

**In the Court of Appeal of Alberta**

**Citation: Kaverit Steel and Crane Ltd. v. Kone Corporation, 1993 ABCA 150**

**Date:** 19930527  
**Docket:** 9203-0886 AC  
**Registry:** Edmonton

**Between:**

**Kaverit Steel and Crane Ltd., 299565 Alberta Ltd., Kelly Viinikka,  
Eric Viinikka and James Caldwell**

Appellants  
(Plaintiffs/Respondents)

- and -

**Kone Corporation, Kone Holdings (Canada) Inc., Kone Inc.  
and Kone Cranes Incorporated**

Respondents  
(Defendants/Applicants)

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**The Court:**

**The Honourable Mr. Justice Stratton  
The Honourable Madam Justice McFadyen  
The Honourable Mr. Justice Gallant**

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**Memorandum of Judgment**

**COUNSEL:**

J.E. Redmond, Q.C. and C.E. Mostert, for the Appellants (Plaintiffs/Respondents)

R.C. Secord and P.E. Kennedy, for the Respondents (Defendants/Applicants)

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**MEMORANDUM OF JUDGMENT**

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**THE COURT:**

[1] The appellants appeal the order of the learned Chambers Judge, striking out the appellants' amended Statement of Claim. The learned Chambers Judge found that the whole cause of action of the appellants, (other than Kaverit, whose action was disposed of

separately) was a derivative action that was barred by the rule in *Foss v. Harbottle* (1843) 67 E.R. 189.

[2] We are of the view that the claims of the three individual shareholders, Kelly Viinikka, Eric Viinikka, and James Caldwell, for damages resulting from the withdrawal of an offer by the third party to purchase their shares in 299565 Alberta Limited is not a derivative action. The loss they say they suffered, occurred in their capacity as vendors who lost the opportunity to sell the shares. They are the only ones who can claim for this loss. Kaverit was not a party to the agreement for sale, and sustained no damages on the loss of opportunity for which it could maintain an action. In that sense, the individual shareholder's claim is not derivative but is a separate cause of action for the damages resulting from the withdrawal of the offer to purchase the shares.

[3] The individual shareholders claim that the respondents, with the intention of preventing the sale of the shares to the third party and with the intention of purchasing those shares themselves at a lesser cost, conspired together to prevent the sale of shares. They did so by setting up a business in competition with Kaverit contrary to the terms of an agreement between some of the respondents and Kaverit. While the overt acts set out in the amended Statement of Claim appear to be directed against Kaverit alone, the appellants claim that the overt acts had a dual objective and effect; one of which was to injure the individual shareholders by preventing the sale of shares by them to the third party.

[4] In argument before us, Mr. Redmond did not seriously resist the Chambers Judge's conclusion that the numbered company's claim and other claims of the individual shareholders were barred by the rule in *Foss v. Harbottle*. We dismiss the appeal on these points.

[5] The appeal is allowed in part. The portion of the Chambers Judge's order striking out the claims of the individual shareholders for damages arising out of the loss of opportunity is set aside. Counsel shall make the necessary amendments to the amended Statement of Claim. If counsel are unable to agree they may seek the assistance of one of the members of this panel.

JUDGMENT DATED at EDMONTON, Alberta,  
this 27th day of May A.D. 1993