RATIONALISING THE NOTICE REQUIREMENT FOR STATUTORY DERIVATIVE ACTIONS

Comparing Singapore and Canadian Perspectives

The statutory derivative action was introduced to ameliorate the harshness of the conditions for commencing a common law derivative action. One statutory mechanism to balance that liberalisation was the requirement that a complainant first gives notice to the directors of the company before applying to the court for leave to bring a statutory derivative action on behalf of the company. However, it is uncertain what is required of the nature and specificity of content in the notice. The various governing statutes do not explicitly address this and the authorities do not speak with one voice. This article seeks to clarify the company law principles underlying, and the policy rationales, *viz*, economic efficiency and corporate governance and accountability, for, the notice requirement and attempts to rationalise the incoherent authorities, arguing that the authorities can be best reconciled on the basis that the courts are exercising judicial pragmatism in attempting to uphold the policy objectives of the notice requirement.

Ronald J J **WONG***
LLB (Hons) (National University of Singapore).

Jeremy **YEO** Wen An*
BA (Hons) (Oxon).

I. Introduction

1 The statutory derivative action was introduced in the companies legislation in various jurisdictions as a response to the onerous requirements on shareholders for bringing common law derivative actions on behalf of the company. One limiting mechanism introduced in such legislation is the requirement that the complainant shareholder first gives notice of the intended derivative action to the company's directors. As will be explained below, the rationale for this limiting mechanism is to prevent an abuse of the statutory process. Yet, there appears to be no certainty as to what is necessary and sufficient for fulfilling the notice requirement: what is the nature and specificity of content in a notice to be furnished by a complainant to the directors of a company before the

* The authors would like to thank the anonymous referee for the review and comments. *S.D.G.*

former is entitled to commence a statutory derivative action? This issue has given rise to many different approaches and seemingly conflicting jurisprudence.

2 Since the statutory derivative action was introduced in the Singapore Companies Act[1] ("CA") in 1993, there has been a dearth of jurisprudence on the notice requirement in s 216A(3)(*a*) of the CA. This article critically analyses several recent Singapore High Court decisions which address the above issue in the context of s 216A of the CA, which was modelled after s 239(2) of the 1985 Canada Business Corporations Act[2] ("CBCA"), as well as Canadian authorities, to offer doctrinal, jurisprudential and policy-based perspectives on the notice requirement in respect of statutory derivative actions. In Part II,[3] authorities from Singapore, Canada and other jurisdictions will be analysed to elucidate the different approaches adopted in respect of the notice requirement. In Part III,[4] the rationales for the notice requirement from the perspectives of company law doctrine and principle, and policy *viz* economic efficiency and corporate governance will be discussed. In Part IV,[5] an attempt will be made to rationalise the seemingly incoherent authorities on the notice requirement, arguing that judicial pragmatism in upholding the policy objectives of the notice requirement is the thematic refrain in the various decisions on the issue. In Part V,[6] an observation on the relationship between the requirement of specificity in the notice and specificity in the leave application will be made.

II. Incoherent authorities?

A. Singapore authorities

3 In the Singapore High Court case of *Teo Seng Ho v IDV Concepts Pte Ltd*[7] ("*IDV Concepts*"), the plaintiff, Teo Seng Hoe ("Teo"), and the second defendant, Chew Choon Kong ("Chew"), were directors and equal shareholders in the first defendant, IDV Concepts Pte Ltd ("IDV"). The relationship between Teo and Chew became strained, resulting in a directors' resolution to wind up the company. Subsequently, the third defendant ("Jen"), Chew's wife, incorporated the fourth defendant, IDV Asia Pte Ltd ("IDV Asia"). Upon discovering this, Teo alleged that Chew and Jen had breached various duties owed to IDV as a director and manager respectively, and that IDV Asia had engaged in wrongful

1 Cap 50, 2006 Rev Ed.
2 RSC 1985, c C-44.
3 See paras 3–24 below.
4 See paras 25–39 below.
5 See paras 40–53 below.
6 See paras 54–55 below.
7 [2013] SGHC 269.

conduct contrary to the interests of IDV. Teo subsequently gave notice to the directors of IDV ("Notice") pursuant to s 216A(3)(*a*) of the CA and applied to the court for leave to commence a derivative action under s 216A. The defendants argued that Teo should not be granted leave because, *inter alia*, the Notice was ineffective as it had omitted several heads of claim: (a) the fourth defendant using IDV's office premises and equipment without approval; and (b) the fourth defendant accessing IDV's confidential information without approval or authorisation. The relevant portions of s 216A of the CA states:

> 216A(2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action in the name and on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.
>
> (3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that –
>
> (*a*) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;
>
> (*b*) the complainant is acting in good faith; and
>
> (*c*) it appears to be *prima facie* in the interests of the company that the action be brought, prosecuted, defended or discontinued.
>
> (4) Where a complainant on an application can establish to the satisfaction of the Court that it is not expedient to give notice as required in subsection (3)(*a*), the Court may make such interim order as it thinks fit pending the complainant giving notice as required.

4 In *IDV Concepts*, Belinda Ang J rejected the defendants' arguments and granted leave to Teo to bring an action on behalf of IDV. With regard to the defendants' arguments on the Notice, Belinda Ang J held that there is "nothing in s 216A(3)(*a*) that requires the statutory notice to list down each and every allegation" and that all that was required was that "notice be given of the complainant's intention to apply for leave to bring an action in the name and on behalf of the company".[8] She relied on the British Columbia Court of Appeal decision in *Re Bellman et al and Western Approaches Ltd*[9] ("*Re Bellman*") for the proposition stated by Nemetz CJ that a "failure to specify each and every cause of action, claim or head of relief in a notice does not … invalidate the notice as a whole" and that it was sufficient "so long as the notice allows a company's directors to be reasonably notified of the intention to

8 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [24].
9 (1981) 130 DLR (3d) 193.

apply for leave to commence a derivative action". Further, Belinda Ang J commented that Chew did not contend that he would have acted (or even considered the matter) differently had the Notice contained the omitted allegations.[10] Accordingly, Belinda Ang J held that the Notice was not invalid,[11] *ie*, it was sufficient to fulfil the notice requirement in s 216A(3)(*a*) of the CA.

5 In another Singapore High Court decision, *Agus Irawan v Toh Teck Chye*,[12] the complainant, a director of the company, sought leave to commence a derivative action on behalf of the company against the respondents, who were two other directors of the company, for breach of fiduciary duties. The complainant brought an action for breach of fiduciary duties as the respondents had allegedly siphoned some rebates which the company was entitled to. The respondents argued that the notice requirement in s 216A(3)(*a*) of the CA had not been met as the complainant had applied to amend his application to include a claim for "price rebates" when the original application, and for which notice was given, was initiated only on the basis of a claim for "volume rebates". Choo Han Teck J rejected this argument on the basis that:[13]

> … the amendment was in respect of the particulars; the action for which leave was sought concerned a breach of fiduciary duties and … the defendants were in no way prejudiced by the inclusion of the additional item especially since the basic position of the defendants is the same in respect of both rebates.

In other words, the notice requirement was met because only some particulars, and not the cause of action, were omitted.

