

67 Ibid, at 251. It is not always beneficial for a corporation to sue because although the cause of action is legally viable, it is not commercially so.

68 Corporate Law Economic Reform Program (CLERP) Proposals for Reform, above n 29, para 5.3.2.

69 It is specifically provided that a director's belief is rational unless the belief is one that no reasonable person in his position would so hold.

70 Draft Rule 50.8(3) provides that 'The court must refuse leave and dismiss the derivative claim if it is satisfied that the claim is not in the interests of the company'.

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slightly different. The court shall have regard⁷¹ to, *inter alia*,⁷² the interests of the company in the proceedings, but to grant leave, it must be satisfied that either the company does not intend to bring the proceedings, or the action is in the interests of the company⁷³. Whether the derivative action is in the interests of the company is therefore not strictly a prerequisite the granting of leave in New Zealand.

In *Teo Gek Luang*, the Singapore High Court held that the proper approach was for the court to be satisfied that there was a reasonable basis for the complaint and that the action sought to be instituted was a legitimate or arguable one, on the basis of affidavit evidence.⁷⁴ The court expressed reservation with the view of the Ontario Court of Appeal⁷⁵ that the section should be accorded a liberal interpretation in favour of the complainant. The court proceeded as follows:

Management decisions should generally be left to the Board of Directors. Members generally cannot sue in the name of his company. A minority shareholder could attempt to abuse the new procedure, which would be as undesirable as the tyranny of the majority directors who unreasonably refuse to act.⁷⁶

This position was echoed in the subsequent case of *Seow Tiong Siew v Kwok, Fung & Winpac Paper Products Pte Ltd*.⁷⁷ The applicant here was a shareholder and director of Winpac Paper Products. He brought the application under section 216A for leave to bring four actions, three of these were against third parties and the last was against directors of the company for breach of directors' duties in connection with the failure to commence the three actions. Goh J opined that matters of management should be left to the board of directors and the court would not question the correctness of such decisions, if they were bona fide arrived at.⁷⁸ Similarly in the unreported decision of *Poh Kim Chwee v Lim Swee Long*,⁷⁹ the applicant was a shareholder and director of a company, Hypertech Development Pte Ltd. He applied for leave to intervene in an action against the company for the purpose of defending the action and to raise a counterclaim on behalf of the company; and to bring an action against the other shareholder and director for breach of directors' duties. Leave for both actions was refused. The court found the defences to be frivolous and vexatious; that no arguable case was

71 Section 165(2) Companies Act 1993.

72 The other factors are the likelihood of the proceedings succeeding; the costs of the proceedings in relation to the relief likely to be taken; and any action already taken by the company to obtain relief.

73 Section 165(3).

74 [1999] 1 SLR 434 at 438.

75 In *Richardson Greenshields of Canada Ltd v Kalmacoff* (1995) 123 DLR (4th) 628,636.

76 [1999] 1 SLR 434 at 438.

77 [2000] 4 SLR 768.

78 *Ibid*, at para 9.

79 OS No 376 of 1997.

established that the company had a counterclaim and that the action for breach of duty was spurious. The court began by stating the following:

Whether or not to embark upon litigation is a management decision for the company and it must follow that whether or not to defend an action is equally a management decision for the company. It may or may not be worth the company's while to devote the resources (financial and managerial) to defend the action. The cost of litigation would be financed by the company and could exceed any possible benefits that the company would reap. The court would not sit as a court of appeal from management decisions honestly arrived at.

As it stands in Singapore, it appears that the business judgment rule has a significant role in the statutory derivative action. This is also the position recommended by the English Law Commission, which has said that a judge in dealing with the issue of the interests of a company, should have regard for decisions of the board made in good faith, on proper information and in the light of relevant considerations.⁸⁰ Thus, Draft Rule 50.10 requires the court to take into account the view of the company's directors on commercial matters when considering whether the claim is in the interests of the company. This is effectively an application of the business judgement rule. Such an approach deals with the legitimate concerns thrown up by shifting the decision to litigate away from the commercial arena to one that is in the purview of the courts, a task that may not be relished by the judiciary.

As was already mentioned, decisions to litigate are in a sense commercial decisions, involving not only cost-benefit analyses, but also considerations of potential damage to the company's reputation. Undue and unnecessary litigation will certainly do more harm than good for the company. As one commentator put it, 'there will often be sound reasons for avoiding the washing of corporate linen in the courtroom'.⁸¹ There is therefore merit in saying that these are decisions best made by a commercially minded board.

The fear however, is that too much deference to the business judgment rule will remove much of the bite from the statutory derivative action and deprive it of the ability to perform the very function it was created to perform, that of policing boards of directors. Some middle path must therefore be found, something undoubtedly easier said than done. One possibility is to do what Australia did, by providing for a link between the business judgment rule and the statutory derivative action in the form of a rebuttable presumption that, in certain spelt out

80 LCCP No 142, pp 143, 164-165. The Law Commission in its report did clarify that this does not mean that the court would be bound to accept the views of the directors. The existence of a conflict of interest may affect the weight to be given to them, and the court would give no weight to views which no reasonable director in that position could hold: Law Commission Report, *Shareholder Remedies*, Law Com No 246, Cm 3769 (Oct 1997, London, HMSO) para 6.79.

81 Hale, above n 7, 225.

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situations, proceeding with litigation will not be in the company's interests. Or perhaps a distinction should be drawn between cases involving an allegation of a breach of the duty of care and cases involving a conflict of interests. An allegation of a breach of duty of care will almost always involve an allegation of a wrong or bad business decision. But such decisions are as likely to result from negligence as they are from pure bad luck.⁸² In contrast, conflict situations involving self-serving behaviour are more likely to be culpable and at the expense of corporate interest. The business judgment rule should therefore have no role in these latter situations.

