Bills Committee on
Companies (Amendment) Bill 2003

Follow-up actions arising from the discussion
at the meeting on 12 February 2004

Introduction

This paper sets out the outcome of the follow-up actions arising from the discussion at the meeting on 12 February 2004.

(A) Provision of remedy under section 168A

2. Section 168A provides for a statutory remedy (short of liquidation) against unfair prejudice. To qualify for this remedy, the conduct complained of must be both unfair and prejudicial to members' interests (s*ee* Re Taiwa Land Investment Co Ltd [1981] HKLR 297*)*. The available remedies are set out in section 168A(2):

> *"(2)....., the court may, with a view to bringing to an end the matters complained of -*
>
> *(a) make an order restraining the commission of any such act or the continuance of such conduct;*
>
> *(b) order that such proceedings as the court may think fit shall be brought in the name of the company against such person and on such terms as the court may so order;*
>
> *(ba) appoint a receiver or manager of the whole or a part of a company's property or business and may specify the powers and duties of the receiver or manager and fix his remuneration;*
>
> *(c) make such other order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or*

otherwise."

3. The Standing Committee on Company Law Reform (SCCLR) considers that, despite the width of section 168A(2)(c), it remains unclear if this would allow the court to make an order of damages to be awarded to shareholders. Our policy intent for the proposed sections 168(2A) and (2C) is to implement the recommendation (see paragraph 45 below) of the SCCLR to expressly empower the court under section 168A to award damages as relief (in addition to other types of relief as set out in the existing section 168A) in respect of the matters complained of. It is not the Administration's intention to alter or disturb the common law principle that a shareholder is not entitled to claim any loss which is merely a reflection of the loss suffered by the company: see Prudential Assurance Co. Ltd. v Newman Industries Ltd (No.2) [1982] Ch 204.

4. For the sake of illustration, we have set out below some decided cases under existing section 168A, which are grouped under three headings: (a) wrongs to members, (b) wrongs to company with separate wrongs to members; and (c) direct wrongs to company with indirect wrongs to members. It is however difficult, if not impossible, to generalize the situations under which the court would grant unfair prejudice remedy, and each case remains to be subject to the court's objective examination taking into account the relevant facts and circumstances.

(a) Wrongs to members
- where the member presenting the petition has suffered a loss but the company has not suffered a loss in respect of the same affair of unfair prejudice

(i) Allotment of shares, dilution of equity stake or voting rights

5. Allotments of shares made to dilute a minority shareholder's stake may itself be an exercise of the company's powers for an improper purpose. The unfair prejudice remedy has been used to obtain relief in such circumstances in a large number of cases[1].

Re Lai Kan Co. Ltd. and
Re Safe Steel Furniture Factory Ltd. [1988] HKLR 257

6. This was a petition to wind up two companies on just and equitable grounds, or in the alternative, for an order under section 168A on

[1] Butterworths Hong Kong Company Law Handbook, Fourth Edition 2002, page 572

the ground that the affairs of the companies were being conducted in a manner unfairly prejudicial to the petitioner's interest.

7. The petitioner had served for several years as the manager of Safe Steel and Lai Kan in which he also held shares. Following a breakdown in relations between the petitioner and the other major shareholders, the petitioner was dismissed as manager of both companies. After his dismissal as a manager of the companies, the petitioner did not receive any salary in lieu of notice and was deprived of his income from the companies.

8. One of the allegations made by the petitioner was that an increase in the capital of Lai Kan after the petitioner was dismissed as manager was carried out in a manner that was intended to be oppressive, unfair and prejudicial to the petitioner. The court held in favour of the petitioner finding that there was no genuine reason for the increase in capital of Lai Kan diluting the petitioner's interest therein from 40% to 8%. The court made a share purchase order in favour of the petitioner and an order for an expert valuation of the assets of the two companies and an assessment of the value of the petitioner's interests.

Re Tseng Yueh Lee, Irene v Metrobilt Enterprise Ltd [1994] 2 HKC 684

9. The petitioner had 41% in a joint venture company to develop some projects in the mainland China. The projects had been introduced to the company by the petitioner and the petitioner, as a result, was rewarded by a stake in the equity. The majority then proposed to increase the paid up capital from $2M to $5M and required the petitioner to pay for the same or face dilution. It was alleged by the petitioner that there was an agreement that funding for the projects would be provided by the respondents. The increase in capital was therefore unwarranted and unnecessary, designed only to dilute the petitioner's equity, knowing that the petitioner did not have the financial ability to pay for the increase.