6 In another recent case before the Singapore High Court, *Lee Seng Eder v Wee Kim Chwee*[14] ("*Lee Seng Eder*"), the complainant alleged that the directors of the company had allowed other parties to appropriate the company's assets and goodwill. However, the complainant did not provide the 14 days' notice to the directors of the company in accordance with s 216A(3)(*a*) of the CA. The complainant argued, relying on s 216A(4), that it was not expedient to do so because he had reasonable concerns that the directors would destroy or tamper with the evidence of their alleged conspiracy to deplete the assets and goodwill of the company.[15] In this respect, the complainant relied on an earlier Singapore High Court decision in *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd*[16] ("*Fong Wai Lyn*") where the plaintiff provided 7 days of notice

10 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [27].
11 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [28].
12 [2002] 1 SLR(R) 471 (HC).
13 *Agus Irawan v Toh Teck Chye* [2002] 1 SLR(R) 471 at [7].
14 [2014] 2 SLR 56 (HC).
15 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [7].
16 [2011] 3 SLR 980 (HC).

instead of the requisite 14 days under s 216A(3)(*a*) before commencing an action for leave to commence a derivative action. Judith Prakash J held that s 216A(4) applied as it was impracticable in the circumstances to adhere to the notice requirement and that there was a strong inference on the facts that even if the notice requirement had been complied with, the defendant directors would not have acted differently and thus suffered no prejudice.

7 On the facts in *Lee Seng Eder*, Andrew Ang J held that the complainant failed to establish why it was not expedient to provide notice. Andrew Ang J found that the risk that the directors might destroy or tamper with evidence could still have materialised any time after the originating summons was served on the directors (since the complainant failed to obtain an Anton Piller order). Thus, there would have been no prejudice suffered by the complainant if he complied with the statutory notice requirement and accordingly he failed to establish why it was not expedient to provide notice.

8 Andrew Ang J also rejected the complainant's arguments, holding that *Fong Wai Lyn* was distinguishable because the complainant therein had provided notice, albeit belatedly, whereas the complainant in *Lee Seng Eder* had not given notice at all.[17] In addition, Andrew Ang J held that s 216A(4) of the CA does not dispense with the notice requirement in s 216A(3)(*a*) but merely empowers the court to make an interim order "pending the complainant giving notice as required".[18] Andrew Ang J also cited the parliamentary speeches on s 216A in support of the foregoing view:[19]

> The clause would provide more effective remedies for minority shareholders than existed [*sic*] at common law at present. It would have the effect of overriding the obstacles put in the way of such actions by the common law. *To ensure that the remedies that would be open to shareholders are not abused and give rise to unjustified court actions, section 216A contains strict conditions that must be satisfied* before any action can be brought against corporations. [emphasis added by Andrew Ang J]

9 Further, Andrew Ang J opined *obiter* that while s 216A of the CA was based on s 239(2) of the CBCA, there are "important differences" between the two.[20] In particular, s 216A(4) expressly provides that the Singapore court may make an interim order "pending the complainant

17 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [8].
18 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [9].
19 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [10]; *Singapore Parliamentary Debates, Official Report* (14 September 1992), vol 60 at col 231, Second Reading of the Companies (Amendment) Bill (Bill No 3 of 1992) by then Minister for Finance, Dr Richard Hu Tsu Tau.
20 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [11].

giving notice as required" which is absent in the CBCA. Conversely, s 239(2)(a) of the CBCA contains the phrase "or as otherwise ordered by the court", which suggests that the Canadian courts have the discretion under the CBCA to "allow less notice or none at all".[21] Section 239(2) of the CBCA states:

> No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that …
>
> > (a) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action ….

B. Canadian authorities

10 The Canadian decisions on the notice requirement in the respective Canadian legislation do not speak with one voice. This can partly be attributed to the fact that each province has its own companies legislation with slightly different wording. However, it is possible to generalise two groups of cases: cases which suggest that there is no need for specificity in the notice and cases which suggest that the notice must have a substantial level of specificity about the claims sought to be brought.

(1) Cases which suggest no need for specificity in the notice

11 We begin with the authorities which appear to suggest that the relevant statutory provision does not require specificity in the notice. In *Re Bellman*, the petitioners applied under s 232 of the 1975 CBCA[22] (the predecessor provision to s 239 of the 1985 CBCA on which the Singapore CA was based) to commence a derivative action on behalf of a company. The respondents argued that one of the grounds in the petition concerning takeover bids was not contained in the notice letter furnished to the directors of the company. Accordingly, they argued that the company's auditors and lawyers, who were engaged by the directors to conduct an investigation into the allegations, were not given the opportunity to consider the allegation.[23] Nemetz CJ held that s 232 of the 1975 CBCA only required that the petitioner give "reasonable notice" of an intention to apply to commence a derivative action. On the facts, Nemetz CJ found that the notice letter, read together with the response to

21 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [11].

22 SC 1974-1975, C 33.

23 *Re Bellman et al and Western Approaches Ltd* (1981) 130 DLR (3d) 193 at [17].

the same, constituted reasonable notice of the petitioners' intention to apply to commence a derivative action.[24] Nemetz CJ further opined that the "[f]ailure to specify each and every cause of action in a notice does not … invalidate the notice as a whole". Section 239(2)(a) of the 1975 CBCA states:

> 239(2) Conditions precedent. – No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that
>
> > (a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his intention to apply to the court under subsection (l) if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action ….

12 The latter statement in *Re Bellman* was cited with approval by Pearlman J in the British Columbia Supreme Court decision in *Luft v Ball*.[25] In *Armstrong v Gardner*,[26] Cory J opined, in the context of s 99 of the Ontario Business Corporations Act[27] ("OBCA"), that although the notice for a derivative action in that case was:[28]

> … not framed with great particularity as to the cause of action to be brought, they were directed to a solicitor. [Accordingly, he thought] that there was a sufficient demand made to bring an appropriate action … to satisfy the provisions of s 99(3)(b). [He did] not think that this section of the Business Corporations Act ought to be construed in an unduly technical or restricted manner.

Section 99(3)(b) of the OBCA states:

> 99(3) A shareholder may, upon at least seven days notice to the corporation, apply to the court for an order referred to in subsection 2, and, if the court is satisfied that …
>
> > (b) the shareholder has made reasonable efforts to cause the corporation to commence or prosecute diligently the action on its own behalf … the court may make the order upon such terms as the court thinks fit, except that the order shall not require the shareholder to give security for costs.

13 The foregoing approach appears to draw a distinction between a layman director and a director who is a solicitor. Although such a distinction does not appear supportable on a plain reading of the statute, it is suggested that this approach of factoring in certain subjective characteristics of the director when determining if reasonable notice has

24 *Re Bellman et al and Western Approaches Ltd* (1981) 130 DLR (3d) 193 at [17].
25 [2013] BCJ No 646 at [43].
26 (1978) 20 OR (2d) 648 (Ont HC).
27 RSO.1970, c 53.
28 *Armstrong v Gardner* (1978) 20 OR (2d) 648 at 652.

been given is warranted as it directly relates to the policy objective of the provision.[29]

14 Bruce Welling cites *Armstrong v Gardner*[30] for the proposition that the notice requesting the company directors to commence action need "not [be] framed with great particularity as to the cause of action to be brought".[31] the authors respectfully differ on this view: it is submitted that Cory J had merely decided on the *specific facts* of the case that the notice requirement was fulfilled because the notice was furnished to a person who happened to be a solicitor, who was presumably capable of determining the relevant cause of action on the facts of the case. It is significant that the notice letter had specified material factual details in respect of the alleged breach in question and also suggested that some form of action be taken.

