Tracing Derivative Action: Application of the *Foss v Harbottle* Rule in Malaysia

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Abstract
The *Foss v Harbottle* rule is under Common Law. In light of the Companies Act 2016, this article traces the development of the common law principles and discusses the possible current application of the said principles in conjunction with the Companies Act 2016. This article subsequently evaluates the sufficiency of the current jurisprudence in Malaysia.

Keywords: Minority shareholders, lifting the corporate veil, *Foss v Harbottle*, Companies Act 2016, derivative action, corporate governance

1. Introduction

1.1 Overview

This paper aims to provide an overview of the exceptions to the general doctrine of separate legal entity, in particular, the methods in which the minority shareholders could take an action against the company as a whole in certain exceptional circumstances. A separate legal entity, as described by Dewey[228], is a legal fiction, or a metaphysical entity.[229] According to Collier,[230] the rule in *Salomon v Salomon* has been liberally applied in Malaysian cases such as *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd*.[231] This principle is seen in *Development and Commercial Bank Bhd v Lam Chuan Co & Anor*[232] whereby Abdul Malek J had stated that the company is a different person than its members.[233] Lord Sumner in *Gas Lighting Improvement Co Ltd v Commissioner of Inland Revenue*[234] similarly commented that the 'machinery' is 'not impersonal though inanimate'.

As Malaysia takes the position in *Salomon*, it is noted that our nation adopts the jurisprudence of the fiction theory; in which the company as a person is merely a legal

[228] Abu Bakar bin Munir, 'Lifting the Corporate Veil and the Criminal Liability of a Company' [1994] 1 MLJ 146 citing John Dewey, 'The Historical Background to Corporate Legal Personality' [1926) 25 Yale LJ 655.
[229] Geoffrey Morse and Francis Beaufort Palmer, *Palmer's Company Law* (22nd edn, Sweet & Maxwell 1976) 149.
[230] Berna Collier, 'The Application of the Rule in Salomon v Salomon In Malaysian Company Law' [1998] 2 MLJ 65.
[231] *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd* [1996] 3 MLJ 533 (FC).
[232] *Development and Commercial Bank Bhd v Lam Chuan Co & Anor* [1989] 1 MLJ 318 (CA).
[233] *Ibid*.
[234] *Gas Lighting Improvement Co Ltd v Commissioner of Inland Revenue* [1923] AC 723.

fiction.[235] Despite giving recognition as a legal person, Salmond argues that only a human being can be recognised as a natural person; whereas companies and other entities, such as the church, is classified as a legal person.[236] In other words, the company is a person, by a legal fiction. Under section 20 of the Companies Act 2016, members have an identity separate from the company and this identity continues to exist until it is removed from the Register.[237]

The most beneficial doctrine that flows from the doctrine of separate legal entity is the doctrine of limited liability. In a sense, the courts would 'limit' the liability of the shareholders according to the number of shares ascribed to him.[238] In another sense, the creditors of the company would look to the company to fulfil its contractual obligations, not the directors themselves.[239]

As a result of the doctrine of corporate personality, is the concept of shareholder ownership,[240] as Parkinson put it, the legal model includes the shareholders having the privilege of the corporation operated for their benefits.[241] The directors, to a certain extent, dictate the objectives of the company.[242]As the court explained in *Macaura v Northern Assurance Co Ltd*,[243]a company is a separate entity from its members. Since the corporation is a single unit, a problem arises if the minority shareholders suffer a wrong from the majority shareholders within the company itself. This paper will analyse the rule in *Foss v Harbottle*[244] and subsequently, the Malaysian position in the courts, the Companies Act 1965 and the Companies Act 2016 respectively.

It is uncertain as to whether the new principles under the Companies Act 2016 will bring a positive change to the status quo of case laws. The current state of case law has not taken the new principles of the Companies Act 2016 into account. With the introduction of the Companies Act 2016, it is imperative to critically examine the potential lacunae of the law to prevent miscarriages of justice. This paper aims to discuss the developments of the derivative action in Malaysia, critically assess the merits of the current law of derivative action in Malaysia to determine whether the law is satisfactory in this area and briefly compare and contrast the position of this doctrine against other Common Law jurisdiction.