In the United States, boards have tried to ensure the application of the business judgment rule to the demand refusal situation by creating a special committee of the board, often called a special litigation committee whose purpose is to decide whether to pursue the action or not. Such committees are comprised of directors who are not interested in the challenged action and who are independent of the defendant directors. The experience in the United States with these committees has been that they almost invariably recommend that the derivative suit be dismissed.⁸³ Quillen, J of the Supreme Court of Delaware put the problem as follows:

We must be mindful that directors are passing judgment on fellow directors... who designated them to serve both as directors and committee members. The question naturally arises whether a 'there but for the grace of God go I' empathy might not play a role. And the further question arises whether inquiry as to independence, good faith and reasonable investigation is sufficient safeguard against abuse, perhaps subconscious abuse.⁸⁴

The English Law Commission envisaged the use of such committees. It recommended that a judge should have regard for the opinion of an independent organ that for commercial reasons the derivative claim should or should not be pursued.⁸⁵

Ratification

Under the common law, if a wrong has been effectively ratified by the company, this will constitute a complete bar to a derivative action. The effect of the ratification will be to 'cure the wrong' so that there is no cause of action in respect of which the company (and therefore the shareholder through the derivative action) can bring proceedings. Even where there has been no formal ratification as such but the wrong is one that is capable of being ratified, it may not be possible

82 JC Coffee Jr, 'New Myths and Old Realities: The American Law Institute Faces the Derivative Action' (1993) 48 *The Business Lawyer* 1407, 1426.

83 See DA DeMott, 'Shareholder Litigation in Australia and the United States: Common Problems, Uncommon Solutions' (1987) 11 *Sydney Law Review* 259, at 277.

84 *Zapata Corp v Maldonado* 430 A 2d 779 (Del Sup Ct 1981).

85 LCCP No 142, 166.

for a minority shareholder to bring a derivative action.⁸⁶ The difficulty is in deciding which types of wrongs are ratifiable and which are not. Section 216B does away with this problem by providing that the fact the alleged breach of a right or a duty owed to the company may be approved by the members is not by itself sufficient for a stay or dismissal of the action. The court in making an order under section 216A may however take such approval into account. Thus, evidence of approval by the general meeting would be taken into account by the court in deciding whether to grant leave or not but is not by itself fatal to the action.

The view of the UK Law Commission is that ratification should continue to be effective in the cases where it is currently effective to bar an action by a minority shareholder.⁸⁷ Thus, the fact that a wrong is ratifiable will not prevent a shareholder from commencing a derivative action. However, if there has been effective ratification, then the action cannot proceed as there will be no subsisting cause of action vested in the company which the shareholder can pursue. Some commentators have expressed reservation with this view as the vexed question of whether and when an attempted ratification is 'effective' remains.⁸⁸ Curiously, it appears that in New Zealand, the statutory derivative action may not be available in respect of a wrong that can be ratified by a majority of shareholders because of section 177(4)⁸⁹ of the Companies Act 1993.⁹⁰

In addition, section 216B provides that no proceeding brought under section 216A can be stayed, or discontinued without the approval of the court. This, provision, which has its roots in American civil procedure, is to prevent strike suits, brought for the sole purpose of and in the hope of reaching some collusive settlement for the benefit of the complainant and the defendants, usually at the expense of the company.

Areas for a Revisit

The statutory derivative action has great expectations of it as a tool of protecting shareholder rights. In Canada, where the statutory derivative action has been operative for many years already, there has not been an abundance of cases in the area, although there have been some important cases. Canadian writers have therefore opined that the statutory derivative action has failed to make a dramatic

86 Thus, a breach such as that in *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 cannot sustain a derivative action.

87 Report para 6.84.

88 J Poole and P Roberts, 'Shareholder Remedies - Corporate Wrongs and the Derivative Action' [1999] *Journal of Business Law* 99, 109.

89 Which provides 'Nothing in this section limits or affects any rule of law relating to the ratification or approval by the shareholders or any other person of any act or omission of a director or the board of the company'.

90 See L Taylor, 'Ratification and the Statutory Derivative Action in the Companies Act 1993' (1998) 16 *Company and Securities Law Journal* (3) 221.

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impact.⁹¹ This need not necessarily be so. Given the deterrence objective of the action, a positive interpretation could be that the action is indeed working! If the courts had been swamped with derivative applications, the fear expressed by the UK Law Commission and others that availability of the action will enhance the scope for involving companies in futile and disruptive litigation⁹² will certainly be vindicated. Be that as it may, there are some areas in which the Singapore statutory derivative action could be improved upon to improve the potential utility quotient of the action. This is not to encourage shareholder litigation for its own sake, but rather, to ensure that the exercise of bona fide shareholder power to commence litigation is not discouraged, and also to ensure that the statutory derivative action has a fair go at reaching its potential as a tool of corporate governance.