15 In the Alberta Court of Queen's Bench decision of *Winfield v Daniel*,[32] in the context of s 240 of the Alberta Business Corporations Act[33] ("ABCA"), Gallant J considered various factors including the rationale behind the notice requirement, the common law rule in cases of futility, and the improbability that the relevant director would have commenced proceedings against himself and another party on behalf of the company.[34] Accordingly, he held that the failure to provide notice should not be fatal to the application on the facts of the case as it was unlikely that the parties would have been able to resolve their dispute outside of the courts, and strict compliance with the notice requirement would have been futile. This suggests a purposive approach to the question of notice whereby courts will examine whether or not the notice or lack thereof made any difference. Section 240 of the ABCA states as follows:

> 240(2) No leave may be granted under subsection (1) unless the Court is satisfied that …
>
> > (a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action …
>
> (3) Notwithstanding subsection (2), when all the directors of the corporation or its subsidiary have been named as defendants, notice to

29 See para 46 below.
30 (1978) 20 OR (2d) 648 (Ont HC).
31 Bruce Welling, *Corporate Law in Canada* (Toronto, Vancouver: Butterworths, 2nd Ed, 1991) at p 528.
32 2004 ABQB 40.
33 RSA 2000, c B-9.
34 *Winfield v Daniel* (1978) 20 OR (2d) 648 at [15].

> the directors under subsection (2)(a) of the complainant's intention to apply to the Court is not required.

16 In *1199918 Alberta Ltd v TRL Holdings Inc*,[35] also in the context of s 240 of the ABCA, Graesser J relied on the earlier decision in *Winfield v Daniel*[36] and held that the absence of notice was not a bar to the granting of leave to commence a derivative action where the notice would not have caused the directors to commence the requested action in any event.[37]

(2) Cases which suggest that the notice must have a substantial level of specificity

17 On the other hand, the following Canadian authorities suggest that the notice must have a substantial level of specificity about the claims sought to be brought. In the British Columbia Supreme Court decision of *Re Northwest Forest Products Ltd*,[38] decided under s 222 of the 1973 British Columbia Companies Act[39] ("BCCA"), Cashman LJSC held that for an applicant to make a reasonable effort to cause the directors to commence an action to fulfil the requirement in s 222(3)(a) of the BCCA, the applicant must provide the directors of the company with sufficient particulars of the action sought to be brought. Cashman LJSC, citing with approval a US decision, *Halprin v Babbit*[40] (discussed below), held that "no more would be required than that sufficient to found an endorsement on a generally endorsed writ of summons".[41] Section 222 of the BCCA states:

> 222.(1) A member or director of a company may, with leave of the Court, bring an action in the name and on behalf of the company …
>
> (3) A member or director may, upon notice to the company, apply to the Court for the leave referred to in subsection (1) or (2) and, if
>
> > (a) he has made reasonable efforts to cause the directors of the company to commence or diligently prosecute or defend the action … the court … may grant the leave on terms it considers appropriate.

18 In the British Columbia Supreme Court decision in *Re Daon Development Corp*,[42] decided under s 225 of the 1979 British Columbia

35 [2011] AJ No 910.
36 2004 ABQB 40.
37 *1199918 Alberta Ltd v TRL Holdings Inc* [2011] AJ No 910 at [73].
38 [1975] 4 WWR 724 (BCSC).
39 SBC 1973, C 18.
40 303 F 2d 138 (1st Cir, 1962).
41 *Re Northwest Forest Products Ltd* [1975] 4 WWR 724 at [59]. Cited in D Cumberford, *The Annotated British Columbia Business Corporations Act* (Thomson Carswell, 2004) at p 7-45.
42 [1984] BCJ No 2945.

Companies Act[43] (the relevant provision, s 225(3)(a) of the 1979 Act, is identical to s 222(3) of the 1973 BCCA quoted above),[44] Wallace J held that the applicant must:[45]

> … at the very least … [give] reasonable notice to the directors of the request together with details of the nature of the claim it wishes the directors to prosecute … [and] if performed, any suspected futility in making the request, if such exists, would be readily exposed.

19 In the Saskatchewan Court of Queen's Bench decision in *Barnes v BWV Investments Ltd*,[46] decided under s 232 of the Saskatchewan Business Corporations Act 1978[47] (which is *in pari materia* with s 232 of the CBCA 1975 quoted above),[48] Armstrong J held on the facts of the case as follows:[49]

> As to form and content, the notice is ample to meet the needs of s 232 of the Act. The notice is sufficient in detail to give notice to the directors of just what the applicant … wants the directors to do and why. It set forth the alleged breaches and wrongs on the part of the proposed defendants and it set out the relief that would be sought in any such action.

In respect of the "reasonableness" of the notice (which was expressly required under s 232 of the Act), Armstrong J construed the issue as pertaining to the time given to the directors to come to a decision. Section 232 of the Saskatchewan Business Corporations Act 1978 states:

> 232(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that:
>
> (a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of his intention to apply to the court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action ….

20 Finally, in the Supreme Court of British Columbia decision in *Ebco Industries Ltd v Eppich*,[50] Pitfield J noted that the requirement in s 201(3)(a) of the 1996 British Columbia Companies Act[51] that the applicant must first make reasonable efforts to cause the directors of the company to commence or diligently prosecute the intended action

43 RSBC 1979, c 59.
44 See para 17 above.
45 *Re Daon Development Corp* [1984] BCJ No 2945 at [20].
46 1991 CanLII 7833 (SK QB).
47 RSS 1978, c B-10.
48 See para 11 above.
49 *Barnes v BWV Investments Ltd* 1991 CanLII 7833 (SK QB) at [6].
50 2000 BCSC 1075.
51 RSBC 1996, c 62.

"contemplates that the duty [breached] will be identified and the manner of breach specified in order that the directors may consider the request".[52] Section 201(3)(a) of the 1996 British Columbia Companies Act states:

> 201(2) A member or director of a company, with leave of the court, in the name and on behalf of the company, may defend an action brought against the company.
>
> (3) A member or director, on notice to the company, may apply to the court for the leave referred to in subsection (1) or (2) and, if
>
> (a) he has made reasonable efforts to cause the directors of the company to commence or diligently prosecute or defend the action … the court … may grant the leave on terms it considers appropriate.

C. Australia

21 In *Texxcon Pty Ltd v Austexx Corp Pty Ltd*,[53] the Commercial Court in the Supreme Court of Victoria, Australia, in the context of s 237 of the Australian Corporations Act 2001 (Cth), held that the notice requirement was met notwithstanding that the relevant notice had omitted a misrepresentation claim but only raised a contract claim. The court held that the notice requirement was only to give notice of the intention to apply for leave and of the reasons for applying and not of the specific heads of claim.[54] Further, the court noted that on the facts, the potential defendants were fully cognisant of the misrepresentation claim by reason of a prior resolution put to the board of the company to commence proceedings but which failed, and accordingly there was no need for a separate notice of the misrepresentation claim.[55] Section 237(2) of the Act states as follows:

> 237(2) The Court must grant the application if it is satisfied that: … (e) either:
>
> (i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or
>
> (ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

22 In *Isak Constructions (Aust) Pty Ltd v Faress*,[56] the Supreme Court of New South Wales, also in the context of s 237 of the Australian Corporations Act 2001 (Cth), took the view that the notice requirement in s 237(2)(e)(i) of the Act may be dispensed with pursuant to

52 *Ebco Industries Ltd v Eppich* 2000 BCSC 1075 at [20].
53 [2011] VSC 203 at [31]–[32].
54 *Texxcon Pty Ltd v Austexx Corp Pty Ltd* [2011] VSC 203 at [31].
55 *Texxcon Pty Ltd v Austexx Corp Pty Ltd* [2011] VSC 203 at [32].
56 *Isak Constructions (Aust) Pty Ltd v Faress* (2003) 47 ACSR 224 at [21]–[22].

s 237(2)(e)(ii) of the Act where the company was already aware of the matters which the notice was supposed to be in respect of, or there was some good reason to allow the applicant to represent the company despite its not being so aware. On the facts of the case, the court was satisfied that the company had been aware of the relevant matters.