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[235] Zuhairah Ariff Bt Abdul Ghadas, 'The Myth of Corporate Personality: An Overview from the English Law and Shariah' [2008] 3 ShLR 13.
[236] *Ibid*, citing John William Salmond, *Salmond On Jurisprudence.* (10th edn, Stevens and Haynes 1913).
[237] Companies Act 2016.
[238] Siew Cheang Loh, *Corporate Powers Accountability* (2nd edn, LexisNexis 2002).
[239] Mark Weinstein, 'Limited Liability in California 1928-31: It's the Lawyers' [2005] 7 Am. L. & Econ. Rev 2.
[240] Ross Grantham, 'The doctrinal basis of the rights of company shareholders' [1998] 57 CLJ 3.
[241] John Edward Parkinson, *Corporate Power And Social Responsibility* (Oxford University Press 1993).
[242] *Ibid*.
[243] *Macaura v Northern Assurance Co Ltd* [1925] AC 619 (HOL).
[244] *Foss v Harbottle* [1843] 67 ER 189 [1843] 2 Hare 461 (Ch).

2. Development of the Principle under Common Law

2.1 The Logic of *Foss v Harbottle*

As stated above, one of the effects of the doctrine of separate legal entity is limited liability. The concept of limited liability limits the liability only towards the amount of assets in which a director owns.[245] In a logical sense, if the body corporate is a single unit, the members of the company on a general rule cannot take action against itself. Therefore, the problem arises if the members, particularly the minority shareholders suffer a wrong from within the company. It is established in *Foss v Harbottle*[246] that the 'proper plaintiff' of an action against the company is the company itself.[247]

Foss is followed in *MacDougall v Gardiner,*[248] in which a shareholder's claim was dismissed as his claim was not a personal claim, but rather the "proper plaintiff" was the company itself. The rule in *Foss* was heavily debated and referred to in the English decision of *Prudential Assurance Ltd. v. Newman Industries Ltd. (No 2),*[249] in which the plaintiff must prove a *prima facie* case of fraud, or the derivative action will not be considered. This is much to the dismay of minority shareholders as L.S. Sealy commented.[250]

The rule in Foss is essentially refined by Jenkins LJ in *Edwards v Halliwell*[251] to include that the proper plaintiff who brings an action for a wrong done to the company is the company itself and the wrong is a transaction that is made binding on a company by a simple majority of shareholders and the minority shareholder is unable to object due to the majority principle.[252] This rule itself is desirable for several reasons.[253] Firstly, Christopher Hale debated that the *Foss* principle was beneficial as litigation was more difficult with this doctrine in place.[254] This prevents unnecessary litigation, in which the decision whether to sue must be made, which is usually a financial and corporate rather than a legal matter.

[245] Loh (n 11).
[246] *Foss* (n 17).
[247] *Foss* (n 17).
[248] *MacDougall v Gardiner* [1875] 1 ChD 13.
[249] *Prudential Assurance Ltd. v. Newman Industries Ltd. (No 2)* [1982] Ch. 204 (CA).
[250] Leonard Sealy, 'More Bleak News for the Minority Shareholder' [1987] 46 CLJ 3, 398.
[251] *Edwards v Halliwell* [1950] 2 All ER 1064 (CA).
[252] Ainul Azam bin Ahmad Khamal, 'There and Back Again- Perspectives on the Law of Derivative Action in Malaysia' [2017] 5 MLJ 124 citing Ibid.
[253] Pearlie Koh, 'The Statutory Derivative Action in Singapore : A Critical and Comparative Examination The Statutory Derivative Action in Singapore - A Critical and Comparative Examination' [2001] 13 Bond Law Review 64.
[254] Christopher Hale, 'What's Right with the Rule in Foss v Harbottle?' [1997] Company Financial Insolvency Law Review 219.

Secondly, the *Foss* rule prevents a form of duplicative litigation.[255] Cheffins adds that litigation will have an adverse impact not only on the shareholders, but other stakeholders, such as creditors, who might have their payments defaulted, and employees, who might suffer retrenchment.[256] This also increases the number of litigations against the defendant itself, further burdening the courts.