The Exclusion of Listed Companies

In contrast to the Canadian provisions and those of other jurisdictions, the Singapore statutory derivative action applies only in connection with companies that are not listed on the Singapore Stock Exchange.⁹³ The Select Committee gave its reasons for the exclusion of the listed company in the following terms:

The Committee was of the view that the proceedings and performance of public listed companies are already monitored by various regulatory authorities and disgruntled shareholders of such companies have an avenue in that they can sell their shares in the open market.⁹⁴

The move to exclude listed companies from the purview of section 216A was described as 'controversial'.⁹⁵ The ability of regulatory authorities and agencies to monitor management is necessarily bound by budgetary and perhaps political constraints. Whilst the exclusion can perhaps be justified to some extent by reference to the checks imposed by market forces, the effectiveness of market forces, particularly in relation to day-to-day accountability⁹⁶ and one-time breaches of duty,⁹⁷ is limited. To deny the listed shareholder the availability of a statutory derivative action on the basis that he has the option of selling his shares on the market is to ignore the deterrent effect of the provision. Perversely, this

91 B Cheffins and J Dine, 'Shareholder Remedies: Lessons from Canada' (1992) 13 *The Company Lawyer* 89 at 94.

92 Hale, above n 7, 226.

93 Although it is recognised by the Select Committee members that if the company was listed on stock exchanges other than the Singapore Stock Exchange, it may apply for leave to bring a statutory derivative action under section 216A.

94 Report of the Select Committee on the Companies (Amendment) Bill, para 45.

95 Low, 'Minority Shareholder Protection: Major Changes under Singapore Law' (1994) 3 *Asia Business Law Review* 90.

96 Bishop, 'Watching the Boss', *The Economist* (29 January 1994) 5.

97 Ramsay, above n 27, 155.

may actually provide wrongdoers with a perceived sense of immunity.⁹⁸ The derivative action is a remedy for shareholders who want to remain in the company.

There are indications supporting the extension of the applicability of the statutory derivative action to listed companies.

First, although listed companies have widely dispersed shareholdings, many Singapore listed companies remain in the control of majority shareholders. In fact, according to one survey of the ownership structure of companies listed on the stock exchange of Singapore,⁹⁹ the median proportion of shares held by majority shareholders is in excess of 60 %, which is very high compared with many developed countries. These shareholders are mainly government-linked companies and statutory boards, individuals who founded the company and other corporate entities. In these companies, majority shareholders are frequently represented on the board. The very composition of the board would probably depend on the majority shareholders and it is not inconceivable that the personal preferences, objectives or vision of these shareholders be prioritised at the expense of the minority. While there may be concerns that to over-arm the minority (particularly an over-zealous minority) will cause more harm than good, the safeguards built into the action are meant to address these very fears.

Second, the listed company regime in Singapore has recently moved towards the principle of caveat emptor. The Singapore stock exchange amended its listing manual in 1998, making previously compulsory corporate governance rules into a separate best practices guide, which is not compulsory,¹⁰⁰ and allowing greater leeway for interpretation of these guidelines. In line with this, the new Code of Corporate Governance also calls for greater shareholder participation in listed companies.¹⁰¹

The assumption here is that shareholders will enforce their own rights and play a part in the control of directors. The fact that the state regulatory body is taking several steps back suggests that there will be a need to enhance the position of public listed shareholders. Increased shareholder intervention in publicly-held companies, appropriately constrained, is necessary for improved corporate

98 Koh, above n 66, 84.

99 YT Mak and PH Phan, 'Corporate Governance in Singapore: Recent Developments for the Next Millennium', paper presented at the Federation of ASEAN Economic Associations 24th Annual Conference, 3-4 Dec 1999, full paper available at <http://www.pes.org.ph/corpgov_sing.html>.

100 But companies are required to disclose in their annual reports whether and how they have complied with the guidelines: see clause 912(4) Listing Manual, Singapore Exchange.

101 Report of the Corporate Governance Committee, 21 March 2001 available at <<http://www.mof.gov.sg/cor>>.

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governance.¹⁰² If the statutory derivative action could be extended to these shareholders, they would potentially have a bigger role in the governance of management and a greater chance of protecting their interests.

Thirdly, there appears to be a shift in the mindset and approach of the Singaporean shareholder. It used to be the common perception that Singaporean shareholders were a passive lot, particular the smaller investors. The sanctity of that generalisation appears to be slowly eroding. Perhaps all that was required was a spark to ignite latent fires, and that spark came in the form of a ban by the Malaysian Government on the trading of Malaysian shares on Singapore's over-the-counter exchange, the Central Limit Order Book, in late 1998.¹⁰³ The establishment of the Securities Investors Association of Singapore came about shortly thereafter. The SIAS now has a membership of some 54,000 and is the unofficial 'watchdog for minority rights'. With the backing of the SIAS, minority shareholders have in recent times been taking directors of listed companies to task, over issues of director remuneration¹⁰⁴ as well as dividend payments.

Fourth, there is the potential corporate governance role for the institutional investor¹⁰⁵ in Singapore, at least theoretically. Institutional dominance of the stock market has been on the rise over the years in jurisdictions such as the United Kingdom,¹⁰⁶ United States and Australia.¹⁰⁷ Whilst such institutional shareholders are not significant players on the Singapore market yet, the concentration of share ownership in funds owned and/or managed by institutional investors can only increase, particularly since the Singapore Government has been making efforts to encourage the development of the funds management industry.¹⁰⁸ For the institutional investor, the typical 'dumping' response to mismanagement in listed companies would not be a viable option.¹⁰⁹ A sale of

102 Bishop, above n 96, 5; Ramsay, above n 27, 149 generally.

103 See S Jayasankaran, 'Clobbered!' *Far Eastern Economic Review* (19 April 2001) <<http://www.feer.com>>.

104 See Siow Li Sen, 'Shareholders take issue with directors' pay' *The Business Times* (15 May 2001) <<http://business-times.asia1.com.sg>>.