D. The US

23 In the US, Rule 23.1 of the Federal Rules of Civil Procedure requires a demand to be made on the directors of a company before an applicant can take out a derivative action ("US Demand Requirement"). In *Halprin v Babbit*[57] (cited in *Re Northwest Forest Products Ltd*),[58] the US Court of Appeals for the First Circuit stated that:[59]

> The demand must be specific. It is not enough, on the one hand, for the plaintiff to allege that the directors knew they had a right of action and have done nothing about it … or, on the other hand, that they were requested to bring the suit, if they were not given full knowledge of the basis for the claim and full opportunity to act.

24 Similarly, in *Scott Bender v Steven Schwartz*,[60] the Court of Special Appeals of Maryland stated that "[e]ach claim must be articulated specifically enough to give directors a fair opportunity to initiate the action requested by appellants", and on the facts of the case, the "appellants did not provide sufficient allegations … to alert the Demand Committees to the existence of appellants' claims. Appellants failed to allege the factual basis of these wrongful acts and the harm to the corporation".[61]

III. Rationales for the notice requirement

25 Before an attempt is made to rationalise the different approaches taken by the courts in the cases discussed above, it would be pertinent to consider the overarching policy aims and purposes of the notice requirement in respect of applications for statutory derivative actions. Before that, we consider the theoretical structure of the company and corporate governance.

---

57 303 F 2d 138 (1st Cir, 1962).

58 [1975] 4 WWR 724 (BCSC) at [54].

59 *Halprin v Babbit* 303 F 2d 138 at 141 (1st Cir, 1962).

60 172 Md App 648 at 669 (2007).

61 It bears mentioning that in the US, "special litigation committees" of company boards emerged in the 1970s to respond to demands for derivative suits. Such committees are often comprised of board members who are deemed to be independent: *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) at pp 50–51.

26 A fundamental principle in company law is that the company exists as a separate legal personality (*Salomon v A Salomon & Co Ltd*).[62] As a necessary corollary of the separate legal personality of the company, the proper plaintiff to bring an action for any wrong done to the company must be the company itself (*Foss v Harbottle*).[63]

27 The law, however, acknowledges that this is not an inviolate principle and recognises various exceptions to this rule (*Edward v Halliwell*).[64] The primary exception to the *Foss v Harbottle* rule which the common law recognises is a fraud on a minority when the wrongdoer exercises sufficient control over the majority shareholders to prevent an action being brought, to the detriment of the minority.

28 The statutory derivative action was developed to counter the uncertainties and difficulties of determining when a fraud on the minority has been established. This provides minority shareholders greater power in terms of corporate accountability. In the Singapore Select Committee Report in respect of the Companies (Amendment) Bill, then Member of Parliament Dr Tony Tan Keng Yam noted that the purpose of the amendments was to "protect minority shareholders".[65] Then Minister for Finance and Minister for National Development Dr Richard Hu Tsu Tau similarly noted that "the objective of this amendment is, in fact, to make it somewhat easier for minority shareholders to raise a complaint".[66] In the Canadian Dickerson Report, on which the CBCA was based, the authors commented that the statutory derivative action:[67]

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

29 Specifically, the statutory derivative action is one of several mechanisms for corporate governance and ensuring check-and-balance as between manager (directors) and owner (shareholders). In this sense, the State achieves a policy goal of regulating corporations by vesting certain rights in shareholders on the premise that the shareholders are

62 [1897] AC 22.
63 (1843) 2 Hare 461.
64 [1950] 2 All ER 1064.
65 Report of the Select Committee on the Companies (Amendment) Bill, Parl 2 of 1993 (26 April 1993) at B7.
66 Report of the Select Committee on the Companies (Amendment) Bill, Parl 2 of 1993 (26 April 1993) at B9.
67 R Dickerson, J Howard & L Getz, *Proposals for a New Business Corporations Law for Canada* vol I (Ottawa: Information Canada, 1971) at para 482.

rationally self-interested in regulating the corporation.[68] In the ordinary course of things, the manager's and owner's aims are aligned, *ie*, to pursue the commercial interests of the corporation, because, *inter alia*, such an aim would be mutually beneficial for both manager and owner. Presumably, the owner would reward the manager according to the extent of the owner's gain through the corporation. The owner's control over the manager manifests in his power to replace the manager. In those circumstances, it is assumed that the manager's decision-making (including the taking of legal action in respect of wrongs to the company) is predominantly to pursue the interests of the company and not contrary to the interests of the owner. However, in situations where the owner's control over the manager is weak (*eg*, minority shareholders having insufficient voting power) and the manager's decision-making is tainted by other goals, very limited modes of managerial control are available. This is because, generally, only exceptional circumstances justify counter-majoritarian action. The derivative action is one such mode of counter-majoritarian managerial control. Given its counter-majoritarian nature, a third-party neutral arbiter, *ie*, the court,[69] is endowed with power of oversight over this control mechanism. The statutory derivative action lowers the threshold requirements for an owner in the minority to utilise this mechanism. However, given its exceptional nature, it nonetheless assumes that a manager who remains in office by virtue of majoritarian choice is untainted in terms of decision-making for the company until proven otherwise.

30 However, the statutory derivative action had to be tempered with sufficient safeguards to prevent minority shareholders from abusing the statutory mechanism. Accordingly, certain strict conditions are required before the court may grant an applicant leave to commence a statutory derivative action. This was articulated in the Singapore Parliament during the introduction of s 216A of the CA:[70]

> To ensure that the remedies that would be open to shareholders are not abused and give rise to unjustified court actions, section 216A contains strict conditions that must be satisfied before any action can be brought against corporations.[71]

---

68 Ross G Rantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554.

69 Arad Reisberg, "Theoretical Reflections on Derivative Actions in English Law: The Representative Problem" (2006) 3(1) *European Company and Financial Law Review* 69; *cf* Dr Hui Huang, "The Statutory Derivative Action in China: Critical Analysis and Recommendations for Reform" (2007) 4(2) *Berkeley Business Law Journal* 227 at 240–241 on the "supervisory board" in Chinese corporations.

70 *Singapore Parliamentary Debates, Official Report* (14 September 1992), vol 60 at col 231.

71 See also *Lee Seng Eder v Wee Kim Chwee* [2013] SGHC 287 at [10], *per* Andrew Ang J; and *Ang Thiam Swee v Low Hian Chor* [2013] 2 SLR 340 at [21]–[23].

