SUPREME COURT OF QUEENSLAND

CITATION:	*Metyor Inc & Anor v Queensland Electronic Switching P/L & Ors* [2002] QCA 269
PARTIES:	**METYOR INC (formerly TALISMAN TECHNOLOGIES INC)** (First Plaintiff/First Appellant) **SARACEN FINANCIAL SERVICES LIMITED** ACN 084 940 983 (Second Plaintiff/Second Appellant) **v** **QUEENSLAND ELECTRONIC SWITCHING PTY LTD** ACN 003 027 503 (First Defendant/First Respondent) **BANK OF QUEENSLAND LIMITED** ACN 009 656 740 (Second Defendant/Second Respondent) **COMPAQ COMPUTER AUSTRALIA PTY LTD** ACN 002 955 722 (Third Defendant/Third Respondent) **CONSOLIDATED WITH** **QUEENSLAND ELECTRONIC SWITCHING PTY LIMITED** ACN 003 027 503 (Applicant/First Respondent) **AUSTRALIAN COMPANY NUMBER 091 907 433 PTY LTD** ACN 091 907 443 (First Respondent) **METYOR INC (formerly TALISMAN TECHNOLOGIES INC)** (Second Respondent/First Appellant) **SARACEN FINANCIAL SERVICES LIMITED** ACN 084 940 983 (Third Respondent/Second Appellant) **COMPAQ COMPUTER AUSTRALIA PTY LTD** ACN 002 955 722 (Fourth Respondent/Third Respondent)
FILE NO/S:	Appeal No 6418 of 2002 SC No 6194 of 2001 SC No 3575 of 2001
DIVISION:	Court of Appeal

PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 July 2002
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2002
JUDGES:	McPherson and Williams JJA and Wilson J Separate reasons for judgment for each member of the Court, each concurring as to the orders made
ORDERS:	**Appeal allowed with costs. The order dismissing the application is set aside and the application granted with costs.**
CATCHWORDS:	CORPORATIONS - INTERNAL DISPUTES - USE OF COMPANY'S NAME - Fraud on the company *Burland v Earle* [1902] AC 83, 93, applied *Ferguson v Wallbridge* [1935] 3 DLR 66, considered *Foss v Harbottle* (1843) 2 Hare 461, discussed *Hurley v G H Nominees Pty Ltd* (1982) 31 SASR 250, applied *Karam v Australia & New Zealand Banking Group Ltd* (2000) 34 ACSR 545, applied *Keyrate Pty Ltd v Hamarc Pty Ltd* (2001) 38 ACSR 396, 398-400, applied *Spokes v Grosvenor Hotel Co Ltd* [1897] 2 QB 124, discussed *Corporations Act* 2001 (Cth) s 236, s 236(c), 236(1)(a), s 237, 237(1), s 237(2), s 237(2), s 237(2)(a), s 237(2)(d), s 237(2)(b), s 237(2)(c)
COUNSEL:	T F Bathurst QC, with T D Castle, for the appellants H B Fraser QC, with C A Wilkins, for the respondents
SOLICITORS:	Brian Bartley Associates for the appellants Clayton Utz for the respondents

[1] **McPHERSON JA:** This is an appeal from the decision of a Supreme Court Judge given on 7 July 2002 refusing an application under s 236 of the *Corporations Act* 2001 by the plaintiffs, who are two members of a company conveniently referred to as JV Co, for leave to bring proceedings on behalf of the company against other members of the company, all of whom are parties to a written contract. The contract, which is dated 31 March 2000 and entitled Subscription and Shareholders Agreement, is in the form of a joint venture agreement for the provision of services, technology and equipment comprising automatic teller machines for use in the operations of the Bank of Queensland Limited. JV Co is the medium through which it was agreed those services would be provided by the contracting parties, who hold

shares in that company as to 49.9% by the Bank or its wholly owned subsidiary Queensland Electronic Switching Pty Ltd (QES); as to 5% by Compaq Computer Australia Pty Ltd; and as to the balance by Metyor Inc (formerly Talisman Technologies Inc) and Saracen Financial Services Limited in equal shares of 22.55% each.

[2] The contract is already the subject of an action nos 6194 of 2001, instituted in New South Wales and cross-vested to the Supreme Court of Queensland, brought by Metyor and Saracen as plaintiffs against QES, the Bank, and Compaq as defendants. The application dated 26 June 2002, against the dismissal of which the appeal is brought, is for the plaintiffs to be granted leave under s 236 to bring the proceedings by joining JV Co as co-defendant in that action. Pleadings have been delivered and the action is set down for trial listed to begin in a few weeks time.