105 Institutional shareholders include insurance companies, super-annuation funds, unit trusts and investment trusts. These institutions may appoint fund managers (in-house or external) to manage their equities. In this event, power to exercise voting rights normally rests with the fund manager. Thus, the fund manager effectively controls the equities managed. See GP Stapledon, 'Share Ownership and Control in Listed Australian Companies' [1999] 3 *CGI* 17 at 24.

106 See J Charkham and A Simpson, *Fair Shares - The Future of Shareholder Power and Responsibility* (1999) Ch 13.

107 See generally GP Stapledon, 'Share Ownership and Control in Listed Australian Companies' [1999] 3 *CGI* 17; AR Goobey, 'The Responsible Owner in Action' [1999] 2 *CGI* 115; Parkinson, above n 38, 166.

108 Mak and Phan, above n 99.

109 In Singapore, see PH Phan, 'Effective Corporate Governance in Singapore: Another Look' (1998) 20 *Singapore Management Review* 43. See also GP Stapledon, 'Share Ownership and Control in Listed Australian Companies' [1999] 3 *Corporate*

large blocks of shares by an institutional investor is very likely to send the wrong kinds of signals to the market, resulting in an adverse effect on the share price. To protect their portfolios therefore, it may be that increased activism on the part of institutional investors would be the only responsible way forward.

Indeed, as Alastair Ross Goobey, the Chief Executive Officer of Hermes Pensions Management Ltd opined:

Too often, institutional shareholders have been concerned only with the health of the companies in which they are invested at that time... As the concentration of [share] ownership [in funds managed by institutional investment managers] has become more and more pronounced ... the investors cannot simply pass the problem on to some unknown third party by selling shares. Either they will sell to another institution or in extremis, to new management through a bid. We start from the premise that early intervention and internal change will prove cheaper and more effective than either of these traditional routes... [W]e are aware that too many companies have been allowed to stumble on for some years without intervention from the shareholders ... Too often this has ended in expensive takeover-bids that might have been avoided, had management been subject to some outside pressure from what are often called 'activist' institutional investors.¹¹⁰

It might be argued that there is no need for an extension of the statutory action to listed companies because the role of monitoring management may be more effectively undertaken by the independent directors on the board. The new Code of Corporate Governance envisages an enhanced role for the independent director in public listed companies and recommends that at least a third of the board be independent directors. An independent director is one who has no relationship with the company, its related companies or its officers that could interfere, or be reasonably perceived to interfere, with the exercise of the director's independent business judgment with a view to the best interests of the company.¹¹¹ If these independent directors take on a 'supervisory' role, these 'supervisory directors' can then undertake the function of monitoring the board. To be effective monitors, however, such independent directors have to be genuinely independent of the board. This requires proper selection¹¹² (and not only proper appointment)

Governance International 17.

110 AR Goobey, 'The Responsible Owner in Action' [1999] 2 *CGI* 115 at 116.

111 Principle 2 and Guidance Notes 2.1, Code of Corporate Governance.

112 In a survey of listed companies commissioned by the Singapore Institute of Directors (*Singapore Board of Directors Survey 2000*, Singapore Institute of Directors and Egon Zehnder International, September 2000), it was found that the Chairman of the board identifies Board candidates in the majority of appointments, and the members of the Board of directors, in particular the Chairman, were found to be very influential in the ultimate decision whether to appoint or not. The survey involved sending questionnaires to the Chairmen of 391 companies listed on the Singapore Exchange. 102 responses were obtained providing information on a total of 692 directors (421 Non-Executive Directors and 275 Executive Directors). The responses came from

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procedures to be in place to ensure independence. This obviously raises costs as a result of increased bureaucracy and one is then pushed to ask what real advantage such monitoring has over empowering the shareholders themselves. An independent director has to be independent not only in name but also in deed. To the extent that the issue of structural bias remains, judicial oversight continues to be necessary.

The real concern, as was also a concern of the English Law Commission,¹¹³ is the fear of increased shareholder litigation in public companies resulting in over-interference in the management of the company and the effect this might have on the decision-making process by the directors. As the Law Commission puts it, the company may very well be 'killed by kindness'.¹¹⁴ In addition, there is the potential for the risk-averse amongst the directors to flee the board, which is a concern that cannot be ignored in the Singapore context, given the small pool of public company directors.¹¹⁵ One possibility that might allay these fears is to limit the applicability of the derivative procedure to claims arising out of breaches of directors' duties. This is the Law Commission's approach¹¹⁶ and does seem a sensible¹¹⁷ position to take, particularly given the purpose¹¹⁸ behind the introduction of the statutory procedure considered earlier.¹¹⁹ There is merit in throwing open the gates to shareholder litigation but certainly not overly widely, as the benefits in the name of corporate governance of so doing are, at the moment, more perceived than real.

companies that were representative of all major industrial sectors of varying sizes.

113 Poole and Roberts, above n 88, 102; see Law Commission's Guiding Principles as set out in para 1.9 of LCR No 246.

114 Guiding principle (v).

115 It is common to find directors sitting on multiple boards, with some highly sought-after individuals sitting on as many as 50 boards: A Teo, 'Multi-board directors will become notable exceptions', *The Business Times* (14 May 2001) <<http://business-times.asia1.com.sg>>. Admittedly, many of these positions are likely to be non-executive positions but Singapore law does not impose different fiduciary standards on the different categories of directors.

