MAK SIEW WEI v. YEOH ENG KONG & OTHER APPEALS

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COURT OF APPEAL, PUTRAJAYA
NALLINI PATHMANATHAN JCA
BADARIAH SAHAMID JCA
ZABARIAH MOHD YUSOF JCA
[CIVIL APPEALS NO: W-02(IM)(NCC)-1582-08-2017,
W-02(IM)(NCC)-1586-08-2017, W-02(IM)(NCC)-1587-08-2017
& W-02(IM)(NCC)-1801-09-2017]
19 SEPTEMBER 2018

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CIVIL PROCEDURE: *Statement of claim – Amendment – Action against company, directors and auditor – Allegations of misrepresentation and deceit – Action commenced by director/shareholder in personal capacity – Director/shareholder later sought to amend statement of claim to continue action only in personal capacity and on behalf of other shareholders of company – Addition of new and separate cause of action in statement of claim – Whether allowing amendment would have effect of permitting common law derivative action to be abrogated by s. 347(3) of Companies Act 2016 – Whether amendment ought to be allowed*

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COMPANY LAW: *Derivative action – Action against company, directors and auditor – Allegations of misrepresentation and deceit – Action commenced by director/shareholder in personal capacity – Director/shareholder later sought to amend statement of claim to continue action only in personal capacity and on behalf of other shareholders of company – Addition of new and separate cause of action in statement of claim – Whether allowing amendment would have effect of permitting common law derivative action to be abrogated by s. 347(3) of Companies Act 2016 – Whether there is difference in nature and character between personal action brought by shareholder and shareholder on behalf of company – Whether amendment ought to be allowed*

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There were four appeals and the appellants comprised various defendants at the High Court. The respondent ('plaintiff') claimed for misrepresentation and deceit, against Scan Associates Berhad ('SCAN') and SCAN's directors ('director defendants') and auditor (collectively referred as 'the defendants'). According to the plaintiff, he suffered losses after investing or purchasing the shareholding in SCAN as the director defendants and the auditor, conspired to defraud the plaintiff and the other shareholders, by concealing SCAN's financial status. At the High Court, the plaintiff initially claimed against the defendants in his personal capacity as a shareholder, and on behalf of the other shareholders of SCAN. However, the plaintiff later sought to re-amend his amended statement of claim to continue the action only in his personal capacity *qua* shareholder, but to add a new and separate cause of action, namely a derivative action for and on behalf of SCAN and all the

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A shareholders, save for the third and fourth defendant. Objecting against the amendment application, the defendants argued that (i) the amendment, if allowed, would have the effect of permitting the plaintiff to bring a common law derivative action which has been expressly abrogated by s. 347(3) of the Companies Act 2016; and (ii) there was a delay in making the amendment
B and the plaintiff failed to prove any cogent reasons for such delay. The High Court Judge ('HCJ') allowed the amendment. Hence, the present appeal. The issue that arose for determination were (i) whether it was appropriate for a shareholder to sue in his personal capacity, for losses he had suffered personally and also on behalf of the company *ie* losses suffered by the
C company, by way of a derivative action in the same suit.

Held (allowing appeals in part)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The amendments ought not to have been allowed. There was a failure of the HCJ to recognise or refer to (i) the essential difference, in nature
D and character, between a personal action brought by a shareholder and that brought by the shareholder on behalf of the company *ie* a derivative action; and (ii) the rule against reflective loss where loss suffered by the company could not be claimed by the shareholder, by bringing an action in his personal capacity. The appeals against the subsequent event re-
E amendments were dismissed such that this category of re-amendments remain. The appeals concerning the amendment to introduce a new cause of action, namely a derivative action, were allowed. (paras 66 & 67)

(2) The reflective loss principle is crucially relevant to the issue of the re-amendment of the statement of claim to add a derivative action. The
F reflective loss principle illustrates the point that the shareholder's personal claim is a different and separate cause of action from a derivative action, which is the company's claim brought in the name of the shareholder. Therefore, the loss recoverable under a personal shareholder action is different from that claimable on behalf of a
G company under a derivative action. It thus followed that the nature of these two claims, under the law, are equally disparate or different. (paras 49 & 50)

(3) The re-amended statement of claim, which contained the pleadings for both the personal action brought by the plaintiff, as well as the
H derivative action, disclosed that no distinction whatsoever was made between (i) the claim brought by the shareholder in his personal capacity for losses suffered by him personally; and (ii) the claim brought on behalf of the company *ie* the derivative action, and the losses suffered by the company. The plaintiff relied on the same series of facts and
I transactions to make a claim in both capacities. There were numerous

prayers and many of them sought damages for both the shareholder and the company almost interchangeably. This offended the principle of reflective loss. (paras 51 & 52)

(4) The amendment sought to change the original claim, from one brought by the shareholder in his personal capacity against the defendants for the recovery of losses suffered *qua* shareholder, to add a derivative cause of action, brought by the shareholder on behalf of the company to recover losses suffered by the company. To that extent, it changed unalterably or irrevocably, the character of the suit from a pure shareholder's personal action to one that is both a shareholder's action as well as a derivative action. (para 55)

(5) A separation of the claims is essential for the defendants, and the court, to comprehend which reliefs the shareholders were entitled to, if at all, and which reliefs the company was entitled to, if at all. Otherwise, the defendants were likely to suffer prejudice in the form of double recovery as a result of the pleadings which did not differentiate between the reliefs sought by the shareholder in his personal capacity and the reliefs sought by the company by way of the derivative action. (para 62)

(6) The re-amendment by the plaintiff was sought at a very late stage and had the effect of unreasonably delaying proceedings unnecessarily. The delay illustrated, *inter alia*, that the re-amendment was very much an afterthought, which also reflected a lack of *bona fides*. (para 54)

Obiter:

(1) When counsel cite case laws to the court, *albeit* domestic or foreign cases, it is essential that they ensure that the case cited has not been overturned, criticised or even distinguished by subsequent court decisions. The importance of doing so needs no underscoring. The correct standard to be adhered to is simply that it is inexcusable for a lawyer to fail, as a matter of routine, to study and examine all cited cases to ensure that there is no citation of a case as a 'precedent', when it no longer qualifies as such. The standard of reasonable diligence or inquiry into the law is expected of all lawyers addressing the courts. (para 73)

