Legislative Council
Bills Committee on Companies (Amendment) Bill 2010 and Business Registration (Amendment) Bill 2010

Follow-up to issues raised at the second meeting on 30 March 2010

Administration's response

Company and business registration

1(a) In gist, the proposed company incorporation and business registration regime ("proposed regime") differs from the existing paper-based company incorporation process in several ways. First, the proposed regime allows 24x7 round-the-clock company incorporation and business registration on-line. Second, the proposed regime enables one-stop simultaneous company incorporation and business registration. Any person who submits an application for company incorporation will be deemed to have applied for business registration at the same time. The Companies Registry ("CR") will issue the business registration certificate together with the certificate of incorporation to the successful applicants. Such one-stop service will be made available for both paper and electronic applications. Together with the implementation of the streamlined company name approval process (i.e. names will be approved for registration instantaneously except for certain restrictions[1]), company incorporation and business registration under the proposed regime can normally be completed within one day if the applications are submitted on-line, as compared

1 As mentioned in paragraphs 6 in the Administration's response to the issues raised at the first meeting on 23 February (CB(1)1453/09-10(08)), a name will be approved for registration instantaneously except where (a) the name is the same as another name on the register; (b) the name is the same as that of a body corporate incorporated or established under an Ordinance; (c) the name contains words that, in the opinion of the Chief Executive, would constitute a criminal offence, or is offensive or contrary to the public interest; (d) the name contains words that are likely to give an impression of government connection, e.g. "Department", "Government", etc.; or (e) the name is the same as a name for which a direction has been issued under sections 22 or 22A of the Companies Ordinance on or after the commencement of the Companies (Amendment) Ordinance 2010.

with an average of four working days to complete the two processes under the existing system.

On verification procedures, at present, the CR will not verify the identities of those who submit applications for company incorporation or deliver company documents for registration. Under the proposed electronic regime for incorporation and documents delivery, the CR will put in place a registration system to require any person using the Integrated Companies Registry Information System ("ICRIS") to register on the ICRIS as registered users. To complete the registration, the user has to submit to the CR a copy of his/her HKID/passport (for individuals), the company registration number (for body corporates registered in Hong Kong) or a copy of the certificate of incorporation issued by the authorities in the place of incorporation (for body corporates incorporated outside Hong Kong). The registered users log on the system using passwords.

1(b) In other comparable jurisdictions like the UK, New Zealand or Singapore, the relevant authorities will not check or verify individual's identity or the status of a body corporate for using the online company incorporation process. However, it is understood that foreigners residing outside Singapore have to hire the service of professional firms, service bureau and group company secretaries in Singapore to incorporate a company in Singapore.

Multiple statutory derivative actions

2(a) As Members have noted, it is our intention that the proposed extension of statutory derivative actions (SDA) to a member of a related company goes further than the decision in the *Waddington*[2] case. *Waddington* dealt with the question whether an action which may be brought by a member of the company,

[2] *Waddington Ltd. v Chan Chun Hoo.* [FACV No. 15 of 2007]

may be brought by a member of its holding company. As Lord Millett NPJ said in the *Waddington* judgment (paragraph 70), that is ultimately a question of *locus standi*, not ownership of shares (relevant paragraphs of the judgment are extracted at Annex A). On the question of standing, the question for the court is whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it.[3] The same question can also apply to whether a member of a related company has a legitimate interest in the relief claimed. So, while expressed in the context of holding company and subsidiary, *Waddington* contains statements of principle which can support going further.

The current proposal seeks to enhance the protection of the interests of minority shareholders, in particular those in a group of companies. The justifications for extending SDA to a member of a related company are also set out in paragraphs 2 to 9 of Annex D to the Administration's response to the issues raised at the first meeting on 23 February (CB(1)1453/09-10(08)) which are extracted at Annex B for easy reference.

In making the proposal, we have taken into account the relevant provisions in other jurisdictions. Our current proposal is similar to the position in Australia while is more limited in scope as compared to the position in Singapore, which includes "any other person" who the court considers a proper person to make an application. It is noted that the Explanatory Memorandum of the Australian Corporate Law Economic Reform Bill 1998 also stated that "members... of a related body corporate will also be included [as persons with standing], as they may be adversely affected by a failure of the company to take action and therefore may have a legitimate interest in applying to commence a [statutory] derivative action."[4]

[3] Paragraph 74 of the judgement.
[4] Paragraph 6.27

We believe that the proposal to give standing to any member of a related company would not result in frivolous or vexatious derivative actions being taken. The leave requirement in section 168BC(3) of the CO operates as a filter on applications and, in any event, experience in those jurisdictions where the SDA has been extended does not indicate that the floodgates would be opened.

It should be noted that the proposed "multiple" SDA provisions has been included in the *Consultation Paper on Draft Companies Bill First Phase Consultation* issued by the Financial Services and the Treasury Bureau for public consultation from 17 December 2009 to 16 March 2010 (paragraphs 9 to 15 of the Explanatory Notes on Part 14 of the draft Companies Bill are extracted at Annex C). No adverse comments on the draft provisions have been found in the public responses received.

(b) The relevant provisions on SDA in the legislation of Australia, Canada, New Zealand and Singapore are at Annexes D1 to D4. As mentioned above, the proposed amendments to the SDA provisions in the Companies Ordinance are similar to the provisions in the Australia Corporations Act 2001.

(c) Our research reveals that there has been a court case in Australia where "multiple" SDA was discussed in the judgement. The brief note on the case is at Annex E.

(d) Paragraph 7 of Annex B provides an example of the circumstances justifying the extension of SDA to the shareholder of a subsidiary company (i.e. the subsidiary having provided security for the holding company's liabilities). If the holding company (principal debtor) disposes of its assets without good reason and thereby increases the risk of the security giver being called upon to pay under the security, the security giver (i.e. the subsidiary and its members) has a very real and legitimate interest in the relief claimed to justify a member of the subsidiary in bringing proceedings to obtain it. The same rationale also applies to the case of a company giving a guarantee or security

for the liabilities of another company in the same group. The expansion of the scope of SDA to members of related companies gives a right to the minority shareholders to seek leave to remedy the commission of a wrong by the controlling shareholders which would deplete the assets of the company concerned and indirectly affect the assets of the related company which has provided security for the liabilities of the company.