116 LCR No 246, paras 6.23 - 6.49. The recommendation is that the derivative action 'should only be available if the cause of action arises as a result of an actual or threatened act or omission involving (a) negligence, default, breach of duty or breach of trust by a director of the company, or (b) a director putting himself in a position where his personal interests conflict with his duties to the company.'

117 Cheffins, above n 5, 243.

118 That of preserving the utility and efficacy of directors' duties as a system of control over management.

119 The Canadian experience indicates to some extent that such a move is unnecessary as the cases have typically involved allegations of self-serving conduct on the part of the company's directors. These cases have however, involved mostly closely-held corporations: see Cheffins, above n 5, 241.

Notwithstanding all that has been said, it is interesting to point out that all applications in New Zealand and the majority of cases in Canada, have been in respect of closely-held companies.

The Oppression Alternative

The statutory oppression remedy was first introduced in England¹²⁰ in recognition of the fact that minority shareholders often faced considerable problems in obtaining appropriate remedies and as an alternative to the just and equitable winding up option. Similar legislation can be found, among other English-based jurisdictions, in Canada,¹²¹ Australia,¹²² New Zealand,¹²³ Singapore¹²⁴ and Malaysia.¹²⁵

The introduction of the oppression remedy reflected a concern of the legislators over the weak position of the minority shareholder. Although the majority view should prevail in a corporate context, the interests of the minority must also be catered for. Although various terms (such as 'oppression' and 'prejudice') are found in the oppression provision, the basic idea behind it is to give a shareholder standing to complain that the affairs of the company were being conducted in a manner that was unfair to him. The remedy is couched in wide terms. The shareholder can complain about transactions that occurred prior to his becoming a member, and even where the unfairness was not directed at him. Because of the breadth with which the provision is usually couched, it is possible that mal-administration of the company's affairs by the directors can amount to oppressive or unfair conduct. The complaint need not be confined only to the conduct of the directors or of the general meeting but can relate to the conduct of anyone who is taking part in the conduct of the affairs of the company. The essential criterion behind the provision is commercial unfairness. This would include the actions of persons with de facto control of the company such as a shadow director or an influential shareholder and possibly even a related company.

The oppression remedy has been used as a way around the rule in *Foss v Harbottle* for the shareholder who wanted to have the acts of directors or the majority reviewed. The oppression provision does not require the action to be framed as a derivative action, the shareholder being given standing in his own right. In

120 Section 210 UK Companies Act 1948. This provision provided relief for members where the company's affairs were being conducted in an oppressive manner. The provision was unfortunately interpreted restrictively by the English courts and was only of limited use to minority shareholders. The provision has since been replaced by section 459 UK Companies Act 1985, which has since developed into an extremely valuable remedy for the minority shareholder: see Farrar et al, above n 8.

121 Eg section 241 Canada Business Corporations Act.

122 Section 232 Corporations Act 2001.

123 Section 165 Companies Act 1993.

124 Section 216 Companies Act Cap 50.

125 Section 181 Malaysian Companies Act.

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addition, the provision gives the courts wide powers to redress the grievances of the petitioning shareholder. One of the orders that the court is empowered to make under the provision is the order to authorise civil proceedings in the name of and on behalf of the company, subject to such conditions as the court may impose.¹²⁶ This is equivalent to a derivative action for wrongs done to the company.

A wrong to the company may result in unhappy shareholders shouting oppression. If the court adopts a flexible view of the oppression section, a shareholder could effectively bring an essentially derivative action as a personal one. Aggrieved shareholders are unlikely to be concerned with the niceties of interpretation and given the choice, would probably prefer to proceed under the oppression provision with its easier procedural requirements and wider range of judicial remedies, if this is at all possible.

In New Zealand, one commentator¹²⁷ opined when the statutory derivative action was newly introduced that it may be 'overshadowed' by the New Zealand unfair prejudice provisions.¹²⁸ Australian commentators¹²⁹ too expressed similar sentiment vis-à-vis the Companies and Securities Law Review Committee's proposal¹³⁰ to introduce a statutory derivative action into Australian corporate law, given the existing section 232¹³¹ of the Corporations Act 2001. In Canada too, the primary reason relied upon for the relatively fewer cases on the statutory derivative action is that unhappy shareholders are much more likely to use the oppression remedy given its procedural advantages over the statutory derivative action.¹³² In Canada, the relationship between the oppression remedy and the derivative action is not clearly defined. Some cases have held that the proper and only avenue for derivative wrongs is the derivative action but others have expressly allowed derivative wrongs to be redressed under the oppression provision.¹³³ In other cases, apparent corporate wrongs, which should therefore be

126 Section 216(2)(c).

127 G Shapira, 'Minority Buy-outs and Derivative Actions in New Zealand', paper presented at the 1994 National Corporate Law Teachers Conference, UTS Sydney.

128 Section 174, 1993 Companies Act.

129 Ramsay, above n 27, 173; J Kluver, 'Derivative Actions and the Rule in *Foss v Harbottle*: Do We Need a Statutory Remedy', [1993] 11 *Companies and Securities Law Journal* 7, 25.

130 Companies and Securities Law Review Committee, Discussion Paper No 11, 1990.

131 Which embodies the Australian oppression remedy and is based on section 210 of the UK Companies Act 1948.

132 These advantages include the fact that leave does not have to be obtained in order to petition under the oppression section, and any remedy granted would be more likely to benefit the applicant personally.