31 Similarly, the Dickerson Report noted that the conditions imposed in respect of an application for a statutory derivative action would "minimize the possible abuse of … [derivative actions] that might otherwise be instituted as a device to blackmail management into a costly settlement".[72] In Australia, the Explanatory Memorandum to the Corporate Law Economic Reform Program Bill 1998 proposed that "[a]ppropriate checks and balances will be provided in the legislation [on statutory derivative action] to prevent abuse of the proceedings and to ensure that company managements are not undermined by vexatious litigation and that company funds are not expended unnecessarily".[73]

32 In the US, the US Court of Appeals for the First Circuit stated in *Halprin v Babbit* that "[t]he reason for the [US Demand Requirement] is that it is the corporation, and not the stockholders, that was injured".[74] The US Supreme Court in *Daily Income Fund, Inc v Fox*[75] explained that:

> A shareholder derivative action is an exception to the normal rule that the proper party to bring a suit on behalf of a corporation is the corporation itself, acting through its directors or a majority of its shareholders. Accordingly, Rule 23.1, which establishes procedures designed to prevent minority shareholders from abusing this equitable device, is addressed only to situations in which shareholders seek to enforce a right that 'may properly be asserted' by the corporation itself.

33 Against the foregoing backdrop, it is generally regarded that the purpose of the notice requirement for a statutory derivative action to be commenced is to give the directors of the company an opportunity to consider a response to the proposed action described in the complainant's notice. The conceptual underpinning for the notice requirement flows from the fundamental principle of company law (as mentioned earlier) that the company is a separate legal entity. Since the statutory derivative action is an incursion on the proper plaintiff rule in *Foss v Harbottle*,[76] and the injured party is the company, the company, being managed by the directors and not the shareholders, should be the party to determine whether to pursue legal action to remedy the injury.[77] Failing which, the subsidiary route of the statutory derivative action may be pursued.

---

72 R Dickerson, J Howard and L Getz, *Proposals for a New Business Corporations Law for Canada* vol I (Ottawa, Information Canada: 1971) at p 482.

73 *Corporate Law Economic Reform Program Bill Explanatory Memorandum* (1998) at para 6.16.

74 *Halprin v Babbit* 303 F 2d 138 at 141 (1st Cir, 1962).

75 464 US 523 at 542 (1984).

76 (1843) 2 Hare 461. See UK Law Commission, *Shareholder Remedies* (LC 246) (11 September 1997) at pp 72–78.

77 Carol B Swanson, "Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball" (1993) 77 Minn L Rev 1339 at 1349.

34 In addition, affording the directors an opportunity to commence litigation on their own accord results in the most economically efficient position. The notice requirement affords the directors an opportunity to resolve the matter (or related matters) without resorting to litigation.[78] This would be ultimately beneficial for the company as it avoids the unnecessary costs of litigation, and beneficial for society as litigation imposes social costs through the expenditure of judicial resources.[79] Even if the company ultimately decides to pursue litigation and this is taken up by the directors instead of the shareholder, this would avoid the unnecessary costs of a shareholder having to apply to the court for leave to bring a derivative action, saving judicial resources in respect of at least a set of proceedings. Further, the shareholder might claim for, or settle at, an inadequate amount from the wrongdoers given the disparity of the knowledge of company information and commercial judgment as to the company's interests as between directors and shareholders. Accordingly, the notice requirement promotes economic efficiency overall. Ultimately, only "efficient derivative actions", *ie*, actions which have greater economic benefits than costs for the company,[80] and arguably greater social benefits than social costs in the enforcement of corporate governance, should be permitted. The notice requirement is one of the mechanisms to incentivise efficient derivative actions, and disincentivise inefficient ones.

35 However, in many cases of shareholder derivative actions, the pre-application notice would appear to be redundant because the directors are themselves the wrongdoers, are associates of the wrongdoers, or are under the control of the wrongdoers, in which case presumably the directors would dismiss the notice in any event.[81] In the US, this has given rise to the "futility exception".[82] Nevertheless, in the authors' view, the notice requirement should still generally be maintained in such cases. This is because the cost of fulfilling the notice requirement on the part of the shareholder would generally be substantially less than

78 *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) at pp 47–48; Carol B Swanson, "Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball" (1993) 77 Minn L Rev 1339 at 1349–1351.

79 Thomas P Kinney, "Comment: Stockholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers" (1994) 78 Marq L Rev 172 at 176–177.

80 *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) at p 32.

81 Thomas P Kinney, "Comment: Stockholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers" (1994) 78 Marq L Rev 172 at 178; Carol B Swanson, "Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball" (1993) 77 Minn L Rev 1339 at 1358–1359.

82 Thomas P Kinney, "Comment: Stockholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers" (1994) 78 Marq L Rev 172 at 176–177.

the cost of litigating over the issue.[83] Indeed, on this logic, it would be efficient for the notice requirement to be strict, so that the cost of adjudication on this requirement would be minimised. Where the shareholder has difficulty fulfilling the notice requirement, for instance, because of lack of information, it may be a presumptive indication of where the cost-benefit scale falls in respect of bringing the action in the first place. As a matter of fairness, however, he may be able to seek the court's assistance to obtain the information pre-application.[84] Another scenario where the notice requirement may be considered unsuitable is where the urgency of commencing legal action is paramount,[85] for instance, where there is a risk that evidence may be tampered with or destroyed.[86] In such exceptional circumstances, it is to be wondered whether there are other procedural modes more appropriate to address such concerns, *eg*, pre-action freezing orders such as a Mareva injunction which prevents the wrongdoer from dissipating his assets.

36 In Singapore, Judith Prakash J in *Fong Wai Lyn* accepted that the "notice requirement served to give the directors a chance to consider a response to the complaint provided in the notice" because "[i]f the company would be willing to pursue the complaint on its own, the leave application would become redundant, and no further legal costs would be incurred or wasted in dealing with the issue of whether leave ought to be granted".[87] This passage was cited with approval by Belinda Ang J in *IDV Concepts*.[88]

37 Singaporean academic treatises take a similar view. Margaret Chew opines that the purpose of the notice requirement is to "alert the directors that a derivative action is being contemplated, and to give the directors an opportunity for remedying the situation, in particular, to

---

83 Thomas P Kinney, "Comment: Stockholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers" (1994) 78 Marq L Rev 172 at 182; Carol B Swanson, "Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball" (1993) 77 Minn L Rev 1339 at 1354–1355.

84 For example, s 216A(4) of the Companies Act (Cap 50, 2006 Rev Ed) provides this recourse for the shareholder. In the US, the shareholder may apply for limited discovery to determine if the special litigation committee established to consider the merits of the proposed action was truly independent: Thomas P Kinney, "Comment: Stockholder Derivative Suits: Demand and Futility Where the Board Fails to Stop Wrongdoers" (1994) 78 Marq L Rev 172 at 179.

85 For example in Japan, there is an "irreparable damage" exception to the notice requirement in the statutory derivative action provisions in the Japanese Commercial Code (Shoho): Mark D West, "The Pricing of Shareholder Derivative Actions in Japan and the United States" (1994) 88 Nw UL Rev 1436 at 1448.

86 As was alleged in *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56. In Singapore, s 216A(4) of the Companies Act (Cap 50, 2006 Rev Ed) provides the courts with a power to make interim orders where appropriate pending the fulfilment of the notice requirement.