2.2 The Problems of *Foss v Harbottle*

Nevertheless, there are consequences of the *Foss* principle to the minority shareholders. In *Wallersteiner v Moir (No 2)*[257], Lord Denning commented that such a derivative action would not be effective as a minority loses out to the majority.[258] A rationale of this phenomenon is that the company is not able to sue as most part of the company is controlled by the dominating party.[259]Naturally, the decision in *Prudential* has brought some dissatisfactions, as criticised by Sealy in *A Marathon that Nobody Wins*,[260] 'de facto' control is not strictly defined and could lead to possibly worse results for the minority shareholders. *Prudential,* as Sealy mentioned, though a simple case of fraud, had been decided on purely procedural grounds, whereby the sole purpose is in which time would be saved.[261]Therefore, the consequence of the *Foss* rule is the inability of the minority shareholders to take action against the company.[262] The Jenkins Committee of England and Wales noted that the minority shareholders have no right of complaint other than the ground of fraud.[263]

Due to this nature, it is held under *Elder v Elder Watson*[264] that the rule in *Foss* should be taken liberally. Under the common law, there are five exceptions under *Edwards v Halliwell* as *ultra vires* and illegality; special majorities; personal rights; fraud by controlling majority; and when justice requires it (although this exception has been disputed in *Prudential Assurance Co Ltd v Newman Industries (No 2)*[265]. Anthony Boyle argued that an obiter dictum can be read into the *Foss* rule to grant this exception.[266] Though Sealy would claim that this rule is the "very foundation" that a minority shareholder could bring an action in the first place[267]). These exceptions can be argued as not exceptions at all, but instead, as Wedderburn stated, merely as the impossibility for the confirmation by the majority to

[255] Koh (n 26).
[256] Brian R Cheffins, 'Reforming the Derivative Action: The Canadian Experience and British Prospects' (1997) 227 Company, Financial and Insolvency Law Review; cited in Koh (n 28).
[257] [1975] 1 All ER 849; [1975] QB 373.
[258] *Ibid*.
[259] Peter Hayden, 'Added protection' 159 NLJ 313.
[260] Leonard Sealy, 'A Marathon that Nobody Wins' [1981] 40 CLJ 1, 29.
[261] *Ibid*.
[262] Saleem Sheikh, 'Judicial policy on corporate giving' [1990] 87 LSG 25, 16.
[263] Board of Trade, 'Report of the Company Law Committee 1962' (Cmnd. 1749, 1962) 4, 6.
[264] *Elder v Elder Watson* [1952] SC 49.
[265] Ahmad Khamal (n 25), citing *Prudential* (n 22).
[266] Anthony Boyle, 'A Liberal Approach to Foss v. Harbottle' [1964] 27 Modern Law Review 603.
[267] Sealy (n 33).

arise,[268] save perhaps the fifth requirement, whereby Sealy, as mentioned, would argue is the fundamental reason for the exceptions.

3. The Statutory Derivative Action

3.1 The Growing Trend of Shareholder Rights &Statutory Derivative Action

There was a growing trend in the 1990s to provide a larger emphasis on shareholders.[269] It is not uncommon for most common law jurisdictions to adopt a form of statutory derivative action to solve the problems of common law derivative action. In England, Wales and Northern Ireland, the new statutory position is seen under the new sections260-264 of the Companies Act 2006 (UK).[270] The law committee overseeing this amendment stated in the paper: '*Shareholder Remedies*' that these provisions do not overrule the rule in *Foss*, but merely a new procedure that would be more flexible and modern to determine if a shareholder can pursue an action.[271]

A derivative claim under the England, Wales and Northern Ireland jurisdiction may be brought under section 260 of the Companies Act 2006,[272] whereby a member of a company may seek relief on behalf of the company (section 260(1)) from an act or omission involving negligence, default, breach of duty or breach of trust by a director, as defined under section 260(5), of the company.[273]

In Canada, the statutory method is seen to be more drastic. In the drafting of the Canadian Business Corporations Act,[274] the Proposals for a New Business Corporations Law for Canada, also known as the Dickinson Committee[275] had explicitly stated that the 'alternative system' will replace the 'infamous doctrine'[276] of *Foss* with its 'injustices' and 'prejudices'.[277]In Singapore, the provisions providing statutory derivative action were found under sections 216A and 216B of the Companies Act. This particular doctrine was taken *in pari materia* from the Canadian Business Corporations Act,[278] as seen in sections 239(1) and 239(2) of the said Act.

