

Article

Charting the Course for Shareholders’ Recourse: Observations on the Malaysian Response

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ABSTRACT

This article aims to examine the nature and enforcement of members’ rights under the corporate law regime in Malaysian company law. First, the rights of Malaysian shareholders to bring an action on behalf of the company will be examined. The focal point in this regard is the common law derivative action. The new statutory derivative action introduced in 2007 by the Malaysian Companies (Amendment) Act 2007 will also be considered. This article will then discuss and comment on the law relating to a legal avenue available to shareholders to bring personal actions for the enforcement of their rights. The spotlight here will be turned on Malaysia’s “oppression” provision, namely section 181 of the Companies Act 1965. Finally, this article will discuss the availability of the commencement of a class action or representative action by members or shareholders in the sphere of company law. The discussion in this article will centre upon the viability and accessibility of the above-mentioned mechanisms and whether or not they promote adequate protection for the interests of companies’ members and shareholders in Malaysia.

Keywords: *Shareholder Protection, Shareholder Rights, Company Law, Malaysia*

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I. INTRODUCTION

Shares of companies are purchased for a variety of reasons. It would not be a misconception to state that shares of public companies are bought by persons in the hope and expectation that the value of their investment will increase. More often than not, shareholders or investors have neither the desire nor the ability to actively participate in the management of the company. However, in the case of private companies, it may be assumed that the shareholders may be more interested to actively take part in the management of the company. Regardless of their inclinations and the type of companies involved, an effective regulatory framework for companies must be put in place so as to ensure that shareholders' or members' rights are properly safeguarded.

This article examines the principles relating to some of the mechanisms governing the enforcement of shareholders' rights under Malaysian company law. The three key areas which are discussed and dealt in this article are as follows.

The first is in relation to the rights of Malaysian shareholders to bring an action on behalf of the company. In this regard, the focal point is on the common law derivative action. Particular emphasis will also be directed to a recent development in the Malaysian corporate framework, namely the new statutory derivative action introduced by the Companies (Amendment) Act 2007.¹

This article will then proceed to discuss and comment on the law relating to a legal avenue available to shareholders to bring personal actions for the enforcement of their rights. The spotlight will be turned on Malaysia's "oppression" provision, namely section 181 of the Companies Act 1965.

Last but not least, this article will consider the disparate views concerning the utility and desirability of introducing a class action regime in the companies legislation of Malaysia. As class action is an important procedural mechanism to uphold shareholders' rights, the question as to whether there is a need to introduce such a provision in the companies legislation of Malaysia as a measure to enhance shareholder protection is of utmost importance. It may be noted that the scope and ambit of this article is confined to the three key areas which have been identified above. Hence this article does not consider other mechanisms which afford rights and safeguards for shareholders such as the enforcement of shareholders' personal rights arising from the company's constitution or from a shareholder's agreement.

1. Companies (Amendment) Act (Act A1299/2007).

II. RIGHTS OF SHAREHOLDERS TO BRING AN ACTION ON BEHALF OF THE COMPANY

A. *The Common Law Derivative Action*

1. *A Brief Background*

A shareholder's right to commence a legal action to remedy a wrong done to the company or to enforce a right of the company is circumscribed by the rule in *Foss v. Harbottle*.² The rule in *Foss v. Harbottle* upholds the principle of supremacy of majority rule in company law. The two main principles as laid down in *Foss v. Harbottle* were explained by Jenkins LJ in *Edwards & Anor v. Halliwell & Ors*³ as follows:

The rule in *Foss v. Harbottle* as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*. No wrong has been done to the company or association and there is nothing in respect of which anyone can sue.

At common law, a device was developed by the courts of Equity in England, as an exception to the rule in *Foss v. Harbottle*, where individual shareholders may seek to enforce the rights of the company in representative form. This device is commonly known as the derivative action. Any such action would not be brought in the company's name as the plaintiff but in the name of a minority shareholder on behalf of the company. The shareholder sues on his own behalf and his fellow members who are not amongst the wrongdoers.⁴ The wrongdoers will be cited as the defendant and the company will be joined as a co-defendant so that any judgement will bind (and benefit) the company and can be enforced against the wrongdoers.⁵

2. *Foss v. Harbottle*, (1843) 67 Eng. Rep. 189 (U.K.).

3. *Edwards v. Halliwell*, [1950] 2 All E.R. 1064 at 1066 (U.K.).

4. Harold Arthur John Ford & Robert P. Austin, *Ford and Austin's Principles of Corporations Law* 449 (1992).

5. *Id.*

2. *Efficiency of the Common Law Derivative Action in Malaysia*

It is now commonplace that the application of the common law derivative action is fraught with problems and obstacles. As a result, it is an unattractive remedy for a minority shareholder in Malaysia.

One of its main problems relates to the issue of costs. Needless to say, the element of costs is a crucial factor to be considered by a litigant before litigation is launched. In derivative actions, the costs of the proceedings must be borne by the individual or minority shareholder who commences the action.⁶ This means that the plaintiff-shareholder would be out of pocket, even if he won, unless the company chooses to reimburse him. Costs can be oppressive and onerous as the proceedings of a derivative action tend to be very protracted and lengthy.⁷ For these reasons, the shareholder may be reluctant to bring an action as he will have to use his own funds to proceed. Furthermore, it may be noted that any damages awarded by the court will go not to the individual shareholder, but to the company for the benefit of the whole body of shareholders. In England, there was an attempt to partially remedy this injustice, by the introduction of Order 15 rule 12A in the former Supreme Court Rules. Order 15 rule 12A expressly authorised the court to give the plaintiff an indemnity against costs out of the assets of the company on terms as it thinks appropriate. In Malaysia, although the Malaysian Rules of the High Court 1980 is a progeny of the former English Supreme Court Rules, no steps have been taken to introduce a provision similar to Order 15 rule 12A into the Rules of the High Court 1980.

Another difficulty faced by a minority shareholder in commencing the common law derivative action is the need to establish that he possesses the requisite *locus standi*, the legal standing of the plaintiff to bring the derivative action. This requirement originates from the English Court of Appeal decision of *Prudential Assurance Co Ltd v. Newman Industries & Ors (No.2)*.⁸ The requirement is that before a plaintiff is allowed to proceed with the derivative action, the court is dutybound to conduct a preliminary investigation and decide as a preliminary issue, whether or not the plaintiff has the requisite *locus standi* to sue. In this regard, the plaintiff must

6. However it may be possible for the shareholder to obtain an indemnity from the company if the court gives a judgment in favour of the company. *See, e.g.,* *Wallersteiner v. Moir (No. 2)*, [1975] 1 All E.R. 849 (U.K.); *Smith v. Croft (No. 1)*, [1986] 2 All E. R. 551 (U.K.); *Watts v. Midland Bank plc*, [1986] B.C.L.C. 15 (U.K.).