(2) The need for well-researched briefs and advocacy is a cornerstone of the administration of justice. The rationale underlying the need for well-researched appellate advocacy is obvious. The courts are overburdened, and in the context of the adversarial system, judges rely upon legal arguments and authorities put forward by counsel in writing their judgments. Any slack in legal research or incorrect citations of case law, particularly in novel or difficult areas of the law, may well result in a misstatement of the correct position in law. (paras 74 & 75)

A ***Bahasa Malaysia*** *Headnotes*

Terdapat empat rayuan dan perayu-perayu terdiri daripada pelbagai defendan di Mahkamah Tinggi. Responden ('plaintif') memfailkan tuntutan, berdasarkan salah nyataan dan penipuan, terhadap Scan Associates Berhad ('SCAN') dan pengarah-pengarah ('defendan-defendan pengarah') dan auditor
B SCAN (dirujuk secara kolektif sebagai 'defendan-defendan'). Menurut plaintif, dia mengalami kerugian selepas melabur dalam, atau membeli saham, SCAN kerana defendan-defendan pengarah dan juruaudit, bersubahat menipu plaintif, dan lain-lain pemegang saham, dengan menyembunyikan status kewangan SCAN. Di Mahkamah Tinggi, plaintif asalnya menuntut
C terhadap defendan-defendan dalam kapasitinya sebagai pemegang saham, dan bagi pihak lain-lain pemegang saham SCAN. Walau bagaimanapun, plaintif kemudian memohon untuk meminda pernyataan tuntutan terpindanya untuk meneruskan tindakan tersebut, khususnya tindakan terbitan untuk dan bagi pihak SCAN dan semua pemegang saham, kecuali defendan ketiga dan
D keempat. Membantah permohonan pindaan tersebut, defendan-defendan menghujahkan (i) pindaan tersebut, jika dibenarkan, akan mempunyai kesan membenarkan plaintif membawa tindakan terbitan common law, yang nyata sudah dimansuhkan oleh s. 347(3) Akta Syarikat 2016; dan (ii) terdapat kelengahan dalam membuat pindaan tersebut dan plaintif gagal membuktikan
E apa-apa alasan kukuh berkaitan kelengahan sedemikian. Hakim Mahkamah Tinggi membenarkan pindaan tersebut. Maka timbul rayuan ini. Isu yang timbul untuk diputuskan ialah sama ada sesuai jika seorang pemegang saham mengambil tindakan, dalam kapasiti peribadinya, untuk kerugian yang dialami secara peribadi dan juga bagi pihak syarikat iaitu untuk kerugian
F yang dialami oleh syarikat, melalui tindakan terbitan dalam guaman yang sama.

Diputuskan (membenarkan sebahagian rayuan-rayuan)
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

G **(1)** Pindaan-pindaan tidak sepatutnya dibenarkan. Hakim Mahkamah Tinggi gagal mengenal pasti atau merujuk pada (i) perbezaan penting, dari segi sifat dan ciri-ciri, antara tindakan peribadi yang dimulakan oleh pemegang saham dan tindakan yang dimulakan oleh pemegang saham bagi pihak syarikat iaitu tindakan terbitan; dan (ii) peraturan membantah
H pantulan kerugian, iaitu kerugian yang dialami oleh syarikat tidak boleh dituntut oleh pemegang saham dengan memulakan tindakan dalam kapasiti peribadinya. Rayuan-rayuan terhadap pindaan semula peristiwa-peristiwa susulan ditolak dan kategori pindaan semula ini kekal. Rayuan-rayuan berkenaan pindaan untuk memasukkan kausa
I tindakan baharu, iaitu tindakan terbitan, dibenarkan.

(2) Prinsip pantulan kerugian sangat relevan pada isu pindaan semula pernyataan tuntutan untuk menambah tindakan terbitan. Prinsip pantulan kerugian mencerminkan hujahan bahawa tuntutan peribadi pemegang saham berbeza dan terasing daripada kausa tindakan yang timbul daripada tindakan terbitan, iaitu tuntutan syarikat yang dimulakan bawah nama pemegang saham. Oleh itu, kerugian yang boleh dituntut semula bawah tindakan peribadi pemegang saham berbeza daripada kerugian yang boleh dituntut bagi pihak syarikat bawah tindakan terbitan. Dengan itu, diikuti bahawa, bawah undang-undang, sifat kedua-dua tuntutan ini sama sekali sangat berbeza dan berlainan.

(3) Pernyataan pembelaan yang dipinda semula, yang mengandungi pliding kedua-dua tindakan yang dimulakan oleh plaintif, dan juga tindakan terbitan, tidak mendedahkan apa-apa perbezaan yang dibuat antara (i) tuntutan yang dimulakan oleh pemegang saham dalam kapasiti peribadinya untuk kerugian yang dia alami secara peribadi; dan (ii) tuntutan yang dimulakan bagi pihak syarikat, iaitu tindakan terbitan, dan kerugian yang dialami oleh syarikat. Plaintif bergantung pada siri fakta dan transaksi yang sama untuk membuat tuntutan dalam kedua-dua kapasiti. Terdapat pelbagai permohonan dan kebanyakannya menuntut ganti rugi untuk pemegang saham syarikat hampir secara saling bertukar. Ini melanggar prinsip pantulan kerugian.

(4) Pindaan tersebut bertujuan menukar tuntutan asal, daripada tuntutan yang dimulakan oleh pemegang saham dalam kapasiti peribadinya terhadap defendan-defendan untuk tuntutan semula kerugian sebagai pemegang saham, untuk menambah kausa tindakan terbitan, yang dimulakan oleh pemegang saham bagi pihak syarikat untuk menuntut semula kerugian yang dialami oleh syarikat. Setakat itu, sifat guaman diubah, sepenuhnya atau tanpa boleh ditarik balik, daripada tindakan peribadi pemegang saham menjadi tindakan pemegang saham dan tindakan terbitan.

(5) Pengasingan tuntutan penting buat defendan-defendan dan mahkamah untuk memahami mana-mana relief yang pemegang saham berhak dapat, jika ada, dan mana-mana relief yang syarikat berhak dapat, jika ada. Jika tidak, defendan-defendan mungkin akan terprejudis dalam bentuk tuntutan berganda akibat pliding yang tidak membezakan antara relief yang dipohon oleh pemegang saham dalam kapasiti peribadinya dan relief-relief yang dipohon oleh syarikat melalui tindakan terbitan.

(6) Pindaan semula plaintif dipohon pada peringkat yang sangat lambat dan mempunyai kesan melengahkan prosiding secara tidak munasabah dan tidak patut. Kelengahan ini menunjukkan, antara lain, pindaan semula satu fikiran kemudian, yang juga mencerminkan ketiadaan niat baik.