10. The court refused the respondents' application to strike out the petition, holding that if the majority knew that the petitioner did not have the money to take up her rights and the offer was made at par when the shares were plainly worth a great deal more than par as a part of a majority holding, it was arguable that carrying through the transaction in that form could constitute unfairly prejudicial act.

(ii) Takeover, restructuring

11. The duties of directors towards shareholders on a takeover are minimal and at best include a duty not to mislead[2]. They are required only to give the shareholders sufficient information and advice to enable them to reach a properly informed decision. They should refrain from giving misleading information or advice or exercise their fiduciary powers in a way which would prevent or inhibit shareholders from choosing the better price. If a shareholder is misled by insufficient or inaccurate information or advice into accepting a particular offer, then his interest may be unfairly prejudiced.

Re a Company (No. 008699 of 1985) [1986 J BCLC 382]

12. There were two rival takeover bids for shares of a private company. The directors advised the shareholders on the merits of the competing bids. In advising the shareholders, information provided in a circular by the chairman of the board asserted that the lower of the two rival takeover bids should be accepted because the other "could not" succeed (when this was not in fact the case). The information and advice was found to be misleading. The directors were themselves interested in one of the bidders.

13. The court held that the failure of the directors to advise shareholders impartially was capable of constituting unfairly prejudicial conduct. It was unfair because it affected the shareholders' right to sell their shares at the most favourable price, and it affected them qua member because being able to sell their shares at the best price was a member's interest.

(iii) Failure to pay dividends or fair dividends

14. Payment of dividends is largely considered as a decision for the management. At common law, a company cannot be compelled to declare a dividend unless in accordance with provisions in the articles. However, unjustifiable failure to pay dividends or fair dividends is within the ambit of section 168A of the Companies Ordinance. Be that as it may, mere failure to pay dividend is unlikely, by itself, to be regarded as sufficient to attract relief under section 168A. Courts will be more ready to act if the failure is accompanied by other improprieties or with intent to squeeze out minority shareholders.

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[2] Butterworths Hong Kong Company Law Handbook, Fourth Edition 2002, page 575-576

Re a Company, ex parte Glossop [1988] BLCL 570

15. The petitioner was a minority shareholder of the company holding 18.75 percent of its issued share capital which she inherited from her late husband's estate.

16. The company was successful. It was run by the petitioner's late husband's brother and father, who were directors, together with a number of other directors who were senior employees. The petition sought relief pursuant to section 459 of the UK Companies Act 1985 (equivalent of section 168A), and alternatively a winding-up on the just and equitable ground, based on allegations that the petitioner had not had a proper share in the company's success. She later sought to amend the petition to allege that the directors of the company had in the years since her husband's death, failed to pay reasonable dividends out of the very large profit accruing year on year.

17. The court allowed the amendments on the ground that directors had a duty to consider how much they could properly distribute to members and that, as a matter of concept, to retain in the company profits which could, with propriety and commercial ease, have been paid out to members in dividends, was capable to being an improper conduct of the affairs of the company, such that members who did not desire to stay in the company should be entitled to be released, if necessary, by a winding up.

Re Wong Man Yin v Lam Lam Wai and others
Unreported judgment dated 22 June 2001 in HCA 6260/1997

18. There was a dispute between three of the shareholders of a company called Ricacorp Properties Ltd., an estate agent. One of them presented a petition against the other two (who were directors) and Ricacorp for an order pursuant to section 168A on his complaint that the affairs of the company had been conducted in a manner unfairly prejudicial to his interest. One of the allegations made was that the company did not declare dividends but the directors paid themselves high remuneration. When the shareholding of the petitioner was subsequently reduced, a proposal was made to declare dividends.

19. The court held that even if the rate of the directors' remuneration was within the norm of the industry, there was unfair prejudice in all the circumstances of the case. It was said -

"... Here, no dividends have been paid at all, despite large

> profits having been made, which by 31 March 1999 had resulted in retained earnings in the company of nearly $45,000,000 and this after directors' emoluments of over $40,000,000 had been paid in the previous two years. On any objective view of the matter ….. this is as clear a case of directors enriching themselves from the profits of their company as one could imagine, while at the same time failing to pay to other shareholders any of the earnings to which they were entitled ..... there is no good reason on the evidence before me why ….. they made no effort to allow the other shareholders to share in the company's success. This is a clear case of conduct unfairly prejudicial to the interests of the shareholders .....".

