

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. W – 03 – 95 – 2003**

ANTARA

AIC DOTCOM SDN BHD
(menyaman dalam keupayaan perwakilan
bagi MTEX CORPORATION SDN BHD) ... PERAYU

DAN

1. MTEX CORPORATION SDN BHD
2. ZURINA BINTI ZUBIR
3. ePEDAS SDN BHD ... RESPONDEN-
RESPONDEN

(Dalam perkara kes Mahkamah Tinggi Malaya
Di Kuala Lumpur Guaman Sivil No. D1-24-41-2002

AIC Dotcom Sdn Bhd
(menyaman dalam keupayaan perwakilan
bagi MTEX CORPORATION SDN BHD) ... Plaintiff

DAN

1. MTEX Corporation Sdn Bhd
2. Zurina binti Zubir
3. ePedas Sdn Bhd ... Defendan-
Defendan)

Coram: Gopal Sri Ram, J.C.A.
Abdull Hamid bin Embong, J.C.A.
Hasan bin Lah, J.C.A

ORAL JUDGMENT

Gopal Sri Ram, J.C.A delivering judgment:

1. This is the Judgment of the Court.
2. This appeal is directed against the order of High Court granting the respondents' (defendants in the court below) application to strike

out the appellant's pleading as wanting a cause of action within the framework of RHC O.18 r. 19.

3. The appellant's main arguments before us are twofold. Firstly, it has been submitted this morning that the action pleaded in the appellant's statement of claim is a derivative action brought within the exception recognized by the rule in **Foss v Harbottle (1843) 2 Hare 461**. The second limb of the appellant's case rests on the submission that even if the written pleading is defective the learned judge ought to have exercised his power of amendment granted to him by the terms of O.18 r. 19(1). See **Kuala Lumpur Finance Berhad v KGV & Associates Sdn Bhd [1995] 1 MLJ 504**. We will deal with these arguments in turn.

4. Taking the first submission, it is quite plain from a reading of the appellant's pleaded case that it is not a derivative action in its true sense of that term. In this context we need no more than to refer to the passage quoted by the learned judge in the court below in his judgment:

"In **Foss v Harbottle** [1843] 67 ER 189, the English Court propounded the proposition that in company law, if a wrong had been done to a company, then it was the company which was the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority did not have the *locus standi* to bring an action to remedy a wrong done to a company. (See **Prudential Assurance**

Co Ltd v Newman Industries Ltd (No. 2)[1982] Ch 204 and **Edwards v Halliwell** [1950] 2 All ER 1064.)

In **Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd** [1995] 3 MLJ 417, Gopal Sri Ram JCA, delivering the judgment for the Court of Appeal, expressed the following views on the exception to the **Foss v Harbottle** principle:

'It is the derivative action; ...It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of the decision-making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose

that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.”

5. The facts relied upon by the appellant do not contain anything in them that assert that the purported wrongdoers in the instant case are in control of the subject company and it is for that reason the action cannot be brought by the Company. In truth the gist of the appellant's complaint is that a former director of the company allegedly committed certain breaches of her fiduciary duties for which she must now be held to account. That, in the absence of what we have already referred to as constituting the requirement of derivative action, is not sufficient to be made the subject matter of a derivative claim. We must therefore reject the first submission of the appellant and express our agreement with the way the learned judge dealt with the case before him. That brings us to the second argument.

6. It is now well settled that a court which is moved to strike out a pleading has a separate and independent jurisdiction to direct an amendment to save the pleading in lieu of it being struck out. See **Shahidan Shafie v Atlan Holdings Berhad [2005] 3 CLJ 793**. But the power may only be exercised if the pleading is capable of being saved by an amendment. On the facts that form common ground

between the litigants before us, no amendment can possibly save the appellant's pleading because this is not a case in which the appellant is in a position to contend that the alleged wrongdoers are in control of the subject company. It is therefore purely an academic exercise to see whether the amending power ought to have been resorted to by the learned judge whose order is now under appeal.

7. For the reasons already given, we are satisfied that the learned judge exercised his discretion conferred upon him by RHC 1980 O. 18 r. 19 properly. It is trite that the summary power of a court whether to strike out a pleading or enter judgment on a summons ought only to be exercised in plain and obvious cases. Suffice to say that this is a plain and obvious case. The appeal is therefore dismissed. The orders of the High Court are affirmed. The appellant must pay the costs of the appeal to the respondents. The deposit in court shall be paid out to the respondents to account of their taxed costs.

Judgment delivered in Open Court at the conclusion of arguments on 19 January 2009.

Counsel for the appellant: Gideon Tan (Adrian Cumming with him)

Solicitors for the appellant: Tetuan Gideon Tan Razali Zaini

Counsel for the respondent: Teh Meng Teck (Bong Lep Siong with him)

Solicitors for the respondent: Tetuan Cheah Teh & Su

Verified with Y.A. Gopal Sri Ram, J.C.A. and certified by me to be correct.