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CORPORATE LAW, DERIVATIVE ACTIONS:
A COMPARATIVE APPROACH

By

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SUMMARY OF THE WORK

This research titled 'Corporate Law, Derivative Actions: A Comparative Approach' consists of two major parts, with eight chapters, containing four chapters in each part. The two major parts deal with namely, -The Common Law Derivative Action, in Part One and -The Statutory Derivative Action, in Part Two respectively.

The research is based on a comparative study carried out on two jurisdictions namely, Australia and Sri Lanka. Taking into consideration the historical approach, and completeness, the research deals with jurisdictions such as England, United States, Canada and New Zealand.

The evolution of the English common law Derivative Action, with special emphasis on Australia and Sri Lanka and the transformation of this common law remedy to a more uniform statutory remedy is analyzed in this research. It is of some importance to these two jurisdictions, as both are on the verge of making it a statutory remedy pursuant to law reform.

The core issues addressed in this research are:

- Derivative Action as a response to inequality.
- The inherent appeal of the Canadian model of the statutory Derivative Action.
- Australia’s graduation from the common law remedy to the statutory remedy in Derivative Actions.
- The profit to Sri Lanka from the Australian experience.

Australia pursuant to a careful and well-formulated reform program of about nine years has finally put forward its provisions for the proposed statute for Derivative Actions, which is in Bill form to become law in the near future. Sri Lanka on the other hand, too has formulated proposed statutory provisions, basically following the New Zealand pattern of the action, without any hard work being put to it. In Sri Lanka too, the proposed provisions are to become law in the near future. When compared with the hard work in the reform program undertaken by Australia, Sri Lanka has not made any effort whatsoever to reform its laws on Derivative Actions. It has simply copied similar provisions from an alien draftsman and has adopted them without any reasoning whatsoever.

Since, Australia has undergone thorough scrutiny on the matter, since the Australian model too is structured on the Canadian formula of the action as New Zealand and as the Australian post statutory common law litigation has thrown much light to its reform program, this research investigates the possibility of adopting a method to take what is best from the Australian reform program to influence the reform program in Sri Lanka on the subject. The end purpose of this research is thus to enable Sri Lanka to profit from the Australian experience, which is all set out by way of conclusions and recommendations in the final chapter of this research.
ABSTRACT

This thesis is a culmination of a research of a particular branch of Corporate Law, which has grown in several major parts of civilized jurisdictions. The thrust of the study was to evaluate the past, present and the future of a particular type of action known in Corporate Law under the umbrella of shareholder remedies – the ‘Derivative Action’ with emphasis to develop the law in one jurisdiction profiting from another. The research thus reveals how, when and where the so called action originated, the initial effects these actions had on the corporate world including shareholders, companies and related persons natural or juristic. Though much has been written by way of books, treatises and articles and several researches have dealt with the common topic shareholder remedies in its broad perspect, there is no separate study carried out on this topic in its global context with a comparative focus. This study has therefore given me the drive, initiative and courage to look at the conceptual view or the macro view of the so called ‘Derivative Action’ with of course special emphasis on the Australian and Sri Lankan jurisdictions in its micro aspects. This, I believe is the first time anyone has undertaken such a task. The study thus travels through distant roads of common law action to the statutory form of the action in the relevant jurisdictions and finds it driving with much purpose in jurisdictions such as Australia and Sri Lanka which are both in the transitional era from the common law action to the statutory action.

The research is based on the collection of material namely, case law – Australian, Sri Lankan and international on the matters in issue, Legal treatises on the subject matter local and international, Law reform material - Australian, Sri Lankan and international on the topic, Bills and Statutes available on the topic in Australia, Sri Lanka and other countries.

I have met resource personnel with regard to Law Reform in several jurisdictions on the matters in issue and visited the Australian Stock Exchange and the Colombo Stock Exchange.

The research findings depend mainly on the electronic data available in addition to resources available at the University of Canberra, the Australian National University,
Colombo Law Library, The Colombo Law Society Library and the Sri Lanka Supreme Court Judges’ Chambers Library and the Sri Lanka Attorney General’s Department Library. Visits to the McGill University in Montreal, Canada and the corporate law sector in New Zealand, including Universities and Law Offices in Christchurch and Auckland too has helped me considerably in the process.

Review of the literature of the proposed statutory Derivative Action in Australia and the proposed statutory Derivative Action in Sri Lanka, are based mainly on; Enforcement of the duties of directors and officers of a company by means of a statutory derivative action (Report No. 12) Companies and Securities Law Review Committee. (November 1990.), Corporate Practices and the Rights of Shareholders (Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs) Parliament of the Commonwealth of Australia. (November 1991.), Report on A Statutory Derivative Action Companies and Securities Advisory Committee. (July 1993.), Corporate Law Economic Reform Program (CLERP) Proposal Paper No 3 (1997), the CLERP draft legislative provisions (1998), Australian case law on the application of the common law Derivative Action, both in the High Court and in individual States and Australian articles on Derivative Action as a common law remedy and on the introduction of the statutory action. In the Sri Lankan context, the proposals in Sri Lanka for the statutory Derivative Action and the case law in Sri Lanka on the application of the common law remedy has been referred to. Other literature include, material available on the Canadian formula of Derivative Action, including Statutes, Rules, case law, articles and other relevant data, material available on the Derivative Actions in the United States, material available in New Zealand on Derivative Actions, material available in England on Derivative Actions, namely on the common law approach, case law, articles, Bills, Rules and other connected material, Statutes on Derivative Actions in other jurisdictions at present and Hong Kong proposals for a statutory Derivative Action, to name some.

The aforesaid material and the review of the same have assisted the study as follows:

- To place the past, present and the future of the common law Derivative Action.
- Examine the objectives of the Derivative Action.
- The operation of the common law aspects of the action.
- The benefits of the statutory form of the action.
- Experiences of other countries in the recent past on the subject.
- The Australian reform process presently underway.
- The best experiences in Australia with regard to case law.
- To evaluate whether the remedy should be limited to fraud on the minority or whether it should be extended further even to negligence.
- How best Sri Lanka could benefit from the Australian formula of the statutory form of the action.
- To evaluate whether the proposed model of the statutory action in Sri Lanka is adequate in view of the Australian and other accepted formulae on the subject.
- Whether the common law action should be expressly abolished in Sri Lanka.
- Consider the possible introduction of the best methods to Sri Lanka.

Finally, the research speaks for itself the need for a statutory Derivative Action for Sri Lanka in the future, to be an improvement on the Canadian, New Zealand and Australian models. The research findings, especially in its conclusions and recommendation in Chapter 8, will no doubt help to improve the proposed statutory Derivative Action in Sri Lanka in a small way.
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