[3] The issues in the action are identifiable by reference to the allegations in those pleadings, which include an amended statement of claim and the defendants' defence and counterclaim. In substance, what is alleged by the plaintiffs is that the contract dated 31 March 2000 is subject to four express conditions subsequent involving: (a) the adoption of a business plan on terms satisfactory to the parties; (b) the adoption of a budget on terms satisfactory to them, but including certain items specified in a schedule to the contract; (c) JV Co obtaining funding on terms satisfactory to the parties; and (d) the Bank and QES obtaining all necessary regulatory approvals in respect of their obligations under the contract also on terms satisfactory to the parties. The amended statement of claim alleges that by their contract the parties agreed that they would use their best endeavours to ensure that the conditions subsequent were satisfied, and that they had entered into the contract in the utmost good faith and in reliance on due performance by each of the other parties of their obligations. There were other contractual provisions by which each of the first and second plaintiffs and QES agreed to grant JV Co licences of rights to enable it to fulfil the business plan, and by which the Bank guaranteed performance by QES of its obligations and indemnified JV Co against claims in connection with default by QES in the course of performance. In addition, it is alleged that it was an implied term that the Bank and QES would not do anything to prevent fulfilment of the conditions subsequent.

[4] The crux of the plaintiffs' allegation is that, for commercial reasons of their own and in breach of duties imposed or implied in the contract, the defendant Bank and QES decided early in September 2000 to rid themselves of the joint venture contract and their obligations under it. It is alleged that, by conduct or deliberate inaction on their part, the defendants repudiated the contract by preventing fulfilment of the conditions subsequent, or by wrongly denying that they had been satisfied, or otherwise by acting in bad faith. The relief claimed originally included specific performance of the contract, together with declarations that the conditions subsequent had been satisfied or that the defendants were estopped from asserting the contrary, as well as damages in lieu of specific performance.

[5] While admitting that since October 2000 they had evinced an intention no longer to remain a party to the contract, the defendants deny many of the plaintiffs' allegations of fact, and pleaded other versions of the events alleged, as well as asserting misleading conduct on the part of the plaintiffs and that the contract was uncertain and unenforceable. They have counterclaimed for damages and for an order under s 87 of the Trade Practice Act rescinding the contract. What is more

important for present purposes is that the defence in paras 110 and 111 pleaded in answer to the plaintiffs' claim for damages that any loss suffered by the plaintiffs arising from loss of a profit or capital gain on their shares in JV Co was not recoverable by the plaintiffs, and that they were "not entitled to seek any relief in relation to losses suffered by or claims vested in the company" JV Co.

[6] Those two allegations raised a plea of what is commonly known as the rule in *Foss v Harbottle* (1843) 2 Hare 461; namely, that in proceedings to redress a wrong done to a corporation, the corporation itself, and not any individual member or members of it, is the only proper plaintiff. To that rule, one well-known exception permitted a member or a minority of members to sue in their own names in circumstances where the majority "are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company, or in which the other shareholders are entitled to participate". See *Burland v Earle* [1902] AC 83, 93. Proceedings of that kind for fraud on the minority were required to be brought in representative form on behalf of all members and were contingent on the company being joined as a co-defendant, so that any judgment for relief or recovery that might be given would both bind and operate in favour of the company found to have been wronged. See *Spokes v Grosvenor Hotel Co Ltd* [1897] 2 QB 124, 128-129. Otherwise the practical effect of the judgment would be to transfer property of the company to individual members and, to that extent, result in an unauthorised dividend or distribution of corporate assets to shareholders.

[7] In referring to this exception, I have used the past tense because it is an exception that was formerly recognised under the general law. It has now been abrogated by s 236(3) of the *Corporations Act* 2001, which provides that the right of a person at general law to bring or intervene in proceedings on behalf of a company is abolished: *Karam v Australia & New Zealand Banking Group Ltd* (2000) 34 ACSR 545. Instead, s 236(1)(a) now provides that a person may bring proceedings on behalf of a company if that person is a member of a company and is acting with leave granted under s 237. So far as material, ss 237(1) and (2) are in the following terms.

> "**237. Applying for and granting leave**
>
> (1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.
>
> (2) The Court must grant the application if it is satisfied that:
>
> (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and
>
> (b) the applicant is acting is good faith; and
>
> (c) it is in the best interests of the company that the applicant be granted leave; and
>
> (d) if the applicant is applying for leave to bring proceedings - there is a serious question to be tried; and
>
> (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.