An order for indemnity for cost is not granted by the court automatically. In *Watts*, the court held that the test whether an indemnity should be granted is whether the proceedings constituted "a reasonable and prudent course to take in the interest of the company".

7. One of the reasons for this is because the minority shareholder first has to satisfy that he has the *locus standi* to sue in a preliminary hearing before he can proceed to the main action. This point will be explained further below.

8. *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No.2)*, [1982] Ch. 204 (U.K.).

establish a *prima facie* case that (i) the company is entitled to the relief claimed; (ii) the action falls within the boundaries of one or more of the exceptions to the rule in *Foss v. Harbottle*; and (iii) the wrongdoers are in control of the company.

It appears that the justification for this exercise is that if upon the conclusion of a lengthy and expensive trial it should turn out that the company is actually not entitled to the relief claimed, or that the plaintiff is not entitled to bring the derivative action, the proceedings would have been futile. It is to be noted that in Australia, the *Prudential Assurance* case was not accepted as having laid down a universal principle that in all derivative actions, the *locus standi* of the plaintiff must be determined as a preliminary issue.⁹ In Malaysia, decided cases have hitherto indicated that the approach taken in *Prudential Assurance* is preferred. For instance, in *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors*,¹⁰ the Malaysian High Court adopted the procedure as laid down in *Prudential Assurance*.¹¹ Although the apparent rationale of this procedural requirement is to save costs and judicial time, it is argued that the requirement does not achieve this objective and is in fact, counter-productive. If, at the *locus standi* hearing, the preliminary investigation of the plaintiff's allegations is extensive, the *locus standi* hearing itself may well be a contentious, lengthy and expensive proceeding.

A further setback which creates a disincentive for a shareholder to use this course of action concerns the requirement of having to establish "fraud". The leading common law cases¹² have laid down the principle that to commence a derivative action, an attendant requirement is that the shareholder who brings the action must show that there is "fraud on the minority". The expression "fraud" here encompasses not only common law fraud but also fraud "in a wider equitable sense of that term".¹³ Case law has demonstrated that the boundaries of the term "fraud on the minority" is uncertain, thus making it difficult for a prospective complainant to ascertain as to whether this requirement can be satisfied. The term has been applied to self-serving negligent decisions of directors (who were also the majority shareholders) to sell the company's asset at an undervalue.¹⁴ However, it does not cover a situation where there was mere negligence on the part of the

9. Broadly, in Australia, it can be said that the test was whether it is "just and convenient" to try the issue as a preliminary issue. See *Hurley v. BGH Nominees Pty Ltd.*, (1982) 6 ACLR 791; *Eromonga Hydrocarbons NL v. Australis Mining NL*, (1988) 14 ACLR 486; *Biala Pty Ltd. v. Mallina Holdings Ltd.*, (1988) 6 ACLC 1138.

10. *Tan Guan Eng v. Ng Kweng Hee*, [1992] 1 MLJ 487.

11. See also *Huang Ee Hoe v. Toing Tai King*, [1991] 2 MLJ 51; *Alor Janggus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd*, [1995] 1 MLJ 241; *Parallel Media Group Plc v. Asia PGA Bhd*, [2004] 6 MLJ 37.

12. See, e.g., *Estmanco (Kilner House) Ltd v. Greater London Council*, [1982] 1 W.L.R. 2 (U.K.).

13. *Id.* at 12.

14. See *Daniels v. Daniels*, [1978] Ch. 406 (U.K.).

directors which caused loss to the company.¹⁵ Be that as it may, the Malaysian Court of Appeal, in *Abdul Rahim Aki v. Krubong Industrial Park Sdn Bhd*,¹⁶ attempted to provide some guidance as to the scope of the term. In that case, Gopal Sri Ram JCA said,

It now becomes necessary to deal with the expression “fraud upon a minority” in the context of the exception under discussion. Although the real meaning of the phrase is unclear in the sense that one is unable as yet to determine its boundaries with any precision, an examination of the authorities leaves us to conclude that the following propositions may be taken as settled and beyond question:

- (i) the expression “fraud upon the minority” is a term of art and has absolutely nothing whatsoever to do with actual fraud or deception at common law;
- (ii) lack of probity comes within the ambit of the expression. But it is not necessary to prove dishonesty before a minority shareholder may claim relief under the doctrine; and
- (iii) it is sufficient for a plaintiff in an action grounded upon the doctrine to show that those wielding majority control abused the powers vested in them in the sense that they used or omitted to use their powers for an oblique or collateral motive or purpose and not for the true purpose for which the power was entrusted to them either by the memorandum and articles of association, by statute or the general law.¹⁷

A difficulty may also arise in a situation where there is ratification by the general body of shareholders of the wrongdoing complained of in the derivative action. At common law, ratification by the general body of shareholders regarding a wrong done to a company may amount to a decision not to sue in respect of that wrongdoing. Thus an effective ratification of a wrongdoing may adversely affect a derivative action by members regarding that wrongdoing. Apart from clear cases of expropriation or abuse of the company assets¹⁸ or of members' property,¹⁹ case law has not laid down a firm principle as to what type of wrongdoing can be ratified by the shareholders.²⁰

15. See *Pavlides v. Jensen*, [1956] Ch. 565 (U.K.).

16. *Abdul Rahim Bin Aki v. Krubong Industrial Park Sdn Bhd*, [1995] 3 MLJ 417.

17. *Id.* at 431.

18. See *Cook v. Deeks*, [1916] 1 A.C. 554 (U.K.).

19. See *Brown v. British Abrasive Wheel Ltd.*, [1919] 1 Ch. 290 (U.K.).

20. At present, it is commonly believed that negligent acts or omissions against the company can be ratified. See *Pavlides v. Jensen*, [1956] Ch. 565 (U.K.).

For the reasons discussed above, it is submitted that the law and applicable procedure relating to the common law derivative action is complex and obscure and it may well deter minority shareholders from commencing such actions in Malaysia. As such, it can be said that it is generally ineffective as a method of enforcement of shareholders' rights. To redress the difficulties of mounting a common law derivative action, the Malaysian High Level Finance Committee on Corporate Governance and the Malaysian Corporate Law Reform Committee²¹ called for a statutory derivative action (as implemented in other jurisdictions)²² to be introduced in Malaysia.

In August 2007, the Companies (Amendment) Act 2007 inserted new sections 181A to 181E into the Companies Act 1965. These new sections create a new statutory derivative action for the benefit of shareholders and other complainants²³ listed out in section 181A(4). This new statutory derivative action is examined in the following section.