20. The court ordered that the two other major shareholders should purchase the petitioner's share based on a proper valuation.

(b) Wrongs to company, separate wrongs to members
- where both have suffered loss but the loss of the member presenting the petition is separate and in additional to that suffered by the company

(i) Misappropriation or diversion of company assets

21. Misappropriation or diversion of company assets and paying excessive remuneration to directors (which may amount to an expropriation of company assets) are, in theory, corporate wrongs which should be actionable only by the company (or by a member through derivative action). It may seem odd at first sight that a right of petition under section 168A vested in individual members may be used to secure the redress of such wrongs. However, as Gower commented, section 168A is drafted so as to protect the "interests" of the members and not just their rights, and it cannot be denied that wrong done to the company may affect the interests of its members[3].

22. The word "interests" is of wide import and may include, in an incorporated partnership, (i) the right to participate in the affairs of the company so as to guarantee some return on his investment; (ii) the right to protect his investment in the company; and (iii) the ability to monitor the conduct of his co-venturers.[4]

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[3] Gower's Principles of Modern Company Law, Seventh Edition 2003, Paul L. Davies, page 513

[4] D.D. Prentice. "The Theory of the Firm: Minority Shareholder Oppression": sections 459-461 of the Companies Act 1985, 8 OJLS 55 at 61.

23. The point to note here is that whilst an unfair prejudice petition may be founded, wholly or partly, on the same set of facts giving rise to a complaint of breach of duty owed to the company, the relief that may be claimed in an unfair prejudice petition is confined to personal remedies and may not include corporate relief.

Re Tai Lap Investment Co. Ltd. [1998] 4HK C 438

24. The petitioners were minority shareholders of Tai Lap Investment Co. Ltd. seeking relief under section 168A. The main complaint of the petitioners was the misapplication of Tai Lap's funds and assets by the first respondent via another company to subsidise and finance businesses conducted by some of the first respondent's children to the detriment of Tai Lap Investment.

25. The court held that the respondents' conduct was unfairly prejudicial to the petitioners as minority shareholders, as those acts were undoubtedly sought to enrich members of the respondents' family at the expense of the petitioners. The court ordered that there should be a valuation of the shares and a buy-out by the first and second respondents (son of first respondent) of the petitioners' shares and if they fail to do so, the petitioners' share be purchased by Tai Lap Investment and that consequently, the capital of Tai Lap investment be reduced.

Re Chan Hung Kau v Texgar Ltd. and others [2002] 1 HKLRD 687

26. The petitioner and the second respondent were shareholders and directors of the first respondent, Texgar Ltd, which was the exclusive distributor of telecommunication products of Tait Electronics Ltd. Texgar supplied such products to customers in the mainland China.

27. The relationship between the petitioner and the second respondent subsequently turned bad. The second respondent set up the third respondent using the name of Texgar (Holding) Ltd. Prior to the expiration of Texgar's exclusive distribution rights, the second respondent wrote to Tait Electronic saying that the name of Texgar had been changed to Texgar (Holding) Ltd. and that the two companies were the same. By so doing, Texgar (Holdings) Ltd. obtained supplies from Tait Electronics and sold such supplies to customers of Texgar in the mainland China.

28. The court held that the second respondent had breached his duty as a director of Texgar for his own personal gain to the prejudice of the

company and the petitioner, by diverting the corporate opportunity of Texgar in the form of the exclusive distributorship with Tait Electronics and its telecommunication business from Texgar. In finding unfair prejudice, the court made a buy-out order in favour of the petitioner of his shares in the company to be valued by an independent valuer.

(ii) Excessive remuneration

29. The general principle under the common law is that the court is slow to interfere with the quantum of directors' remuneration unless there is evidence to suggest that the power to pay remuneration is not genuinely exercised having regard to the services rendered *(Re Halt Garage (1964) Ltd. [1982] 2 All ER1016).*

30. Where directors pay themselves remuneration in a sum which is plainly excessive, so that it amounts not to a proper reward for services rendered but as a means to distribute profits of the company, such conduct has been held, either of itself or in connection with other factors, to be unfairly prejudicial conduct against the interest of non-director members.