87 *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980 at [14].

88 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [22].

cause the company to pursue the action as the proper plaintiff".[89] Pearlie Koh suggests that the notice requirement may result in "the directors [deciding] that the company should shoulder the responsibility for the suit, thus making the derivative action unnecessary. Or the directors may take such steps as to correct or remedy the situation".[90] Wee and Puchniak opine that the notice requirement is "eminently sensible" as the board is the "preferred body to make litigation decisions" and "it is only when it declines to discharge its functions properly that an individual shareholder may be allowed to apply to court to be given the authority to conduct legal proceedings".[91]

38 In Canada, Grotsky J in the Saskatchewan Court of Queen's Bench decision of *Johnson v Meyer*,[92] cited Stanley M Beck[93] with approval, who opined that the requirement of notice:

> … seems a reasonable requirement as the company should be given the opportunity of vindicating its own rights. And the directors, faced with an application to the court and possible trial, may well decide that corporate action is the responsible course. Moreover, such a request might result in an amicable resolution of the dispute. Explanation may satisfy the shareholder that suit should not be brought or the directors may decide to revoke or restructure the matter that gave rise to the complaint.

39 Similarly in Australia, R P Austin and I M Ramsay opined that the notice requirement is "meant to allow the company time to address the applicant's concerns prior to the court hearing the matter".[94] In the US, the Supreme Court of Delaware in *Aronson v Lewis*[95] suggested that the purpose of the US Demand Requirement is "to give a corporation the opportunity to rectify an alleged wrong without litigation, and to control any litigation which does arise".

89 Margaret Chew, *Minority Shareholders' Rights and Remedies* (Singapore: LexisNexis, 2nd Ed, 2007) at p 298.

90 Pearlie Koh, "The Statutory Derivative Action in Singapore – A Critical and Comparative Examination" (2001) 13(1) *Bond Law Review* 64 at 73.

91 Wee Meng Seng & Dan W Puchniak, "Derivative Actions in Singapore" in *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) ch 8, at p 342.

92 1987 CanLII 4830 (SK QB) at [27]; [1987] SJ No 123.

93 Stanley M Beck, "The Shareholder's Derivative Action" (1974) 52 *Canadian Bar Review* 159 at 202.

94 R P Austin & I M Ramsay, *Ford's Principles of Corporations Law* (Australia: LexisNexis, 14th Ed, 2010) at p 731.

95 473 A 2d 805 at 809 (Del 1984).

IV. Rationalising the different approaches

40 In the light of the above-stated policy and purpose of the notice requirement, it follows that the nature and degree of particularity of the content in the notice must be sufficient to fulfil the relevant policy aims and purposes. Hence, Pearlie Koh opines that "the notice must contain at least sufficient information to allow the directors to decide what to do".[96]

41 Would it therefore suffice that the notice merely informs the directors of an intention to apply to commence a derivative action *simpliciter*? This appeared to be the approach posited in *Re Bellman*,[97] *IDV Concepts*[98] and *Texxcon Pty Ltd v Austexx Corp Pty Ltd*.[99] The authors respectfully submit that this cannot be the preferred position absent explicit statutory wording to the contrary (as may be the case in Australia). In a paradigmatic case where a minority shareholder alleges that the company has been wronged by a third party, the directors of a company would hardly be able to determine if the allegation is justifiable or not if the minority shareholder merely informs them that he intends to commence a statutory derivative action. This policy purpose explicates the approach taken in cases such as *Re Northwest Forest Products Ltd*,[100] *Halprin v Babbit*,[101] *Re Daon Development Corp*,[102] *Barnes v BWV Investments Ltd*,[103] *Ebco Industries Ltd v Eppich*[104] and *Scott Bender v Steven Schwartz*,[105] where the courts suggest that the notice furnished to the directors of the company should set out sufficient particulars of the factual basis, claims and reliefs in respect of the alleged wrongs caused to the company.[106]

42 It is particularly important that the directors of a company are made aware of all the potential claims because each claim should be assessed on its own. It may be in the interests of the company to bring certain claims but not others. In *Northwest Sports Enterprises Ltd v Griffiths et al*,[107] the court held that it:

---

96 Pearlie Koh, "The Statutory Derivative Action in Singapore – A Critical and Comparative Examination" (2001) 13(1) *Bond Law Review* 64 at 73.
97 *Re Bellman et al and Western Approaches Ltd* (1981) 130 DLR (3d) 193.
98 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269.
99 [2011] VSC 203 at [31]–[32].
100 [1975] 4 WWR 724 (BCSC).
101 303 F 2d 138 (1st Cir, 1962).
102 [1984] BCJ No 2945.
103 1991 CanLII 7833 (SK QB).
104 2000 BCSC 1075.
105 172 Md App 648 (2007).
106 See also Daryl Xu, "The Statutory Derivative Action: What of the Notice Requirement?" (2014) 26 SAcLJ 766 at 771, para 8.
107 [1999] BCJ No 3150 at [13]; cited in *Ebco Industries Ltd v Eppich et al* 2000 BCSC 1075 (Supreme Court of British Columbia).

> … may be in the interests of the company to advance one cause of action against a company but not another. A claim of fraud, for example, may not be in the best interests of the company as it exposes it to special costs if the allegation is unproven. That may be so even though it is in a company's interest to advance other related claims against the same defendant arising from the same transaction.

Accordingly, the authors' view is that reasonable notice should entail a complainant listing out every cause of action, contrary to the position in *Re Bellman*.

43 On the other hand, the requirement for sufficient particularity of the proposed claims must be balanced with the fact that minority shareholders often do not have access to company records and documents and are therefore unable to provide detailed particulars of the alleged wrongs suffered by the company. This was recognised by Cory J in *Armstrong v Gardner*[108] where he held that "[a]lmost invariably minority shareholders will be in such a disadvantageous position that they will not be able to obtain first-hand evidence and information upon which to found their motion". It should be borne in mind that the policy aim of the notice requirement is not to shut out minority shareholders – indeed, it is meant to provide minority shareholders with greater access to recourse and ensure corporate accountability – but to prevent *abuse* of the statutory derivative action. Hence, a shareholder who is acting in good faith (which is itself one of the requirements for an applicant to obtain the court's leave to commence a statutory derivative action) but is unable to provide detailed particulars of the alleged wrongs, due to limitations on his access to company information, should not be precluded from an opportunity to pursue recourse for the company. In the Singapore context, such a shareholder may have recourse to s 216A(4) if he is able to satisfy the court that the circumstances warrant the court's assistance, *eg*, freezing or search orders, pending the shareholder giving the requisite notice once he is able to do so. Nonetheless, the shareholder should still aim to provide sufficient particularity in the notice (to the best of his ability) in order to fulfil the policy aims of the statute (*ie*, to give directors an opportunity to consider the claim).

44 However, the judicial pragmatism in cases such as *Armstrong v Gardner*, *Winfield v Daniel*,[109] *1199918 Alberta Ltd v TRL Holdings Inc*,[110] *Texxcon Pty Ltd v Austexx Corp Pty Ltd*[111] and *Agus Irawan v Toh Teck Chye*,[112] where the courts dispensed with a strict compliance of the notice requirement on the facts of the case, may be explicated on the basis that

108 (1978) 20 OR (2d) 648 (Ont HC).
109 2004 ABQB 40.
110 [2011] AJ No 910.
111 [2011] VSC 203 at [31]–[32].
112 [2002] 1 SLR(R) 471 (HC).

the policy purposes of the notice requirement had been fulfilled in any event. Alternatively, the dispensation of the notice requirement would not have been inconsistent with the policy purposes.