B. *The New Statutory Derivative Action*

The salient features of this new statutory derivative action are as follows. First, an action under section 181A can only be instituted with the leave of the court. Under section 181A, a complainant must also demonstrate that he is a complainant within the meaning of section 181A(4). The procedure for obtaining the leave of court is set out in section 181B. It provides that the application for leave shall be made by originating summons and no appearance need be entered.²⁴ In addition, the complainant must give thirty days notice in writing to the directors of his intention to apply for

21. The Corporate Law Reform Committee was established on 17 December 2003 under the auspices of the Companies Commission of Malaysia "to undertake a fundamental review of the current legislative policies on corporate law in order to propose amendments that are necessary for corporate and business activities to function in a cost effective, consistent, transparent and competitive business environment in line with international standards of good corporate governance." Co. Law Reform Comm., <http://www.ssm.com.my/clrc/clrc.html> (last visited Jan. 26, 2011). As at 31 July 2008, the Corporate Law Reform Committee has issued twelve consultative documents dealing with various aspects of Malaysian company law. The Consultative Documents are available at *id.*

22. For the position in Australia, see sections 236-242 in Part 2F.1A of Chapter 2F of the Corporations Act 2001 (Act No. 50/2001). For the position in New Zealand, see sections 165-168 of the Companies Act 1993 (Act No. 105/1993). For the position in Canada, see section 239 of the Canada Business Corporation Act, R.S.C. 1985, c. C-44. For the position in South Africa, see section 266 of the Companies Act 1973 (Act No. 61/1973).

23. Section 181A(4) provides that a "complainant" means:

- (i) a member or person entitled to be a member of the company;
- (ii) a former member if the application relates to circumstances in which the member ceased to be a member;
- (iii) any director of the company; or
- (iv) the Registrar in the case of a company which is under investigation under Part IX of the Companies Act 1965.

24. See Companies Act 1965, § 181B(1) (Act No. 79/1965) (amended 2007).

leave and where leave has been granted by the court, the complainant must commence the action within thirty days of the grant of leave.²⁵ Section 181B(4) is a key provision. It provides that the court in deciding whether or not leave shall be granted shall take into account whether the complainant is acting in good faith and whether it appears *prima facie* to be in the best interest of the company that the application be granted.

To date, there are only two reported decisions in Malaysia which deal with this new statutory derivative action, namely *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak*,²⁶ a decision of the Court of Appeal and *Ng Hoy Keong v. Chua Choon Yang & Ors*,²⁷ a decision of the High Court. In the *Celcom* case, the plaintiff, a former member of the defendant company (Celcom), applied for leave to bring a statutory derivative action under section 181A in respect of certain business decisions taken by the directors of Celcom. At the court of first instance,²⁸ the learned High Court judge was satisfied that the plaintiff fell within the meaning of a "complainant" under section 181A(4) as the court was satisfied that the plaintiff was a former member of Celcom and the application related to matters and circumstances in which he ceased to be a member of Celcom. Thus the plaintiff had the *locus standi* to bring this action on behalf of Celcom. The court was also satisfied that the plaintiff had complied with the procedural requirements specified in section 181B(2), namely that thirty days notice in writing had been given to the directors of Celcom of the plaintiff's intention to apply for the leave of court. The main issue which required the court's deliberation was whether or not the requirements of section 181B(4) was satisfied, namely that (i) the plaintiff was acting in good faith and (ii) it appears *prima facie* to be in the best interest of the company that the application for leave be granted. The High Court expressed the view that section 181B(4) would be satisfied as long as the complainant could demonstrate "that there was a reasonable basis for the complaint and that the proposed action was legitimate and arguable, in that it had some semblance of merit".²⁹ The court emphasised that at leave stage, which is the threshold stage, the court is not to go into substantial issues on

25. *See Id.* § 181B(2) and (3).

26. *Celcom (Malay.) Bhd v. Mohd Shuaib Ishak*, [2010] 7 CLJ 808.

27. *Ng Hoy Keong v. Chua Choon Yang* [2010] 9 MLJ 145. This case dealt with the question as to whether leave should be granted to the plaintiff to proceed with a derivative action under s 181B. The plaintiff had not complied with section 181B(2) in that he had only given nine days notice instead of the required thirty days notice of his intention to bring the action. The High Court held that so long as no injustice has been caused to the other party, such a non-compliance must be treated as a mere irregularity and could be cured. Further, based on the facts of the case, the court found that the plaintiff had demonstrated a *prima facie* case on the complaint and had shown that he was acting in good faith. As such the plaintiff was granted leave to proceed with the derivative action.

28. The decision of the court of first instance is reported in *Mohd Shuaib Ishak v. Celcom (Malay.) Bhd* [2008] 5 MLJ 857.

29. *Id.* at 891.

merits and that all the plaintiff had to show was that there was some substance in the grounds supporting the application.

At the Court of Appeal, the main issue for consideration was whether leave was wrongly granted by the High Court. The Court of Appeal held that the learned High Court judge was wrong in “stating cursorily”³⁰ that the matter before him was merely an application for leave and for relying on a low threshold to determine the question of whether leave should be granted. The Court of Appeal emphasised that the learned judge must, as a matter of judicial prudence exercise greater caution in satisfying himself that the requirements under section 181A are met. Abdul Hamid Embong JCA, who delivered the judgement of the Court of Appeal, said, “there needs to be a strict interpretation of s[ection] 181A ... and compliance to those statutory requirements.”³¹ After a detailed scrutiny of the facts in this case, the Court of Appeal arrived at the conclusion that leave should not be granted for this derivative action as it would be counter-productive to the company’s interest and would serve no commercial sense.

The *Celcom* case is the very first reported decision on the new statutory derivative action. The decision enunciates that the granting of leave to proceed with the statutory derivative action is a matter which should be scrutinized with strict vigilance by the courts. Such an approach is prudent as it may prevent abuse of the new statutory derivative action and avoid a flood of claims by members seeking to impugn decisions of boards of directors for collateral or self-serving purposes. Be that as it may, we submit that the court, in the exercise of its discretion, must also strive to perform the difficult task of achieving a balance between preventing abuse of the new statutory derivative action and promoting legitimate actions by minority shareholders against wrongdoers who are in control of the company.

In the ultimate analysis, it is submitted that the introduction of the statutory derivative action in Malaysia is a welcome development. The statutory derivative action creates a more flexible and progressive criteria for leave to commence a derivative action as compared to having to establish “fraud on the minority”. It also appears that in developing this new statutory action, the legislature attempts to redress some of the setbacks of the common law derivative action. An example of this is found in section 181D which deals with the effect of a ratification of the wrongdoing. Under section 181D(a), a ratification by the shareholders *will not prevent*³² a complainant from bringing a statutory derivative action with the leave of the court under

30. *Celcom (Malay.) Bhd v. Mohd Shuaib Ishak*, [2010] 7 CLJ at 819.

31. *Id.* at 820.