[8] It was because Metyor Inc and Saracen Financial Services Limited are confronted in the action by a pleading of the rule in *Foss v Harbottle* raised in paras 110 and 111 of the defence that as plaintiffs they applied to join JV Co as a defendant in those proceedings. For that they need the leave of the Court, which, in their capacity of members under s 236(1)(a), they are qualified to apply for under s 237(2) of the Act.

[9] The requirements imposed by s 237(2)(a) and s 237(2)(d) raise no real difficulty for the plaintiffs. Having regard to the spread of shareholdings in JV Co and the defendants' opposition to this application and the allegations in the defence and counterclaim delivered by the defendants, it is obvious that the company, acting through those majority shareholders, will not now elect to bring such proceedings itself. Requirement (a) is therefore satisfied. As to (d), there can be no question that the pleadings raise a serious question to be tried in the action to which it is now sought to add JV Co as a party. The other two requirements in paras (b) and (c) of s 237(2) are therefore the only issues to be considered on appeal; and it was primarily the plaintiffs' failure to satisfy requirement (c) that resulted in the refusal of the application for leave from which the appeal is brought.

[10] In dismissing the application on 9 July 2002, her Honour stated her reasons as follows:

> "Considering the question afresh for myself, the litigation concerns competing allegations between shareholders. It is the outcome of that dispute which will determine if it is in the best interests of JV Co that it pursue litigation against one or other group of shareholders. It cannot be pre-empted by one of those groups, which is what the plaintiffs seek to do.
>
> Until the dispute is resolved, it is impossible to assess what is in the company's best interests. I should dismiss the application pursuant to section 237 of the Corporations [Act]."

With great respect, I find myself unable to agree with this approach to an application under s 237(2) for leave to bring proceedings on behalf of a company. To require that disputes between members be resolved before leave is granted to bring proceedings on behalf of the company would defeat the very purpose which those statutory provisions are designed to serve and for which derivative proceedings were formerly permitted under the relevant exception to the rule in *Foss v Harbottle*. Nor does it accord with the attitude adopted by Australian courts in the past in proceedings for fraud on the minority to require that any such prerequisite be satisfied. See *Hurley v G H Nominees Pty Ltd* (1982) 31 SASR 250, 253, and *Dempster v Biala Pty Ltd* (1988) 1 WAR 266, 269-270. It may be accepted that ss 236 and 237 were not intended to preserve the former law; but they should surely be approached as measures of reform designed to improve, rather than to place novel obstacles in the way of, such proceedings.

[11] It is because one group of members are in control of the management or affairs of the company and refuse to permit it to take proceedings that there is a dispute between the two groups of shareholders or members here. It is only by permitting

proceedings to be taken on behalf of the company that the dispute in question can be resolved at all and that the complaint of one set of members against the others can be remedied. Otherwise the majority will be able to prevent the minority and through them the company from obtaining redress against the actions of the majority. That is what is meant when the cases and text books speak of it as a fraud on the minority or a fraud on the company. Reverting to what was said by Lord Davey in *Burland v Earle* [1902] AC 83, 93, the procedure is available because the majority are endeavouring to appropriate to themselves corporate assets belonging to the company or in which the other members are entitled to share. Because of the rule in *Foss v Harbottle* and the abolition by s 236(3) of the exception to it, the majority will be able to continue to do so with impunity if the minority are not permitted to sue for it on behalf of the company.

[12] Whether this is such a case can be determined only by allowing action to be taken on behalf of the company. The substance of the plaintiffs' complaint is that the defendant majority shareholders are denying JV Co its rights by failing or refusing, in their own interests as it is alleged, to perform their contractual obligations or to institute legal proceedings by JV Co to enforce them. Whether that would under the general law have fallen within the fraud exception to the rule in *Foss v Harbottle* is not the critical question. Sections 236 and 237 have now displaced the former exception. What remains true is that if the existing action proceeds without the company as a party, it will not be bound by the result of the proceedings in that action whether that result is in favour of or against JV Co. That has always been the principal reason for insisting on joinder of the company as a party to the proceedings: *Spokes v Grosvenor Hotel Co Ltd* [1897] 2 QB 124, 128-129. If the plaintiffs are correct and JV Co has been the victim of wrongdoing against it, it will not receive the benefit of any judgment that would otherwise have gone in its favour. No estoppels by judgment or otherwise will arise against the defendants, and the dispute will have to be litigated again, conceivably with a different outcome, in other proceedings to which the company is a party. Deferring the question of leave until the dispute between shareholders is resolved will therefore not conduce to but only serve to prejudice the best interests of the company.

