

Consultation Paper on Statutory Derivative Action in the Companies (Amendment) Bill 2003

Purpose

This paper aims to seek the views of all the relevant parties on issues arising from the statutory derivative action (SDA) in the Companies (Amendment) Bill 2003.

Background

2. Where a wrong has been done to a company, the general principle is that only the company can sue. This is called the rule in ‘*Foss v Harbottle*¹’. However, minority shareholders are allowed under limited circumstances to sue on behalf of the company. Such action is called a “derivative action”. These limited circumstances are exceptions to the rule in *Foss v Harbottle*. The most important of these exceptions is an act which constitutes a “fraud on the minority” (where the wrong in question is one that cannot be validly ratified by the majority) and the “wrongdoers are in control of the company” (wrongdoer control).

3. It has been recognized² that difficulties lie in discerning from the case law clear principles under which a wrongdoing may be ratified by the majority shareholders and circumstances under which they may not. Furthermore, the concept of wrongdoer control may be difficult to apply. In practice, it would normally be difficult to show that there are controlling or ill-motivated shareholders who are preventing litigation from taking place. There are also some other practical difficulties with and disincentives to shareholders commencing a derivative action in Hong Kong. For example, the shareholder bringing the action is potentially liable for the costs of the action, even though he has no corresponding right to the potential damages, and the shareholder is likely to find that he is effectively prevented from taking action because he is unable to access information in order to commence a proper action.

4. In view of the above difficulties, it was proposed to include sections 168BA to 168BI in the Companies (Amendment) Bill 2003 (relevant extract at [Annex A](#)) to provide for a SDA whereby a shareholder of a company may commence an action on behalf of the company in respect

¹ *Foss v Harbottle* (1843) 2 Hare 461

² Corporate Governance Review by the Standing Committee on Company Law, A Consultation Paper on Proposals made in Phase I of the Review, July 2001, pages 55 – 57.

of a wrong done to the company. These difficulties are also recognized in other comparable jurisdictions which have amended their company law to provide for SDAs, namely: Australia³ (enacted in 2001), Singapore⁴ (enacted in 1993), and New Zealand⁵ (enacted in 1993). As in these jurisdictions, under our proposed SDA, the court will consider, among other things, the good faith of the shareholder and the best interests of the company instead of whether the case falls within the exceptions to the rule in Foss v Harbottle. Furthermore, ratification by a general meeting will not be a bar to the commencement of derivative proceedings.

5. The Bill was introduced into the Legislative Council in June 2003 and a Bills Committee was formed in July 2003 to study the Bill. The Clerk to the Bills Committee then wrote to all relevant parties to seek their comments on the Bill. Comments received have been considered by the Bills Committee.

Committee Stage Amendments (CSAs)

6. The scrutiny of the Bill (insofar as the SDA is concerned) started in February 2004. Having regard to the views of the Bills Committee, we agreed to propose a number of Committee Stage Amendments (CSAs) to the Bill to address the comments made by the Bills Committee and depositions. A marked-up version of the CSAs is at Annex B. In particular, the CSAs aim to implement the following changes –

- (a) To introduce, as proposed by the Bills Committee, a leave requirement for a shareholder of a company before he can bring proceedings on behalf of the company. Once leave of the court has been obtained, the shareholder can commence the proceedings. There is no need for the shareholder to prove to the court that his case falls within the exceptions to the rule in Foss v Harbottle either in the leave application or the derivative action proper;
- (b) In granting leave for a shareholder of a company to bring proceedings on behalf of the company, the court has to be satisfied with the “good faith”, “best interests” and “serving pre-action notice” conditions in the proposed section 168BB(3). In addition to the above conditions, we propose to add the following new conditions (along the

³ Australian Corporations Act 2001

⁴ Singapore Companies Act

⁵ New Zealand Companies Act 1993

lines of section 237(2) of the Australian Corporations Act 2001) –

- (i) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them; and
- (ii) there is a serious question to be tried; and
- (c) with the introduction of the leave requirement, the striking-out mechanism in the proposed section 168BD will be abolished.