A ***Obiter:***

(1) Apabila peguam memetik kes-kes undang-undang di mahkamah, tidak kira kes dalam atau luar negeri, penting agar mereka memastikan kes yang dipetik tidak diakas, dikritik atau dibezakan dengan keputusan-keputusan terkemudian mahkamah. Kepentingan berbuat demikian
B tidak perlu ditekankan. Standard betul yang harus dipatuhi, ialah sememangnya tidak boleh dimaafkan jika seorang peguam gagal, dalam rutinnya, untuk meneliti dan memeriksa semua kes yang dipetik demi memastikan tiada petikan kes sebagai 'duluan', sedangkan kes tersebut tidak lagi berkelayakan sedemikian. Standard ketekunan munasabah
C atau inkuiri undang-undang dijangka daripada peguam-peguam yang berhujah di mahkamah.

(2) Keperluan arahan dan advokasi yang dikaji selidik dengan baik satu asas pentadbiran keadilan. Rasional sebalik keperluan advokasi rayuan yang dikaji selidik dengan baik adalah jelas. Mahkamah amat terbeban, dan
D dalam konteks sistem pertentangan, hakim-hakim bergantung pada hujahan undang-undang dan autoriti-autoriti, yang dikemukakan oleh peguam, dalam menulis penghakiman mereka. Apa-apa kecuaian dalam penyelidikan undang-undang atau salah petikan kes undang-undang, khususnya dalam pengkhususan undang-undang yang baharu atau rumit,
E mungkin berakibatkan salah nyataan kedudukan yang betul bawah undang-undang.

Case(s) referred to:

Abdul Rahman Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

F *Carlos Sevilleja Garcia v. Marex Financial Limited [2018] EWCA Civ 1468* ***(refd)***

Giles v. Rhind [2002] EWCA Civ 1428 ***(refd)***

Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***

Johnson v. Gore Wood [2002] 2 AC 1 ***(refd)***

Prudential Assurance v. Newman Industries No. 2 [1982] 1 Ch 204 ***(refd)***

Prudential Assurance Co Ltd v. Newman Industries Ltd and Others [1979] 3 All ER 507
G ***(refd)***

Prudential Assurance Co Ltd v. Newman Industries Ltd and Others [1980] 2 All ER 841 ***(refd)***

Ranjeet Singh Sidhu & Anor v. Zavarco PLC & Ors [2016] 2 CLJ 975 HC ***(refd)***

Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors [2018] 2 CLJ 129 FC ***(refd)***

H *Stroud v. Lawson and Others [1898] 2 QB 44 CA* ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 347(3), 348, 349, 350, 620(4)

I Interpretation Acts 1948 and 1967, s. 30(1)(b)

Rules of Court 2012, O. 15, O. 20

(Civil Appeal No: W-02(IM)(NCC)-1582-08-2017)
For the appellant - Alex Tan Chie Sian & Marcus Ng; M/s Wong Kian Kheong
For the respondent - S Ravindran; M/s Sreenevasan Young

(Civil Appeal No: W-02(IM)(NCC)-1586-08-2017)
For the appellant - Justin Saw; M/s Lim Chong Phang & Amy
For the respondent - S Ravindran; M/s Sreenevasan Young

(Civil Appeal No: W-02(IM)(NCC)-1587-08-2017)
For the appellant - Sasha Ravindran & Tasha Lim; M/s Cheah Teh & Su
For the respondent - S Ravindran; M/s Sreenevasan Young

(Civil Appeal No: W-02(IM)(NCC)-1801-08-2017)
For the appellant - Maisarah Mohd Razali; M/s Ram Reza & Muhammad
For the respondent - S Ravindran; M/s Sreenevasan Young

[Editor's note: For the High Court judgment, please see Yeoh Eng Kong v. Dato' Nik Ismail Nik Yusoff & Ors (No 2) [2016] 1 LNS 1112 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Nallini Pathmanathan JCA:

[1] There are four appeals before us. The appellants, who comprise various defendants in the court below, appeal against the grant by the High Court of leave to the respondent, who was the plaintiff in the court below, to re-amend its amended statement of claim pursuant to O. 20 of the Rules of Court 2012.

[2] Appeal No. 1586 is brought by the first, second, sixth, seventh, eighth and ninth defendants while Appeal No 1582 is brought by the third and fourth defendants, Appeal No. 1801 by the fifth defendant and Appeal No. 1587 by the tenth defendant. The four appeals were heard together.

[3] The central issue that arises for consideration in these appeals relates to whether, on the factual matrix of the present case, the plaintiff may amend his claim to continue the action in all the following capacities jointly:

(a) As a shareholder in his personal capacity, as originally pleaded;

(b) By way of a derivative action for and on behalf of Scan Associates Berhad ('SCAN') *vide* the proposed re-amendments; and

(c) On behalf of all the shareholders of SCAN.

[4] By virtue of this amendment application the plaintiff also seeks to plead the events that transpired between 8 September 2016 and 22 April 2017 when SCAN was de-listed.

A **Brief Background Facts**

[5] The background facts may be gleaned from the statement of claim, the judgment of the learned High Court Judge and the submissions of the parties.

[6] The plaintiff is a director and shareholder of SCAN. At all material
B times, the first to eighth defendants were directors of SCAN, which is the ninth defendant in the suit. The tenth defendant was the auditor of SCAN.

[7] The plaintiff's claim against the individual defendants is premised on misrepresentation and deceit. Essentially, the plaintiff claims that in their individual capacities as directors of SCAN (and as auditor), these individuals
C and the firm of auditors, had actively concealed the actual financial status of SCAN from the plaintiff as well as all the shareholders of SCAN.

[8] The plaintiff levelled these allegations primarily at the fourth defendant who, it is claimed, exercised considerable influence over the other directors. Alternatively, the plaintiff contends that these other directors were
D aligned with the fourth defendant.

[9] The plaintiff relied upon these representations made by the fourth defendant and the other defendants, to purchase a substantial stake/ shareholding in SCAN in or around June 2015 and thereafter. (At the time
E of the filing of the suit, the plaintiff was a director and a substantial shareholder in SCAN, holding approximately 7.791% of the company.)

[10] With effect from 18 May 2015, SCAN was classified a GN3 company pursuant to Guidance Note 3 ('GN3') of the ACE Market Listing Requirements of Bursa Securities ("ACE LR"). On 28 April 2017 SCAN's
F shares were de-listed and removed from the Official List of Bursa Malaysia.

