

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

**Follow-up actions arising from the discussion  
at the meetings on 20, 26 and 28 February 2004**

**Introduction**

This paper sets out the outcome of the follow-up actions arising from the discussion at the meetings on 20, 26 and 28 February 2004.

**Meeting on 20 February 2004**

*(i) Leave for bringing a statutory derivative action*

2. In response to the Bills Committee's suggestion, we agree to amend the proposed section 168BB to the effect that a member of a specified corporation is required to obtain leave before bringing proceedings on behalf of the specified corporation. Relevant Committee Stage Amendments (CSAs) will be sent to the Bills Committee separately.

*(ii) Scope of a statutory derivative action*

3. Under common law, a member may bring derivative actions on behalf of his company provided that first, the wrong in question is one that cannot be validly ratified by the majority because it is a fraud on the minority e.g. misappropriation of company assets, and second, the wrongdoers are in control of the company<sup>1</sup>. As in other jurisdictions like Australia, which have statutory derivative action, under our proposed statutory derivative action, the court will consider, among other things, the good faith of the member and the best interest of the company. Furthermore, ratification by general meeting will not be a bar to the commencement of derivative proceedings. Instead, the court will be required, in deciding what order or judgement to make, to consider whether independent shareholders have ratified, what the state of knowledge of members was and whether they were acting for proper purposes.

4. Given the difference between the common law derivative action and the proposed statutory derivative action, the following categories of cases may be claims that are not allowed under the former but could possibly be claims under the latter –

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<sup>1</sup> Gower's Principles of Modern Company Law, Sixth Edition 1997, Paul L. Davies, page 670

- (a) mere negligence of directors without bad faith or fraud (which has been held by the court to be capable of ratification, i.e. not being a fraud on minority);
- (b) cases where there is a fraud on minority e.g. misappropriation of assets but wrongdoers in control element cannot be established.

*(iii) Safeguards in the statutory derivative action*

5. In responses to the Bills Committee's concerns on whether there are sufficient safeguards in the statutory derivative action, we agree to amend Part IVAA in Schedule 4 of the Bill to add the following to the action -

- (a) a member is required to obtain leave before bringing proceedings on behalf of his company;
- (b) in granting leave for a member to bring proceedings on behalf of his company, the court has to be satisfied with, in addition to the existing "good faith", "best interests" and "serving pre-action notice" conditions, the following new conditions (along the lines in section 237(2) of the Australian Corporations Act 2001) –
  - (i) it is probable that the concerned specified corporation will not itself bring the proceedings, or properly take responsibility for them; and
  - (ii) there is a serious question to be tried.
- (c) A rebuttable presumption along the lines in section 237(3) of the Australian Corporations Act 2001 (copy at [Annex A](#)) that granting leave will not be in the best interest of the specified corporation where the proceedings involve a third party.

Relevant CSAs will be sent to the Bills Committee separately.

6. In view of the above additional safeguards, we do not consider it necessary to add another new provision along the lines in section 50 of the Australian Securities and Investments Commission (ASIC) Act 2001,

which confines the scope of proceedings to those for recovery of damages for fraud, negligence, default, breach of duty etc. Furthermore, section 50 of the ASIC Act provides for a public interest action which is different from a shareholder's derivative action. The limitation in the scope of proceedings is not found in the statutory derivative action in other jurisdictions, like Australia and Singapore. Nor is such limitation found in the common law derivative action.

*(iv) Procedural issues relating to statutory derivative action*

7. We are awaiting the responses from our counterparts on how the procedural issues such as discovery of documents are dealt with in their statutory derivative action, and will revert to the Bills Committee on this matter once the relevant information is obtained.

*(v) Timing for determination of the costs of the derivative action*

8. Section 242 of the Australian Corporations Act 2001 provides that the court may at any time make any orders it considers appropriate about the costs in relation to a statutory derivative action or an application for leave to commence the action. The judgement in Charlton v Baber [2003] NSWSC 745 (15 August 2003) seems to suggest that the earliest possible time where the court can make an order as to costs of a statutory derivative action is upon the commencement of the action, not upon obtaining the leave to commence the action. In response to the Bills Committee's concern about the timing for the court to make an order as to costs of a statutory derivative action, we propose to amend the proposed section 168BG to make it clear that the court can make an order as to the costs of a statutory derivative action upon (instead of after) obtaining the leave to commence the action. Relevant CSAs will be sent to the Bills Committee separately.