133 JF MacIntosh, 'The Oppression Remedy: Personal or Derivative?' (1991) 70 *Canadian Bar Review* 27, 46; B Cheffins and J Dine, 'Shareholder Remedies: Lessons from Canada', (1992) 13 *The Company Lawyer* 89 at 94.

the subject of derivative actions, have without comment, been litigated under the oppression section.¹³⁴

Interestingly enough, this 'overlap' potential was envisaged by the Select Committee in Singapore. The Companies Amendment Bill¹³⁵ proposed the deletion of section 216(2)(c),¹³⁶ making it clear that section 216A is the only avenue for the commencement of derivative actions. The proposed deletion was however not made in the Amendment Act. It is likely that this was the result of a submission by Professor D Prentice and Mr Lee Beng Tat that 'while the proposed deletion is clearly intended to make the remedy available under section 216 a personal remedy, it may turn out at the end of an action under section 216 that the most appropriate remedy would be to allow the applicant to bring an action under the new section 216A. While section 216 does allow a court to 'make such order as it thinks fit', the deliberate deletion of a provision like... subsection (2)(c) may suggest that it was intended that the court should not have the power under section 216 to make an order to authorise an action to be brought under section 216A...'. It was proposed that section 216(2)(c) be amended to read 'authorise proceedings under section 216A to be brought in the name of or on behalf of the company by such person or persons and on such terms as the court may direct'. This proposal was not adopted, although the marginal note to section 216 was changed from 'Remedies in cases of oppression and injustice' to 'Personal remedies in cases of oppression and injustice'.

That this is insufficient to avoid interpretative confusion is illustrated by the judicial approach taken in at least one relatively recent case. In *Re Eng Cheong Peng Kee Pte Ltd; Janie Low v Low Peng Boon & Ors*,¹³⁷ the plaintiff, Janie Low sought an order under section 216 of the Singapore Companies Act alleging that the affairs of the company, in which she had a minority stake, had been conducted in a manner oppressive to her interests in the company. She was the daughter of the first defendant and the half brother and cousin of the second and third defendants respectively. She, and the first to third defendants, were directors of the company. It was alleged, inter alia, that the first defendant had used the company's funds to pay for holidays overseas for himself and numerous companions, that the company's accounts were not in order, that there had been a procedural irregularity in the manner in which the first to third defendants had approved the accounts of the company's subsidiaries, that the company and its subsidiaries had substantial profits but had refrained for many years from declaring dividends because the terms of the memorandum and articles of the companies made it favourable to the first defendant for profits not to be distributed as dividends, that the company's funds had been used to purchase an

134 Cheffin and Dine, *ibid*, at 94.

135 No 33 of 1992.

136 Which allows the court to authorise civil proceedings to be brought in the name of the company.

137 [1998] 3 SLR 1.

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expensive luxury car for the third defendant. These allegations could very well have founded an action for breach of directors' duties and should therefore have been litigated as a corporate wrong. No mention of section 216A was made in the judgment. The Singapore High Court held that there was the clearest evidence of a visible departure from the standards of fair dealing and a violation of the conditions of fair play by the first, second and third defendants. The court therefore considered that the appropriate remedy in the circumstances was an order requiring the first, second and third defendants to buy out Janie Low's shares at a fair and proper value. The wrongdoing directors were 'penalised' in that they had to purchase the plaintiff's shares but this merely consolidated their control over the company and certainly nothing was achieved in the name of managerial accountability.

If Ms Low had commenced a section 216A application, the only 'benefit' to her would be the knowledge that she has possibly contributed to a wider good and probably an order that the company bears the costs of the action. Given the choice therefore, which individual will want to pursue a derivative action for the company's, rather than her personal, benefit?¹³⁸ Obviously such a position is undesirable. To avoid an evisceration¹³⁹ of section 216A, it would be necessary to make clear that in respect of all actions that are essentially derivative in character, the shareholder must obtain leave to commence the action.

The Lack of Incentives for Shareholders

The question who bears the costs of any litigation action plays a large part in the decision whether to commence an action. In derivative actions, this concern is particularly acute since, by the very nature of the action, the benefits of the suit flow to the company as a whole, with the individual shareholder receiving only a small pro-rata benefit. This and the fact that the other shareholders will free-ride on the plaintiff shareholder's action creates a disincentive to commence litigation.¹⁴⁰ Notwithstanding the fact that it is the company that takes the benefit of the action, the individual shareholder who institutes the action, unless it is otherwise provided, will have to be responsible for the litigation costs of the action. Under the Singapore system, if the action is unsuccessful, the plaintiff will have to bear the legal costs of the defendants.

The common law recognised the financial difficulties of the intrepid shareholder in *Wallersteiner v Moir (No 2)*¹⁴¹. Lord Denning observed that:

138 A similar problem exists in New Zealand. See *Holden v Architectural Finishes Ltd* (1996) 7 NZCLC 260,796 where a wrong to the company was held to constitute oppressive conduct resulting in relief being granted to the minority shareholder. See discussion in Taylor, above n 44, 324.

139 Per Barry J in *Pappas v Acan Windows Inc* (1991) 2 BLR (2d) 180, 214.

140 Ramsay, above n 27, 163.

141 [1975] QB 373.