32. This is the position even if the wrongdoing is ratifiable at common law, for example, in cases of negligence.

the new provisions.³³

Another example of the legislature's intention to overcome the difficulties of the common law derivative action is section 181E. This section, in particular section 181E(1)(d) and (e) provides that the court, in granting leave under section 181A, may make appropriate orders including an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action and also an order as to indemnification for costs.³⁴ This provision will certainly go a long way to encourage shareholders' actions against their company's wrongdoers. However, it is uncertain what matters will be taken into consideration by the Malaysian courts when exercising their discretion on the issue of costs. The wording of the section indicates that the courts have a broad discretion. A crucial factor which should be considered by the courts is the member's conduct in bringing the action, that is to say whether he was acting reasonably and in good faith. Must the member bringing the action be the successful party before he can request for an order for the company to pay the legal fees and disbursements? We are of the view that it is unlikely that the courts will impose such a requirement.

Finally, it must be noted that the common law derivative action appears to be preserved by the new section 181A(3) which states:

The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated.

The intention of the Malaysia legislature in preserving the common law derivative action is unclear. We would like to offer the view that it would have been preferable to abrogate the common law derivative action in Malaysia. This is primarily because to allow both actions may lead to confusion and uncertainty in the law.³⁵ A more orderly and systematic development of the law in this area may be achieved if there were only one point of reference for a derivative action. The Corporate Law Reform Committee had also strongly recommended that the common law derivative action *be replaced* by the statutory derivative action on the ground that such an approach will provide certainty and clarity to the law.³⁶ Despite the clear

33. It may be noted however that under section 181D(c), the court may take into account the ratification in determining what order it would make.

34. See Companies Act 1965, § 181E(1) (d) and (e) (Act No. 79/1965) (amended 2007).

35. In Australia and New Zealand, the common law derivative action is no longer available to shareholders. According to the report of the Corporate Law Reform Committee, the reason for this, as stated by the Companies and Securities Advisory Committee Report of Australia, was to provide certainty in the applicable law.

36. See Corp. Law Reform Comm., Co. Comm'n Malay., Review of the Companies Act 1965 -

recommendation by the Corporate Law Reform Committee, the new section 181A(3) continues to preserve the right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law.

Be that as it may, no major problems are anticipated from the co-existence of the common law derivative action and the new statutory derivative action in Malaysia. It is likely that the common law derivative action will be disused and eventually, become redundant. A member of a company intending to bring derivative action in Malaysia would simply not opt to proceed under the common law procedure when he is now endowed with the benefits under the new statutory scheme.³⁷

III. RIGHTS OF SHAREHOLDERS TO BRING PERSONAL ACTIONS³⁸

A. *Section 181 of the Companies Act 1965*

1. *A Brief Historical Background*

Broadly, section 181 of the Companies Act 1965, *inter alia*, gives a right to members whose rights or interests have been affected by oppressive, discriminatory or prejudicial acts of the company or its directors, to apply to the court for relief. Once oppression, disregard of interests, discrimination or prejudice is established, the court has a wide range of powers under section 181(2). Section 181(1) provides as follows:-

- (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground—
 - (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their

Final Report 115, 117 (2008) (¶ 13.02 and Recommendation 2.41).

37. An empirical study indicating a Malaysian plaintiffs' preference for the new statutory derivative action would be necessary to substantiate this proposition. However, we are of the view that it is still too early to conduct such a study taking into consideration that hitherto, there are only two reported decision on the new statutory derivative action and many cases may be unreported.

38. At this juncture, it may be pertinent to consider the relation, if any, between the new statutory derivative action in section 181A and section 181 of the Companies Act 1965. The introduction of the new statutory derivative action in section 181A is to address the deficient position of the derivative action at common law. Therefore, the new statutory derivative action has no relation and does not affect a member's right to petition for relief against oppressive conduct, discrimination or prejudicial acts under section 181.

- interests as members, shareholders or holders of debentures of the company; or
- (b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

A brief discussion as to the history and genesis of this section would be pertinent. The origin of this section can be traced to section 210 of the Companies Act 1948 of England and section 186 of the Australian Uniform Companies Act 1961. It must be noted however that the wording of the Malaysian section is substantially different from its antecedents and generally, is of wider import than both of them.

Prior to the introduction of section 210 of the Companies Act 1948 of England, English company law (and that of other Commonwealth jurisdictions) contained no statutory provision which provided relief to shareholders for acts which were oppressive, discriminatory, prejudicial or unfair conducted by the company or its directors. Shareholders were therefore compelled to rely on the limited remedy of applying to court for winding up on the just and equitable ground. In 1945, the position of minority shareholders was considered by the Committee of Company Law Amendment (the Cohen Committee).³⁹ The Cohen Committee was of the view that the winding up remedy may in some circumstances be inappropriate and made the following recommendation:

... [T]he Court should have, in addition, the power to impose upon the parties to a dispute whatever settlement the Court considers just and equitable. This discretion should be unfettered, for it is impossible to lay down a general guide to the solution of what are essentially individual cases. We do not think that the Court can be expected in every case to find and impose a solution; but our proposal will give the Court a jurisdiction which it at present lacks, and thereby at least empower it to impose a solution in those cases where one exists.⁴⁰

As a result of the Cohen Committee's recommendations, section 210 of

39. COMM. CO. LAW AMENDMENT, REPORT OF THE COMMITTEE ON COMPANY LAW AMENDMENT, 1945, [Cmd.] 6659 (U.K.), http://www.takeovers.gov.au/content/Resources/other_resources/Cohen_Committee.aspx.

40. *Id.* at ¶ 60.

the Companies Act 1948 was enacted. The section provided an alternative remedy to winding up upon proof that “the affairs of the company are being conducted in a manner oppressive to ... members”. In 1962, the Company Law Committee (the Jenkins Committee)⁴¹ reviewed the law in this area and made recommendations to further improve section 210. The Jenkins Committee’s recommendations formed the basis of section 75 of the Companies Act 1980 which eventually became sections 459-461 of the Companies Act 1985. Upon the enactment of the Companies Act 2006 of England, the legal position on this area of the law in England is now governed by section 994 of the Companies Act 2006.⁴²

The enactment of 210 of the Companies Act 1948 of England paved the way for other Commonwealth jurisdictions such as Australia, Canada, South Africa and New Zealand to legislate similar statutory provisions in their companies legislation. The first move was made by Australia when section 186 of the Uniform Companies Act 1961 was introduced. Other jurisdictions which followed suit were New Zealand, Canada, South Africa and India. Malaysia took similar steps in 1965 when the provision in the form of section 181 was enacted in her Companies Act 1965. As was mentioned earlier, the wording of section 181 is substantially different and is of much wider import than section 210 of the Companies Act 1948 and section 186 of the Uniform Companies Act 1961. The main differences between section 181 and its antecedents were explained succinctly by Lord Wilberforce in the Privy Council decision of *Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung*.⁴³

This section can trace its descent from section 210 of the United Kingdom Companies Act, 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider section 186 of the Australian Companies Act, 1951. But section 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-section (1)(a) it adds disregard of the interests of members, etc. to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see *In re HR Harmer Ltd* [1959] 1 WLR 62, 75). It introduces a new ground in sub-section (1)(b) and, most importantly, in sub-section (2), which sets out the

41. CO. LAW COMM., REPORT OF THE COMPANY LAW COMMITTEE, 1962, Cmnd. 1749 (U.K.), http://www.takeovers.gov.au/content/Resources/other_resources/downloads/jenkins_committee.pdf.