[11] In essence, the plaintiff claims to have suffered considerable loss in investing or purchasing the shareholding in SCAN, as a consequence of the representations of the defendants.

G **[12]** The plaintiff also claimed that the individual defendants had violated their statutory and fiduciary duties and that the director defendants together with the tenth defendant who were the auditors, conspired to defraud the plaintiff and the shareholders and thereby caused loss to them.

[13] In his claim prior to the re-amendments comprising the subject matter
H of these appeals, the plaintiff made claim against the defendants in his personal capacity as a shareholder of SCAN and on behalf of all the other shareholders of SCAN.

[14] As stated at the outset, *vide* the proposed re-amendments, the plaintiff sought to:

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(a) continue the action not only in his personal capacity *qua* shareholder, but to add a new and separate cause of action namely a derivative action for and on behalf of SCAN and all the shareholders save for the third and fourth defendants;

(b) plead events transpiring between 8 September 2016 and 22 April 2017 when SCAN was de-listed.

Item (b) is not of great consequence. It is in fact item (a) that comprises the crux of the appeal.

[15] The appellants' main objections to the amendment application were that:

(i) the amendment, if allowed, would have the effect of permitting the plaintiff to bring a common law derivative action which has been expressly abrogated by s. 347(3) of the Companies Act 2016; and

(ii) there was delay in making the amendment and the plaintiff had failed to provide any cogent reason for such delay.

The Grounds Of Judgment Of The High Court

[16] The learned High Court Judge allowed the amendment. Her Ladyship substantiated this decision *inter alia*, on the following bases:

(a) The plaintiff had stipulated in his original statement of claim that he reserved the right to bring a derivative action for and on behalf of SCAN if necessary, against any one or more of the defendants;

(b) As such there was no element of surprise which prejudiced the defendants;

(c) The purpose of bringing the derivative action in these proceedings was to avoid a multiplicity of proceedings, which might arise if the derivative action were to be filed in another court;

(d) The derivative action sought to be included in the proceedings *vide* the amendment did not change the character of the suit into another as it was not inconsistent with the complaints earlier pleaded by the plaintiff, namely that the board of directors had breached its statutory and fiduciary duties by allowing SCAN to be exposed to the risk of de-listing and legal action being taken against it for not proceeding with a proposed regularisation plan;

(e) As the facts are identical, it did not matter that a derivative action was being "added" as the plaintiff was merely supplementing the claim by seeking reliefs on behalf of SCAN;

(f) The derivative action is purely procedural in nature, citing *Abdul Rahman Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417. As for the defendants' objection that the plaintiff would effectively be circumventing and contravening s. 347(3) of the Companies Act 2016 ('the 2016 Act') as a derivative action is a procedural device and therefore has retrospective effect, the learned judge rejected the argument. She went on to hold that it was undisputed that the facts giving right to the commencement of the common law derivative action had accrued prior to the 2016 Act and as no contrary intention appeared in the 2016 Act, proceedings could be initiated after the amendment of the 2016 Act, in respect of substantive rights acquired before the amendment took effect by way of the common law derivative action;

(g) It was clear that the 2016 Act did not have any retrospective effect. The intention of Parliament was unambiguous that the 2016 Act was to be applied prospectively. Any rights accrued prior to the 2016 Act, would survive.

(h) The learned judge was satisfied that the inclusion of the derivative action by way of re-amendment did not alter the character of the suit and did not prejudice the defendants, and accordingly the amendment was allowed.

The Appeal

[17] Before us the appellants, ie, the defendants put forward the same arguments they had raised in the court below. Essentially they are as follows:

(a) By virtue of s. 347(3) of the 2016 Act, the right to bring a common law derivative action has been expressly abrogated;

(b) Section 347(3) is a procedural provision and has retrospective application. The learned High Court Judge was plainly wrong in concluding that the common law derivative action is a substantive right and not a procedural rule;

(c) The common law derivative action was expressly displaced by s. 347(3) and, contrary to what was held by the learned High Court Judge, is not saved by s. 620(4) of the 2016 Act, or s. 30(1)(b) of the Interpretation Acts 1948 and 1967;

(d) The learned High Court Judge erred in allowing the amendment application. The effect of the decision was to allow the plaintiff to circumvent the procedural requirements of ss. 348, 349 and 350 of the 2016 Act;

(e) There is an inordinate and unexplained delay of more than one year in the filing of the amendment application. The learned High Court Judge erred in holding that it was sufficient for the plaintiff to expressly reserve his rights to bring a derivative action as pleaded in the original statement of claim, as such the filing of the amendment application does not take the defendants by surprise;

(f) The learned High Court Judge failed to take into consideration that in *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1 ('*Hong Leong Finance*'), the Federal Court held that the principles in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428; [1983] 1 MLJ 213 ('*Yamaha*') are not the sole considerations in a case of a late amendment application;

(g) The learned High Court Judge erred in deciding that there were cogent and reasonable explanations for the delay, these being the plaintiff's appeal to the Court of Appeal, the stay of proceedings, and the events leading to the de-listing of the ninth defendant in April 2017. These points were not canvassed by the plaintiff in his affidavits and submissions;

(h) The learned High Court Judge erred in failing to consider whether full particulars have been pleaded for the court to ascertain if there is a real prospect of success with regard to the representative action.

[18] The re-amendments may be divided into two separate categories. One category relates to the inclusion of factual events and matters that transpired between 8 September 2016 and 22 April 2017 ('the subsequent events re-amendment').

[19] The second category of re-amendments relates to the addition of a new cause of action, namely a derivative action, to the existing cause of action based on a claim by the plaintiff as a shareholder in his personal capacity. (As we have pointed out earlier, the cause of action premised on a representative capacity on behalf of all the shareholders save for the third and fourth defendants was abandoned).

[20] We should state at the outset of this analysis that we conclude that the learned judge exercised the judicial discretion conferred upon her correctly in allowing the subsequent events re-amendment. There is therefore no reason for this court in the exercise of its appellate role, to interfere with the exercise of that discretion. The subsequent events re-amendments therefore remain.

[21] It is the second category of amendments that warrants, in our view, consideration and review. This relates to the addition of a new cause of action namely the inclusion of a derivative action. The primary objection put forward by the defendants was simply that the advent of the new 2016 Act

with its new s. 347(3) abrogated the common law derivative action as the section (presumably) operated retrospectively. We were unable to agree with this proposition as explained above. We should state here again, that with respect, we concur with the learned judge in her determination of this issue. We agreed with her analysis that the section did not operate retrospectively.