[13] In saying this I am conscious that, in addition to the existing action between shareholders, there is also another proceeding presently on foot between them. It is an application instituted on the ground that the amicable relations expected to prevail between members in conducting the business of JV Co have ceased, and it has therefore, it is said now, become just and equitable to wind the company up on the principle in *Re Westbourne Galleries Ltd* [1973] AC 360. That application has been consolidated, as it is described, with the existing action no S 6194 of 2001 by an order made by Douglas J in the Supreme Court on 31 July 2001. It is intended that the two proceedings will be heard together. Precisely what will ensue if, after being joined in the action, the company is ordered to be wound up has not been the subject of submissions before us on the appeal. The decision of the Privy Council in *Ferguson v Wallbridge* [1935] 3 DLR 66, suggests that it would then be for the liquidator to decide whether or not the action is continued for the benefit of the company; but, even if that is so, given a proper indemnity it is not uncommon now for proceedings to be brought either by the liquidator or by someone else in the name and on behalf of a company that is in liquidation. The question is one that may safely be left to be considered if and when it arises.

[14] Returning to the statutory requirements, it was submitted by Mr Fraser QC for the defendants on appeal that the plaintiffs should not be permitted to join JV Co as a defendant in the action, because s 236(1) and s 237 envisage that an applicant is permitted only to "bring" proceedings "on behalf of" the company, which meant, he said, that the company must be a plaintiff in the proceedings. No doubt it would be feasible, although possibly not without some difficulties, to arrange for proceedings to be brought in the name of the company as plaintiff; but in the present case there is no compelling reason for doing so. The action is already on foot and, to avoid the rule in *Foss v Harbottle*, calls for no or little more than the addition of JV Co as a defendant, together perhaps with some consequential or incidental amendments to the body of the pleading.

[15] Joining the company as defendant was always the procedure adopted in actions for fraud on the minority under the general law, and its use was recently sanctioned by Santow J in granting leave under s 237 of the Act in *Keyrate Pty Ltd v Hamarc Pty Ltd* (2001) 38 ACSR 396, 398-400. As his Honour there pointed out, it has the advantage previously noticed of producing a judgment that is binding on the company. I would respectfully adopt his Honour's reasoning, and, if the plaintiffs are otherwise entitled to succeed on this application, they should be at liberty to take proceedings on behalf of JV Co by joining it as co-defendant in the action rather than as co-plaintiff. The practice, as Mr Bathurst QC suggested in his submissions for the plaintiffs, is analogous to the procedure by which a beneficiary may bring proceedings in his own name for administration of a trust upon his joining the trustee as a party to proceedings. See *Ramage v Waclaw* (1988) 12 NSWLR 84, 91, where the principles are discussed. There is no reason why it should not apply to proceedings under ss 236 and 237 of the Act, which are not in terms confined to authorising proceedings to be brought on behalf of the company as plaintiff. Indeed s 236(1)(a) enables a person to "intervene" in proceedings on behalf of a company, which is an expression that is capable of referring to an appearance on either side of the record.

[16] The question remains whether the plaintiffs in their application for leave ought to have been found to have satisfied the requirements (b) and (c) of s 237(2). I see no reason for doubting that, in terms of s 237(2)(b), the applicants were and are acting in good faith in making the application for leave to proceed on behalf of the company. As matters turned out, her Honour did not consider whether that requirement was fulfilled because, for the reasons she gave, she disposed of the application by reference simply to the requirement of "best interests" in s 237(2)(c). An earlier application for leave had been refused on 7 September 2001 because, as the learned judge (who on that occasion was Mullins J) found, the plaintiffs had failed to satisfy her that, in making the application, they were not acting for their own benefit, rather than the benefit of the joint venture company, and, so as Mullins J concluded, were therefore not then acting in good faith. At that stage, however, the plaintiffs were insisting on specific performance of the contract in their own right and interest alone. They have since abandoned the claim to specific performance, and have amended their statement of claim to make it clear that, if successful in recovering damages for breach of contract in right of the company, JV Co will to that extent be entitled to those damages. At that hearing there was both evidence and cross-examination in relation to the plaintiffs' good faith; but it was only for the particular reason given by Mullins J that the plaintiffs' application failed on that issue. There is reason now to be satisfied that the application is not now brought by the plaintiffs in their own interest but in good faith for the benefit of the company.

Nothing to the contrary was identified by Mr Fraser QC in his submissions on the appeal and the plaintiffs should be found to be making this application in good faith.

