

**Responses to the submission of 5 February 2004
from Mr Winston Poon, SC,
Mr Godfrey Lam and Ms Linda Chan**

***Subsection (2) of proposed section 168BB in paragraph 5 of Schedule 4
to the Companies (Amendment) bill 2003 – statutory derivative action
brought in the name of the company***

(1) Discovery of documents

Order 24 of the Rules of High Court, Cap. 4A provides that there shall be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action. In the case of a statutory derivative action brought by a member under the proposed section 168BB(2), a company, being a party to the action, is obliged to give discovery. As a company can only act through persons, the persons who do have control of the company's documents should cause the company to comply with the discovery obligation. If the shareholder applicant cannot gain access to the company documents and hence would not be able to enable the company to comply with the discovery obligation, he may, on behalf of the company, make an application to the court for direction or relief, as appropriate (see Rules 7, 12 and 16 of Order 24). Moreover, the proposed section 168BF provides the court with a general power to make any order and give any direction it considers appropriate in respect of the action, including an order directing the company or an officer of the company to do or not to do any act. Lastly, the Rules Committee of the High Court may make rules of court under the proposed section 168BI in order to give effect to the proposed sections in Part IVAA (Bringing or Intervening in Proceedings on behalf of Specified Corporation), as appears to be necessary or expedient.

(2) Order as to costs

2. The proposed section 168BG provides that the court may, at any time, make any orders it considers appropriate as to the liabilities of the company, the parties to the statutory derivative action and the member who commenced the action in relation to costs of the action.

**Financial Services Branch
Financial Services and the Treasury Bureau
February 2004**