*(vi) Multiple interventions*

9. It is not our policy intent to prohibit multiple interventions in the same derivative action by different members of a specified corporation. For example, it is possible that a member X may under the proposed section 168BB(1)(b) intervene on behalf of a company in proceedings which were brought by another member Y on behalf of the same company earlier on under the proposed section 168BB(1)(a). There does not appear to be any restriction on the multiple interventions in the statutory derivative actions in other jurisdictions. In practice, the court may not necessarily grant the leave for the member X to intervene in proceedings commenced by the

member Y on behalf of the same company. This is especially so given that there is a leave requirement for Y to commence proceedings, i.e. the court has been satisfied that the bringing of the action was in the best interests of the company and that member Y was acting in good faith. If however the court does grant leave to member X to intervene in the action, we believe that the court in granting leave to X to intervene in the proceedings would give the necessary directions as to how the parties should proceed under the proposed section 168BF.

*(v) Disclosure of information*

10. In response to the Bills Committee's comments, we agree to delete “, or any investigation carried out in Hong Kong in accordance with law” in the proposed section 152FC(1)(a).

**Meeting on 26 February 2004**

*(i) Scope of the proposed section 168A(2A) to (2C)*

11. We do not consider that the proposed section 168A(2A) to (2C) on their own would result in a violation of the common law principle that a member cannot sue for a loss which is merely reflective of the company's loss as they would not vary the nature of the claim, create new cause of action, or confuse the distinction between personal claim and derivative claim. That said, in response to the Bills Committee's comments, we agree to add in a new provision to make it clear that these two sections will not have the effect of entitling any member to recover by way of damages which should properly belong to the company under common law. This provision will have the effect of putting beyond doubt that the common law principle that a member cannot sue for a loss which is merely reflective of the company's loss will not be affected. Relevant CSAs will be sent to the Bills Committee separately.

*(ii) Deletion of the phrase “whether or not with a view to bring to an end the matters complained of”*

12. In response to the Bills Committee's comments, we agree that the phrase “whether or not with a view to bringing to an end the matters complained of” in the proposed sections 168A(2A) and (2C) should be deleted, and that the proposed section 168A(2A) should be subsumed under the existing section 168A(2). Relevant CSAs will be sent to the Bills Committee separately. The reason for not qualifying the court's power to award damages in the proposed section 168A(2A) and (2C) by “with a view

to bringing to an end the matters complained of” is that such damages, unlike other types of relief under existing section 168A(2) whose nature is to provide “exit” for unfairly prejudiced members e.g. shares buy-out, may not necessarily have the effect of bringing to an end the matters complained of, though it may have the effect of giving relief in respect of the matters complained of. In the Irish Press plc v. Ingersoll Irish Publications Ltd [1995] 2 ILRM 270, the Irish Supreme Court overturned the order for relief given by the Irish High Court, whereby the respondent was ordered to pay £2,750,000 to the petitioner, on the grounds that the object of such an order was to compensate the petition, not to bring an end to the oppression, and, as such, was beyond the powers awarded to the court under section 205(3)<sup>2</sup> of the Irish Companies Act 1963.

*(iii) Application for unfair prejudice remedy by a former shareholder under the New Zealand Companies Act 1993*

13. We have not been able to locate any court case relating to an application for unfair prejudice remedy by a former shareholder under the New Zealand Companies Act 1993. We are checking with our counterparts in New Zealand on whether they can provide us with any information on this matter.

*(iv) Statutory limitation period for action to seek unfair prejudice in other jurisdictions*

14. We are awaiting the responses from our counterparts on the statutory limitation period and will revert to the Bills Committee once the relevant information is obtained.

## **Meeting on 28 February 2004**

*(i) Order for inspection*

15. In response to the Bills Committee’s comments, we have revised the CSAs relating to the order for inspection (copy will be sent to

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<sup>2</sup> UK Law Commission Consultation Paper on “Shareholder Remedies”, 1996, footnote 72, page 102  
Section 205(3) of the Irish Companies Act 1963 provides that if the High Court is of the opinion that the affairs of a company are being conducted, or the powers of the directors are being exercised in a manner oppressive to any of the members of the company, or in disregard of their interests as members, the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit whether directing or prohibiting any act or cancelling or varying any transaction or 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 to the company’s capital, or otherwise.

the Bills Committee separately). Information about the par value of shares of a case sample of listed companies is at Annex B.