Re Sanford v Sanford Courier Services Pty Ltd. and others [1987] 10 ACLR549

31. The plaintiff was one of the three equal shareholders in the capital of the first defendant. The second defendants were the other two shareholders. The first defendant was a courier company operating in NSW. The second defendants became dissatisfied with the contribution of the plaintiff to the conduct of the affairs of the business and on 11.2.1983, the plaintiff gave notice of his retirement suggesting that his shares be acquired by the second defendants at a value to be agreed upon.

32. The value was not agreed upon and the plaintiff commenced proceedings seeking an order that the first defendant be wound up or that his shares be purchased by the second defendants. One of the allegations of the plaintiff was that the level of emolument of the second defendants by way of salary, the provision of motor vehicles and retirement benefits was unreasonably high and in effect a distribution of a significant part of the profit to the second defendants rather than to the three shareholders as dividends, amounting to an unfair prejudicial conduct.

33. The court held that the evidence justified the conclusion that the second defendants were providing themselves with a salary and emoluments which were above the level which could be justified having regard to the

plaintiff's position as a one-third shareholder. The court made an order for the purchase by the second defendants of the plaintiff's shares as neither side wished that the first defendant be wound up.

Re a Company No. 002612 of 1984 [1986] BCLC 99.453

34. This was a petition brought under section 75 of the UK Companies Act 1980 (Companies Act 1985, sections 459-461). The issued share capital of the relevant company comprised 1,000 ordinary shares of £1 each. The petitioner held 333 of the shares, and the rest were held by the respondents to the petition.

35. The petitioner had subscribed for shares in the company on the basis of an informal agreement found upon mutual trust and confidence. The majority shareholder had breached that agreement in a number of ways and one of those breaches was the payment to himself of excessive remuneration.

36. The court held on the evidence that the remuneration paid to the majority shareholder director in 1984 was plainly in excess of anything he had earned and was so large as to be unfairly prejudicial to the petitioner. The court granted an order for the purchase by the respondents of the petitioner's shares for the sum of £925,000.

(c) Direct wrongs to company, indirect wrongs to members
- where the loss of the member presenting the petition is merely reflective of the company's loss.

37. A member holding shares in a company cannot claim from a person who has caused the company to suffer loss, any compensation for the diminution in value of those shares which merely reflects a loss which the company could recover from that person. The diminution in value of the shares due to the company's loss will be reversed to the company when the company recovers compensation for that loss.

38. In Prudential Assurance Co. Ltd. v Newman Industries Ltd. (No. 2) [1981] Ch 257, the Court of Appeal held that the personal claim should lead to no recovery for the shareholders on the facts, because the only relevant loss suffered consisted in a diminution in the value of the claimant's shares, which was simply a reflection of the loss allegedly inflicted on the company by the defendants. The principle that a shareholder cannot recover a loss which is simply reflective of the company's loss, even though the shareholder's cause of action is

independent of the company's, has been confirmed by the House of Lords in Johnson v Gore Wood & Co. [2001] All ER. 481. HL.

39. Where the reflective loss principle applies, the shareholder's claim, in so far as it is for the same loss as that suffered by the company and for the same remedy as that claimable by the company, is merged into the company's claim[5]. It will not however prevent the shareholder from suing on a separate cause of action for relief distinct from that claimable by the company.

Re Johnson v Gore Wood & Co. [2001] All E.R. 481 HL

40. A member of a company, who controlled it, claimed against the solicitors of the company on ground of professional negligence for contributions (amongst other things) which the company failed to make to his pension fund when it did not have enough money because of losses allegedly caused by the defendants.

41. The court thought it plain that this claim was merely a reflection of the company's loss and it was therefore struck out. It also held that if a company with a right to sue a person to recover a loss failed to recover all or part of that loss, for example, because it settled the claim before trial, or refused to take any action at all, it would not be possible for the company to pay members all or part of the reflected loss. This would not give the members a right to sue that person for the unrecovered amount of the reflected loss because the shortfall in recovery was caused by the company, not that person.

(B) Provision of remedy to members other than the petitioner

42. As a general rule, a party will not be bound by or be affected by a court order unless and until it is joined in pursuance of Order 15 of the Rules of High Court as a party to the action. Order 15 Rule 4(2) of the Rules of the High Court specifically provides that where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any written law and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant. However, Order 15 Rule 4(2) is

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[5] Gower's Principles of Modern Company Law, Seventh Edition 2003, Paul L. Davies, page 456

made expressly subject to the provisions of any written law and unless the court gives leave to the contrary. In light of the wording in the proposed section 168(2A) and (2C) and subject to the leave of the Court, the Court may award damages and interests on such damages to any members of a company whose interests have been unfairly prejudiced (even though they have not petitioned to the court under section 168A).