[22] In brief, the learned High Court Judge held that s. 620(4) of the 2016 Act, as the savings provision, preserves any rights acquired before the enactment of the 2016 Act. Her Ladyship therefore held that no interpretative exercise is needed to determine whether the 2016 Act is retrospective or prospective, as such an exercise is only necessary where a statute is unclear. We concur with her view that the intention of Parliament is unambiguous that the 2016 Act is to be applied prospectively, and that any rights accrued before its enactment will survive. Under the old Companies Act 1965, the plaintiff has the right to bring a common law derivative action. This right has been preserved by s. 620(4) of the 2016 Act.

[23] However this contention in itself, did not, to our minds address some fundamental issues relating to the difference between personal shareholder actions and derivative actions.

[24] Accordingly, at the first date fixed for the hearing of this appeal, we asked the defendants to specifically address us on the following issue, namely whether it was appropriate for a shareholder to sue in his personal capacity ie, for losses he had suffered personally, and also on behalf of the company ie, losses suffered by the company, by way of a derivative action in the same suit.

[25] In this context, we requested that the research on this point not be confined solely to this jurisdiction but to other jurisdictions as well.

[26] Learned counsel for the tenth defendant referred us to the High Court decision of *Ranjeet Singh Sidhu & Anor v. Zavarco PLC & Ors* [2016] 2 CLJ 975 where both personal and derivative actions had been brought in one suit. Wong Kian Kheong JC (as His Lordship then was) held, *inter alia* as follows in respect of the hybrid nature of the plaintiffs' claim:

> … I have not overlooked the fact that the plaintiffs have "combined" a "double derivative action" with personal causes of action in this suit against all the defendants in this case. I am of the opinion that RC (Rules of Court) does not prohibit such a course adopted by the plaintiffs in this case.

[27] A perusal of this case discloses that the primary issue arising before the court was whether a "double derivative" action concerning a public listed company incorporated in the United Kingdom, Zavarco PLC, and a locally incorporated public listed company, Zavarco Bhd could be brought for the

benefit of two of the defendants against the "wrongdoer" directors of both companies. Applications were brought to strike out the plaintiffs' claim. The striking out was refused by the High Court, which held that such a derivative action could be brought in the Malaysian courts. This decision was upheld by the Court of Appeal.

[28] The personal causes of action brought by the shareholder in his personal capacity did not comprise the main feature of consideration or comment by the courts, save for the statement by the learned judge of the High Court above. In essence, the issue of whether a cause of action brought by the shareholder in his personal capacity for recovery of losses personally suffered, and a derivative action brought by the shareholder on behalf of the company, should be combined in one action was considered primarily in the context of the Rules of Court, namely O. 15 only.

[29] Reference was also made by counsel for the tenth defendant to the English case of *Stroud v. Lawson and Others* [1898] 2 QB 44 CA where there were two separate plaintiffs and two causes of action. Although the defendants' application to strike out the plaintiff's claim was dismissed, on appeal, the English Court of Appeal held to the contrary, stipulating that the causes of action pleaded arose out of different transactions although they had a feature in common. As such, the requirements for joinder under the then English Rules of the Supreme Court were not met. This too does not touch on the issue at hand.

[30] Learned counsel for the plaintiff referred us to *Prudential Assurance Co Ltd v. Newman Industries Ltd and Others* [1979] 3 All ER 507 ('*Prudential Assurance*'), stating that a joinder of both a personal shareholder action and a derivative action on behalf of the company could be brought. Unfortunately, the reference to this case in itself did not reflect the entire legal position correctly[1]. Neither was there any submission from legal counsel for the other appellants that could assist us.

[31] We were therefore constrained to undertake further research ourselves to ascertain the correct legal position. What we learnt was that *Prudential Assurance*, the case referred to us by learned counsel for the plaintiff, was decided by the English High Court where a judgment was handed down by Vinelott J.

[32] However, Vinelott J also determined the cases of *Prudential Assurance Co Ltd v. Newman Industries Ltd and Others* [1980] 2 All ER 841 ('*Prudential Assurance v. Newman Industries No. 1*'). It is this case which is the relevant judgment for the purposes of ascertaining whether a personal action and a derivative action should be brought together in one action, and not Prudential Assurance.

[33] However, the judgment of Vinelott J in *Prudential Assurance v. Newman Industries No. 1* was reversed, in part, on appeal to the English Court of Appeal in the case of *Prudential Assurance v. Newman Industries No. 2* [1982] 1 Ch 204 ('*Prudential Assurance v. Newman Industries No. 2*') and the portion of the judgment that was reversed, was specifically on the point of whether a personal shareholder action should be brought together with a derivative action. It is therefore *Prudential Assurance v. Newman Industries No. 2* that is the correct point of reference.

[34] As such, the reference to the High Court decision in *Prudential Assurance* was not of assistance to us. More importantly, it failed to address the concern underlying our query. It will be recalled that our question was whether it was appropriate to join a personal shareholder claim with a derivative action in the same suit. And there was a reason for our query.

[35] We were therefore constrained to re-call all counsel for the various parties and ask them whether they wished to submit on the law relating to reflective loss in the context of the present appeal, as pursuant to our research such an issue was relevant to this appeal. We took this course of re-calling counsel in order to afford the parties an opportunity to be heard on this issue. Learned counsel all responded that they wished to submit on this issue of reflective loss which they did. Learned counsel for the plaintiff and all the appellants, save for the tenth defendant took the position that the rule on reflective loss made no difference in the context of this appeal. They submitted in essence that the joinder of these causes of action ought not to be refused on this ground. However, they reiterated their earlier objections against the re-amendment, namely relating to the retrospective effect of the 2016 Act.

[36] Learned counsel for the plaintiff in his submissions set out the three *Prudential Newman* cases and sought to argue that the reversal of the English High Court decision in *Prudential Assurance v. Newman Industries No. 1* by the Court of Appeal did not materially affect the present appeal. It was contended that there was no legal bar or procedural bar to combining these two causes of action. As for the reflective loss principle, it was argued that it did not concern the question of whether an amendment may be made to a personal action to include a derivative action which comprises the subject matter of this appeal. In short, as we understand it, learned counsel submitted that as this was not a striking out action, it was not open to this court to rule on the amendment on the basis of the reflective loss principle.