*(ii) Banking laws*

16. The Banking Ordinance does not contain any provision which governs the disclosure of information by banks relating to the affairs of bank customers. However, banks in Hong Kong are subject to common law duty to protect information of customers (both corporations and individuals) and are also required to comply with the requirements under the Personal Data Protection Ordinance in relation to the protection of personal data of their customers who are individuals.

17. The UK, Australia and Singapore are all common law jurisdictions and so the common law duty on protection of customer confidentiality should also apply to banks in these jurisdictions. For the UK and Australia, we are not aware of any provisions in their banking laws which restrict or prohibit the disclosure of customer information by banks. For Singapore, it may be relevant to note section 47(1) of their Banking Act which states that "Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in this Act". Contravention of this requirement is an offence under section 47(6).

18. In the light of the Bills Committee's comments, we are prepared to amend the CSA to the proposed section 152FD further to the effect that the court shall not make an order authorizing a person to inspect the records of a specified corporation carrying on the business of banking that relate to the affairs of its customers.

*(iii) Injunctions*

19. Two Australian judgements in respect of applications for inspection orders made under section 1324 of the Australian Corporations Act 2001 are at Annex C. We wish to clarify that the scope of the injunctions in the proposed section 350B and that in the Australian Corporations Act 2001 is not the same as that in the Singapore Companies Act in that the latter only covers contravention of the Singapore Companies Act. A copy of the relevant provisions in the Australian Corporations Act 2001 and Singapore Companies Act is at Annex D.

*(iv) Undertaking as to damages*

20. We are considering the matters relating to undertaking as to damages and will revert to the Bills Committee as early as possible.

Financial Services Branch  
Financial Services and the Treasury Bureau  
March 2004

**AUSTRALIAN CORPORATIONS ACT 2001**  
**- SECTION 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.

**AUSTRALIAN CORPORATIONS ACT 2001**  
**- SECTION 228**

Related parties

Controlling entities

- (1) An entity that controls a public company is a related party of the public company.

Directors and their spouses

- (2) The following persons are related parties of a public company –
- (a) directors of the public company;
  - (b) directors (if any) of an entity that controls the public company;
  - (c) if the public company is controlled by an entity that is not a body corporate—each of the persons making up the controlling entity;
  - (d) spouses and de facto spouses of the persons referred to in paragraphs (a), (b) and (c).

Relatives of directors and spouses

- (3) The following relatives of persons referred to in subsection (2) are related parties of the public company –
- (a) parents;
  - (b) children.

Entities controlled by other related parties

- (4) An entity controlled by a related party referred to in subsection (1), (2) or (3) is a related party of the public company unless the entity is also controlled by the public company.

Related party in previous 6 months

- (5) An entity is a related party of a public company at a particular time if the entity was a related party of the public company of a kind referred to in subsection (1), (2), (3) or (4) at any time within the previous 6

months.

Entity has reasonable grounds to believe it will become related party in future

- (6) An entity is a related party of a public company at a particular time if the entity believes or has reasonable grounds to believe that it is likely to become a related party of the public company of a kind referred to in subsection (1), (2), (3) or (4) at any time in the future.

Acting in concert with related party

- (7) An entity is a related party of a public company if the entity acts in concert with a related party of the public company on the understanding that the related party will receive a financial benefit if the public company gives the entity a financial benefit.

**Par value of shares of a case sample of listed companies**

Company No.	Company Name	Class of Shares	Par value of each share
255	The Bank of East Asia, Limited	Ordinary	HK\$2.50
3653	Hang Seng Bank Limited	Ordinary	HK\$5.00
770009	BOC Hong Kong (Holdings) Limited	Ordinary	HK\$5.00
627771	CLP Holdings Limited	Ordinary	HK\$5.00
117620	The Hong Kong and China Gas Company Limited	Ordinary	HK\$0.25
24096	Cheung Kong (Holdings) Limited	Ordinary	HK\$0.50
1679	Swire Pacific Limited	Ord. A	HK\$0.60
		Ord. B	HK\$0.12
54532	Hutchison Whampoa Limited	Ordinary	HK\$0.25
69030	PCCW Limited	Ordinary	HK\$0.20
2672	Cathay Pacific Airways Limited	Ordinary	HK\$0.20
123905	Sun Hung Kai & Co. Limited	Ordinary	HK\$1.00
714016	MTR Corporation Limited	Ordinary	HK\$1.00
F 4746	HSBC Holdings Limited	Ordinary	US\$0.50