(C) Relationship between the proposed provisions on unfair prejudice and those on statutory derivative action

43. At present, a derivative action can be brought under common law by a member of a company in respect of a wrong done to the company ("corporate wrong"). As explained in paragraphs 21 – 23 above, certain corporate wrongs such as misappropriation of company assets have also be held by the court to constitute unfair prejudice under existing section 168A, which is drafted to protect the "interests" of the members and not just their rights[6]. The proposed provisions on unfair prejudice and those on statutory derivative action would not themselves affect the existing relationship between an action under section 168A and a common law derivative action. It remains the court's decision as to whether these actions should be joined together having regard to the relevant facts and circumstances.

44. If some common questions of law or fact would arise in a derivative action and an action under section 168A, and all rights to relief claimed in the actions are in respect of or arise out of the same transaction or series of transactions, then the two kinds of actions can be joined with the leave of the court under Order 15 of the Rules of the High Court, provided that the court does not consider that the joiner of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient. In Prime Aim International Ltd v Cosmos – Pavis International Ltd & Ors [1994] 2 HKC 545, the court acknowledged the potential for wasted time and expense if the derivative action and an action under section 168A were to proceed independently of one another. The court hence ordered that both sets of proceedings be listed for an early interlocutory hearing before the companies judge to allow him to consider how best to proceed and perhaps to order that both proceedings be held together with a consequent saving in time and cost.

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[6] Gower's Principles of Modern Company Law, Seventh Edition 2002, Paul L. Davies, page 513

(D) Rationale for providing the court with power to award damages and interests on such damages

45. In the context of the Phase I of the Corporate Governance Review (CGR), the SCCLR recommends that existing section 168A should be amended to make it clear that the court has power to award damages (as well as interests on such damages) by way of a remedy to members in circumstances of unfair prejudice. The rationale behind this recommendation is that despite the width of existing section 168A(2), it is not clear if this section would allow the court to make an order for damages to be awarded to members and that in relation to listed companies, it is not clear that the remedies available under this section are necessarily adequate since it may not be practicable in all circumstances, for instance, for the court to require a buy-out of minority shareholders. On the basis of the SCCLR's recommendation, we propose to add sections 168A(2A) and 168A(2C) to make it clear that the court may award damages by way of a remedy, in addition to other remedies, to members in circumstances of unfair prejudice.

46. Our policy intent is not to restrict the power of the court under section 168A to award damages and interests as relief to the matters complained of insofar as the court thinks fit to do so. To achieve this policy intent, we do not consider it appropriate to subject this relief to the restriction imposed by the phrase "with a view to bringing the matter to an end" (as in the case of other types of relief under existing section 168(2) whose nature is to provide "exit" for unfairly prejudiced members e.g. shares buy-out). Hence, we do not consider it necessary to subsume the proposed section 168A(2A) under existing section 168A(2). It is worth noting that in the UK equivalent of existing section 168A, the phrase "giving relief in respect of the matter complained of" has been used instead of "with a view to bringing the matter to an end".

47. While there is no explicit provision regarding damages in the unfair prejudice provisions in other jurisdictions like the UK, Singapore (copy of the relevant legislation at Annex A), the court's power to give relief in respect of the matters complained of in these jurisdictions seems to include an element of compensation in the valuation of a petitioner's shareholding for the purpose of a purchase order e.g. Re Yeo Hung Khiabg v Dickson Investment (Singapore) Pty Ltd. [1999] 2 SLR 129. Furthermore, section 174 of the New Zealand Companies Act 1993 (Annex B) provides that if, on an application by a prejudiced shareholder of a company, the court considers that it is just and equitable to do so, it may make such order as it thinks fit including an order to require the company or

any other person to pay compensation to a person. The following passages from CCH New Zealand Company Law and Practice [paragraphs 50-51] may help explain the need for giving the court such power -

> "The payment of compensation is not a remedy which has been widely used to remedy oppression, but there are clearly circumstances where it would be appropriate. One of these is where a shareholder has sold shares at an undervalue as a result of misleading advice by the company. Such a situation occurred in Cotterall v Fidelity Life Assurance Co. Ltd [1987] 3NZCLC 100.054 ….
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> Although the applicant was denied standing in that case, she would now qualify as a former shareholder under section 174……".