45 In *Armstrong v Gardner*, although the specific cause of action had not been set out in the notice, material facts in respect of the proposed action had been provided, and Cory J emphasised that the notice was furnished to a solicitor, who would presumably have been able to determine the specific causes of action based on the material facts. Similarly, in *Texxcon Pty Ltd v Austexx Corp Pty Ltd*,[113] the directors had in fact been cognisant of the proposed claims by way of a directors' resolution which had been previously circulated but voted down by the respondents themselves. In *Agus Irawan v Toh Teck Chye*, the only purported omission in the notice related to very specific particulars of the claims, whereas the material facts had presumably been set out in the notice. It is plausible that *Re Bellman* may be explained on the same basis: the purported omission in the notice related to specific particulars of a relief relating to takeover bids[114] but the directors might have been cognisant of the material facts relating to the said relief since the directors had engaged auditors and lawyers to examine company records to investigate the underlying subject matter, *ie*, insider trading of shares.

46 It is, however, important to note that the aforementioned cases, in the authors' view, do not posit a subjective approach to the notice requirement. The fact that the directors were actually aware of the alleged breach in question does not mean that the notice requirement is automatically satisfied regardless of the content of the notice. Instead, the notice is still assessed by the court on an objective basis as to whether it sufficiently provides reasonable notice to a director. The objective approach, however, takes into account subjective elements in so far as the court considers the specific characteristics of the director in question (*eg*, that the director is a lawyer as was the case in *Armstrong v Gardner*) when considering if the notice in question was reasonable. This approach accords with the policy reasoning behind the notice requirement, which is to afford the company with a reasonable opportunity to consider bringing a claim. It is submitted accordingly that the reasonableness of the opportunity is dependent on the abilities of the directors in question. If, however, the director in question is already sufficiently apprised of the breach in question, the court can choose to exercise its statutory discretion to dispense with the notice requirement (depending on the statutory wording) as opposed to finding that the notice requirement was satisfied on the facts. This distinction in approach is best demonstrated in the case of *Isak Constructions (Aust) Pty Ltd v Faress*,[115] where the

113 [2011] VSC 203 at [31]–[32].
114 *Re Bellman et al and Western Approaches Ltd* (1981) 130 DLR (3d) 193 at [14].
115 *Isak Constructions (Aust) Pty Ltd v Faress* (2003) 47 ACSR 224 at [21]–[22].

Supreme Court of New South Wales, in the context of s 237 of the Australian Corporations Act 2001 (Cth), took the view that the notice requirement in s 237(2)(e)(i) of the Act may be dispensed with pursuant to s 237(2)(e)(ii) where the company was already aware of the matters which the notice was supposed to be in respect of. This clearly demonstrates how the fact that a company was aware of the matters does not necessitate that the notice requirement is satisfied, but merely affords the court the ability to dispense with the notice requirement.

47 In *Winfield v Daniel* and *1199918 Alberta Ltd v TRL Holdings Inc*, the courts took into consideration that any omissions in the notice would not have caused the directors to have decided differently regarding the proposed action in any event, *eg*, decide to commence action. This is usually the case where the directors themselves are named as the potential defendants in the proposed action. This exception is alluded to in s 240 of the ABCA albeit that it requires *all* the relevant directors to have been named as defendants. This may also explain the decision in *IDV Concepts*, since the only director (Chew) other than the applicant was named as a defendant in the proposed action. Indeed, Belinda Ang J emphasised that Chew did not contend that he would have acted (or even considered the matter) differently had the notice contained the omitted allegations.[116] Similarly, in *Agus Irawan v Toh Teck Chye*,[117] Choo Han Teck JC also considered, *inter alia*, that "the defendants were in no way prejudiced by the inclusion of the additional item" when deciding the issue of whether the notice requirement was satisfied. These cases are all clear examples of where the judges explicitly considered the policy reasons behind the notice requirements and concluded that the fact that the notice requirement was not fulfilled should not be a bar to leave being granted. This is clearly demonstrated in *Winfield v Daniel*[118] where Gallant J held that "given the rationale behind the notice requirement … the failure to provide notice should not be fatal in this case".

48 Accordingly, it is submitted that it would be appropriate to adopt different approaches based on who the potential defendant in the derivative action is. If the potential defendant is a third party to the company, it would thus be appropriate for the applicant to provide more detailed particulars as to the nature of the wrongdoing given that the directors may not have personal knowledge as to the facts of the case, which would limit their ability to make an appropriate commercial decision on the merits of commencing a claim by the company against the potential defendant. Conversely, where the potential defendant in question is one of the directors (as in the case of *IDV Concepts*), a lax approach may possibly be adopted since the director would presumably

116 *Teo Seng Ho v IDV Concepts Pte Ltd* [2013] SGHC 269 at [27].
117 [2002] 1 SLR(R) 471 at [7].
118 2004 ABQB 40 at [15].

already be aware of the particulars of the wrongdoing and notice would not serve any additional function beyond alerting the director as to the applicant's intention to commence a derivative action and would have little bearing on the board of directors' decision on whether to bring a claim.

49 In the light of the foregoing analysis, the authors submit that the determination of whether the notice requirement in respect of statutory derivative actions has been fulfilled should be a substantive, and not merely a technical or procedural, one. The court should have regard to whether the policy objective of the notice requirement, *viz*, that the directors of the company had been given an opportunity and sufficient information to consider the applicant's proposed claims so as to make an informed decision on the same, *ie*, whether to make the company commence an action to pursue all or any of the claims, or to resolve the matter without resort to litigation, or to dismiss the matter altogether. In so far as the said policy objective has been fulfilled (*eg*, the directors are already cognisant of the matter),[119] or the policy objective would not be contravened, the court may hold that the notice requirement had been substantively fulfilled or may dispense with the notice requirement altogether, depending on the wording of the relevant legislation.[120]

50 With regard to the latter proposition, it bears noting that the court's judicial pragmatism should be exercised within the confines of the legislative parameters. Conceptually, if it is accepted that the requisite content of the notice should be informed by the policy and purpose of the notice requirement, and accordingly that the notice should contain sufficient information for the directors of the company to be given a meaningful opportunity to make an informed decision on the applicant's proposed claims, it follows conversely that where on the facts of the case, there had been insufficient information in the notice, a court which grants the applicant leave to commence the statutory derivative action would have effectively dispensed with the notice requirement. It is submitted that it would be incorrect for the court to hold that the statutorily prescribed notice requirement had been fulfilled in such a case. Instead, the court must rely on its statutory discretion to dispense with the notice requirement.

51 This may be buttressed by a construction of the relevant statutory provisions. For instance, in s 216A(3) of the Singapore CA, it is stated that

---

119 Pearlie Koh, "For Better or For Worse – The Statutory Derivative Action in Singapore" (1995) 15 SAcLJ 74 at 96. This may be the case in family-owned companies: see Tan Lay Hong, "Family-Owned Firms in Singapore: Legal Strategies for Constraining Self-dealing in Concentrated Ownership Structures" (2011) 23 SAcLJ 890.