**(1) ASIC v Mauer-Swisse Securities Ltd and Goldman**  
**[2002] NSWSC 684 (2 August 2002);**  
**[2002] NSWSC 741 (9 August 2002)**

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ASIC commenced investigation into apparently fraudulent investment scheme operated by the 1<sup>st</sup> and the 2<sup>nd</sup> defendants. The 1<sup>st</sup> defendant company was incorporated in New Zealand. The 2<sup>nd</sup> defendant, director of the 1<sup>st</sup> defendant, was a New Zealander. ASIC applied to the court under sections 1323 and 1324 of the Corporations Act for an order prohibiting the 2<sup>nd</sup> defendant from leaving Australia without the consent of the Court and an order requiring him to deliver his passport to the Court. The Court granted the orders as sought. In the judgment on 9 August 2002, the Court summarized the principles whereupon section 1324 would operate :-

“36 At the risk of some repetition, I summarize the principles which I draw from the presently applicable authorities :

- the jurisdiction which the Court exercises under s.1324 CA is a statutory jurisdiction, not the Court’s traditional equity jurisdiction;
- Parliament has made it increasingly clear by successive statutory enactments that the Court, in exercising its statutory jurisdiction under s.1324, is not to be confined by the considerations which would be applicable if it were exercising its traditional equity jurisdiction;
- amongst the considerations which the Court must take into account in an application for an injunction under s.1324 CA are the wider issues referred to by Austin J in *Sweeney and Parkes*, and by Davies AJ in *Pegasus*; they may be gathered under the broad question whether the injunction would have some utility or would serve some purpose within the contemplation of the *Corporations Act*;
- these considerations are to be taken into account regardless of whether the application is for a permanent injunction under s.1324(1) or for an interim injunction under s.1324(4);

- where an application under s.1324(4) is made by ASIC rather than a private litigant the Court is more likely to give greater weight to the broad question whether the injunction would serve a purpose within the contemplation of the *Corporations Act*;
- where there is an appreciable – that is, not fanciful – risk of particular future contraventions of the *Corporations Act* by a defendant, it would serve a purpose within the contemplation of the *Corporations Act* that the Court grant not only a permanent injunction but, in an appropriate case, an interim injunction restraining such conduct. Section 1324 evinces an intention that the possibly severe consequences and the relative promptness of proceedings for contempt of Court be added to criminal prosecutions as a deterrent to contraventions of the *Corporations Act*;
- although the questions whether there is a serious question to be tried and where the balance of convenience lies will not circumscribe the Court’s consideration in an application for an interim injunction under s.1324(4), the interests of justice will always require that those questions be examined carefully when restrictions are sought to be imposed before the case has been properly examined by the Court, even where the protection of the public is said to be involved: see per Young J (as his Honour then was), in *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd* (1986) 11 ACLR 566, at 570-571;
- the balance of convenience will be viewed differently according to whether the applicant under s.1324(4) is ASIC or a private litigant. Where ASIC is acting to protect the public interest, the absence of an undertaking as to damages, exempted by s.1324(8), will usually be of little consequence. However, where the proceedings are brought to advance a plaintiff’s private interests, then if such an undertaking is not proffered even though it is likewise exempted by ss.(8), the Court may take that circumstance into account as a matter of practicality, common sense and fairness in determining where the interests of justice lie and whether “it is desirable” to grant the injunction : see per Young J in *Lombard Nash* at 571. ”

**(2) Mancini v Mancini [1999] NSWSC 800 (6 August 1999)**

A solicitors' firm had acted for a number of companies wherein H and W were sole directors. H and W were husband and wife. They divorced and dissention arose in the management of the companies. W purported removed H as director and commenced proceedings against him for remedies relating to the companies' affairs. The solicitors' firm acted for H in W's proceedings and W applied for injunction under s.1324 of the Corporations Act to retain H from retaining the solicitors' firm. It was not shown that the solicitors' firm had any confidential information which was relevant to the proceedings and was obtained while acting for the companies. The court held that the power in section 1324 was discretionary and in the absence of any sound ground related to the purposes of that section for making an injunction, it would not be appropriate to make one. Having regard to the general purposes of the Corporations Act, the relevant discretionary considerations should relate to the interests of the company affected by the contravention, and the fact that W was or might be a person whose interest would be affected by the retainer, while it might give her standing to make the application, did not constitute a positive ground for granting the injunction.