42. Section 994 of the Companies Act 2006 repeats section 459 of the Companies Act 1985, so the legal principles and decided cases on the earlier provision remain relevant in England.

43. *Re Kong Thai Sawmill (Miri) Sdn Bhd v. Ling Beng Sung* [1978] 2 MLJ 227, 228-29.

kinds of relief which may be granted, it provides for “remedying the matters complained of” and states as a specific type of relief that of winding-up of the company.

Section 210 is differently constructed. Under it, the court is required to find that the facts would justify the making of a winding-up order under the “just and equitable” provision in the Act, but also that to wind-up the company would unfairly prejudice the “oppressed” minority. The Malaysian section, on the other hand, requires (under sub-section 1(a)) a finding of “oppression” or “disregard”, and then leaves to the court a wide discretion as to the relief which it may grant, including among the options that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of section 210, but is not the case under section 181.

The features of section 181 and its application in Malaysia are explained in the following section.

2. *Features of Section 181*

At the outset, it must be noted that section 181 applies to a “member” and not a “shareholder”. Consequently, if a shareholder is not registered as a member at the date of the commencement of the action, he would not have the *locus standi* to proceed with the action.⁴⁴ The matters complained of must affect the member in his capacity as a member.⁴⁵ Furthermore, although a literal interpretation of section 181(1)(a) may suggest otherwise, it has been held that there is no requirement that the conduct complained of must in every case continue right up to the date of the petition. In fact, a single act or omission may be sufficient to mount an action under section 181.⁴⁶ Whilst the majority of the case law on section 181 involves

44. In *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd*, [1996] 1 MLJ 113, the Federal Court of Malaysia held that a person intending to present a petition under section 181 must demonstrate that his name appears on the company’s register of members at the date of the presentation of the petition. However, the court emphasized that this was a general and not a universal rule as there might be cases where an application of the general rule may be unfair. Gopal Sri Ram JCA said (at p. 135),

It may therefore be quite safely stated that if facts emerge from which it may be determined that it is unjust or inequitable to permit a respondent to a petition under s 181 to assert or to contend that a petitioner has no *locus standi* to move the court, then, he will be estopped from so asserting. Stated in another fashion, a respondent who is guilty of unconscionable or inequitable conduct will not be permitted to raise or rely upon the requirement of membership in order to defeat a petitioner’s standing as this would amount to his using statute as an engine of fraud. It does not matter how the proposition is formulated so long it has the effect adverted to.

45. See *Vergese Mathai v. Telok Plantations Sdn Bhd*, [1988] 3 MLJ 216.

46. In *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd*, [1996] 1 MLJ at 129, Gopal Sri Ram JCA

applications made by minority shareholders, the section is also available to majority shareholders.⁴⁷

Section 181(1) contains two limbs, namely section 181(1)(a) and 181(1)(b). For a case to be brought under section 181(1)(a), the complainant must prove that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner *oppressive* to him or to other members (including him) or in *disregard of his or their interests*. For a case to be brought under section 181(1)(b), the complainant must show that some act has been done or is threatened to be done or a resolution has been passed or is proposed which *unfairly discriminates* against or is otherwise *prejudicial* to him and the other members (including himself).

Hence, four main elements emerge from section 181(1), namely, (1)oppression, (2)disregard of interests, (3)unfair discrimination and (4)prejudice. These words are not defined by the Companies Act 1965. Needless to say, the words may take numerous meanings and cover a variety of circumstances and this is a pure question of fact to be determined by the courts. In Malaysia, a number of reported decisions have attempted to explain the meaning and application of these words. Suffice it to say that in most cases, these words have been given a wide and liberal interpretation, taking into consideration the facts and circumstances of each case.⁴⁸ Typical conduct which have been found to have fallen within the ambit of this section include the failure to provide information,⁴⁹ denial of voting rights and participation at meetings,⁵⁰ excessive remuneration and non-payment of dividends⁵¹ and improper increases in share capital.⁵²

In relation to the remedies that may be dispensed once a case has been proven, the court is given great latitude in prescribing the relief to bring to an

said,

... It is not and has never been the law that the section does not bite where what is complained of is but a single act or omission on the part of the wrongdoer.

A single act or omission may, by its very nature, have so devastating or far-reaching a consequence upon the rights of a member that its *effects* may be permanently felt. For the purposes of s 181(1)(a), it is sufficient that the *effects* of a single act or omission are such that they persist at the date of the presentation of the petition. It is no answer, in those circumstances, for the perpetrators of the act or omission to allege that there was no continuous oppressive conduct up to the date of presentation of the petition. (emphasis in original).

47. See *Kumagai Gumi Co Ltd v. Zenecon-Kumugai Sdn Bhd*, [1994] 2 MLJ 789 at 808.

48. See *Dato' Toh Kian Chuan v. Swee Construction & Transport Co (Malaya) Sdn Bhd*, [1996] 1 MLJ 730, 760; *Jaya Medical Consultants Sdn Bhd v. Island & Peninsula Bhd*, [1994] 1 MLJ 520, 536; *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd*, [1996] 1 MLJ at 131; *Re Kong Thai Sawmill (Miri) Sdn Bhd v. Ling Beng Sung*, [1978] 2 MLJ 227; *Kumagai Gumi Co Ltd v. Zenecon-Kumugai Sdn Bhd*, [1994] 2 MLJ 789.

49. *Chiew Sze Sun v. Cast Iron Products Sdn Bhd*, [1993] 2 AMR 3173.

50. *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd*, [1996] 1 MLJ 661.

51. *Re Gee Hoe Chan Trading Co Ltd.*, [1991] 3 MLJ 137; *Re Coliseum Stand Car Service Ltd.*, [1972] 1 MLJ 109.

52. *Re Chi Liung & Son Ltd.*, [1968] 1 MLJ 97.

end or remedy the matters complained of. Section 181(2) specifically sets out five heads of remedies but the court may make any other order as it thinks fit.⁵³ Much depends on the matters complained of and the circumstances prevailing at the time of hearing and disposal of the application.

B. *A Brief Assessment of the Statutory Mechanism under Section 181*

A large volume of case law involving applications under section 181 demonstrates that this section is a well-accepted recourse for Malaysian shareholders for the enforcement of their rights. It has been seen that the requirements of the section are drafted in liberal terms and a wide range of remedies may be dispensed by the court to bring an end to the matters complained of.

We are of the view that section 181 offers an expedient and practical course of action for the enforcement of shareholders' rights in Malaysia. The section is an essential component in the Malaysian legal framework on the subject of shareholder protection. The section achieves a fair balance in promoting and protecting the interests of the shareholders and that of the company.