Financial Services Branch
Financial Services and the Treasury Bureau
April 2010

Annex A

Judgment on *Waddington Limited vs Chan Chun Hoo Thomas*

[FACV No.15 of 2007]

Extract

Multiple derivative actions

61. So far as the researches of Counsel have been able to discover, there has never been a reasoned decision of a higher court in any common law jurisdiction outside the United States which is determinative of this question. We must decide it as a matter of principle.

62. Such actions have been entertained in England, but in none of them has the plaintiff's right to bring the action been challenged. *Wallersteiner v. Moir* (No.2) (*supra*)itself was such a case. The plaintiff brought two claims, one to recover damages for the company of which he was a member and the other to recover damages for its subsidiary. This fact did not escape the attention of the Court of Appeal, which observed that if damages were recoverable they would be payable in the one case to the company and in the other to the subsidiary. But the plaintiff's right to maintain the action on behalf of the subsidiary was not contested or considered. It seems unlikely that the point escaped the notice of the experienced counsel who conducted the case. It is more probable that they considered that it was unlikely to find favour with Lord Denning. For my part I think he would have given it short shrift.

63. Similar actions have been brought in England since then, but in every case the right to bring the action has been assumed without argument: see *Halle v. Trax*[2000] BCC 1020; *Trumann Investment Group v. Societe GeneralSA* [2002] EWHC 2621; and *Airey v. Cordell*[2006] EWHC 2728. In each of these cases, leave was granted to continue the action, but despite the wording of the rule in force at the relevant time, no point was taken that the plaintiff was not a member of the company in which the cause of action was vested.

64. The only case in which the question whether a multiple derivative action may be maintained has been decided in a common law jurisdiction outside the United States is *Ruralcorp Consulting Pty Ltd v. Pynery Pty Ltd*(1996) 21 ACSR 161 ("Ruralcorp"), a decision of the Senior Master of the state of Victoria. He ruled that it may not. I shall have to return to this decision later.

65. The multiple derivative action has been recognised in many states of the United States, but the legal basis on which the action is maintainable has varied from state to state and from time to time. Many of the grounds upon which the action has been rationalised would not be accepted in either England or Hong Kong. In some cases the subsidiary has been treated as a mere instrument, agent or *alter ego* of the parent company; in others the corporate structure has been described as a fiction or "specious and illusory device" allowing the court to pierce the corporate veil. In the absence of special circumstances it is not permissible to adopt such an approach in Hong Kong. In *Melvin Brown v. Richard Tenney* 532 N.E. 2d 230 (Ill. 1988), the Supreme Court of Illinois analysed the double derivative action as really consisting of two actions, one by the shareholders against the directors of the parent company for breach of their fiduciary duty in failing to bring an action against the wrongdoers, and the other to vindicate a right vested in the subsidiary. The analysis assumes that a director of a company owes fiduciary duties to the shareholders, which appears be the case in Illinois but is not the law in England or Hong Kong.

66. While the United States cases are therefore of little assistance in deciding whether a multiple derivative action is maintainable in Hong Kong, they are helpful in demonstrating that it should be. In Melvin Brown v. Richard Tenney (supra) the Appellate Court of Illinois observed that in the absence of such an action the additional layer in the corporate structure would:

"… prevent the righting of many wrongs and would insulate the wrongdoer from judicial intervention."

In *Holmes v. Camp*(1917) 219 N.Y. 359, the Supreme Court of New York said that :

"The free use of holding companies which has grown up in recent years would prevent the righting of many wrongs if an action like the present might not be maintained by a stockholder of a holding company."

If this was true of New York in 1917 it is certainly no less true of Hong Kong in 2008.

67. But it is not necessary to travel to the United States to appreciate the need for a multiple derivative action to be maintainable. Lord Denning's justification of the derivative action in *Wallersteiner v. Moir* (No.2)(*supra*) applies as well to the case where the wrongdoers, who through their control of the parent company also control its subsidiaries, defraud a subsidiary or sub-subsidiary as it is to the case where they defraud the parent company itself. In either case wrongdoer control precludes action by the company in which the cause of action is vested; and yet

"In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress."

68. In my opinion it is not for the plaintiff to demonstrate that a multiple derivative action is maintainable in Hong Kong but for the appellant to show why it is not.

69. This the appellant has set out to do. His reasons for disallowing the action may be summarised as follows :

(1) The action contravenes fundamental principles of company law and in particular the principles (i) that a company is a separate legal person from its shareholders and (ii) that save in exceptional circumstances which are not alleged in the present case directors owe fiduciary duties to the company alone and not to its shareholders, let alone to the shareholders of its parent company.

(2) A multiple derivative action is in truth two derivative actions, one by the shareholders on behalf of the parent company against the subsidiary for its failure to sue the wrongdoers and the other by the parent company on behalf of the subsidiary against the wrongdoers. But neither action is maintainable, first because the subsidiary owes no duty to its parent company to bring proceedings against the wrongdoers, and secondly because the parent company is in control of the subsidiary and does not need the intervention of its shareholders to enable it to bring such proceedings.

(3) It is well established that only a shareholder can bring a derivative action on behalf of the company of which he is a member. A shareholder in a parent company has no title or interest in and is a stranger to the shares of its subsidiaries. He has no rights in relation to the conduct of the affairs of the subsidiaries or in relation to the manner in which the directors of a subsidiary manage or dispose of its assets.

(4) It is untrue to say that, absent the multiple derivative action, a wrong would be without redress. It is true that in the 19th Century when the derivative action was first developed there was no alternative remedy. But for many years now minority shareholders have had a statutory means of obtaining redress if the affairs of the company are being conducted in a manner prejudicial to their interests. The current provision in England is s.459 of the Companies Act 1985, replacing earlier provisions contained in the Companies Acts of 1948 and 1980. Legislation in Hong Kong has broadly reflected the position in England: for the current provision see s.168A of the Companies Ordinance.

(5) Legislation expressly authorising multiple derivative actions has been introduced in recent years in Australia, New Zealand, Canada and Singapore. Its introduction in Hong Kong should be left to the legislature. It should not be created by the courts, which lack the ability to resolve the many questions which would arise.

70. The first objection is seriously weakened by the fact that other commonwealth countries have all legislated to introduce multiple derivative actions without finding it necessary to make any significant changes to company law to accommodate them. Both the first and second objections depend on the same analysis of the multiple derivative action as two or more derivative actions which have been consolidated into one, as its name implies. But as I indicated at the outset the description, though convenient, is deceptive. The action is a single action on behalf of the company in which the cause of action is vested. The only question is whether the action, which may be brought by a member of the company, may be brought by a member of its parent or ultimate holding company. This is simply a question of *locus standi*.