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[268] Kenneth Wedderburn, 'Shareholders' Rights and the Rule in Foss v. Harbottle' [1957] 15 CLJ*2,* 194.
[269] American Law Institute Tentative Draft No 6 at 3 cited from Koh (n 26).
[270] Companies Act 2006.
[271] Law Commission, *Shareholder remedies* (Law Com No 246, 1997).
[272] Section 260 of the Companies Act 2006 (n 43).
[273] *Ibid*.
[274] Canada Business Corporations Act, RSC 1985.
[275] R. Dickerson, *et al*, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Ministry of Supply and Services Canada, 1971), vol 1 para 482.
[276] *Ibid*.
[277] Dickerson (n 48).
[278] Canada Business Corporations Act (n 47).

3.2 The initial Statutory Derivative Action and Common Law Principles under the Companies Act 1965

Prior to section 181 of the Companies Act 1965, the only statutory remedy by the Malaysian courts would be to wind up the company under the rule of 'just and equitable' grounds,[279]or under the Companies Ordinance 1940.[280] In this aspect, the law had to be reconsidered in drafting the Companies Act 1965.[281]

There exists 2primary methods of derivative action, one by the courts and the common law, and another by the statutory method.[282]Derivative action was usually executed by the courts following the principles of Common Law. For example, the principles in *Edwards v Halliwell* were followed by Malaysian courts such as in *Tan Guan Eng v Ng Kweng Hee.*[283] Gopal Sri Ram JCA in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd v Ors*[284] who affirmed the decision in *Tan Guan Eng*, also approved the derivative action under statutory means under s181 of the Companies Act 1965.[285] His Lordship stated that a derivative action is an ingenious device used by the courts to overcome 'judicial non-interference'.[286] Essentially, it is a method to curb the injustice that arose from the *Foss* rule.

In this vein, for a period of time, the Malaysian courts followed to a large extent the exceptions held in *Edwards* and statutory derivative action based on section 181.It must be noted that it can be argued following the decision in *Elder v Elder Watson Ltd*[287] that the word 'oppressive' was too strictly defined.[288] Therefore, Gopal Sri Ram JCA noted that a key element in section 181(1)(a) is that it should be taken at a purposive approach. This was according to *Re Kong Thai Sawmill (Miri) Sdn Bhd*[289] whereby 'oppression' under section 181includes any conduct which departs from fair play.[290] This principle was also taken suit in other common law jurisdictions such as in Canada in *Re Ferguson and Imax Systems Corp;*[291] as well as in Australia in *Re Associated Tools Industries Ltd.*[292] However, the weakness of the

[279] Canada Business Corporations Act (n 47).
[280] Canada Business Corporations Act (n 47) citing Straits Settlement 49 of 1940, section 166(6).
[281] *Ibid*.
[282] Straits Settlement 49 (n 53).
[283] Mohammad Rizal Salim, 'The Shareholders' Derivative Action' [2000] 1 MLJ 44.
[284] *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) SdnBhd v Ors* [1995] 4 CLJ 551.
[285] Ahmad Khamal (n 25).
[286] Ahmad Khamal (n 25).
[287] *Elder* (n 37).
[288] Loh (n 11).
[289] *Re Kong Thai Sawmill (Miri) SdnBhd v Ling Beng Sung* [1978] 2 MLJ 227 (PC).
[290] *Ibid*.
[291] *Re Ferguson and Imax Systems Corp*., 43 O.R.2d 128, 137 (Ont. C.A. 1983).
[292] *Re Associated Tools Industries Ltd* [1963] 5 FLR 55 (FC).

broad scope of 'oppression' is that it lacks a proper definition. This leads to uncertainty of the criteria of 'oppression'.[293]