In its "Consultative Document on Members' Rights and Remedies",⁵⁴ the Corporate Law Reform Committee made two important recommendations to further improve the statutory protection afforded to members under section 181. Firstly, it was recommended that the section should be clarified to state that the remedy is available where the effect of the conduct complained of persists at the time the application was made.⁵⁵ In other words, there is no need to show that the conduct complained of is *continuing* at the time of the application so long as the *effect* of the conduct still persists. This recommendation stems from the fact that a literal interpretation of section 181(1)(a) may lead to the conclusion that the conduct complained of must be continuing in nature at the time of the

53. Section 181(2) provides as follows:

If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may—

- (a) direct or prohibit any act or cancel or vary any transaction or resolution;
- (b) regulate the conduct of the affairs of the company in future;
- (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
- (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
- (e) provide that the company be wound up.

54. See Corp. Law Reform Comm., Co. Comm'n Malay., A Consultative Document on Members' Rights and Remedies (2007), available at <http://www.ssm.com.my/clrc/cd6.pdf>.

55. *Id.* at 20.

application. The Corporate Law Reform Committee was of the view that the more favourable position is that section 181 looks at the cumulative effect of the conduct and not whether the conduct was still continuing when the application was made.⁵⁶ In fact, as seen above, this is the position taken by the Malaysian courts as illustrated in *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd*.⁵⁷ Hence, in effect, the recommendation of the Corporate Law Reform Committee is for the codification of this judicial pronouncement.

The second recommendation was that section 181 should be extended to give legal standing (to bring an action under the section) to two further categories of persons, namely, (1) a person who was a former member but only if the oppression relates to the circumstances in which he ceased to be a member and (2) a transferee of shares or a person entitled to the shares by operation of law whose membership has not yet been perfected (in other words, a beneficial owner).⁵⁸ This recommendation was made after reviewing the law from comparable jurisdictions such as Australia, New Zealand and England. In these jurisdictions, statutory provisions which are in *pari materia* with section 181 recognise the rights of the persons falling within the two categories above to bring an action.⁵⁹

The above recommendations by the Corporate Law Reform Committee were not implemented when the Companies Act 1965 was recently amended by the Companies (Amendment) Act 2007. Be that as it may, we are of the view that these recommendations are sound and germane and will only serve to enhance the usefulness of the remedy under section 181 as well as provide clarity to the law. It is hoped that the Malaysian legislature will implement these recommendations in the future when the next amendment exercise is undertaken.

IV. CLASS ACTION IN THE CONTEXT OF COMPANY LAW

The Chairman of the Malaysian Corporate Law Reform Committee aptly noted that a balance must be struck between the majority shareholder's rights to control the company and the minorities' right to be treated fairly.⁶⁰ It was further acknowledged that an effective regulatory framework for companies must include provisions that are designed to ensure that all shareholders are treated fairly whilst the affairs of the company is [sic] being

56. *Id.*

57. *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd*, [1996] 1 MLJ 113.

58. Corp. Law Reform Comm., Co. Comm'n Malay., *supra* note 54, at 21-23.

59. The Corporate Law Reform Committee referred to section 459 of the Companies Act 1985 of England, section 234(a) of the Corporations Act 2001 of Australia and section 174(1) of the Companies Act 1993 of New Zealand.

60. See Corp. Law Reform Comm., Co. Comm'n Malay., *supra* note 54, at 5.

carried out.⁶¹ With that overriding consideration in mind, the Corporate Law Reform Committee made a number of recommendations in relation to members' rights and remedies. As mentioned earlier in this article, amongst the recommendations made include the introduction of the statutory derivative action and for the clarification of the scope of section 181.⁶² The above recommendations are indeed warranted and our reasons for supporting the introduction of the statutory derivative action and for the clarification of section 181 have been alluded to in Part II and Part III of this article.

An issue that we consider important and should be explored further in relation to members' rights and remedies is class action. In its simplest sense, a class action in the context of corporate litigation is a procedural mechanism that allows a group of shareholders seeking certain remedies to commence an action collectively. It has also been said that a class action is a form of shareholders protection mechanism.⁶³ In discussing members' rights and remedies, a crucial question for consideration is whether there is a necessity to introduce a provision for class action in the Companies Act 1965. This question was answered in the negative by the Corporate Law Reform Committee.

In considering the issue relating to class action, the Corporate Law Reform Committee made reference to Order 15 rule 12 of the Malaysian Rules of the High Court 1980.⁶⁴ Order 15 rule 12(1) is the procedural rule for the commencement of a representative action in Malaysia and it reads as follows:

Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

In essence, a shareholder or shareholders may commence and maintain a representative action to seek redress or whatever remedies deemed appropriate from the court if the requirements set out in Order 15 rule 12(1)⁶⁵ and other rules that must be read together with Order 15 rule 12 are

61. *Id.* at 6.

62. *See* Corp. Law Reform Comm., Co. Comm'n Malay., *supra* note 36.

63. *See* Corp. Law Reform Comm., Co. Comm'n Malay., *supra* note 54, ¶ 5.01 at 70.

64. Rules of the High Court, 1980 (P.U.(A) 50/1980) (Malay.).

65. In order for a shareholder to successfully invoke and maintain an action pursuant to this procedure, essentially, three conditions must be fulfilled. These conditions are that: (1) the plaintiffs are members of a class; (2) they have a common grievance or interest; and (3) the relief sought is in its nature beneficial to all whom the plaintiffs represented.

complied with.⁶⁶ Since the procedure in Order 15 rule 12 allows for a representative action to be commenced by disgruntled shareholders or members, one may thus argue and conclude that a provision for class action under the Companies Act 1965 is not necessary.

However, it is submitted that Order 15 rule 12 as a procedural mechanism is not without problems.⁶⁷ The Corporate Law Reform Committee acknowledged that there are indeed several shortcomings under Order 15 rule 12 in relation to its use by the minority shareholders.⁶⁸ For instance, it was rightly pointed out that where the relief requested for is damages, it will be necessary for the persons represented to bring a separate action to establish the damage suffered by each of them. Second, since the representative plaintiff and those represented are not strictly parties to the proceedings, the court has no power to order any represented person to make discovery of documents. Third, the represented persons are not liable for costs. Hence, this would discourage many potential plaintiffs from undertaking the role of the representative plaintiff.

In addition, the Corporate Law Reform Committee made reference to section 173 of the New Zealand Companies Act 1993.⁶⁹ This provision provides that where a shareholder of a company brings proceedings against the company or a director, and there are other shareholders who have the same or substantially the same interest in relation to the subject-matter of the proceedings, the court may appoint that shareholder to represent all or some of the shareholders having the same or substantially the same interest. More importantly, the court may also make such orders in relation to, (i) the conduct of the proceedings, (ii) the costs of the proceedings, and (iii) the distribution of any amount ordered to be paid by the company or director. The orders that the court may make in the New Zealand provision deal with the weaknesses that have been shown to exist under a general provision for a representative action in Order 15 rule 12.