71. This is the question raised by the third objection, and it lies at the heart of the case. There are numerous dicta in the cases to the effect that only a shareholder may bring a derivative action to enforce a right vested in the company. But most of them are merely *obiter*. Where they have formed the ground for decision, they have to be understood in their context. In every case where the status of the plaintiff has been determinative, the question was whether a former shareholder or a person who was an equitable but not the legal owner of the shares in question could maintain the action: for former shareholders see *Birch v. Sullivan*[1957] 1 WLR 1247 at p.1249 (England); *Dynevor Pty Ltd v. The Proprietors, Centrepoint Building Units Plan* No.4327[1995] QCA 166 (Queensland); *Keaney v. Sullivan*[2007] IEHC 8 at p.19 and *O'Neill v. Ryan*[1993] ILRM 557(Ireland): for equitable owners see *Maas v. McIntosh*(1928) 28 SR (NSW) 441; *Hooker Investments Ltd v. Email Ltd* (1986) 110 ACLR 443 at p.435

(New South Wales). The focus in all these cases was on the character of the plaintiff's shareholding; he must be a current and legal shareholder. The present case is concerned with a different question: the identity of the company of which he must be such a shareholder.

72. The only case in which the question whether a shareholder may maintain a multiple derivative action to enforce the rights of a subsidiary of the company of which he is a member has fallen for decision is *Ruralcorp*(*supra*). The Senior Master gave two grounds for his conclusion that he may not. The first was that the plaintiff was "a stranger" to the company, and "strangers" are not entitled to bring a derivative action. By "stranger", however, the Senior Master meant no more than a person who was not a shareholder, so his statement was not a reason for his conclusion but merely an assertion of it.

73. His second ground, scarcely more convincing than the first, was that equitable owners of shares in a company had no standing to bring a derivative action, and the want of standing of persons who had no legal or equitable interest in the shares was *a fortiori*. But the reason why persons with only an equitable interest in a company's shares cannot bring a derivative action on its behalf is that a company does not recognise or give effect to equitable interests. Such persons are not named in the company's register of members, and their existence let alone their identity is not discoverable from the share register. But the identity of the shareholders of a company's parent company is readily ascertainable by an inspection of the relevant share registers.

74. As I have said, the question is simply a question of the plaintiff's standing to sue. This would have been obvious when the procedure was for the proposed plaintiff to apply to the court for leave to use the company's name. On a question of standing, the court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it. The answer in the case of person wishing to bring a multiple derivative action is plainly "yes". Any depletion of a subsidiary's assets causes indirect loss to its parent company and its shareholders. In either case the loss is merely reflective loss mirroring the loss directly sustained by the subsidiary and as such it is not recoverable by the parent company or its shareholders for the reasons stated in *Johnson v. Gore Wood* (*supra*). But this is a matter of legal policy. It is not because the law does not recognise the loss as a real loss; it is because if creditors are not to be prejudiced the loss must be recouped by the subsidiary and not recovered by its shareholders. It is impossible to understand how a person who has sustained a real albeit reflective loss

which is legally recoverable only by a subsidiary can be said to have no legitimate or sufficient interest to bring proceedings on behalf of the subsidiary.

75. This is not to allow economic interests to prevail over legal rights. The reflective loss which a shareholder suffers if the assets of his company are depleted is recognised by the law even if it is not directly recoverable by him. In the same way the reflective loss which a shareholder suffers if the assets of his company's subsidiary are depleted is recognised loss even if it is not directly recoverable by him. The very same reasons which justify the single derivative action also justify the multiple derivative action. To put the same point another way, if wrongdoers must not be allowed to defraud a parent company with impunity, they must not be allowed to defraud its subsidiary with impunity.

76. The appellant submitted that the plaintiffs in a single derivative action are allowed to bring the proceedings not because they have suffered a reflective loss but because the right to bring such proceedings is an incident of their shareholding. There are two answers to this. In the first place it begs the question, for if shareholders are allowed to bring a multiple derivative action then the right to bring it will be another incident of their shareholding. In the second place, it is necessary to ask why the shareholder's right to bring a derivative action is an incident of his shareholding, and the reason is that he is regarded as having a legitimate and sufficient interest in the relief claimed in the proceedings.

77. The fourth objection is easily disposed of. Shareholders may bring proceedings under s.168A of the Companies Ordinance if the affairs of a subsidiary are being conducted in a manner which is prejudicial to their interests; and for this purpose the affairs of the subsidiary can also be regarded as the affairs of the parent company: see *Re Citybranch Ltd* [2005] 1 WLR 3505. But while there is some overlap between such proceedings and the derivative action they serve essentially different functions. Unfair prejudice proceedings are concerned to bring mismanagement to an end; derivative actions are concerned to provide a remedy for misconduct: see *Re Charnley Davies Ltd* (No.2)[1990] BCLC 760; *Re Chime Corp Ltd*(2004) 7 HKCFAR546. While the court may have jurisdiction in the strict sense on a petition under s.168A to order payment of compensation to the company, the derivative action is the proper vehicle for obtaining such relief where the plaintiff's complaint is of misconduct rather than mismanagement: see *Re Chime Corp Ltd* at p.571.

78. Two other aspects of s.168BA merit consideration. First, while s.168A(2)(a)(ii) enables the court to direct the petitioner to bring a derivative action, it is far from

clear that it can direct him to bring a multiple derivative action; and as at present advised I do not think that it can. Secondly, under s.168A the court may order the minority shareholder to be bought out, and where he has a small shareholding, as the plaintiff has in the present case, that is a course which the Court may well take. There is no reason why a plaintiff who does not want to be bought out should be compelled to invoke a process which may lead to that result.

79. The last objection must also be rejected. Australia, New Zealand, Canada and Singapore have all introduced legislation to require the plaintiff to obtain the leave of the court before instituting or continuing derivative actions, and have taken the opportunity to permit multiple derivative actions where the cause of action is vested in a "related" or "affiliated" company of the company of which the plaintiff is a member. The various statutes have different threshold tests, different approaches to deciding whether the proposed action is in the interests of the company, and different procedures. But it is noticeable that in prescribing such requirements none of the statutes draws any distinction between the single derivative action and the multiple derivative action; and in truth there is no conceivable reason why the procedural and other requirements of the two kinds of action should differ.