**AUSTRALIAN CORPORATIONS ACT 2001**  
**- SECTION 1324**

**Injunctions**

- (1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute –
- (a) a contravention of this Act; or
  - (b) attempting to contravene this Act; or
  - (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
  - (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
  - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
  - (f) conspiring with others to contravene this Act;

the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the Court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

(1A) For the purposes of subsection (1) –

- (a) a contravention of this Act affects the interests of a creditor or member of a company if the insolvency of the company is an element of the contravention; and
- (b) a company's contravention of –
  - (i) paragraph 257A(1)(a) (share buy-back not to prejudice ability to pay creditors); or
  - (ia) paragraph 256B(1)(b) (share capital reduction not to prejudice ability to pay creditors); or



- (ii) paragraph 260A(1)(a) (financial assistance for share acquisition not to prejudice company or shareholders or ability to pay creditors); affects the interests of a creditor or member of the company; and
- (c) a company's contravention of paragraph 256B(1)(a) (fair and reasonable test for share capital reduction) affects the interests of a member of the company.

This subsection does not limit subsection (1) in any way.

(1B) If the ground relied on in an application for an injunction is conduct or proposed conduct of a company or other person that it is alleged constitutes, or would constitute:

- (a) a contravention of paragraph 256B(1)(a) or (b), section 257A or paragraph 260A(1)(a); or
- (b) a contravention of a provision of this Act involving the insolvency of the company because of –
  - (i) the company making a reduction of its share capital to which Division 1 of Part 2J.1 applies; or
  - (ii) the company buying back its shares; or
  - (iii) the company giving financial assistance to which Part 2J.3 applies;

the Court must assume that the conduct constitutes, or would constitute, a contravention of that paragraph, section or provision unless the company or person proves otherwise.

(2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required by this Act to do, the Court may, on the application of –

- (a) ASIC; or
- (b) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing;

grant an injunction, on such terms as the Court thinks appropriate, requiring the first-mentioned person to do that act or thing.

- (3) Where an application for an injunction under subsection (1) or (2) has been made, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that that subsection applies.
- (4) Where in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
- (5) The Court may discharge or vary an injunction granted under subsection (1), (2) or (4).
- (6) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised –
  - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
  - (b) whether or not the person has previously engaged in conduct of that kind; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (7) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised –
  - (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
  - (b) whether or not the person has previously refused or failed to do that act or thing; and
  - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

- (8) Where ASIC applies to the Court for the grant of an injunction under this section, the Court must not require the applicant or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages.
- (9) In proceedings under this section against a person the Court may make an order under section 1323 in respect of the person.
- (10) Where the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.

## **SINGAPORE COMPANIES ACT**

### **Injunctions**

409A. – (1) Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of this Act, the Court may, on the application of –

(a) the Registrar; or

(b) any person whose interests have been, are or would be affected by the conduct,

grant an injunction restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

(2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that he is required by this Act to do, the Court may, on the application of –

(a) the Registrar; or

(b) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing,

grant an injunction requiring the first-mentioned person to do that act or thing.

(3) Where an application is made to the Court for an injunction under subsection (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim injunction restraining a person from engaging in conduct of the kind referred to in subsection (1) pending the determination of the application.

(4) The Court may rescind or vary an injunction granted under subsection (1), (2) or (3).

(5) Where an application is made to the Court for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the power of the Court to grant the injunction may be exercised –

(a) if the Court is satisfied that the person has engaged in conduct of that kind — whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or

(b) if it appears to the Court that, in the event that an injunction is not granted, it is likely the person will engage in conduct of that kind — whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(6) Where an application is made to the Court for a grant of an injunction requiring a person to do a particular act or thing, the power of the Court to grant the injunction may be exercised –

(a) if the Court is satisfied that the person has refused or failed to do that act or thing — whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; or

(b) if it appears to the Court that, in the event that an injunction is not granted, it is likely the person will refuse or fail to do that act or thing — whether or not the person has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to any person if the first mentioned person refused or fails to do that act or thing.

(7) Where the Registrar makes an application to the Court for the grant of an injunction under this section, the Court shall not require the Registrar or any other person, as a condition of granting an interim injunction, to

give any undertakings as to damages.

(8) Where the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.