[37] Learned counsel for the tenth defendant took a different stance and submitted that the re-amendment proposed by the plaintiff sought in effect to introduce a derivative action seeking damages on behalf of SCAN for the exact same losses as that claimed in his personal action. Further, it was

submitted that the plaintiff's amendment was filed in order to "save" his suit as the proper party to claim such losses was SCAN and not the plaintiff. The re-amendment, if allowed to remain, would result in a double recovery of damages against the defendants which was contrary to the reflective loss principle.

The Rule Against Reflective Loss

[38] The loss suffered by a company is separate, distinct and disparate from that suffered by a shareholder. As a consequence, the nature of the claim brought by a shareholder for loss suffered personally or *qua* shareholder, is completely different and distinct from that brought by a shareholder on behalf of the company for losses suffered by the latter.

[39] This principle is known as the rule against reflective loss. The genesis of the rule against reflective loss is the decision of the English Court of Appeal in *Prudential Assurance v. Newman Industries No. 2.*

[40] In that case, the plaintiff, which had a 3.2 % shareholding in the company, Newman Industries, *inter alia* sued two individual directors in respect of a fraud on the company. The English Court of Appeal held that the claim was misconceived. It is pertinent that like the present case, the shareholder brought a single action in three different capacities, firstly for relief in his personal capacity, secondly on behalf of all the shareholders of the company and thirdly by way of a derivative action on behalf of the company. The High Court Judge did not query this and the action proceeded. The Court of Appeal however explained that the personal action was misconceived, which the High Court Judge had not perceived:

> … In our judgment the personal claim is misconceived. It is of course correct, as the judge found and Mr. Bartlett did not dispute, that he and Mr Laughton, in advising the shareholders to support the resolution approving the agreement, owed the shareholders a duty to give such advice in good faith and not fraudulently. It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. *But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 percent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation are not directly affected by the wrongdoing.* The plaintiff still holds all the shares in his own absolutely unencumbered property. The deceit practised upon the plaintiff

> does not affect the shares it merely enables the defendant to rob the company … "…. The rule [in *Foss v. Harbottle* (1843) 67 ER 189] is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting … (emphasis added)

[41] The loss suffered by the shareholder is reflective loss, ie, loss reflective of the loss actually suffered by the company. The shareholder does not suffer actual loss. To that extent, a personal action brought by a shareholder in respect of losses suffered by him personally cannot be equated with a derivative action brought by the same shareholder on behalf of the company to enable the company to recover its losses suffered by acts or omissions committed by (generally) the majority wrongdoers in control of the company.

[42] The House of Lords' case of *Johnson v. Gore Wood* [2002] 2 AC 1 (which approved *Prudential Assurance v. Newman Industries No. 2*) is generally regarded as the leading case for the principle that reflective loss cannot be recovered in respect of the diminution in value of a member or shareholder's shares but also to loss of dividends:

> … A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs has declined or failed to make good that loss.

[43] The rationale for the rule is the need to prevent double recovery and to ensure that the company's creditors are not prejudiced as a consequence of recovery by the shareholder personally:

> If the shareholder is allowed to recover in respect of (reflective) loss then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder. (see *Johnson v. Gore Wood* (above)).

[44] The distinction between the company's losses and a shareholder's loss are therefore clear. The rights in respect of which a personal action may be brought are methodically and meticulously set out in Chapter 12 of the textbook entitled *Corporate Powers: Accountability* by Loh Siew Cheang (3rd edn, published by Lexis Nexis). In relation to the nature of the shareholder's personal action the learned author states:

> 12-4 In a personal action, the allegation is that the wrongdoing in question is an invasion of rights that belong to the plaintiff individually and in his personal capacity as a member. Hence, unlike a derivative action relief is asked against the company in a personal action. The company is not merely a nominal defendant ...

[45] As submitted by learned counsel for the tenth defendant, the rule against reflective loss has been followed in Malaysia. In *Rinota Construction Sdn Bhd v. Mascon Rinota Sdn Bhd & Ors* [2018] 2 CLJ 129; [2018] 1 MLJ 141 ('*Rinota*') the Federal Court referred to the decision of the House of Lords in *Johnson v. Gore Wood* (above):

> The position is, however, different where the company suffers loss caused by the breach of duty owed both to the company and to the shareholder. In such a case, the shareholder's loss, in so far as this is measured by the diminution in value of his shareholding or the loss of dividends, merely reflects the loss suffered by the company in respect of which the company has its own cause of action. *If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the Company and its creditors and other shareholders. Neither course can be permitted. This is a matter of principle; there is no discretion involved. Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder.*
>
> (emphasis added).

[46] The principle was recently reiterated in the English Court of Appeal decision of *Carlos Sevilleja Garcia v. Marex Financial Limited* [2018] EWCA Civ 1468 ('*Marex*'). Although the precise point determined by the court was different, namely whether the rule against reflective loss applies to claims by unsecured creditors who are not shareholders of the relevant company, Flaux LJ in the course of his judgment explained the purpose and rationale for this rule. After considering the leading English cases on the rule he expanded on four-fold rationale for the existence of the rule. It is useful to examine the same. They are:

(a) The need to avoid double recovery by the claimant (ie, the shareholder) and the company from the defendant;

(b) If the company chooses not to claim against the wrongdoer, the loss to the shareholder or claimant is caused by the company's decision and not by the defendants' wrongdoing;

(c) The public policy of avoiding conflicts of interest one of which is that if the shareholder had a separate right to claim it would discourage the company from making settlements; and

(d) The need to preserve company autonomy and avoid prejudice to minority shareholders and other creditors.

[47] It must be said for completion that there is an exception to the principle against reflective loss as illustrated in the very limited circumstances set out in the case of *Giles v. Rhind* [2002] EWCA Civ 1428; [2003] Ch 618. That exception is where there is a situation in which the wrongdoer ie, the defendants in the instant case by virtue of their breach of duty owed to the shareholder has actually disabled the company from pursuing such a cause of action as the company had. In that case, the wrongdoer's action was effectively the theft of the company's most lucrative contract which caused the company to suffer considerable loss. The company brought an action against the wrongdoer but it soon went into administrative receivership, and was unable to meet a security for costs application mounted by the wrongdoer who was the defendant. This resulted in the company discontinuing proceedings *vide* a consent order which provided that the company was precluded from bringing any further action against the defendant or his companies. As such, the company was disabled from bringing any action against the wrongdoer.

[48] Such a situation cannot be said to be applicable in the instant case, where *vide* the re-amendment, the plaintiff pleads a cause of action whereby the company in effect *vide* the derivative action seeks to mount an action against the defendants.

Was The Re-amendment To The Statement Of Claim Granted On Correct Principles Of Law?