120 See also Mohammad Rizal Salim & Deborah Gurdial Kaur, "The Statutory Derivative Action in Malaysia" (2012) 24(2) *Bond Law Review* 125 at 150–151.

"*[n]o action may be brought* … unless the Court is satisfied that … (c) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue **the action**" [emphasis added]. The authors submit that the "action" in bold in the foregoing quote would refer to the very "action" italicised in the same quote,[121] and accordingly that s 216A(3) precludes the court from granting leave for a proposed "action" that has not met the requirements set out in s 216A(3)(*c*). The above view is supported by the decision of *Ebco Industries Ltd v Eppich*,[122] in which a company successfully struck out a cause of action in the statement of claim of a derivative action commenced on behalf of that company. The basis was that the court had not granted leave to commence an action in respect of that cause of action but only in respect of others. Pitfield J interpreted the word "action" in s 201(3)(a) of the 1996 British Columbia Companies Act,[123] holding that the provision "cannot be construed to authorize an action undefined in nature and extent".[124] Pitfield J continued:[125]

> The requirement that a cause of action must be identified is further supported by s 201(3)(a) which requires the member or director seeking authorization to commence the derivative action to first make reasonable efforts to cause the directors of the company to commence or diligently prosecute the action. The section contemplates that the duty will be identified and the manner of breach specified in order that the directors may consider the request.

52 In so far as there is a substantive link between the notice requirement and the particular action, including the causes of action sought to be relied on in the same, for which the court may grant leave, there must be substantive similarity between the action notified and the action for which leave is ultimately granted. Accordingly, if the action for which the applicant seeks the court's leave to commence does not substantively coincide with the action notified, it is submitted that the court should not hold that the statutorily prescribed notice requirement has been fulfilled but may order that the notice requirement be dispensed with altogether, to the extent that the court is empowered by the legislation to do so.

---

121 See *AA v BB* [2003] OJ No 1215, where the Ontario Superior Court of Justice held (at [34]) that "[w]hen the legislation uses a word such as 'the', it is presumed to do so precisely and for a purpose. It represents a choice of the definite article over the indefinite article. Considerable weight must be given to its clear and ordinary meaning".

122 2000 BCSC 1075.

123 RSBC 1996, c 62.

124 *Ebco Industries Ltd v Eppich* 2000 BCSC 1075 at [16].

125 *Ebco Industries Ltd v Eppich* 2000 BCSC 1075 at [20].

53 As pointed out by Andrew Ang J in *Lee Seng Eder*,[126] on a proper construction of s 216A(3)(*a*) and s 216A(4) of the CA, the Singapore court is not empowered to dispense with the notice requirement altogether but is merely able to make interim orders to preserve the *status quo* "pending the complainant giving notice as required". This is unlike the case of s 239(2) of the CBCA in which it is expressly provided that the court may "otherwise order" with regard to the notice requirement pursuant to which the court may dispense with the notice requirement altogether. In the Singapore context, the court may direct that the hearing of the leave application be adjourned and make any necessary orders to preserve the *status quo*, *eg*, interim preservation orders, until the applicant has given fresh notice to the directors of the company to consider the proposed claims, so as to fulfil the policy and purpose of the notice requirement.[127]

V. Specificity in the leave application: Draft pleadings

54 Finally, it is noteworthy that the need for specificity of the notice as regards the proposed action is conceptually separate from the need for specificity of particulars as to the proposed action set out in the applicant's leave application. In discussing the notice requirement, Pearlman J in *Luft v Ball*[128] cited the decision of *Lost Lake Properties Ltd v Sunshine Ridge Properties Ltd*,[129] where the British Columbia Supreme Court refused to grant the petitioner leave to bring derivative proceedings because, *inter alia*, the petitioner failed to precisely identify the parties whom the derivative action should be commenced against and the reliefs sought. Accordingly, Pearlman J opined that:[130]

> [T]he preferable practice for a party seeking leave to bring derivative proceedings is to include in its materials a draft of the proposed pleadings for the derivative action. Here, the plaintiffs' failure to provide draft pleadings for the proposed derivative claims, combined with the absence, (for which the plaintiffs cannot be faulted), of audited financial statements which might have shed some light on the … [subject matter of the proceedings], render it difficult, if not impossible for the court at this stage to fairly determine whether the plaintiffs' proposed derivative claims have any reasonable chance of success.

55 While the foregoing guidance is certainly helpful, it should be noted that the purpose of the requisite specificity of the proposed action

126 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [9].
127 *Cf* UK Law Commission, *Shareholder Remedies* (LC 246) (11 September 1997) at pp 90–91; and *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd* [2011] 3 SLR 980.
128 [2013] BCJ No 646 at [43] and [44].
129 2009 BCSC 938.
130 *Luft v Ball* [2013] BCJ No 646 at [45].

in the leave application is to enable *the court* to make a proper determination as to whether the proposed action is sufficiently justifiable for the court's sanction. This is quite different from the purpose of the specificity of the notice, which is to enable *the directors* of the company to make an informed decision on the proposed action. The directors of the company are able to commence an internal inquiry into the subject matter of the applicant's proposed action to make an informed decision on the same. The court, on the other hand, would only have the benefit of the information furnished by the applicant and the other parties to make a determination on the leave application. With insufficient evidence or particularity of the proposed action, the applicant would be unable to satisfy his burden of proof. It follows, it is submitted, that the level of particularity of the proposed action and material facts in both cases would be different. The requisite degree of information in the notice may be significantly less than that required in the leave application.

VI. Conclusion

56 In summary, the authors have argued that a court determining whether the notice requirement in respect of a statutory derivative action has been fulfilled should have regard to whether the policy objective of the notice requirement is satisfied, *viz*, that the directors of the company had been given an opportunity and sufficient information to make an informed decision on an applicant's proposed claims. Nonetheless, the court's determination is circumscribed by the relevant legislative parameters. In an appropriate case, *ie*, where the legislative provision allows for it, a court may dispense with the notice requirement altogether in so far as the policy objective of the notice requirement has been fulfilled or is not contravened in so doing. Alternatively, a court could adjourn the hearing of the leave application until the policy objective has been fulfilled, *eg*, by way of the applicant furnishing fresh notice of the omitted information. In this respect, to the extent that s 216A of the CA does not allow for the former option, the latter option has to be adopted pursuant to s 216A(4). However, it is worth considering whether s 216A of the CA should be amended along the lines of s 239(2)(a) of the CBCA (noted by Andrew Ang J in *Lee Seng Eder*)[131] to provide for a judicial discretion to dispense with the notice requirement altogether.

57 The above approach is preferable as it gives effect to the fundamental principle enshrined in *Salomon v A Salomon & Co Ltd*,[132] as well as the statutorily prescribed architecture of corporate accountability

131 *Lee Seng Eder v Wee Kim Chwee* [2014] 2 SLR 56 at [11].
132 [1897] AC 22.

by way of the statutory derivative action,[133] *viz*, shareholders serving as a check and balance on directors of a company while directors exercise their fiduciary and directors' duties to ensure that the company is not unduly hampered by vexatious shareholders or unjustifiable complaints, and judicial oversight over the company being the final resort.

---

133 *The Derivative Action in Asia: A Comparative and Functional Approach* (Dan W Puchniak, Harald Baum & Michael Ewing-Chow eds) (Cambridge University Press, 2012) at pp 12–14.