

The Anatomy of Singapore's Statutory Derivative Action: Why Do Shareholders Sue – or Not?

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Overview

- History of statutory derivative actions (STDA) in the Commonwealth
- Singapore's STDA
 - Legal requirements
 - Empirical data
 - Driving forces behind DA litigation

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Derivative Actions in the Commonwealth

- Old form of derivative action (common law derivative action) was too complicated, rarely used, almost never successful
- Statutory reform across Commonwealth in 21st century
- Canada (1975), Singapore (1993), New Zealand (1994), Australia (2001), Hong Kong (2005), UK (2007)

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Derivative Actions in the Commonwealth

- Substantial variation across Commonwealth
- Four common features
 - **Leave application**
 - No minimum shareholding requirement
 - No distinction between public and private companies
 - Court can order company to pay Pf's costs

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Derivative Actions in the Commonwealth

- Leave application
 - Shareholder must apply for court's permission to pursue DA
 - Often takes the form of an 'interlocutory' proceeding
 - Interlocutory proceedings used for procedural matters in Commonwealth
 - Not a trial: no witnesses required etc.
 - Not heard in open court, but in judge's private chambers

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Derivative Actions in Singapore

- Companies Act, ss 216A - 216B
- Introduced in 1993
- Excluded SG-listed companies until 2014
- Only for Singapore-incorporated companies



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Derivative Actions in Singapore

- Three main requirements
 - Give company 14 days notice
 - Action prima facie in company's best interests
 - Pf acting in good faith



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Derivative Actions in Singapore

- Singapore's corporate landscape: dominated by private companies

Year	Type of Company		
	Private	Public	Listed
2012	247,453	2,653	776
2013	257,212	2,719	776
2014	270,737	2,796	775
2015	280,691	2,897	769

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Derivative Actions in Singapore

- Empirical study of leave applications from 1993 to 2018
 - STDA rarely proceed to trial, usually disposed of at leave stage
 - Hand-collected dataset of all publicly available judgments for leave applications

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Derivative Actions in Singapore

- Empirical study of leave applications from 1993 to 2018

Type of Company	Leave Applications
Private	22 (91.67%)
Public, unlisted	1 (8.33%)
Public, listed	0 (0.00%)
Total	23 (100%)
Successful	11 (47.83%)

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Derivative Actions in Singapore

- Empirical study of leave applications from 1993 to 2018
 - Total of 23 leave applications over 25 years: average of 0.92 applications per year
 - Dominated by closely-held, private companies, substantial number of family companies
 - Substantial majority of proposed claims were for breaches of director duties

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Derivative Actions in Singapore

- Empirical study of leave applications from 1993 to 2018
 - What type of Pfs bring derivative actions?
 - Pfs total shareholdings rarely below 10%, substantial number were equal (50%) shareholders
 - Total number of shareholders usually 2 or 3
 - Significant number of Pfs were or had been directors
 - Conclusion: Pfs (and Dfs) had substantial involvement and investment in company

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Derivative Actions in Singapore

- Why do shareholders seem reluctant to bring DAs?
 - Minimal financial incentives for lawyers and Pfs
 - No contingency fees
 - ‘Costs follow the event’: loser pays for the winner’s legal expenses as well as their own costs
 - Indemnity orders for company to bear costs are rare

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Derivative Actions in Singapore

- STDA extended to Singapore-listed companies in 2014
- BUT: no leave applications involving listed companies
- Why are shareholder reluctant to bring DAs in listed public companies?
 - Many Singapore-listed public companies are (indirectly) state-owned – DAs would be politically sensitive

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Derivative Actions in Singapore

- Why are shareholder reluctant to bring DAs in listed public companies?
 - No activist shareholder organisations to engage in DAs
 - Leading investor rights organization prefers conciliatory approach instead of litigation
 - Considered creating minority shareholder litigation fund in 2016; no developments as of 2019
 - Prospect of retaliatory litigation by listed company management
 - 2018: Stamford Land Ltd launched defamation suit against minority shareholder for critical remarks at AGM

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Derivative Actions in Singapore

- Why do shareholders bring DAs in private companies?
 - Primary conflict is between shareholders (cf public co)
 - STDA as shareholder dispute resolution mechanism
 - Even outvoted, disempowered, oppressed min sh may use STDA – shareholder voice
 - Cheaper than main minority shareholder remedy for private companies (oppression remedy)
 - Facilitates settlement on fair terms

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Conclusion

- Singapore's unique corporate and legal landscape poses significant non-financial obstacles to DAs
- STDA moribund in listed companies – contrary to legislator's expectations in 2014
- But STDA has unexpected but valuable functions for private companies
 - Exercise of shareholder voice
 - Cheap & quick resolution to shareholder disputes