

**立法會**  
**Legislative Council**

LC Paper No. CB(1)970/03-04  
(These minutes have been seen  
by the Administration)

Ref: CB1/BC/18/02

**Bills Committee on Companies (Amendment) Bill 2003**

**Minutes of the eleventh meeting  
held on Thursday, 29 January 2004, at 10:45 am  
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Audrey EU Yuet-mee, SC, JP (Chairman)  
Hon Albert HO Chun-yan  
Dr Hon Eric LI Ka-cheung, GBS, JP  
Hon CHAN Kam-lam, JP  
Dr Hon Philip WONG Yu-hong, GBS  
Hon Emily LAU Wai-hing, JP  
Hon Henry WU King-cheong, BBS, JP
- Non-Bills Committee Member  
Hon Miriam LAU Kin-yee, JP
- Members absent** : Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP  
Hon SIN Chung-kai
- Public officers attending** : Financial Services and the Treasury Bureau
- Ms Shirley LAM  
Principal Assistant Secretary for Financial Services and  
the Treasury (Financial Services) 4
- Mr Arthur AU  
Assistant Secretary for Financial Services and  
the Treasury (Financial Services) (4) 1

Companies Registry

Mr G W E JONES  
Registrar of Companies

Mr Edward LAU  
Secretary, Standing Committee on  
Company Law Reform

Department of Justice

Mr Allen LAI  
Senior Government Counsel

**Clerk in attendance** : Ms Anita SIT  
Chief Council Secretary (1)6

**Staff in attendance** : Miss Monna LAI  
Assistant Legal Adviser 7

Mr Matthew LOO  
Senior Council Secretary (1)3

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**I Confirmation of minutes of meeting**

LC Paper No. CB(1)870/03-04 - Minutes of meeting on 8 January  
2004

The minutes of the meeting held on 8 January 2004 were confirmed.

**II Meeting with the Administration**

LC Paper No. CB(1)2504/02-03(01) - Submission dated 22 September 2003  
from the Chinese General Chamber of  
Commerce

- LC Paper No. CB(1)2521/02-03 (03) - Administration's response to written submissions from the Association of International Accountants, the Chinese General Chamber of Commerce and the Stock Exchange of Hong Kong Limited
- LC Paper No. CB(1)2504/02-03(04) - Submission dated 5 September 2003 from Consumer Council
- LC Paper No. CB(1)2521/02-03(04) - Administration's response to written submission from Consumer Council
- LC Paper No. CB(1)2504/02-03 (05) - Submission dated 16 September 2003 from Office of the Privacy Commissioner for Personal Data, Hong Kong
- LC Paper No. CB(1)2521/02-03 (05) - Administration's response to written submission from Office of the Privacy Commissioner for Personal Data, Hong Kong
- LC Paper No. CB(1)2504/02-03 (11) - Submission dated 22 September 2003 from Linklaters
- LC Paper No. CB(1)798/03-04 (01) - Administration's response to written submission from Linklaters
- LC Paper No. CB(1)2504/02-03(12) - Submission dated 22 September 2003 from the Stock Exchange of Hong Kong Limited
- LC Paper No. CB(1)2504/02-03 (13) - Submission dated 22 September 2003 from the Hong Kong Institute of Company Secretaries
- LC Paper No. CB(1)798/03-04 (02) - Administration's response to written submission from the Hong Kong Institute of Company Secretaries
- LC Paper No. CB(1)2521/02-03 (01) - Submission dated 25 September 2003 from the Hong Kong Chinese Enterprises Association

- LC Paper No. CB(1)2521/02-03(02) - Submission dated 25 September 2003 from School of Business, Hong Kong Baptist University
- LC Paper No. CB(1)798/03-04 (03) - Administration's response to written submission from School of Business, Hong Kong Baptist University
- LC Paper No. CB(1)185/03-04 (01) - Submission dated 27 October 2003 from Hong Kong Society of Accountants
- LC Paper No. CB(1)798/03-04 (04) - Administration's response to written submission from Hong Kong Society of Accountants
- LC Paper No. CB(1)217/03-04 (01) - Submission dated 21 October 2003 from Hong Kong Small and Medium Enterprises Association
- LC Paper No. CB(1)798/03-04 (05) - Administration's response to written submission from Hong Kong Small and Medium Enterprises Association
- LC Paper No. CB(1)786/03-04 (01) - Submission dated 12 January 2004 from Mr Winston POON, SC, Mr Godfrey LAM, Barrister, Ms Linda CHAN, Barrister
- LC Paper No. CB(1)2425/02-03 (01) - Letter dated 29 August 2003 from Assistant Legal Adviser 7 (ALA7) to the Administration on Schedule 4 of the Bill
- LC Paper No. CB(1)849/03-04 (01) - Administration's response dated 17 January 2004
- LC Paper No. CB(1)798/03-04 (06) - Administration's paper on follow-up actions arising from the discussion at the meeting on 2 October 2003 on Schedule 4
- LC Paper No. CB(1)798/03-04 (07) - Administration's paper on international comparisons of shareholders' remedies