66. For instance, Order 6 rule 3 which requires a proper endorsement as to the plaintiff's representative capacity to be made on the originating process.

67. For a discussion on the operation of Order 15 rule 12 in Malaysia, see Choong Yeow Choy & Sujata Balan, *The Globalization of Class Actions – Malaysia: Principles and Procedural Obstacles*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 286 (2009).

68. See Corp. Law Reform Comm., Co. Comm'n Malay., *supra* note 54, ¶ 5.01 at 70.

69. Section 173 of the Companies Act 1993 of New Zealand reads,

Where a shareholder of a company brings proceedings against the company or a director, and other shareholders have the same or substantially the same interest in relation to the subject-matter of the proceedings, the Court may appoint that shareholder to represent all or some of the shareholders having the same or substantially the same interest, and may, for that purpose, make such order as it thinks fit including, without limiting the generality of this section, an order—

- (a) as to the control and conduct of the proceedings;
- (b) as to the costs of the proceedings;
- (c) directing the distribution of any amount ordered to be paid by a defendant in the proceedings among the shareholders represented.

Despite having made the above observations, the Corporate Law Reform Committee took the view that there is no necessity to introduce a provision for class action in the Companies Act 1965. The reluctance appears to be based on the conviction that the new statutory derivative action (which indeed has been introduced) and the specific provision in the statutory derivative action which addresses the problems as to costs, are sufficient enough reasons for the recommendation against the introduction for a provision for class action suits within the Companies Act 1965.

We are of the view that a provision for class action in the Companies Act 1965 would go a long way in the promotion and protection of members' rights and thus ensuring that minorities' rights are safeguarded. In deciding whether there is a necessity to introduce a class action provision in the Companies Act 1965, a number of other key issues pertaining to class action must be addressed, considered and understood. It is not apparent if these issues, which are discussed below, were addressed and considered by the Corporate Law Reform Committee. A case for the introduction of a class action provision in the Malaysian companies legislation is based on the following grounds.

A. *The Statutory Derivative Action is Not a Good Substitute for a Class Action*

To reject a provision for class action in the Companies Act 1965 on the basis that there is now a new statutory derivative action (with a specific provision to resolve the problems as to costs) in the Companies Act 1965 is flawed. This is based on the following reason.

In recommending the introduction of a statutory derivative action, the Corporate Law Reform Committee also categorically suggested that the statutory derivative action should be made applicable to all types of companies.⁷⁰ The rationale for these recommendations is premised on the belief that a statutory derivative action "will be able to resolve the difficulties faced by members who want to bring an action on behalf of the company under the common law".⁷¹ Therefore, it is undeniable that a derivative action is merely a type of a class action.⁷² A class action is wider and encompasses situations where the members or shareholders may *not* wish to bring an action *on behalf* of the company. In such a case, the

70. See Corp. Law Reform Comm., Co. Comm'n Malay., *supra* note 36, Recommendation 2.40 at 117.

71. See Corp. Law Reform Comm., Co. Comm'n Malay., *supra* note 36, ch. 2, ¶ 13.01 at 114.

72. Gopal Sri Ram JCA in delivering the majority decision in *Tang Kwor Ham v. Pengurusan Danaharta Nasional Bhd*, [2006] 5 MLJ 60, 75 explained that "the derivative action ... is a mere variation of the representation rule as applied in the environment of company law".

statutory derivative cannot be of any assistance to members who may wish to institute a class action.

B. *Order 15 rule 12 is Not a Good Substitute for a Class Action*

In the Malaysian Court of Appeal decision of *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors*,⁷³ Gopal Sri Ram JCA gave an account of how the procedure concerning representative action in Order 15 rule 12 had developed and opined that the rule should not be applied in a rigid manner but its application should remain as flexible as possible. This, according to the Court of Appeal, includes permitting or recognising a common law derivative action to be pursued under the general provision of Order 15 rule 12.

Despite the flexibility and usefulness of the procedure in Order 15 rule 12, it has been pointed out that Order 15 rule 12 is fraught with a number of shortcomings. As a general procedure for the commencement of a representative action in Malaysia, Order 15 rule 12 is outdated. This is mainly because, unlike other jurisdictions, Malaysia has not taken active steps to introduce specific rules and procedures to facilitate and promote representative actions such as procedures relating to pre-trial case management in group litigation, funding mechanisms and the payment and allocation of costs and benefits for group litigation.

Hence, Order 15 rule 12 in its present form may not advance the cause of affording adequate protection for shareholders or members of a company wishing to institute a class action.

C. *Other Key Issues Pertaining to Class Action*

Class action must always remain as one of the options available for shareholders and members to enforce their rights. In designing a class action regime, one of the most pressing concerns is whether it would be more appropriately introduced by way of statute, rather than amendment of the existing Order 15 rule 12, which is a rule of procedure. This legislation versus regulation conundrum has attracted much debate and views on this question appear to be divided.⁷⁴ We do not wish to add our views to this debate except to say that having a class action regime rooted in the Companies Act 1965 instead of in the rules of court will ensure that the drafters and policy makers be able to deal freely with matters of substantive company law and need not simply address issues which relate only to

73. *Id.* at 74.

74. See RACHEL MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE 38-42 (2004).

practice and procedure.

Our preference for a new class action regime in the form of a provision in the Companies Act 1965 is also premised on the fact that such a new schema will afford an opportunity for the drafters and policy makers to address a number of other important issues relating to class action. Two of these important policy questions are the threshold criteria at the preliminary hearing by which the class action can only proceed,⁷⁵ and the proper approach for class membership formulation.⁷⁶ In addition, specific mechanisms which relate to funding and costs as well as pre-trial procedures for representative actions may be put in place.

In light of the above, we maintain the view that the preferred stand would have been to introduce a new class action regime in the Companies Act 1965 of Malaysia.

V. CONCLUDING REMARKS

To create an effective regulatory corporate framework, companies must be regulated by strong and effective laws and that their management must be guided by efficacious corporate governance. In this regard, a matter which is of paramount importance is the protection and promotion of shareholders' interests. This is crucial as investors may not part with their money unless they feel assured that they will be protected by a stable environment which is reinforced with resilient and progressive laws.

The introduction of the statutory derivative action is a commendable effort on the part of the Malaysian legislature to raise the standard and efficiency of the country's corporate laws relating to shareholder protection. As has been seen in Part II of this article, this new statutory derivative action provides a progressive and effective criteria for commencing a derivative action as compared to that at common law.

As for the main statutory provision in the Companies Act 1965 which affords protection to shareholders, it is our contention that section 181 offers a useful and efficacious course of action for aggrieved shareholders. Case law involving this section demonstrates that the courts are inclined to take a liberal interpretation of the section in favour of the aggrieved minority shareholders to do justice. Be that as it may, we submit that this section could be further strengthened if the legislature were to implement the suggestions highlighted in Part III.