[49] We do not expand further on the rule against reflective loss, as we are primarily concerned in this appeal with whether the grant of the re-amendment of the statement of claim to include a derivative claim in conjunction with a personal claim was correctly granted. However the reflective loss principle is crucially relevant to the issue of the re-amendment of the statement of claim to add a derivative action.

[50] The reflective loss principle illustrates the point that the shareholder's personal claim is a different and separate cause of action from a derivative action, which is the company's claim brought in the name of the shareholder. Therefore, the loss recoverable under a personal shareholder action is different from that claimable on behalf of a company under a derivative action.

Therefore It Must Follow That The Nature Of These Two Claims Under The Law Are Equally Disparate Or Different

[51] A perusal of the re-amended statement of claim, which contains the pleadings for both the personal action brought by the plaintiff as well as the derivative action discloses that no distinction whatsoever is made between:

(i) the claim brought by the shareholder in his personal capacity for losses suffered by him personally; and

(ii) the claim brought on behalf of the company ie, the derivative action, and the losses suffered by the company.

[52] A perusal of the statement of claim discloses that in the instant case, the plaintiff relies on the same series of facts and transactions (including the latest events sought to be incorporated *vide* the re-amendment) to make claim in both capacities. There are numerous prayers and many of them seek damages for both the shareholder and the company almost interchangeably. This in itself offends against the principle of reflective loss.

[53] What are in effect two claims of a fundamentally different nature and character in law, are being sought interchangeably. As in the cases of *Prudential Assurance No. 1 and No. 2* in the English High Court, the failure to recognise that the two claims are fundamentally dissimilar will lead to confusion and errors in assessing whether the claims are made out and in awarding damages and costs. There is the real danger of double recovery and prejudice to creditors as outlined in the foregoing cases, particularly *Rinota* and *Marex.*

[54] Apart from the foregoing, it also appears to us that the re-amendment by the plaintiff has been sought at a very late stage and has had the effect of unreasonably delaying proceedings unnecessarily. The delay illustrates *inter alia* that the re-amendment is very much an afterthought, which also reflects a lack of *bona fides*.

Application Of The Principle In *Yamaha*

[55] Applying *Yamaha* (above), it appears to us that the amendment seeks to change the original claim from one brought by the shareholder in his personal capacity against the defendants for the recovery of losses suffered *qua* shareholder, to add a derivative cause of action, brought by the shareholder on behalf of the company to recover losses suffered by the company. To that extent, it changes unalterably or irrevocably, the character of the suit from a pure shareholder's personal action to one that is both a shareholder's action as well as a derivative action.

[56] As for the *bona fides* of the re-amendment, no reasons or facts have been put forward to substantiate why the derivative action was not brought at the outset of the suit. The reservation of a right to bring a derivative action in the future if the need arises, is not equivalent to a late amendment to join or bring a derivative claim in the same suit. It certainly does not address the fundamental distinction and disparate nature of the two types of claims.

Application Of *Hong Leong Finance v. Low Thiam Hoe*

[57] With regards to the application of *Hong Leong Finance*, it is evident that the amendment is brought at a very late stage, well after trial dates had been fixed. This is clearly a claim that was, or ought to have been, within the contemplation of the plaintiff from the very outset. Again it needs to be reiterated that the reservation of a right to do so in no way alleviates the tardiness of the re-amendment.

[58] The learned judge in the High Court determined the matter on the basis that as the factual events and transactions giving rise to the claim were the same, it was best that the amendment be allowed. Her Ladyship was of the view that otherwise, this would lead to the filing of another suit which would result in a multiplicity of proceedings and the possibility of a conflict in findings.

[59] We are cognisant that the subject matter of the claim, in terms of the factual matrix, is the same. The issue of a multiplicity of proceedings is an issue that has been raised and considered. The filing of a separate derivative action that is heard separately and possibly subsequently could be viewed as a waste of court time and proceedings. However, it should be borne in mind that if both the shareholder action and the derivative action do eventually proceed to trial, *albeit* separately, the findings of fact made in the first trial will be binding in any subsequent trial, certainly in so far as the factual matrix is concerned. As such, the issue of duplicity is not a reality.

[60] More importantly, to allow these two separate claims to proceed in one action ignores the fundamental reality of the law, namely that it would amount to a contravention of the rule against reflective loss, as was the case in *Prudential Assurance v. Newman Industries No. 1*. The two claims are essentially dissimilar and the reliefs available to be granted are generally clearly disparate or different as argued earlier.

[61] However, the reliefs sought in the instant claim do not reflect any such dissimilarity. On the contrary, the reliefs sought are virtually identical. In this context, a perusal of the prayers sought in the statement of claim discloses, as stated earlier on, that the reliefs sought by the plaintiff *qua*

shareholder in his personal capacity, and that brought for the company *vide* derivative action in the re-amended statement of claim are virtually the same. Damages are sought for the shareholder in his personal capacity and for the company *vide* the derivative action. This is illustrated *inter alia* by the following loss and damages claimed and prayers:

LOSS AND DAMAGE

95. By reason of the matters pleaded above, the Plaintiff states that he has suffered loss or damage including but not limited ~~to mental distress as a result of the imminent risk and the real possibility of the delisting of SCAN shares~~ the loss in value in SCAN's shares as they are no longer tradable in the open market and loss of opportunity for not being able to proceed with Revenue Harvest as the White Knight.

96. The Plaintiff states that the loss and damage suffered is a personal loss as the de-listing of SCAN shares means that all SCAN shares are no longer tradable on open market, which was the very basis why the Plaintiff had purchased SCAN's shares in the first place.