The rule in *Foss* was scrutinized by the Corporate Law Reform Committee, to address the drawbacks to the principle,[294] specifically that the common law does not adequately offer a remedy under the situation of section 181 of the Companies Act 1965. Hence, there was a need to introduce a statutory derivative action which abolishes all forms of common law derivatives.[295]The Corporate Law Reform Committee also indicated that another problem of the common law derivative action is the problem of free riders,[296] in which the aggrieved minority shareholder is obliged to fund the legal costs to commence the action. Such an obligation is a major disincentive to commence the said action.[297]

Similarly, another criticism of the provision is the *locus standi* of the applicant. In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor,*[298] it was held that membership was to be held generally, and not strictly. Therefore, a beneficial owner of a share who is not a member could technically pray for a leave from the court.[299] The Corporate Law Reform Committee suggested extending the provision to include beneficial owners of shares.[300] Subsequently, another criticism is that the plaintiff is required to prove *prima facie* that the company is entitled to the relief before pleading the action itself.[301] This places a high standard of proof on the plaintiff prior to the action itself.

A similar criticism is that the plaintiff has to bear his own costs of litigation. If the plaintiff fails in the litigation, he has to pay the taxed costs of the defendant. Whereas if the plaintiff succeeds, any amount of damages will be awarded to the company itself.[302]In regards to the winding up order by the courts, sections 181(1)(a) and 181(1)(b) allows the court to wind up companies if the manner conducted by the directors proved to be oppressive.[303]

Section 218(1)(i) of the Companies Act 1948 is a similar provision in England and Wales. Lord Wilberforce addressed this provision in *Ebrahimi v Westbourne Galleries Ltd &Ors,* that this doctrine allows the court to use legal obligations to address equitable principles in cases of

[293] Aishah Hj Bidin, 'Legal Issues Arising from Minority Shareholders' Remedies in Malaysia and United Kingdom' [2003] 7 Jurnal Undang-undang dan Masyarakat 51-69.
[294] *Ibid*, citing Corporate Law Reform Committee Consultation Document, 'On Members' Rights and Remedies'.
[295] Corporate Law Reform Committee Consultation Document, 'On Members' Rights and Remedies' [2007] 6, para 3.
[296] *Ibid*, 2.03.
[297] Corporate Law Reform Committee Consultation Document (n 68).
[298] *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd& Anor* [1996] 1 MLJ 113.
[299] *Ibid*.
[300] Corporate Law Reform Committee Consultation Document (n 68).
[301] Bidin (n 66).
[302] Bidin (n 66).
[303] Teng Kam Wah, 'Power to the Minority Shareholder' [1997] 2 MLJ 37.

unfairness.[304] In other words, the company can only be wound up if the court is satisfied that it is just and equitable for the company to be wound up.[305] Naturally, this was unsatisfactory to the minority shareholders as he is of obligation to justify the winding up order, in which, following that, the court is obliged to grant the winding up order.[306]

The Malaysian position differs from the English position in this aspect. This is due to the meaning of the term 'oppression' from the English cases such as *Re Jermyn Street Turkish Baths Ltd* which differs from Malaysian cases such as *Re Kong Thai Sawmill (Miri) Sdn Bhd*[307] as stated above. However, it can be argued that a remedy of such a conduct, under s181, is subjected to the discretion of the courts.[308] Due to this fact, the court may grant an order to wind up the company despite not being prayed to do so, or to provide an appropriate alternative remedy depending on the situation, as seen in *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd.* [309] This may be beneficial as winding up the company may not be in the company's best interests.

However, AnuarJ in *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors,*[310] stated that despite the differences in s181 and the just and equitable rule in section 218 of the Companies Act 1948, the outcome is the same. He noted that despite how sections 218 or 181 were construed, the courts were entitled to impose equitable rights on strict legal obligations.