80. We have no power to extend the provisions of s.168BC to multiple derivative actions by analogy. We must leave such actions to continue to be governed by the common law, while expressing the hope that the legislature may in due course extend the section to cover them, and perhaps at the same time take the opportunity to consider whether it is really sensible to maintain two parallel regimes with different threshold tests, one requiring leave and the other not.

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Annex B

Annex D to the Administration's response to the issues raised at the first meeting on 23 February (CB(1)1453/09-10(08))

Extract

A. Justification for extending SDA to a member of a related company, in particular to a member of a subsidiary company of a specified corporation

The SDA Provision

2. The Companies Ordinance (CO) was amended in 2004 by the Companies (Amendment) Ordinance 2004 to provide a new SDA procedure. The relevant provisions are contained in Part IVAA which came into operation on 15 July 2005.

3. The SDA provisions allow a member of a Hong Kong or non-Hong Kong company (specified corporation) to bring an action on behalf of the specified corporation in respect of "misfeasance" committed against the specified corporation. "Misfeasance" is defined as "fraud, negligence, default in compliance with any enactment or rule of law, or breach of duty" in section 168BB(2) of the CO.

4. Unlike some of the overseas jurisdictions[1], only members of a specified corporation have the standing under section 168BC(1) of the CO to seek leave to commence a SDA or to intervene in proceedings. This is commonly known as a "simple" derivative action.

The Waddington Case

5. In *Waddington Ltd. v Chan Chun Hoo*[2], the Court of Final Appeal (CFA) affirmed the Court of Appeal's decision that an action by a shareholder of a parent company on behalf of a subsidiary or second or lower tier subsidiary is maintainable under the common law. Such action is commonly referred to as a "multiple" derivative action.

6. Lord Millet NPJ said in the *Waddington* case that it is appropriate

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[1] For example, Australia, New Zealand, Singapore and Canada. Please see paras 11 to 16.

[2] FACV No. 15 of 2007. The writ in this action was issued prior to the commencement of the SDA provisions.

to allow multiple derivative actions for the following reasons :

(a) As a question of standing, the shareholder in the holding company has a legitimate interest in the relief claimed on behalf of the subsidiary sufficient to justify him in bringing proceedings to obtain it. The shareholder's interest is sufficient as he suffers a real loss (albeit an indirect loss) as a result of the depletion of the subsidiary's assets.[3]

(b) If the shareholder is not given standing to commence the proceedings, then there is no possibility of righting the wrongs committed against the subsidiary. In other words, the same rationale for allowing an ordinary derivative action also applies to multiple derivative actions.[4]

The concerns of the CFA were discussed in the context of shareholders in a holding company taking action on behalf of a subsidiary or sub-subsidiary.

7. Perhaps less common, but there could be situations where similar reasons apply in relation to a shareholder of a subsidiary seeking to bring a derivative action on behalf of the holding company. An example is a holding company whose directors are also the only shareholders of the holding company. If those directors misappropriate assets of the holding company, then there might not be any person who could take action against the directors. A depletion of the holding company's assets does not necessarily impact on the subsidiary in the same way that a depletion of the subsidiary's assets would impact detrimentally on the holding company. However, in some situations the subsidiary may be prejudiced by a depletion of the holding company's assets, e.g. where the subsidiary has provided security for the holding company's liabilities. If creditors of the holding company pursue the subsidiary, then the subsidiary and its shareholders are prejudiced at the expense of the wrongdoing directors/controllers of the holding company.

8. The reasons for allowing multiple derivative actions, as identified in paragraph 6 above would also apply to justify giving standing to a shareholder of the subsidiary to bring an action on behalf of the holding company in the circumstances outlined in paragraph 7 above. The shareholders suffer a real loss as a result of the depletion of the holding company's assets, and there may otherwise not be any basis for righting

[3] Paragraph 74 of the judgment.
[4] Paragraphs 66 and 67 of the judgment.

the wrongs committed by the directors/controllers of the holding company. A similar analysis could also be made in relation to a situation where a shareholder in a subsidiary wishes to take action on behalf of another subsidiary of the same holding company.

9. The Administration is of the view that there is a strong argument for extending the CFA's reasoning to justify giving standing to members of related companies, since this situation concerns a wrongdoer controlling the corporate group to the detriment of a shareholder in the group.

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Annex C

Consultation Paper on
Draft Companies Bill – First Phase Consultation
issued on 17 December 2009

Explanatory Note on Part 14 (p.122)

Extract

(c) Allowing a member of an associated company to bring a statutory derivative action on behalf of the company ("multiple derivative action")

Background

9. Statutory derivative action ("SDA") provisions in Part IVAA of the CO allow a member of a company to bring an action or intervene in proceedings on behalf of the company in respect of "misfeasance" committed against the company. "Misfeasance" means fraud, negligence, default in complying with any statutory provision or rule of law or breach of duty. Unlike some comparable jurisdictions[3], only members of the company (vis-à-vis members of a related company of the company) have standing under section 168BC(1) of the CO to seek leave to commence a SDA. In other words, only "simple" derivative actions, as opposed to "multiple" derivative actions, can be brought under the SDA provisions.

10. However, in a recent case *Waddington Ltd v Chan Chun Hoo and Others*[4], both the Court of Appeal and the Court of Final Appeal ruled that a "multiple" derivative action is maintainable in Hong Kong under the common law. The reasons for allowing members to bring a simple derivative action also justify a multiple derivative

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[3] For example, in Australia, provision is made (subject to leave of the court) for proceedings to be brought by a person who is "a member… of the company or of a related body corporate (section 236(1)(a), ACA). New Zealand has taken the same approach under NZCA, section 165(1)(a). In Canada, a complainant bringing a derivative action may be a shareholder of the corporation or any of its affiliates and may sue on behalf of the corporation or any of its subsidiaries (Canadian Business Corporations Act 1985, sections 238 and 239(1)). In Singapore, the immediate members of the corporation and any other person who in the discretion of the court is a proper person may apply for leave to sue on behalf of the relevant company (SCA, section 216A(1)).