LC Paper No. CB(1)871/03-04 (01) - Summary of written submissions and the Administration's response on Schedule 4 of the Bill (Position as at 28 January 2004)

LC Paper No. CB(1)871/03-04 (02) - List of issues requiring follow-up actions by the Administration (Position as at 28 January 2004)

2. The Bills Committee noted that the meeting would be dedicated to the scrutiny of Schedule 4 of the Bill (Amendments relating to shareholders' remedies).

3. The Administration undertook to provide information on the following matters -

(a) the meaning of "proper purpose having regard to the interests of both the relevant specified corporation and the applicant" under proposed section 152FA(2)(b); and

(b) precedent cases in Australia and other jurisdictions, if any, to illustrate the meaning of "proper purpose" under proposed section 152FA(2)(b).

### **III Any other business**

#### Additional meetings in February

4. Members noted that the following timeslots had been reserved for additional meetings of the Bills Committee for the scrutiny of Schedule 4 (Amendments relating to shareholders' remedies) of the Bill -

<b><u>Date</u></b>	<b><u>Time</u></b>
Thursday, 5 February 2004	8:30 am - 10:30 am
Thursday, 12 February 2004	10:45 am - 12:45 pm
Friday, 20 February 2004	10:45 am - 12:45 pm
Thursday, 26 February 2004	10:45 am - 12:45 pm
Saturday, 28 February 2004	9:30 am - 11:30 am

*(Post-meeting note: Notice of the meetings to be held in February was issued to members vide LC Paper No. CB(1)899/03-04 dated 30 January 2004.)*

Date of next meeting

5. Members noted that the next meeting would be held on Thursday, 5 February 2004 at 8:30 am. The Bills Committee will continue to scrutinize Schedule 4 of the Bill (Amendments relating to shareholders' remedies) at the next meeting.
6. There being no other business, the meeting ended at 12:55 pm.
7. The index of proceedings of the meeting is at **Appendix**.

Council Business Division 1  
Legislative Council Secretariat  
11 February 2004

**Proceedings of the meeting of the  
Bills Committee on Companies (Amendment) Bill 2003**

**11th meeting on Thursday, 29 January 2004, at 10:45 am  
in Conference Room B of the Legislative Council Building**

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
000000 - 000400	Chairman	Confirmation of minutes of meeting on 8 January 2004 Welcoming and introductory remarks The Bills Committee started to scrutinize Schedule 4 of the Bill.	
000401 - 000632	Chairman Administration	Briefing by the Administration on Schedule 4 of the Bill	
000633 - 001000	Chairman Ms Miriam LAU	Ms Miriam LAU supported in principle the proposed amendments relating to shareholders' remedies, but she was concerned about the details of the proposed amendments. For example, the amendments relating to the inspection of a specified corporation's records by a member might go too far in terms of "who may apply" for an order for inspection and the scope of "records" which a member of a specified corporation might seek to inspect.  Relevant arrangements in other jurisdictions <i>[CB(1)798/03-04 (07)]</i>	

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
001001 - 004222	Chairman Mr Albert HO Ms Miriam LAU Administration ALA7	<p>Administration explained the reasons for introducing statutory derivative action in the Bill</p> <p>ALA7 highlighted that the term "derivative action" was not used in the Bill. Instead, the title of new Part IVAA was "Bringing or intervening in proceedings on behalf of specified corporation". ALA7 commented that the effect of the provisions in new Part IVAA might go beyond the scope of "derivative action" under common law.</p> <p>ALA7 explained the existing arrangement in the United Kingdom (UK) that although there was no statutory derivation action in UK, the Civil Procedural Rules which took effect in 2000 provided a definition of "derivative claim" and set out the relevant procedures, which included the requirement to seek permission from the court to continue proceedings on the derivative claim, and the court's power to make orders as to costs.</p> <p>Mr Albert HO highlighted the importance of early determination as to whether the claimant would be indemnified of the costs of proceedings.</p> <p>ALA7 advised that the Civil Procedural Rules in UK did not prescribe the timing of the court's order as to costs of proceedings.</p>	