3.3 Introduction of the Companies Amendment Act 2007

The provisions of sections 181A-E were introduced in the Companies Amendment Act (2007 Amendment) which provide for derivative action on behalf of the company. Sections 181 A-E were debated by the Corporate Law Reform Committee in the Consultative Document 6.[311] The statutory derivative action was first aptly attempted in *Celcom (M) Bhd v Mohd Shuaib Ishak.*[312] It was held that the derivative action under s181A must be strictly applied. There must also be a direct causal nexus whereby the complainant must prove, " ... between the complainant and how he ceased to be a member."[313] This case was to be said to impose a strict requirement on the provision.[314] Another requirement, as stated by Abdul Hamid

[304] *I bid*.
[305] Teng (n 76).
[306] Teng (n 76).
[307] *Re Kong Thai Sawmill* (n 62).
[308] Teng (n 76).
[309] *KuahKok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129.
[310] *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors* [1995] 2 SLR 297.
[311] Corporate Law Reform Committee Consultation Document (n 68).
[312] *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636.
[313] *Ibid*.
[314] Ahmad Khamal (n 25).

Embong JCA, is to prove 'good faith', which is based on honest belief and that the application is not of a collateral purpose.[315]

It is due to the two important factors of whether the derivative action is brought in good faith for the best interests of the company;[316] that the Court of Appeal sets the bar high for such an action, with a strict adherence to the provision.[317] The court in *Celcom (M) Bhd*[318] held that on the issue of good faith, there is a twofold test of good faith under section 181B: (i) an honest belief by the respondent, and (ii) that the claim is not meant for a collateral purpose.

These requirements are important, as stated by Annabelle Yip and Hon Yi Lim in the Singaporean Court of Appeal case of *Ang Thiam Swee v Low Hian Chor*.[319] The necessity to prove a good faith is established under section 216A(3) of the Singaporean Act.[320] Both limbs are held as important as 'personal matters' would be avoided from these frivolous claims.[321]However, there is a slight emphasis on the issue of honest belief in the Malaysian jurisdiction, rather than the Singaporean emphasis on both honest belief and interests of the company. As the Malaysian requirement for 'honest belief' and 'interest of the company' is more akin to the Australian decision of *Swansson v R A Pratt Properties Pty Ltd and Another,*[322]it is a twofold test, rather than merely one from the Singaporean statute.

Imperfections in these particular amendments still exist. For instance, section 181A was silent on a possibility of a multiple derivative action[323] which is an action taken by a minority shareholder against a subsidiary or a related company,[324] seen in the Hong Kong case of *Waddington Ltd v Chan Chun Hoo Thomas and others.*[325]Therefore, due to the lacunae in the statutes, the courts would often refer to the common law[326]as shown in *Ranjeet Singh Sidhu v Zavarcoplc*[327] which refers to cases such as *Waddington.*[328] In this particular case,

[315] *Celcom (M) Bhd* (n 85).
[316] Vivian Chen, 'The Statutory Derivative Action in Malaysia: Comparison with an Australian Judicial Approach' [2017] 12 Asian Journal of Comparative Law 1.
[317] Ahmad Khamal (n 25).
[318] *Celcom (M) Bhd*(n 85).
[319] *Ang Thiam Swee v Low Hian Chor* [2013] SGCA 11.
[320] Section 216A(3) of the Companies Act.
[321] Annabelle Yip and Hon Yi Lim, 'Ang Thiam Swee v Low Hian Chor [2013] SGCA 11 (Singapore, Court of Appeal, 31 January 2013): Acting in Good Faith' [2013] Wong Partnership LLP <http://www.mondaq.com/x/234352/Shareholders/Ang+Thiam+Swee+v+Low+Hian+Chor+2013+SGCA+11+Singapore+Court+of+Appeal+31+January+2013+acting+in+good+faith> accessed 28 May 2020.
[322] [2002] 42 ACSR 313.
[323] Aiman Nariman Mohd Sulaiman, 'The Statutory Derivative Action in Malaysia: Filling in the Gaps' [2012] 20 IIUMLJ 177.
[324] Victor Joffe, 'The multiple derivative action: pt 1' [2009] 2 JIBFL 61.
[325] *Waddington Ltd v Chan Chun Hoo Thomas and others* [2008] HKLR 1381. [2008] HKCFA 63.
[326] Ahmad Khamal (n 25).
[327] [2016] 2 CLJ 975.
[328] *Kumagai Gumi Co Ltd (n 85*).

