

BRITISH VIRGIN ISLANDS COURT OF APPEAL

Fok Hei Yu & Others -v- Basab Inc **BVIHCMAP 2014/0010**

INTERLOCUTORY APPEAL - JOINER OF PARTIES - APPLICATION MADE BY APPELLANTS IN COURT BELOW TO BE JOINED AS PARTIES TO FIRST RESPONDENT'S APPLICATION FOR LEAVE TO BRING DERIVATIVE ACTION IN NAME AND ON BEHALF OF SECOND RESPONDENT - WHETHER LEARNED JUDGE ERRED IN DISMISSING APPELLANTS' APPLICATION - SECTION 184C BVI BUSINESS COMPANIES ACT, 2004 - RULE 19.3 CIVIL PROCEDURE RULES 2000

The Appellants in this matter, directors of the Respondent company (Accufit), sought to be joined to the First Respondent's (Basab Inc, the sole shareholder of Accufit) application for leave to bring a derivative application in the name and on behalf of Accufit. The Judge in the Court below dismissed the Appellants' application to be joined as parties to the leave application.

The Appellants appealed the dismissal on the basis that the Judge at first instance failed to take into account the wording of Section 184C of the *BVI Business Companies Act, 2004*, which implies that evidence from the directors of the company should be heard at the hearing of the application for leave to bring the derivative action and that denying the Appellants the opportunity to be joined as parties and adduce evidence would result in there being no evidence from the company or any of its officers. The Appellants also claimed that the Judge failed to take into account the scope of CPR 19.3(2) in relation to the Appellants' entitlement to be joined as parties.

The Court of Appeal dismissed the appeal, finding that the Appellants' joinder application in the Court below was "*wholly misconceived and totally unnecessary*" since Accufit was already a party to Basab's application for leave to bring the derivative action, and Accufit essentially acts through the Appellants. By Section 184C(4) of the *BVI Business Companies Act, 2004*, Accufit was

entitled to appear and be heard on Basab's application and it was the Appellants who would cause Accufit to appear and be heard, by putting in evidence on behalf of the company. The Court found that no additional advantage would be gained by the Appellant's being made a party to the action.

The Court further held that Section 184C(2)(b) states that the Court, in determining Basab's leave application, must take into account "*the views of the [Accufit's] directors on commercial matters*". The Appellants, as Accufit's only two directors were the only persons able to provide this evidence. However, having regard to the nature of Basab's application for leave to bring a derivative action, the Appellants' assertion that they wished to be heard on the application in their capacity as 'receivers' did not provide a proper basis for seeking to be joined as parties to the application. Joining the Appellants in their capacity as receivers of Accufit at the permission stage served no useful purpose.

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