Time marker	Speaker	Subject(s)	Action required
001001 - 004222 (Cont'd)		<p>Administration responded that the power of court to make orders, at any time, as to costs of proceedings was explicitly provided under <b>proposed section 168BG(1)</b>. <b>Proposed section 168BG(3)</b> specified the conditions under which the court might make an order as to costs in favour of the member instigating the derivation action. The reasons for not requiring a preliminary hearing were that currently, there was no requirement in Hong Kong for a preliminary hearing to be held to determine the standing of the plaintiff in a derivative action (referring to comments of Godfrey JA as set out in footnote 4 in CB(1)849/03-04(01)), and that there should not be "a trial within a trial" to determine the standing of the plaintiff, as pointed out by the Standing Committee on Company Law Reform (SCCLR).</p> <p>Ms Miriam LAU pointed out that the comments of Godfrey JA might in fact point to the need for the trial of a preliminary issue of whether the plaintiff ought to be allowed to maintain a derivative action at all. Ms LAU also raised concern that the "no leave" arrangement for a member of a specified corporation to bring or intervene in proceedings under <b>proposed section 168BB</b> might result in undue burden on companies to handle unreasonable claims.</p> <p>Administration responded that it would consider whether certain criteria should be specified in the law.</p>	

Time marker	Speaker	Subject(s)	Action required
001001 - 004222 <i>(Cont'd)</i>		<p>ALA7 advised that under the Civil Procedural Rules in UK, there were no specified conditions to limit the court's power to make an order as to the costs of proceedings for derivative actions.</p> <p>Mr Albert HO suggested that, with reference to the relevant arrangements in UK, the Administration should consider the need to provide for preliminary hearing to ensure early determination of (a) whether a derivative claim was properly instigated and thus the proceedings should continue; and (b) indemnification of costs of proceedings.</p>	
004223 - 004540	Chairman Administration	<p>For the background to the proposed provisions on statutory derivative action, the Secretary, SCCLR, referred members to the conclusions and recommendation on statutory derivative action made in the "Report of SCCLR on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance (February 2000)".</p> <p><i>(An extract of the report is at Annex.)</i></p>	
004541 - 004952	Chairman Administration Ms Miriam LAU	<p>Ms Miriam LAU echoed Mr Albert HO's suggestion.</p> <p>The Chairman highlighted the need to strike a proper balance between shareholders' rights to take derivative actions and burdens arising from these actions on the companies concerned.</p>	

Time marker	Speaker	Subject(s)	Action required
004953 - 005006	Chairman	Administration's response to written submission relating to Schedule 4 of the Bill <i>[CB(1)871/03-04(01)]</i>  Administration's response to Stock Exchange of Hong Kong Limited's general comments on Schedule 4 of the Bill	
005007 - 005543	Chairman Administration Ms Miriam LAU ALA7	Administration's response to Linklaters' general comments on Schedule 4 of the Bill  The term "oversea company" would be replaced by "non-Hong Kong" in the proposed amendment under Schedule 3 of the Bill	
005544 - 005639	Chairman Administration	Administration's response to general comments on Schedule 4 of the Bill from Chinese General Chamber of Commerce, Hong Kong Institute of Company Secretaries and Hong Kong Chinese Enterprises Association	
005640 - 005651	Chairman	<u>Clause 3 - Inspection of specified corporations' records by members</u> Administration's response to the concern of the Office of the Privacy Commissioner for Personal Data, Hong Kong	
005652 - 005705	Chairman	<u>Clause 3 - Inspection of specified corporations' records by members</u> Administration's response to the concern of Linklaters and Hong Kong Small and Medium Enterprises Association	

Time marker	Speaker	Subject(s)	Action required
005706 - 013727	<p>Chairman Ms Miriam LAU Administration ALA7 Mr Albert HO</p>	<p>Comparison with corresponding provisions in Australia, UK and Singapore <i>[CB(1)798/03-04(07)]</i></p> <p>Criteria used by the court to make the order of inspection.</p> <p>Whether there was a need to specify the purposes for which the application for inspection of records should be made.</p> <p>Whether there was a need to specify a minimum shareholding requirement to deter abuses of the proposed order for inspection arrangement under <b>proposed section 152FA</b>.</p> <p>Chairman highlighted that costs incurred to comply with an order for inspection might cause substantial burden on the company concerned.</p> <p>ALA7 advised that there were provisions in the existing Companies Ordinance (Cap. 32) governing the rights of shareholders' access to records of a company. <b>Section 142</b> (<i>Investigation of the affairs of a company on application of members</i>) provided that the Financial Secretary might appoint inspectors to investigate the affairs of a company, and the company concerned should produce records. There was a minimum shareholding requirement under <b>section 142</b> for a member to apply for investigation of the affairs of a company. Under <b>section 152A</b> (<i>Power of Financial Secretary to require production of documents</i>), the Financial Secretary might give directions to a company requiring it to produce books or papers if it appeared to the Financial Secretary that there was good reason to do so.</p>	<p>Administration to take the follow up action set out in paragraph 3 of the minutes</p>