multiple derivative action was applied in Malaysia via section 181A(3) of the Companies Act 1965.[329]

3.4 The Current Position under the Companies Act 2016

Remedies for minority shareholders are found in sections 346 to 351 of the Companies Act 2016.[330] Section 346 is similar to section 181 of the Companies Act 1965 in providing a remedy to a minority shareholder in cases of oppression.[331]Section 346 of the Companies Act 2016 states that a member, upon proving either that (a) the affairs of the company were exercised as oppressive to one or more shareholders including himself; or (b) if an act of a company is prejudicial to one or more members, including himself;[332] the court has a discretion to (a) Direct, prohibit, cancel or vary a transaction or resolution, (b) regulate the conduct of the company, (c) to allow purchasing of shares, (d) to provide a reduction in the purchasing of shares or (e) to wind up the company.[333]

Section 346 of the Companies Act 2016 is a personal claim. The individual member or debenture holder brings an action under his name. Whereas, under section 347, the proceedings are derivative, in which the applicant brings the claim in the company's name by way of section 347(2). Sections S347- 350 of the Companies Act 2016 is similar to the amended provisions of section 181A-E of the Companies Act 1965, as elaborated below. Section 347(1)of the Companies Act 2016 states that the complainant may initiate, intervene in, or defend a proceeding on behalf of the company. Essentially, the complainant may take action against the majority shareholders on behalf of the company itself. This would mean that the plaintiff no longer has to take a representative action to include all the shareholders except the defendants. Rather, the plaintiff will be acting under the company's name.

Section 347 of the Companies Act 2016 is similar to section 181A of Companies Act 1965. Sections 181A(1) and (2) are identical in nature to sections 347(1) and (2). However, most importantly, under the Companies Act 2016, common law rules are abrogated under section 347(3).[334] This differs from the Companies Act 1965. Under section 181A(3) of the Companies Act 1965, the right of a person to bring an action under Common Law is not abrogated.

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[329] Ainul Azam bin Ahmad Khamal, 'There and Back Again: The Journey Continues – Recent Perspectives on the Law of Derivative Action in Malaysia' [2019] 6 MLJ 119.
[330] Companies Act 2016 (n 10) s 346-351.
[331] Chan Wai Meng, *Essential Company Law in Malaysia: Navigating the Companies Act 2016* (1st Edn, Sweet & Maxwell 2017).
[332] Companies Act 2016 (n 10)s 346(1).
[333] Companies Act 2016 (n 10) s 346(2).
[334] Companies Act 2016 (n 10) s347(3).

Section 348 of the Companies Act 2016 states the procedure of which the derivative action via section 347 is initiated. This section is identical with section 181B of the Companies Act 1965. Similarly, section 348(5) of the Companies Act 2016 is identical to section 181C of the Companies Act 1965. Under section 348(4) of the Companies Act 2016, the twofold test of honest belief and best interests of the company is retained. It is opined that the same high standard of the Companies Act 1965, held in *Celcom (M) Bhd*[335] still applies.

Section 349 of the Companies Act 2016 is parallel to section 181D of the Companies Act 1965. This states that a ratification or an approval of the conduct by the members of the company does not prevent any persons from bringing a claim. However, the court may take the ratification or order into the consideration of the order to be made. Section 350 of the Companies Act 2016, which is identical to section 181E of the Companies Act 1965, gives power to the court to make orders on (a) authorise the complainant to control the conduct of proceedings, (b) gives direction for conduct of proceedings,(c) for any person to provide assistance and information to the complainant, (d) to require the company to pay legal fees and disbursements or to grant leave of an injunction, (e) to make orders on costs.

Section 351 of the Companies Act 2016, which corresponds to section 368A of the Companies Act 1965, is a wide provision that gives power to the court to grant injunctions if any offences under the respective acts were committed. From the comparison above, it is clear that the major difference between derivative actions under the Companies Act 2016 and the Companies Act 1965 is that the Companies Act 2016 expressly abrogates the common law principles, whereas the Companies Act 1965 did not.