[T]he minority shareholder, being an agent acting on behalf of the company, is entitled to be indemnified by the company against all costs and expensed reasonable incurred by him in the course of the agency... Seeing that if the action succeeds the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf... But what if the action fails? Assuming that the minority shareholder had reasonable grounds for bringing the action – that it was a reasonable and prudent course to take in the interests of the company – he should not himself be liable to pay the costs of the other side, but the company itself should be liable, because he was acting for it and not himself. In addition, he should himself be indemnified by the company, in respect of his own costs even if the action fails.¹⁴²

Under the Singapore provisions, the courts ‘may make such orders or interim orders as it thinks fit in the interests of justice... including...an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action’.¹⁴³ Additionally, the Court is given the power to order, at any time, the company to pay the complainant interim costs but the complainant may be accountable for these interim costs upon the final disposition of the application or action.¹⁴⁴

The Singapore position is unlike that in New Zealand, where section 166 of their Companies Act 1993 provides:

The Court *shall*, on the application of the member or director *to whom leave was granted* under section 165 of this Act to bring or to intervene in the proceedings, order that the whole or part of the reasonable costs of bringing or intervening in the proceedings, including any costs relating to any settlement, compromise, or discontinuance approved under section 168 of this Act, *must* be met by the company unless the Court considers that it would be unjust or inequitable for the company to bear the costs. (emphasis added)

It appears reasonably clear that the intent of the section is to lay the costs of the derivative action at the door of the company provided leave has been granted under section 165 and unless the interests of justice and equity dictate otherwise. This makes perfect sense. Once leave has been granted, the applicant would have convinced the court that it is appropriate in the instant case for leave to be granted. Under the New Zealand section 165, the court would have considered factors such as the likelihood of the proceedings succeeding, the costs of the proceedings and the interests of the company. In addition, the court would have to be satisfied that either the company does not itself intend to bring the action or that it is not in the company’s interests that the conduct of the proceedings be left to the directors or to the shareholders in general meeting. As such, there is little

142 Ibid, at 391–392.

143 Section 216A(5c).

144 Section 216A(5).

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reason why the company should not be required to meet the costs of the applicant in conducting the proceedings.¹⁴⁵

Notwithstanding this enlightened provision, which also differs from the Canadian provisions, the New Zealand court in the first decision on the statutory derivative action managed to inject some uncertainty into the applicant's position as to costs in the case of *Vrij v Boyle*.¹⁴⁶ In the case, Fisher J did so by ordering that 'all questions of costs and indemnity from the company should be reserved *pending the outcome of the action on the merits*'.¹⁴⁷ To the extent that this makes an award of costs dependent on the outcome of the substantive action, it would be at odds with section 166.¹⁴⁸ Nevertheless, orders that the company met the reasonable costs of the proceedings were made in subsequent cases.¹⁴⁹

It would be a rare shareholder indeed who would fly in the face of all the recognised disincentives of derivative litigation. There is therefore merit in the proposal that once the court grants leave to the applicant to commence derivative proceedings on behalf of the company, it should be mandatory for the company to pay the costs of the proceedings.¹⁵⁰ There is perhaps less imperative for legislation to provide explicitly that the costs of the *application* too should be borne by the company. In the New Zealand case of *Thorrington v McCann*,¹⁵¹ the High Court ordered that costs in the application be fixed at a particular sum but that the liability for payment 'be determined by the final outcome of the substantive proceeding'. Thus, if the action is successful, the applicant is reimbursed, if not, he would have to bear the costs of the application. The justification for this approach can be found in the following words of Tysoe J of the Supreme Court of British Columbia:¹⁵²

Many decisions in the course of litigation in my view are influenced by attendant legal costs and it is appropriate in my view that the person having the conduct of a derivative action should make the legal decisions bearing in mind that they will not necessarily be reimbursed for the legal costs...The matter of the legal fees will, in a sense, be the litmus test for this proceeding. If [the applicants] are prepared to prosecute the derivative proceeding with the risk that they may not be reimbursed for the legal costs incurred by them,

145 Ramsay, above n 27, 164.

146 (1995) 7 NZBLC 260 846.

147 *Vrij v Boyle* (1995) 7 NZBLC 260 846 at 269 849 (emphasis added). See Fitzsimons, 'The Companies Act 1993: A New Approach to Shareholder Litigation in New Zealand', (1997) 18 *The Company Lawyer* 306 at 309-310.

148 Ibid.

149 See *MacFarlane v Barlow* (1997) 8 NZCLC 261, 470 where the court ordered that the company meet the whole costs of bringing the proceedings. In *Thorrington v McCann* (1998) 8 NZCLC 261 564, no order for costs could be made as there was no application under section 166 by the plaintiff.

150 Ramsay, above n 27, 164.

151 (1998) 8 NZCLC 261 564.

152 *Intercontinental Precious Metals Inc v Cooke* (1993) 10 BLR (2d) 203 at 225 and 226.

it will tend to substantiate their positions that they are acting in good faith and that they do believe the pursuit of the action to be in the best interest of [the company].

Whilst the learned judge extended this reasoning to the issue of costs of the substantive action, it is submitted that this really does go too far. Such a position is likely to deter unbiased shareholders but might not prevent someone bent on grinding a personal axe. It would be far more reasonable and equitable to limit the reasoning to the costs of the application. After all, once leave is granted, the applicant would have cleared the twin hurdles of good faith and the action being in the interests of the company.

That the issue of costs has a great impact on the utility of the statutory derivative action can be seen from the Japanese experience. Japan's present statutory derivative action¹⁵³ evolved from an original version¹⁵⁴ that was borrowed from Germany. In Japan, there is a strong traditional cultural aversion to litigation as a means of settling disputes.¹⁵⁵ Indeed, litigation, it seems, is seen as a 'dangerous characteristic of the foreigner who does not know better'.¹⁵⁶ Notwithstanding this cultural position, Japanese shareholders have, in recent years, been stepping up lawsuits against corporate leaders using the derivative action¹⁵⁷. Seen against a corporate scene of management control and ignored shareholder interests, this state of affairs could indicate a general trend for increasing litigation, particularly in commercial matters, perhaps fuelled in part by the increasing exposure the Japanese have to Western influence and expressions of individualism and liberty.¹⁵⁸ The real reason, however, is not merely the general shift in attitude but the dramatic changes in Japanese law in late 1993 making it easier and cheaper¹⁵⁹ for shareholders to bring derivative suits.