[4] [2006] 2 HKLRD 896; (2008) 11 HKCFAR 370.

action, as the wrongdoers' control of both a parent company and its subsidiary can preclude the subsidiary from taking action against the wrongdoers. Giving standing to a member of the parent company to bring an action on behalf of the subsidiary company is appropriate since the member may otherwise suffer a real loss if no action on behalf of the subsidiary is taken. In addition to allowing a multiple derivative action under the common law, the Court of Final Appeal stated that it was appropriate for the CO to be amended to take in "multiple" derivative actions as there was no justification for excluding them from the statutory scheme.[5]

11. Following the *Waddington* case the SCCLR recommended that the SDA provisions in the CO should be expanded to allow a multiple derivative action by a shareholder of a parent company on behalf of a subsidiary or on behalf of a second or lower tier subsidiary.

12. The *Waddington* case was concerned with a multiple derivative action in the context of a parent-subsidiary relationship and the reasoning of the Court of Final Appeal was discussed in that context. The same reasoning can however be applied to situations where a member of a subsidiary seeks to bring a derivative action on behalf of another subsidiary of the same holding company.

13. Based on the SCCLR's recommendation and in order to bring the position of Hong Kong more in line with the legislation of comparable jurisdictions, we propose to extend the scope of the SDA provisions to allow a member of a related company to bring or to intervene in an action on behalf of the company.

Proposal

14. **Clause 14.13** will give standing to members of associated companies[6] and thereby expand the scope of SDA to cover "multiple" derivative actions which would provide a simple and effective mechanism for members of an associated company to commence SDA on behalf of the company. The proposal would

[5] Paragraph 26 of the Court of Final Appeal judgment per Ribeiro PJ.

[6] An "associated company" in relation to a company (which includes both a company incorporated in Hong Kong and a non-Hong Kong company) means any company that is (a) a subsidiary of the company; (b) a holding company of the company; or (c) the subsidiary of such a holding company.

further enhance the protection of the interests of minority shareholders.

15. To expedite implementation of the amendments, the proposal on enabling multiple statutory derivative actions will be incorporated into a Companies (Amendment) Bill scheduled to be introduced into the LegCo in early 2010.

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Part 2F.1A—Proceedings on behalf of a company by members and others

236 Bringing, or intervening in, proceedings on behalf of a company

(1) A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:

(a) the person is:

(i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or

(ii) an officer or former officer of the company; and

(b) the person is acting with leave granted under section 237.

(2) Proceedings brought on behalf of a company must be brought in the company's name.

(3) The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished.

Note 1: For the right to inspect company books, see subsections 247A(3) to (6).

Note 2: For the requirements to disclose proceedings and leave applications in the annual directors' report, see subsections 300(14) and (15).

Note 3: This section does not prevent a person bringing, or intervening in, proceedings on their own behalf in respect of a personal right.

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 in 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.

(3) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that:

(a) the proceedings are:

(i) by the company against a third party; or

(ii) by a third party against the company; and

(b) the company has decided:

(i) not to bring the proceedings; or

(ii) not to defend the proceedings; or

(iii) to discontinue, settle or compromise the proceedings; and

(c) all of the directors who participated in that decision:

(i) acted in good faith for a proper purpose; and

(ii) did not have a material personal interest in the decision; and

(iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and

(iv) rationally believed that the decision was in the best interests of the company.

The director's belief that the decision was in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold.

(4) For the purposes of subsection (3):

(a) a person is a third party if:

(i) the company is a public company and the person is not a related party of the company; or

(ii) the company is not a public company and the person would not be a related party of the company if the company were a public company; and

(b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

Note: ***Related party*** is defined in section 228.

Section 50

50 Related bodies corporate

Where a body corporate is:

(a) a holding company of another body corporate; or

(b) a subsidiary of another body corporate; or

(c) a subsidiary of a holding company of another body corporate;

the first-mentioned body and the other body are related to each other.

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Current version: in force since Apr 20, 2007

Link to the latest version: http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/
Stable link to this version: http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/31395/
Currency: Last updated from the Justice Laws Web Site on 2010-03-23

Canada Business Corporations Act

C-44

C-44

An Act respecting Canadian business corporations

SHORT TITLE

Short title

1. This Act may be cited as the *Canada Business Corporations Act*.

R.S., 1985, c. C-44, s. 1; 1994, c. 24, s. 1(F).

PART I

INTERPRETATION AND APPLICATION

INTERPRETATION

Definitions

2. (1) In this Act,

"affairs"
« affaires internes »

"affairs" means the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate;

"affiliate"
« groupe »

"affiliate" means an affiliated body corporate within the meaning of subsection (2);

"articles"
« statuts »

"articles" means the original or restated articles of incorporation, articles of amendment, articles of amalgamation, articles of continuance, articles of reorganization, articles of arrangement, articles of dissolution, articles of revival and includes any amendments thereto;

"associate"
« liens »

"squeeze-out transaction" means a transaction by a corporation that is not a distributing corporation that would require an amendment to its articles and would, directly or indirectly, result in the interest of a holder of shares of a class of the corporation being terminated without the consent of the holder, and without substituting an interest of equivalent value in shares issued by the corporation, which shares have equal or greater rights and privileges than the shares of the affected class;

"unanimous shareholder agreement"
« convention unanime des actionnaires »

"unanimous shareholder agreement" means an agreement described in subsection 146(1) or a declaration of a shareholder described in subsection 146(2).

Affiliated bodies corporate

(2) For the purposes of this Act,

(*a*) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person; and

(*b*) if two bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.

Control

(3) For the purposes of this Act, a body corporate is controlled by a person or by two or more bodies corporate if

(*a*) securities of the body corporate to which are attached more than fifty per cent of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those bodies corporate; and

(*b*) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

Holding body corporate

(4) A body corporate is the holding body corporate of another if that other body corporate is its subsidiary.

Subsidiary body corporate

(5) A body corporate is a subsidiary of another body corporate if

(*a*) it is controlled by

(i) that other body corporate,

(ii) that other body corporate and one or more bodies corporate each of which is controlled by that other body corporate, or

(iii) two or more bodies corporate each of which is controlled by that other body corporate; or

(*b*) it is a subsidiary of a body corporate that is a subsidiary of that other body corporate.

Exemptions — on application by corporation

(6) On the application of a corporation, the Director may determine that the corporation is not or was not a distributing corporation if the Director is satisfied that the determination would not be prejudicial to the public interest.

Exemptions — classes of corporations

(7) The Director may determine that a class of corporations are not or were not distributing corporations if the Director is satisfied that the determination would not be prejudicial to the public interest.