For reasons which have been articulated in Part IV above, we are of the

75. This is commonly known as "certification" in the context of class action litigation.

76. A number of varying approaches have been adopted in various jurisdictions, namely, the opt-in approach, the opt-out approach, compulsory class membership or leaving the issue of class membership entirely in the hands of the court.

view that the promotion and protection of shareholders will be further enhanced if an option to commence a class action is made available to Malaysian shareholders. As there is a constant need to examine existing companies' legislation and to evaluate its capability to meet the demands of the twenty first century, we would urge the relevant authorities to consider the implementation of a class action mechanism in Malaysian company law. This, we submit, will invigorate the existing legislation in Malaysia and enhance responsible management and good corporate governance.

REFERENCES

- Alor Jangus Soon Seng Trading Sdn Bhd v. Sey Hoe Sdn Bhd, [1995] 1 MLJ 241.
- Abdul Rahim Bin Aki v. Krubong Industrial Park Sdn Bhd, [1995] 3 MLJ 417.
- Biala Pty Ltd. v. Mallina Holdings Ltd., (1988) 6 ACLC 1138.
- Brown v. British Abrasive Wheel Ltd., [1919] 1 Ch. 290.
- Canada Business Corporation Act, R.S.C. 1985, c. C-44.
- Celcom (Malay.) Bhd v. Mohd Shuaib Ishak, [2010] 7 CLJ 808.
- Chiew Sze Sun v. Cast Iron Products Sdn Bhd, [1993] 2 AMR 3173.
- Committee on Company Law Amendment. (1945). *Report of the Committee on Company Law Amendment* (Command 6659). Retrieved from http://www.takeovers.gov.au/content/Resources/other_resources/Cohen_Committee.aspx
- Companies Act, 1965 (Act No. 79/1965).
- Companies Act, 1973 (Act No. 61/1973).
- Companies Act, 1985 (Eng.).
- Companies Act, 1993 (Act No. 105/1993).
- Companies Act, 2006 (Eng.).
- Companies (Amendment) Act (Act A1299/2007).
- Company Law Committee. (1962). *Report of the Company Law Committee* (Command 1749). Retrieved from http://www.takeovers.gov.au/content/Resources/other_resources/downloads/jenkins_committee.pdf
- Cook v. Deeks, [1916] 1 A.C. 554.
- Corporate Law Reform Committee, Companies Commission of Malaysia. (2008). *Review of the Companies Act 1965 - Final report*. Retrieved from <http://www.ssm.com.my/en/docs/CLRCFinalReport.pdf>
- Corporate Law Reform Committee, Companies Commission of Malaysia. (2007). *A consultative document on members' rights and remedies*. Retrieved from <http://www.ssm.com.my/clrc/cd6.pdf>
- Corporate Law Reform Committee's website, <http://www.ssm.com.my/clrc/clrc.html>.
- Corporations Act, 2001 (Act No. 50/2001).
- Choy, C. Y., & Balan, S. (2009). *The Globalization of Class Actions – Malaysia: Principles and Procedural Obstacles*, *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 622, 286.
- Daniels v. Daniels, [1978] Ch. 406.

- Dato' Toh Kian Chuan v. Swee Construction & Transport Co (Malaya) Sdn Bhd, [1996] 1 MLJ 730.
- Edwards v. Halliwell, [1950] 2 All E.R. 1064.
- Eromonga Hydrocarbons NL v. Australis Mining NL, (1988) 14 ACLR 486.
- Estmanco (Kilner House) Ltd v. Greater London Council, [1982] 1 W.L.R. 2.
- Ford, H. A. J., & Austin, R. P. (1992). Ford and Austin's principles of corporations law (7th ed.). Sydney: Butterworths.
- Foss v. Harbottle, (1843) 67 Eng. Rep. 189.
- Huang Ee Hoe v. Toing Tai King, [1991] 2 MLJ 51.
- Hurley v. BGH Nominees Pty Ltd., (1982) 6 ACLR 791.
- Jaya Medical Consultants Sdn Bhd v. Island & Peninsula Bhd, [1994] 1 MLJ 520.
- Kong Thai Sawmill (Miri) Sdn Bhd v. Ling Beng Sung, [1978] 2 MLJ 227.
- Kumagai Gumi Co Ltd v. Zenecon-Kumugai Sdn Bhd, [1994] 2 MLJ 789.
- Mohd Shuaib Ishak v. Celcom (Malay.) Bhd [2008] 5 MLJ 857.
- Mulheron, R. (2004). The class action in common law legal systems: A comparative perspective. Portland, OR: Hart.
- Ng Hoy Keong v. Chua Choon Yang [2010] 9 MLJ 145.
- Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd, [1996] 1 MLJ 113.
- Parallel Media Group Plc v. Asia PGA Bhd, [2004] 6 MLJ 37.
- Pavlides v. Jensen, [1956] Ch. 565.
- Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No.2), [1982] Ch. 204.
- Re Chi Liung & Son Ltd., [1968] 1 MLJ 97.
- Re Coliseum Stand Car Service Ltd., [1972] 1 MLJ 109.
- Re Gee Hoe Chan Trading Co Ltd., [1991] 3 MLJ 137.
- Re Kong Thai Sawmill (Miri) Sdn Bhd v. Ling Beng Sung [1978] 2 MLJ 227.
- Rules of the High Court, 1980 (P.U.(A) 50/1980) (Malay.).
- Smith v. Croft (No. 1), [1986] 2 All E.R. 551.
- Tan Guan Eng v. Ng Kweng Hee, [1992] 1 MLJ 487.
- Tang Kwor Ham v. Pengurusan Danaharta Nasional Bhd, [2006] 5 MLJ 60.
- Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd, [1996] 1 MLJ 661.
- Vergheese Mathai v. Telok Plantations Sdn Bhd, [1988] 3 MLJ 216.
- Wallersteiner v. Moir (No. 2), [1975] 1 All E.R. 849.
- Watts v. Midland Bank plc, [1986] B.C.L.C. 15.

定位股東追索權 ——馬來西亞之觀察

Choong Yeow Choy 與 Sujata Balan

摘 要

本文聚焦於馬來西亞的公司法，其企業制度法律規範下公司成員之權利性質與其實施。首先，將檢驗股東代表公司提起訴訟的權利，著重於普通法下的股東代位訴訟；相關規定於2007年增定於馬來西亞公司法當中。接下來，本文將討論並評價保障股東權利執行的法律規範，尤其是馬來西亞法律中的「壓制條款」，也就是1965年公司法第181條。最後，關於公司成員之團體訴訟或代表訴訟，本文將討論其發端。並且，檢驗前文所提及之法律是否確實提供公司成員與股東適切的權利保護，觀察其是否可靠，與是否易於使用。

關鍵詞：股東保護、股東權利、公司法、馬來西亞