While the availability of an order for costs ameliorates the burden of positive action on the part of the shareholder, it does not provide an incentive¹⁶⁰ to act.

153 Articles 267–268-3 Commercial Code.

154 *Shoho [Commercial Code]*, unamended 1899 provisions, Art 178, reprinted in *Kyuhorei Shu [Old Laws and Ordinances]* 329 (1968). See deVere Stevens, above n 25, 127.

155 A Williams, 'Japan's Recipe for Dispute Resolution' [1996] *International Commercial Litigation* 2; T L'Estrange, 'Major Issues in Litigation in the Asia Pacific Rim' [1996] *International Commercial Litigation* 24.

156 Williams, above n 155, 2.

157 S Wada, 'Empowered Shareholders Step Up Lawsuits Against Corporate Leaders: Commercial Code Revisions Make Court Action Easier' *Nikkei Weekly*, 11 October 1993, available in LEXIS, News Library, Non-US File.

158 Williams, above n 155.

159 After the amendment to the Commercial Code, shareholders in Japan file derivative law suits for a uniform ¥8,200 as opposed to a filing fee which approximated 0.5% of the compensation claim, a figure which usually made it unfeasible to file such suits: see Wada, above n 157.

160 In this respect, one should consider the unique position in the US where the derivative action is driven not by incentives being made available to shareholders but by

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Recovery in a derivative suit is the right of the company, not the litigant shareholder. Indeed, if the wrongdoers remain in control of the company, an award of damages to the company perversely benefits the wrongdoers! In this regard, it is submitted that the Singapore action could be improved with an express power conferred on the courts to order that recovery be made directly to the shareholders or former shareholders of the company. In the Canadian Business Corporations Act, the court has the power to make an order 'compensating an aggrieved person'.¹⁶¹ Section 167 of the New Zealand Companies Act is more explicit. It provides that the court may make 'an order directing that any amount ordered to be paid by a defendant in the proceedings must be paid, in whole or part, to former and present shareholders of the company or related company instead of to the company or related company'. Such an order prevents funds from being returned to a company that may still be under the control of the wrongdoers.¹⁶²

Conclusion

Advances in technology have allowed companies to grow to sizes not previously imaginable. The divorce between ownership and control is a natural by-product of this growth. As more powers in relation to the running of the company were conferred on the management, the shareholder's position in the company was increasingly being relegated to a small backseat, waiting only to receive dividends, if these were declared. In addition, certain problems are compounded when the majority in a company backs the management. Plentiful opportunities remained for the corporate form to be manipulated to the management's and the majority's own ends. With the shareholders' hands tied with legal strings, courtesy of *Foss v Harbottle*, an important check on mismanagement was not allowed its full potential. A certain level of shareholder activism ought to be encouraged.

The risk of course is that encouraging shareholder involvement may result in increased counter-productive litigation. Indeed, the one thing that appears most capable of raising the ire of shareholders is that thorny issue of directors' fees. Giving the shareholders new powers with which to litigate may result in shareholders launching challenges on directors' fees, ignoring competitive salary levels and the ability of the company to attract competent and capable directors.

incentives available to the *legal profession*. The US system of contingency fees entitles an attorney representing a shareholder who brings a successful derivative action to a counsel fee award from the amount received by the corporation. These counsel fee awards, which historically amount to a substantial 20 -30 per cent, provide lawyers with a financial incentive to seek out derivative litigation and 'perform the socially useful function of deterring undesirable conduct': see JC Coffee, 'Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class Actions' (1986) 86 *Columbia Law Review* 669.

161 Section 241(3)(j).

162 Taylor, above n 44, 326.

This would certainly be undesirable, bearing in mind that even having to defend one action that is without merit is a waste of resources.

Nevertheless, increasing the scope for shareholder intervention in the hope of enhancing corporate accountability is laudable, provided the necessary safeguards are in place. Potential investors must have the confidence that the officers of corporate entities operate them honestly and in the best interest of the shareholders, both majority and minority. If not, they must believe that they can do something about it. It would certainly be too late to make legislative amends if perceived managerial ineptitude and corporate wrongdoing manifest themselves in the form of a lack of investor confidence. Inevitably, allowing for increased shareholder activism will foster a new reality that management will have to take greater account of shareholder interests and rights. As Professor Coffee opined almost a decade ago, 'the knowledge that one is being watched and that one must justify one's actions improves the behaviour of most individuals'.¹⁶³

The statutory derivative action was therefore enacted in Singapore in response to these issues, and it has been 8 years since. In late 1999, the Ministry of Finance, together with the Monetary Authority of Singapore and the Attorney-General's Chambers set up three private-sector led committees to review the corporate regulatory framework, disclosure standards and corporate governance in Singapore. One of these was the Committee on Company Legislation and Regulatory Framework. Its mandate is to 'undertake a comprehensive and coherent review of our company law and regulatory framework and recommend a modern company law and regulatory framework for Singapore which not only accords with global standards but also promote a competitive economy'. This is thus an opportune time to revisit the Singapore provisions and consider those areas in which the action can be improved upon. It is hoped that this paper contributes towards that aim.

163 Coffee, above n 82 1425.