Infants

(8) For the purposes of this Act, the word "infant" has the same meaning as in the applicable provincial law and, in the absence of any such law, has the same meaning as the word "child" in the United Nations Convention on the Rights of the Child, adopted in the United Nations General Assembly on November 20, 1989.

R.S., 1985, c. C-44, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 6; 1992, c. 51, s. 30; 1994, c. 24, s. 2; 1998, c. 30, ss. 13(F), 15(E); 1999, c. 3, s. 16; 2000, c. 12, s.

PART XX

REMEDIES, OFFENCES AND PUNISHMENT

Definitions

238. In this Part,

"action"
« action »

"action" means an action under this Act;

"complainant"
« plaignant »

"complainant" means

(*a*) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(*b*) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(*c*) the Director, or

(*d*) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

1974-75-76, c. 33, s. 231.

Commencing derivative action

239. (1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

Conditions precedent

(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that

(*a*) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;

(*b*) the complainant is acting in good faith; and

(*c*) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

R.S., 1985, c. C-44, s. 239; 2001, c. 14, s. 116.

New Zealand

Companies Act 1993

Derivative Actions

SECTION 165 DERIVATIVE ACTIONS

165(1) [Powers of Court] Subject to subsection (3) of this section, the Court may, on the application of a shareholder or director of a company, grant leave to that shareholder or director to—

(a) Bring proceedings in the name and on behalf of the company or any related company; or

(b) Intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or related company, as the case may be.

165(2) [Matters Court must consider] Without limiting subsection (1) of this section, in determining whether to grant leave under that subsection, the Court shall have regard to—

(a) The likelihood of the proceedings succeeding:

(b) The costs of the proceedings in relation to the relief likely to be obtained:

(c) Any action already taken by the company or related company to obtain relief:

(d) The interests of the company or related company in the proceedings being commenced, continued, defended, or discontinued, as the case may be.

165(3) [Rules for granting leave] Leave to bring proceedings or intervene in proceedings may be granted under subsection (1) of this section only if the Court is satisfied that either—

(a) The company or related company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or

(b) It is in the interests of the company or related company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.

165(4) [Notice] Notice of the application must be served on the company or related company.

165(5) [Duty to inform Court] The company or related company—

(a) May appear and be heard; and

(b) Must inform the Court, whether or not it intends to bring, continue, defend, or discontinue the proceedings, as the case may be.

165(6) [Restrictions on shareholders' power] Except as provided in this section, a shareholder is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or a related company.

2(3) **[Related companies]** In this Act, a company is related to another company if—

(a) The other company is its holding company or subsidiary; or

(b) More than half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, is held by the other company and companies related to that other company (whether directly or indirectly, but other than in a fiduciary capacity); or

(c) More than half of the issued shares, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, of each of them is held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or

(d) The businesses of the companies have been so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable; or

(e) There is another company to which both companies are related;—

and "related company" has a corresponding meaning.

History: S 2(3) amended by No 24 of 2004, s 3, by replacing in para (b) "capital" with "capital,"; **effective 15 April 2004.**

Singapore

Companies Act 1994

216A Derivative or representative actions

(1) In this section and section 216B –

"company" means a company other than a company that is listed on the stock exchange in Singapore;

"complainant" means –

(a) any member of a company;

(b) the Minister, in the case of a declared company under Part IX; or

(c) any other person who, in the discretion of the Court, is a proper person to make an application under this section.

(2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action in the name and on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

(3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that –

(a) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant is acting in good faith; and

(c) it appears to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued.

(4) Where a complainant on an application can establish to the satisfaction of the Court that it is not expedient to give notice as required in subsection (3)*(a)*, the Court may make such interim order as it thinks fit pending the complainant giving notice as required.

(5) In granting leave under this section, the Court may make such orders or interim orders as it thinks fit in the interests of justice, including (but not limited to) the following :

(a) an order authorising the complainant or any other person to control the

conduct of the action;

(b) an order giving directions for the conduct of the action; and

(c) an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action.

(6) Where the action has been commenced or is to be brought in the subordinate courts, an application for leave under subsection (2) shall be made in a District Court.

Annex E

Australian Case Law on "Multiple" Statutory Derivative Actions (SDA)

1. The Australian case law is most relevant as our proposed amendments to the SDA provisions are similar to the provisions in the Australia Corporation Act 2001 (ACA). Section 236(1)(a)(i) and section 237 of the ACA state that a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate may apply to the court for leave to bring a derivative action.

2. There are few cases on multiple SDA. The research result does not reveal any case in which the applicant is a shareholder in a subsidiary company seeking leave to commence action on behalf of its holding company. Nevertheless, there is a case, namely *Goozee v Graphic World Group Holdings Pty Ltd* (2002) 42 ACSR 534, the judgment of which contained discussions on multiple SDA.

3. In the *Goozee* case, an application was brought by members of a holding company. The court dismissed the application for leave and held that :-

   (a) In relation to the corporate defendants, the plaintiffs were members of the company and members of a related body corporate within the meaning of section 236(1)(a) and therefore have standing to seek leave to commence proceedings under section 237.

   (b) On the evidence available, the plaintiffs have failed to demonstrate that :-

      - There was a serious question to be tried, as required by section 237(2)(d), in relation to a claim by the holding company that the affairs of the subsidiary have been conducted oppressively.

      - The applications were in good faith as required under section 237(2)(b).

- The derivative actions were in the best interest of the putative plaintiff, i.e. the first defendant, as is required by section 237(2)(c).

4. Paragraphs 12 to 22 of the judgment discussed the standing of a member of a related body corporate as an applicant within the meaning of section 236(1)(a)(i). Barrett J. stated in paragraph 22 that "The remoteness of the plaintiffs' position from each company on behalf of which they would sue (being members of its holding company, in some instances several places removed) does not affect the standing afforded to the plaintiffs by the Act, but it may affect other aspects of their application.".