…

WHEREFORE THE PLAINTIFF CLAIMS AGAINST THE DEFENDANTS, JOINTLY AND/OR SEVERALLY THE FOLLOWING:

(1) Declaration that the Former Board consisting of Dato' Nik Ismail bin Nik Yusoff, Mejar Ismail bin Ahmad, Dato' Dr Norbik Bashah bin Idris, Mak Siew Wei, Dato' Nasir bin Nasrun together with Baker Tilly Monteiro Heng have **conspired together to injure and/or defraud Yeoh Eng Kong**;

(2) As against Dato' Nik Ismail Bin Nik Yusoff, Mejar Ismail Bin Ahmad, Dato' Dr Norbik Bashah bin Idris, Mak Siew Wei, Dato' Nasir bin Nasrun and Baker Tilly Monteiro Heng, whether jointly or severally, **damages to Yeoh Eng Kong for conspiracy and/or fraud and/or deceit and/or misrepresentation** to be assessed by a proper officer of this Honourable Court;

…

(3) Declaration that the Intermediate Board consisting of Dato' Nik Ismail bin Nik Yusoff, Mejar Ismail bin Ahmad, Dato' Dr Norbik Bashah bin Idris, Roy Winston George, Mak Siew Wei, Teh Chee Hoe and Chong Khing Chung have **conspired together to injure and/or defraud SCAN and/or Yeoh Eng Kong**;

(4) As against Dato' Nik Ismail Bin Nik Yusoff, Mejar Ismail Bin Ahmad, Dato' Dr Norbik Bashah Bin Idris, Roy Winston George, Mak Siew Wei, Teh Chee Hoe and Chong Khing Chung whether jointly or severally, **damages to SCAN and/or Yeoh Eng Kong for conspiracy to be assessed by a proper officer of this Honourable Court;** … (emphasis added)

[62] A separation of the claims is essential for the defendants and the court to comprehend which reliefs the shareholder is entitled to (if at all), and which reliefs the company is entitled (if at all). Otherwise, the defendants are likely to suffer prejudice in the form of double recovery as a result of the pleadings which do not differentiate between the reliefs sought by the shareholder in his personal capacity and the reliefs sought by the company *vide* the derivative action.

[63] And it is this failure to distinguish between the two separate causes of action and their separate reliefs that gives rise to confusion. The re-amendment sought has the effect of conflating:

(a) the reflective loss alleged to be suffered by the shareholder in the personal action *qua* shareholder; with

(b) the loss alleged to be suffered by the company and in respect of which the derivative action is brought.

[64] If the re-amendment in the instant appeal is allowed to remain, such that there is a "joinder" of the two different and separate causes of action, there is a real danger of confusion and complications in the grant of reliefs.

Does The Rule Against Reflective Loss Preclude The Joinder Of A Shareholder's Personal Action And A Derivative Action Brought On Behalf Of The Company In Every Case?

[65] We should clarify at this juncture that it is not in every instance that the rule against reflective loss precludes the joinder of a shareholder's personal action and a derivative action brought on behalf of the company in one claim. If indeed the causes of action are clearly pleaded correctly such that the claims *qua* shareholder are distinct and clearly separable from the relief sought in the derivative action, there ought, in principle, to be no objection or problem with both causes of action being brought in one action. In short, the clear separability of the causes of action and the reliefs such that the distinct nature of the claims is apparent, does not preclude a joinder. That was the case in *Zavarco*.

Conclusion

[66] For these legal reasons, we are of the unanimous view that:

(i) The appeals against the subsequent events re-amendments are dismissed such that this category of re-amendments remain;

(ii) With respect to the amendment to introduce a new cause of action, namely a derivative action, the appeals are allowed.

[67] These amendments ought not to have been allowed. There was a failure in the court below to recognise or refer to:

(i) The essential difference in nature and character between a personal action brought by a shareholder and that brought by the shareholder on behalf of the company ie, a derivative action; and

(ii) The rule against reflective loss whereby the loss suffered by the company cannot be claimed by the shareholder by bringing an action in his personal capacity.

[68] We are of the further view that the tests in *Yamaha Motors*, not to mention *Low Thiam Hoe* (above), are not met in its entirety, as explained earlier.

[69] However, we are equally cognisant of the fact that these issues were not ventilated in the court below, *albeit* inadvertently or by intention. To that extent, Her Ladyship was not accorded an opportunity to consider these arguments. As remitting the matter back to the High Court for a consideration of this legal issue pertaining to reflective loss and its application to the facts of the instant matter was not a tenable option, given that the matter has already been delayed considerably we had no option but to deal with the appeal in the manner stated above.

[70] We are aware that the reversal of the learned High Court Judge's decision will mean that the derivative action may well have to be brought within the confines of the new/revised 2016 Act which abrogates or does away with the common law derivative action, in line with other jurisdictions. This may well result in some delay and costs for the plaintiff, who will, under the new regime, be constrained to procure leave for such a derivative claim. The plaintiff's claim however does not appear to suffer from the infirmity of being caught by limitation.

[71] The need for leave is a statutory requirement not only in this jurisdiction but in most others, as it ensures that frivolous claims and claims lacking in merit do not waste the commercial court's valuable time and resources. It will not prove a deterrent for a genuine claim. Accordingly, these factors do not to our mind outweigh the harm ensuing from the grant of a re-amendment which would allow the personal shareholder's claim and the derivative claim to be brought in the manner pleaded, such that the two are virtually interchangeable.

[72] When decision was delivered, learned counsel advised us that the company had been wound up such that a derivative action was no longer possible. However, the fact that the company is in liquidation does not preclude the liquidator from bringing a claim to recover any loss allegedly suffered by the company, *albeit* in misfeasance or otherwise.

Post-Script

[73] It is with some hesitancy that we bring up this post-script, applicable not only in the instant case, but recently in many cases that this court has had occasion to deal with. When learned counsel cite case-law to this court, *albeit* domestic or foreign cases, it is essential that they have ensured that the case cited has not been overturned, criticised or even distinguished by subsequent court decisions. The importance of doing so needs no underscoring. The correct standard to be adhered to *albeit* by counsel from the Bar or judicial officers from the Attorney-General's office is simply that it is inexcusable for a lawyer to fail as a matter of routine to study and examine all cited cases to ensure that there is no citation of a case as a 'precedent', when it no longer qualifies as such. Given the technology present today that duty is no longer as onerous as it once was. The use of Westlaw or Lexis Nexis and numerous other legal research engines allows this to be done with ease, so much so that a failure to carry out this exercise warrants genuine judicial concern as to whether an incorrect citation is inadvertent or deliberate. Both give rise to negative impressions and consequences, although the latter is considerably worse as it amounts to misleading the court. In short, the standard of reasonable diligence or inquiry into the law is expected of all lawyers addressing the courts.

[74] The rationale underlying the need for well-researched appellate advocacy is obvious. The courts are overburdened at the best of times, and in the context of the adversarial system, judges rely upon legal arguments and authorities put forward by counsel in writing their judgments. Any slack in legal research or incorrect citations of case-law, particularly in novel or difficult areas of the law, may well result in a misstatement of the correct position in law.

[75] The need for well-researched briefs and advocacy is a cornerstone of the administration of justice. In Malaysia, where the profession is fused such that any lawyer may appear before any level of the hierarchy of the courts, it is even more imperative that standards of advocacy are maintained at the highest levels, so as to ensure accuracy in the development of the law.