[17] That leaves for consideration the requirement in s 237(2)(c) that the Court be satisfied that it is in the best interests of the company that the applicant be granted leave. Mr Fraser QC submitted that in s 237(1)(c) the emphasis is on identity of the applicant who seeks leave, and that the application was rightly refused by her Honour on 9 July 2002 because it was not in the best interests of the company that the plaintiffs be given leave to bring the proceedings. I agree with the first part of this proposition, but not with the second. By that, Mr Fraser intended to convey that the applicants are shareholders in J V Co who, as plaintiffs, have claims against the other shareholders in the same company, who are the defendants in the action. Some of the claims against the defendants in the action are or may be personal claims belonging to the plaintiffs as their own, while others are or may be enforceable against those defendants by the company in its own right. It was, it was submitted, undesirable that the plaintiffs, having personal interests of their own, should be authorised on behalf of the company to conduct proceedings to enforce corporate claims that may possibly compete with their own. It would place the plaintiffs in a position of conflict between their personal interests and those of the company, which it would be their duty to prosecute and protect. It was this, Mr Fraser QC submitted, that explained those passages from her Honour's reasons set out earlier in this judgment, in which she spoke of one group of shareholders pre-empting litigation against another before the dispute between them had been resolved.

[18] I am not persuaded that any such conclusion can fairly be derived from what her Honour said. Even if it can, however, it does not seem to me to be a sound basis for refusing to be satisfied that it is in the best interests of the company that the plaintiffs should have leave to bring the proceedings on its behalf. It is not always possible to say at once whether a particular asset, advantage or opportunity belongs to the company rather than to one or other of two groups of warring shareholders. If a particular asset is in law corporate property, the company ought to recover it; if it is not, one or other of the shareholders may perhaps be entitled to do so. Resolving such questions is the principal purpose that the proceedings are designed to serve. Against the risk that the plaintiffs may, in their own interest, be tempted somehow to misuse their authority in bringing proceedings on behalf of the company there is the safeguard afforded by the presence as defendants or opposing parties of the other shareholders in the company. They may fairly be expected to vigorously defend the interest they have in ensuring that the proceeds of any damages or assets recovered from them as defendants are restored to corporate funds, in which they will ultimately be entitled to participate by virtue of their own shareholdings in the company.

[19] It follows in my opinion that the factor that is said by Mr Fraser QC to have weighed with her Honour in refusing the plaintiffs' application for leave to bring proceedings on behalf of JV Co lacks cogency. On the contrary, it appears to me it is just such a case as this that is contemplated by ss 236 and 237 as one in which it is in the best interests of the company that the plaintiffs should be granted leave to proceed on behalf of he company. There are two conflicting groups of shareholders, of whom one is, as the minority, unable to set the company in motion to vindicate its rights because the majority, who are alleged to be the wrongdoers, oppose the company's doing so. If under such conditions the statutory procedure is not available to the plaintiffs as the minority members, it is unlikely that it will be

available in many, perhaps most, other circumstances. For my part, I cannot accept that, in speaking of "the best interests of the company", what s 237(2)(c) has in mind is some kind of cost-benefit analysis of possible outcomes of the prospective litigation, which is an assessment that it would be almost impossible to make with any degree of confidence or accuracy. There may be cases in which it will plainly not be in the best interests of a corporation considered as a trading entity to engage in litigation that is likely to result in much harm and little or no evident benefit to the company. The present is, however, not a case of that kind. The plaintiffs' complaint here is that the defendants, or at least the Bank and QES, have, for commercial reasons of their own, deliberately set out to frustrate the contract that is the prerequisite to success of the trading venture in which JV Co was originally formed to engage. Whether the plaintiffs will make good their claim to that effect depends on the outcome of the litigation. If it does, JV Co will benefit without cost to itself. If it does not, it will not be disadvantaged. It will be the plaintiffs, and not JV Co, that will bear the stigma, if any, of defeat as well as the not inconsiderable costs of the proceedings.

[20] In my opinion, it is in the best interests of JV Co that the plaintiffs be given leave under s 237 to bring proceedings on behalf of JV Co against the defendants in action no S 6194 of 2001 by joining JV Co in that action as a co-defendant action or otherwise as the plaintiffs may be advised. There should be liberty to all parties to make such consequential amendments to pleadings as they may be advised and as may be incidental to giving effect to this order. The appeal should be allowed with costs. The order dismissing the application should be set aside, and the application granted with costs.

[21] **WILLIAMS JA:** I agree with the orders proposed by McPherson JA for the reasons he has given.

[22] **WILSON J:** I respectfully agree with the reasons for judgment of McPherson JA and with the orders he proposes.