5. Relevant extract from the case report including the aforesaid paragraphs 12 to 22 is at **Appendix**.

170 FLR 451

Law Report Image (PDF)

2002 WL 1654652 (NSWSC), 20 ACLC 1,502, 42 ACSR 534, 170 FLR 451, [2002] NSWSC 640
42 ACSR 534; 20 ACLC 1,502; 2002 WL 1654652; [2002] NSWSC 640

Goozee v Graphic World Holdings Pty Ltd
Barrett J

15 July 2002, 25 July 2002

Corporations - Derivative actions - Application for leave to commence action on behalf of a corporation - Whether plaintiffs had standing to make the application - Proposed action for relief against oppressive conduct of subsidiary companies - Whether criteria for leave satisfied - Whether a serious question to be tried - Whether sole shareholder can be a plaintiff seeking relief from oppression - Whether prospective proceedings brought in good faith - Whether prospective proceedings in the best interests of the corporation - Corporations Act 2001 (Cth), ss 232, 236(1)(a), 237(2)

The plaintiffs were shareholders in the first defendant. The second defendant was the majority shareholder of the first defendant. The other defendants were wholly-owned subsidiaries of the first defendant with whom they operated as a group in the printing industry. The plaintiffs, in the primary proceedings, sought declarations that the affairs of the first defendant were conducted oppressively and against the interests of its members pursuant to s 232 of the Corporations Act 2001 (Cth) (the Act). By interlocutory application the plaintiffs sought leave pursuant to s 237 of the Act to commence derivative proceedings on behalf of the first defendant against the other corporate defendants for orders under s 233 winding up these wholly owned subsidiary companies on grounds of oppression. Section 236(1)(a) of the Act provided that a person could bring proceedings on behalf of a company where he or she was a member of the company or a related body corporate. The grounds for oppression were that the defendants had adopted a policy of not declaring dividends despite substantial profits, and instead operated a "bonus pool" fund for distribution to employees at the discretion of the directors of the corporate defendants.

Held, dismissing the application for leave: (1) In relation to the corporate defendants the plaintiffs are members or members of a related body corporate within the meaning of s 236(1)(a) and therefore have standing to seek leave to commence proceedings under s 237.

(2) The Court must grant leave to a party to commence derivative proceedings if the party satisfies all the criteria set out in s 237(2), but otherwise will refuse leave.

RTP Holdings Pty Ltd v Roberts (2000) 36 ACSR 170; Jeans v Deangrove Pty Ltd [2001] NSWSC 84, applied.

(3) It is no bar to seeking leave under s 237 that the purported victim seeking relief under s 232 in derivative proceeding is the sole member of the company. A sole shareholder can be a complainant under s 232 because the statutory norms of conduct by reference to which that section operates has a

wholly objective content independent of the identity and will of the shareholder for the time being.

Wayde v NSW Rugby League Ltd (1985) 180 CLR 459; Reid v Bagot Well Pastoral Co Pty Ltd (1993) 61 SASR 165, followed. *452

(4) On the evidence available it is impossible to assess that any of the wholly owned subsidiaries of the first defendant had failed to pay dividends in accordance with "properly exercised commercial judgments". The plaintiffs have therefore failed to demonstrate that there is a serious question to be tried, as required by s 237(2)(d), in relation to a claim by the holding company that the affairs of the subsidiary have been conducted oppressively.

Re Sam Weller Ltd [1990] 1 Ch 682; Re D G Brims and Sons Pty Ltd (1995) 16 ACSR 559, applied.

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, followed.

(5) Nor have the plaintiffs demonstrated that their applications in good faith as required under s 237(2)(b), because the lack of a serious question to be tried means they cannot reasonably believe that the holding company has a good cause of action under s 232, and the proposed derivative actions are intended as a means of persuading the other shareholders of the first defendant to procure payment of dividends, which is a collateral purpose amounting to an abuse of process.

Swansson v R A Pratt Properties Pty Ltd (2002) 42 ACSR 313, applied.

(6) Nor are the proposed derivative actions in the best interests of the putative plaintiff, the first defendant as is required by s 237(2)(c), as they are intended to result in its subsidiaries being wound up.

Application

This was an application under s 237 of the Corporations Act for leave to commence proceedings on behalf of the first defendant and others as derivative actions for relief under s 232 of the Act. The facts appeal sufficiently from the judgment of the Court.

C R Newlinds, for the plaintiffs.
M Einfeld, for the defendants.

Cur adv vult

25 July 2002

Barrett J.

Introduction

1 The present application, initiated by the plaintiffs' interlocutory process filed on 28 May 2002, is founded on Pt 2F.1A (ss 236-242) of the Corporations Act 2001 (Cth), entitled "Proceedings on behalf of a company by members and others", which regulates the statutory derivative action procedure introduced by the Corporate Law Economic Reform Program Act 1999 (Cth) with effect from 13 March 2000.

2 The plaintiffs seek, pursuant to s 237, leave to initiate proceedings on behalf of several companies. Their application for leave is best understood in the context of a description of the principal proceedings and the parties to them.

Parties and corporate structure

3 The first plaintiff (Mr Goozee) and the second plaintiff, his wife (Mrs Goozee), are two of the four shareholders in the first defendant (Graphic). The other two shareholders in Graphic are the second defendant (Mr Hoolahan) and a Mr Thomas who is not a party to the proceedings. Mr Goozee holds some 14.7 per cent of the shares in Graphic, Mrs Goozee holds some 2.11 per cent, Mr Thomas holds about 13.33 per cent and Mr Hoolahan holds the remaining *453 69.86 per cent. The constitution of Graphic is in evidence. It shows that the share capital is not divided into classes and that no distinctions are drawn between the shares held by the several shareholders.

4 Until Mr Goozee's recent departure, the board of directors of Graphic consisted of Mr Hoolahan, Mr Goozee, Mr Thomas and a non-shareholder, Mr Parker. Mr Hoolahan is the managing director and also acts as chairman at board meetings, although whether he holds a formal and ongoing appointment as chairman is

not shown by the evidence and is beside the point for present purposes. All the directors were employed in the group's business, together with other employees.

5 Graphic has several subsidiaries. It holds all the shares in the third defendant (Pyomon), the fourth defendant (Bentley), the fifth defendant (Keyset), the sixth defendant (Eroimount) and the seventh defendant (Toveheld). Two of these directly and wholly owned subsidiaries of Graphic themselves have directly and wholly owned subsidiaries: Bentley holds all the shares in the ninth defendant (Jem-K) and Eroimount holds all the shares in the 10th defendant (Art Etc). Art Etc, in turn, holds all the shares in each of the 11th defendant (Les Baddock), the 12th defendant (Baddock & Sons) and the 13th defendant (Trade Ruling). There is nothing to suggest that shares held are not also beneficially owned.

6 The position may be more readily gathered from the following diagram in which all connecting lines (except those between the four individual shareholders and Graphic) denote both holding and beneficial ownership of all shares issued.

