

**Responses to the submission of 9 March 2004  
from Mr Winston Poon, SC,  
Mr Godfrey Lam and Ms Linda Chan**

***A. Leave requirement for commencement of a statutory derivative action***

We are looking into the matters and will let you have our substantive response later on.

***B. Responses to the submission of 12 January 2004***

**§2**

2. We note the position in the UK i.e. the unfair prejudice provisions in the UK Companies Act 1985 do not apply to both overseas companies and unregistered companies. As agreed with the Bills Committee, we would consult the Standing Committee on Company Law Reform (SCCLR) and relevant stakeholders before taking a decision on whether the unfair prejudice remedy in section 168A of the Companies Ordinance should also apply to unregistered companies and that this issue would be dealt with in the next exercise of amending the Companies Ordinance.

**§§3-4**

3. We do not disagree that there may be merits in grouping all the existing provisions in the Companies Ordinance (insofar as overseas companies are concerned) e.g. section 85 (relating to entries of satisfaction and release of property from charge), section 106 (relating to branch registers of overseas companies kept in Hong Kong) and section 168A (relating to unfair prejudice remedy) as amended by the Bill under a separate part in the Companies Ordinance. Such grouping exercise, by its nature, should be taken forward in the context of the rewrite of the Companies Ordinance.

**§§6-7**

4. 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>1</sup> of the Irish Companies Act 1963. In response to your comments, we propose 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.

### **§9**

5. Section 168A is a statutory relief. Unless the Companies Ordinance so provides, a member (as well as a former member after the proposed amendments to section 168A in the Bill are brought into operation) would not be able to seek unfair prejudice remedy in relation to the conduct of the affairs of a company. We do not see why there should be a statutory limitation period for a former member but not a present member. As long as one accepts that damages can be granted as a remedy for a past prejudicial conduct, it is difficult to argue that the action of a former member should be time-barred but not that of a present member when both actions are in relation to the same type of past conduct. Neither do we agree that justice dictates that there should be a limitation period for a former member’s action. In fact, if we were to introduce a time limit for a former member’s action but not a present member’s action, it would more likely be seen as not acting in the interest of justice.

### ***Others - Proposed subsection (2D) of section 168A in paragraph 4(3) of Schedule 4***

6. We agree that the proposed subsection (2D) of section 168A should be deleted.

### ***C. Responses to the submission of 5 February 2004***

#### ***Subsection (2) of proposed section 168BB in paragraph 5 of Schedule 4 – Discovery of documents***

7. Under the common law derivative action, while the company defendant is represented by separate solicitors, the company, not being a

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<sup>1</sup> UK Law Commission Consultation Paper on “Shareholder Remedies”, 1996, footnote 72, page 102.

natural person, can only give instructions to its solicitors through its directors (who could also be the wrongdoers in question). In fact, the difficulties in securing cooperation from the company (who are under the control of the wrongdoers) exist irrespective of whether the company is named as a plaintiff or a defendant. At common law, if the directors are reluctant to produce documents on behalf of the company in a derivative action, the shareholder plaintiff can apply to court for discovery.

8. In a similar way, under the proposed statutory derivative action, the company is named as a plaintiff but the conduct of the proceedings would be in the hands of the member who has obtained leave to commence the proceedings on behalf of the company. If the directors of the company refuse to produce discovery, we believe that the member 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). Since the member has the conduct of the proceedings on behalf of the company, we believe that the member would be able to take any steps in the proceedings including discovery. If this route were not feasible, the member could apply under either the proposed section 168BF (providing that 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) or the proposed section 152FA (providing for the inspection of company documents). 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.

9. If the directors are not defendants to the proceedings, it is true that as a general rule, the court has no power to order the discovery or production of documents as against a non-party, and the right to obtain and the liability to give discovery are limited to parties to the cause or the matter. However, there are a number of exceptions to this general rule, under which the directors (not being a party to the cause or the matter) may be required or ordered to disclose or produce relevant documents in his possession, custody or power. The more relevant exceptions include production of documents at proceedings other than a trial, *Norwich Pharmacal discovery*, and production of documents at a trial subsequent to a *subpoena duces tecum*.

10. As regards the court's power to award costs, the proposed section 168BF makes it clear 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  
March 2004**