

LHAG INSIGHTS

DISPUTE RESOLUTION

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DERIVATIVE ACTION: DOES LOSS OF STANDING BY THE COMPLAINANT DEFEAT THE PROCEEDINGS?

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Introduction

Under Malaysian company law, a company is a separate legal entity and is ordinarily the proper plaintiff to bring an action in respect of a wrong done to it. However, where those in control of the company are the alleged wrongdoers, the company cannot be expected to act against them.

Section 347 of the Companies Act 2016 (“**CA 2016**”) addresses this gap by conferring standing on a Complainant under section 345 to apply for leave to bring a derivative action in the company’s name against those in control of the company for their wrongdoing committed against it.

A key question then arises: **what happens if the Complainant loses his standing after commencing the derivative action?**

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This issue was recently considered in **Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd** [Suit No. WA-24NCC-677-12/2023], where the Plaintiff, a director at the time he commenced the derivative action, was subsequently removed from the board, prompting the argument that he had lost standing to continue the action.

In this article, we distil the High Court's grounds of judgment in deciding whether a Complainant must maintain his locus standi throughout the derivative proceedings.

An Overview of the Statutory Derivative Action

(A) Who has Standing?

To begin with, only persons who qualify as "Complainant" under section 345 of the CA 2016 may commence a derivative action:

- Any member or a person entitled to be registered as a member of the company;
- A former member, where the application relates to the circumstances of them ceasing to be a member;
- Any director of the company; or
- The Registrar, in the case of a company declared under section 590.

The limits of this requirement are strict. A person who falls outside these categories cannot invoke the statutory regime at all.

This was made clear in the recent case of **Ni, Ke v Chee Chern Chun** [2026] 2 AMR 206, where the High Court held that the Plaintiff who was neither a registered shareholder nor a director of the company alleged to have been wronged, and whose connection to the company was purely indirect, lacked standing to sustain proceedings in respect of that company, whether under section 346 (oppression) or section 347 of the CA 2016.

(B) The Threshold: Leave of Court

That said, **leave of the Court** is required before any derivative action may proceed. The applicable thresholds were elaborated upon by the Federal Court in **Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd & Another Appeal** [2024] 3 MLJ 433:

- **30 days' written notice** to the directors, stating the Complainant's intention to apply for leave of Court under section 347 (section 348(2));
- The application is made in **good faith** (section 348(4)(a)), namely:
 - An honest belief that a good cause of action exists with reasonable prospect of success; and
 - The application for leave is not brought for a collateral purpose.
- The action is prima facie in the **best interests** of the company (section 348(4)(b)), having regard to, *inter alia*:
 - Commercial financial gain, likelihood of recovery, costs, and the overall benefits to the company if the action proceeds.

These requirements act as a filter to ensure that only qualified Complainants and genuine corporate wrongdoings are permitted to proceed under the statutory derivative action regime.

What Happens if the Complainant Loses Standing After Commencing a Derivative Action?

Recently, the issue of whether the Complainant must retain his standing throughout the derivative proceedings was determined in **Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd** [Suit No. WA-24NCC-677-12/2023] ("**Timor**").

The Plaintiff was a nominee director appointed by the minority shareholder in a joint-venture company (the Defendant). He filed an application for leave to commence a derivative action on behalf of the company, alleging that the majority directors had caused the company to pay inflated operating expenses to a ship management company in which one of them held an interest.

Following the filing of the leave application, the majority directors declared the Plaintiff's office as director vacant (1st vacancy). Although that declaration was set aside by the Court in separate proceedings [WA-24NCC-102-02/2025], they later convened a fresh board meeting and again declared the Plaintiff's office vacant. On this basis, the Defendant applied to strike out the leave application, contending that the Plaintiff was no longer a director and had therefore ceased to be a "Complainant" under section 345 of the CA 2016.

The High Court **dismissed the striking out application**, holding that standing to bring an application under section 347 of the CA 2016 is retained **so long as the Complainant possessed the capacity at the date of the application**. A subsequent change in status does not render the leave application academic or a non-starter.

The High Court's grounds may be summarised as follows:

(i) Statutory Interpretation

Sections 347, 348, and 350 of the CA 2016 do not require a Complainant to retain his initial capacity until an application for leave concludes. The statutory language is directed at who may initiate proceedings, not who must continuously maintain that status.

This is reinforced by section 350(a) of the CA 2016, which allows the Court to authorise "the complainant **or any other person**" to control the conduct of the proceedings, indicating that the Complainant need not necessarily remain in that same capacity.

(ii) Policy Considerations under the Statutory Derivative Action Regime

The Court's interpretation that there is no continuing capacity requirement is supported by practical and policy considerations:

- **Retrospective Knowledge:** Applications are based on knowledge accumulated while the Complainant held office. As the alleged wrongs would already have occurred, there is no logical basis to require that capacity to continue.
- **Prevention of Tactical Removal:** A continuing capacity requirement would allow the errant directors to defeat the derivative proceedings by removing the Complainant from office to deny standing.

- **Shareholder Fluctuations:** Requiring a shareholder to maintain status throughout the litigation would be impractical, as shares may be sold or bought out after the wrongdoing is discovered.

(iii) *Complainant as a Mere Procedural Vehicle*

The Complainant is merely the **procedural vehicle** through which the company's rights are asserted, and the intended claim belongs to the company. Therefore, once the derivative application is properly commenced, the lis does not abate merely because the Complainant's corporate status changes.

(iv) *Equitable Considerations*

While equitable considerations do not determine standing under the statutory derivative action regime, the Court adopted a purposive interpretation of the statutory provisions to ensure that they are not applied in a way that enables alleged wrongdoers to defeat proceedings through the tactical removal of the Complainant.

(v) *Duties and Interests of Former Directors*

A former director may maintain a derivative action, and in any event, the Plaintiff is not to be treated as an outsider, given his position as a nominee director of the minority shareholder. Any concerns as to the Plaintiff's good faith are to be addressed at the leave stage, including the framing of appropriate orders for the conduct of the contemplated derivative action if leave is granted.

Conclusion

The High Court's decision in **Timor** represents a significant judicial clarification of the statutory derivative action regime under the CA 2016 – a properly commenced derivative action does not abate merely because the Complainant's corporate status changes during the proceedings.

This ensures that the statutory regime cannot be undermined by tactical removals, preserving its purpose of enabling the company's rights to be vindicated where those in control are unwilling to act.

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