7 It is necessary to mention also the eighth defendant (Double Pay) which stands apart from the structure depicted in the diagram. The shares in Double *454 Pay are held as to 40 per cent by Mr Hoolahan, 24 per cent by Mr Goozee, 16 per cent by Mr Thomas and 20 per cent by Pyomon.

8 The several companies to which I have referred operate as a group and carry on business in the printing industry. There is no evidence about the separate operations of the individual companies or about their respective financial positions, except that Pyomon is the employer of the group's workforce and that, as a group, the companies have operated profitably for several years. Mr Googee was, until recently, an employee of Pyomon. As I have already noted, the three continuing directors are employees and there are also non-director employees.

The substantive proceedings

9 By their originating process filed on 28 May 2002, the plaintiffs seek as principal relief declarations that the affairs of Graphic and Double Pay, being the two companies in which they are shareholders, are being conducted in a manner that is oppressive or unfairly prejudicial to or unfairly discriminatory against the plaintiffs as members, or in a manner that is contrary to the interests of the members as a whole, these being claims based on s 232 of the Corporations Act. The plaintiffs also seek orders that Graphic, Pyomon, Bentley, Keyset, Eroimount, Toveheld, Double Pay, Jem-K, Art Etc, Les Baddock, Baddock & Sons and Trade Ruling - in other words, all of the companies in the corporate group - be wound up pursuant to s 233(1)(a).

10 As adjuncts to this, there are several claims for leave to initiate proceedings on behalf of Graphic and the other holding companies within the group. In each such proceeding, the plaintiffs would assert on the relevant holding company's behalf a claim for relief based on conduct caught by s 232 in the affairs of a subsidiary directly and wholly owned by that holding company. The relief claimed in each instance would be an order that the subsidiary be wound up.

11 The central allegation, therefore, is that conduct of the affairs of each company shown on the diagram is "contrary to the interests of the members as a whole" or "oppressive to, unfairly prejudicial to or discriminatory against, a member or members". I have used here the words found in s 232, including the plural "members". In the case of all but two of the companies concerned (the exceptions being Graphic and Double Pay), there is only one member. I shall come presently to the question how the statutory formulations apply in such a case.

The present application

12 By the interlocutory process presently before the Court, the plaintiffs seek, under Pt 2F.1A (or, more precisely, s 237), the leave to which I have referred, that is, leave to bring proceedings on behalf of Graphic and each other immediate holding company in the group depicted in the above diagram seeking the winding up of the holding company's wholly and directly owned subsidiary (or each of its wholly and directly owned subsidiaries) on the grounds of oppression, unfair prejudice or unfair discrimination in relation to the affairs of the subsidiary, or conduct in those affairs inconsistent with the interests of the members as a whole.

13 There is thus a claim by the plaintiffs, in relation to each such holding company (that is, Graphic, Bentley, Eroimount and Art Etc), that they should be allowed to act for it in pursuing a claim to an order for winding up in respect *455 of conduct in relation to the affairs of the company of which it is the sole member falling within the oppressive and related specifications.

14 According to the interlocutory process, the various winding up orders would be sought under s 233(1)(a).

Standing

15 The question of standing must be approached at two levels. First, there is the question of who has standing to invoke s 232 and to seek winding up orders under s 233(1)(a) in relation to a particular company because of conduct related to the affairs of that company. Secondly and where the person having such standing is itself a company, there is the question of who is competent to apply for authority to activate that company through Pt 2F.1A derivative action to seek such orders.

16 The first question must be approached by reference to s 234 which identifies the persons who may apply for an order under s 233 in relation to a company. Basically, the competent applicants are a present member of that company, a transmittee of shares in that company, certain past members of that company and a person identified in a particular way by ASIC.

17 In relation to the affairs of each company presently relevant (that is, each on the above diagram except Graphic itself), any claim for s 233 relief must therefore be made by the company shown as holding all the shares in that company. In each of five cases, the plaintiff must be Graphic, in a sixth case (Jem-K) it must be Bentley, in a seventh case (Art Etc) it must be Eroimount and in each of the remaining three cases (Les Baddock, Baddock & Sons and Trade Ruling) it must be Art Etc.

18 If each appropriate plaintiff company to which I have just referred is to be activated by the plaintiffs pursuant to leave granted under s 237, it must first appear that they stand in such a relationship to that plaintiff company as to entitle them to be applicants for such leave. This is the second of the issues about standing.

19 **Section 236(1)** is in the following terms:

> "A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:
>
> (a) the person is:
>
> (i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or
>
> (ii) an officer or former officer of the company; and
>
> (b) the person is acting with leave granted under section 237."

20 Under this provision, leave to sue on behalf of a particular company is not to be given to a person who does not occupy, in relation to that company, a position described in s **236(1)**(a)(i). I read the provision this way because it would be, I think, an odd and unintended result that the court should embark upon the s 237 inquiry in relation to a particular cause of action on the company's behalf asserted by a person who, even if leave were granted, would not be allowed by s 236 to pursue the company's claim based on the cause of action.***456***

21 The plaintiffs, being members of Graphic, occupy in relation to each of the other companies on the above diagram a position contemplated by s **236(1)**(a)(i). Having regard to the definitions of "related body corporate" and "holding company" in s 9 and to the provisions in Div 6 of Pt 1.2, Graphic is a "related body corporate" of each of the other companies depicted. Each of the plaintiffs is accordingly, in relation to each of those other companies, "a member... of a related body corporate", being Graphic.

22 It follows that the court may, under s 237, grant leave to the plaintiffs to initiate proceedings based on s 232 on behalf of each potential plaintiff company mentioned at [17] above in respect of conduct in relation to the affairs of the company standing immediately beneath that plaintiff company in the diagram. The remoteness of the plaintiffs' position from each company on behalf of which they would sue (being members of its holding company, in some instances several places removed) does not affect the standing afforded to the plaintiffs by the Act, but it may affect other aspects of their application.

The causes of action to be asserted in the derivative actions

23 The cause of action the plaintiffs wish to see each of Graphic, Bentley, Eroimount and Art Etc pursue is based on the proposition that adoption and implementation of certain financial policies within the subsidiary (or each subsidiary) wholly owned by that plaintiff amounts to conduct in the affairs of that subsidiary within the purview of s 232. The identical cause of action is asserted directly by the plaintiffs, as members, in relation to the affairs of Graphic and Double Pay. The nature of their complaints may conveniently be