Although it is of the Corporate Law Reform Committee's intention for the common law principles to be abrogated in the new statute, there are many uncertainties in whether the Companies Act 2016 would allow common law principles in practice and in case law.[336]One of the uncertainties is the multiple derivative action as decided in *Ranjeet Singh.*[337]The Companies Act 2016 is similar to the Companies Act 1965 that it is silent on this issue. Since the Companies Act 2016 expressly abrogates common law principles, it is unclear whether doctrines such as multiple derivative action should continue in the current legal framework.

Conversely, several of the interpretations decided in case law based on the said provisions of the Companies Act 1965 are clearly to be retained. For instance, due to the identical nature of sections 181A (1) and (2) of the Companies Act 1965 and sections 347(1) and (2) of the Companies Act 2016, the strict requirement of the direct causal nexus " ... between the complainant and how he ceased to be a member ... " decided in *Celcom (M) Bhd* should be followed.

[335] *Celcom (M) Bhd*(n 85).
[336] Ahmad Khamal (n 25).
[337] *Ranjeet Singh Sidhu v Zavarco plc* (n 100).

Therefore, it is appropriate to refer to the Corporate Law Reform Committee in regards to this issue. The Corporate Law Reform Committee recommends that common law derivative action be abrogated in favour of the statutory derivative action. In this regard, the Corporate Law Reform Committee achieved its goal. It must be noted that the Companies Act 2016 does provide certain provisions that compensate the exceptions under *Edwards,* namely, fraud in section 213;special majority in sections 33(1) and 38(6); and personal rights in section 71.[338]

However, as common law rules regarding derivative action were repealed, the Malaysian position seemingly becomes less vague as compared to the previous situation with the Companies Act 1965.[339] It is of this author's opinion that the removal of Common Law principles from the law is a benefit, rather than a loss. The common law rules of *Foss* are restrictive, and much antiquated in an age where shareholder power is seen with more value.[340]To quote Lord Browne Wilkinson in *R v Secretary of State for the Home Department, ex-parte Pierson*,[341] *"*Parliament is presumed not to have intended to change the common law unless it is clearly indicated such intention either expressly or by necessary implication."

Despite the clear express abrogation of Common Law principles, the 2019 decision of the Federal Court in *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd*[342] affirmed the common law principle of 'wrongdoers' control'. Wrongdoer's control was an essential requirement in the common law derivative action.[343] If a company is 'deadlocked' in which the company is equally split between 2 opposing views, the plaintiff has to prove that the defendant has control over the board. This is called the Wrongdoer's Control test.

Under the Companies Act2016, there is no such requirement. The recourse back to the common law principles trivialises the express prohibition of section 347(3) of the Companies Act2016. It must be noted that Raus Sharif CJ admitted in his judgment that the case arose in 2012, and thus the Companies Act2016 does not retrospectively apply to this case. Therefore, it is for this reason that the author opines that this decision is not to be followed.

[338] Chan (n 104).
[339] Ahmad Khamal (n 25).
[340] Koh (n 26).
[341] *R v Secretary of State for the Home Department, ex-parte Pierson* [1998] AC 539.
[342] *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1.
[343] *Ibid*.

4. Conclusion

Due to the developments of the law under sections 181A-E of the Companies Act 1965, it is this author's opinion that the case laws decided based on the said provisions of the Companies Act 1965 fully applicable to the new legislation due to the similarity of the provisions of section 347 of the Companies Act 2016 and sections 181A-E of the Companies Act 1965. It is also of this author's opinion that a more recent development in the case law, made in light of the Companies Act 2016, should be made explicit that the case law made under the Companies Act 1965 is to be followed. In light of the future developments in case law, English Common Law principles should be slowly replaced by Malaysian precedents as the lacunae starts to be filled with established legal doctrine.

Due to the abrogation of the common law principles, it can be concluded that the flaws in the common law actions are solved. Maintaining the principles of *Edwards v Halliwell* would only complicate matters further as the Corporate Law Reform Committee suggestions in the Companies Act 2016 have filled the gap left by the Common Law. Moreover, by abrogating the Common law principles, the law is now streamlined. This analysis also demonstrates that the law, like any other human developments, should not be static, but a dynamic, evolving force that improves over time.

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