Time marker	Speaker	Subject(s)	Action required
005706 - 013727 (Cont'd)		<p>Administration explained that the Financial Secretary's exercise of powers on inspection of a company's records under the existing CO was subject to the consideration of whether public interest was at issue. The proposed new provisions on inspection of records were aimed at enabling a member of a specified corporation to apply for inspection of records in circumstances where public interest might not be at issue.</p> <p>Members expressed concern about the criteria used by the court for making an order under proposed <b>section 152FA(2)</b> and sought precedent cases to illustrate what had been regarded as "proper purposes" and "not proper purposes" by the court.</p>	

Time marker	Speaker	Subject(s)	Action required
013728 - 015300	Chairman Administration Mr Albert HO  ALA7	ALA7 commented on the Administration's response to the issue of contractual or common law liabilities arising from the disclosure of information under the proposed <b>sections 152FA and 152FC</b> . [ <i>CB(1)798/03-04(06) and CB(1)849/03-04(01)</i> ] Under common law, the court would normally respect the freedom to contract of the parties to contract and uphold the agreement reached by the parties, unless the issues of illegality or public interests arose. On the other hand, when the interests of various parties involved were in conflict, legislation might be made to balance the interest of the parties involved. Application by a member under section 152FA might only involve the civil rights of the parties concerned, namely the member, the specified corporation and an innocent third party who had entered into an agreement with the specified corporation, and thus the issue of public interest might not arise. As such, the interest of the innocent third party should be considered when the Bills Committee decided that the court be given the power to order inspection of the records of the specified corporation by a member, notwithstanding that information of an innocent third party might also be revealed.	
015301 - 020924	Chairman Mr Albert HO Ms Miriam LAU Mr CHAN Kam-lam Administration	Additional meetings for the scrutiny of Schedule 4 of the Bill	

<b>Time marker</b>	<b>Speaker</b>	<b>Subject(s)</b>	<b>Action required</b>
020925 - 020955	Chairman Administration	The Administration to consider the need for preliminary hearings for derivative action with reference to the existing arrangement adopted in UK	

Council Business Division 1  
Legislative Council Secretariat  
11 February 2004

**Extract from**  
**The Report of the Standing Committee on Company Law Reform on the**  
**Recommendations of a Consultancy Report of the Review of**  
**the Hong Kong Companies Ordinance (February 2000)**  
*(available in English only)*

## Conclusions

8.86 We believe that the *Foss v. Harbottle* rule itself is correct in confirming majority rule for the governance of companies, but recognize that the state of the law is unsatisfactory. Having considered the defects in the law and the solutions adopted elsewhere, we believe that statutory reforms should be made along the following lines:

1. the derivative action be made simple and accessible to minority shareholders. To that end,
  - (a) it would not be desirable to require preliminary hearings on the plaintiff's standing or to vest in the court discretion to approve the commencement or maintenance of an action. Where a cause of action, being a wrong done to a company by directors not capable of ratification by the majority, is stated, the plaintiff should be allowed to proceed to trial on the merits, and
  - (b) the right of the majority to "ratify" (approve or forgive) wrongs of directors against the company should be clarified, rationalized and reformed in the manner set out in chapter 7;
2. a plaintiff who seeks interim payments on account of the company's indemnity as to costs be required to prove that he has acted in good faith and on reasonable grounds. When considering such applications, the court may seek and consider the views of independent organs of the company as to the desirability of the action;
3. the personal rights of shareholders not subject to deprivation by majority rule be clarified, rationalized and reformed in the manner set out in Chapter 7;
4. the securities regulator be given the power to bring derivative actions against directors of a public company for breaches of duty as if it were a shareholder, except that (a) the regulator shall exercise its power in the public interest as well as in the interest of the company, and (b) it shall not be entitled to indemnities as to costs from the company.

<p><b>Recommendation 96: The Committee recommends that a statutory right of derivative action as outlined in this Report be provided.</b></p>
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