(E) Limitation period for a past member seeking relief under the proposed section 168A(2B) and (2C)

48. The Limitation Ordinance prescribes the limitation periods for bringing actions of the various classes (section 3 of the Limitation Ordinance). Section 40 of the Limitation Ordinance provides that the Ordinance does not apply to any action or arbitration for which a period of limitation is prescribed by or under any other enactment. Where the cause of action does not fall within the prescribed classes in the Limitation Ordinance and there is no separate provision for limitation period in any other enactment, there is no statutory limitation period for such actions. In this connection, we note that there is no prescribed limitation period for the proposed section 168A(2B) or the existing section 168A as specified in the Limitation Ordinance. Nor is there any separate provision for limitation period for section 168A relief in the Companies Ordinance.

49. In Re Sarator Properties and Investment Limited (unreported judgment dated 2 January 2002 in HCCW 64/2000), the petitioner was aware that the company had sold a property which was used as his residence, in 1987, when he had gone to Latin America. He was aware of the sale in 1988 but did not take any action until 1996. The court held that it was too late for the petitioner to complain about the conduct being unfairly prejudicial to him. The court had mentioned nothing in the judgment that an unfair prejudice action should be subject to the Limitation Ordinance.

50. On the basis of the SCCLR's recommendation in the CGR, we propose to add section 168A(2B) whereby a past member may petition to

the court for unfair prejudice remedies under section 168A. Unfairly prejudicial conduct may arise out of circumstances in which a person ceases to be a member or may have occurred while the former members were still members but comes to light subsequently and after their membership has ceased[7]. There would be a lacuna in relation to standing if a past member who had actually been unfairly prejudiced while he was still a member, could have no remedy at all just because he had, for some reasons, ceased to be a member. It is worth noting that a former shareholder of a company is allowed to seek for unfair prejudice remedy under the New Zealand Companies Act 1993.

Financial Services Branch
Financial Services and the Treasury Bureau
February 2004

[7] Butterworths Hong Kong Company Law Handbook, Fourth Edition 2002, page 564

Extract from UK Companies Act

459 Order on application of company member

(1) A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company; and references to a member or members are to be construed accordingly.

(3) In this section (and so far as applicable for the purposes of this section, in section 461(2)) 'company' means any company within the meaning of this Act or any company which is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991.

Extract from Singapore Companies Act

Personal remedies in cases of oppression or injustice.

216. —(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister may apply to the Court for an order under this section on the ground —

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of such grounds is established the Court may, with a view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and, without prejudice to the generality of the foregoing, the order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) authorise civil proceedings to be brought in the name of or on behalf of the company by such person or persons and on such terms as the Court may direct;

(d) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(e) in the case of a purchase of shares by the company provide for a reduction accordingly of the company' s capital; or

(f) provide that the company be wound up.

15/84.

(3) Where an order that the company be wound up is made pursuant to subsection (2) (*f*), the provisions of this Act relating to winding up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company' s memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the provisions of the order, the company concerned shall not have power, without the leave of the Court, to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) A copy of any order made under this section shall be lodged by the applicant with the Registrar within 14 days after the making of the order.

(6) Any person who fails to comply with subsection (5) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $1,000 and also to a default penalty.

15/84.

(7) This section shall apply to a person who is not a member of a company but to whom shares in the company have been transmitted by operation of law as it applies to members of a company; and references to a member or members shall be construed accordingly.

15/84
13/87.
U.K.s.210.

Extract from New Zealand Companies Act

174. Prejudiced shareholders — (1) A shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity or in any other capacity, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this subsection, an order —

(a) Requiring the company or any other person to acquire the shareholder's shares; or

(b) Requiring the company or any other person to pay compensation to a person; or

(c) Regulating the future conduct of the company's affairs; or

(d) Altering or adding to the company's constitution; or

(e) Appointing a receiver of the company; or

(f) Directing the rectification of the records of the company; or

(g) Putting the company into liquidation; or

(h) Setting aside action taken by the company or the board in breach of this Act or the constitution of the company.

(3) No order may be made against the company or any other person under subsection (2) of this section unless the company or that person is a party to the proceedings in which the application is made.

Refer s 209(1), (2), Companies Act 1955 (1955 No 63).