The Bills Committee has asked that these CSAs should be sent to all relevant parties for comments and has expressed concerns that the threshold “properly taking responsibility for proceedings” in item (b)(i) above may be too high and/or very difficult to prove, and may result in unnecessary complication of the leave application proceedings.

Issues arising from the discussion by the Bills Committee

7. Apart from these CSAs, the Bills Committee has raised a number of issues in relation to the operation of the SDA and asked that all relevant parties should be consulted on these issues -

- (a) the co-existence of the common law derivative action (CDA) and the SDA;
- (b) the conduct of proceedings; and
- (c) the scope of proceedings.

Co-existence of CDA and SDA

8. The proposed section 168BB(4) provides that the SDA provisions in the Bill shall not affect any common law right of a shareholder of a company to bring proceedings on behalf of the company. In other words, unlike the law in other jurisdictions which either expressly or implicitly abolishes the CDA, the Bill allows the co-existence of the CDA and SDA. This has been done because Hong Kong is unique in the sense that there are a large number of companies incorporated outside Hong Kong but controlled by Hong Kong residents. Our SDA will apply to Hong Kong incorporated companies and non-Hong Kong companies. For companies incorporated outside Hong Kong, the law of the place of

incorporation governs the right of a shareholder to bring a CDA (See Konamaneni and others v Rolls Royce Industrial Power (India) Ltd and others [2002] 1 All ER 979). There may be different rules of internal management in the law of the place of incorporation compared with those applying to Hong Kong incorporated companies. To abolish the common law right in respect of non-Hong Kong companies might deprive shareholders of those companies of rights otherwise available to them. Hence, we consider it more desirable not to abolish the CDA, thereby giving shareholders one more option to commence an action on behalf of companies.

9. By reason of the proposed section 168BB(4), we cannot rule out the possibility that a shareholder may seek to take derivative actions respectively under the common law and the statute, hoping to increase his chance of success. It should be noted that the CDA and the SDA differ not only in terms of form, but also in substantive issues. For example, the effect of ratification by the board of directors in a CDA is different from that in a SDA. Besides, there is no need to prove the exceptions to the rule in *Foss v Harbottle* in a SDA.

10. In the event where a shareholder takes both a SDA and a CDA in respect of the same subject matter, we expect either one of the following scenarios may occur –

- (a) One of the actions may be struck out if any ground of Order 18 Rule 19, Rules of High Court, Cap. 4A is established;
- (b) The two actions may be ordered to be heard together.

We doubt if the two actions can be consolidated since some of the substantive issues are different and the company appears as the plaintiff in a SDA but as the defendant in a CDA.

11. That said, it appears unlikely that a shareholder would take two derivative actions respectively under common law and the statute, given that the damages, if any, obtained in the derivative action would go to the company and the shareholder may be exposed to two sets of costs. Moreover, since the SDA is being introduced to address the difficulties in the CDA, it is believed that a shareholder would generally opt for taking a SDA and refrain from taking a CDA.

12. In light of the above analysis, the Administration would like to seek relevant parties' views on whether they consider it necessary to include provisions in the Bill to deal with the co-existence or duplicity of a CDA and a SDA taken by the same shareholder. If so, the following amendments to the Bill ***may be considered*** –

- (a) An express provision be included to empower the court to dismiss a shareholder's application for leave to commence a SDA if a CDA has been commenced by the same shareholder in respect of the same subject matter;
- (b) An amendment be introduced to the proposed section 168BB(4) to abolish a shareholder's common law right to commence a CDA if leave has been granted to the same shareholder to commence a SDA in respect of the same subject matter.

13. It should be noted that the proposed amendments in paragraph 12 above, if adopted, should apply only to dual derivative actions taken by the same shareholders. Where there are a CDA and a SDA taken by different shareholders in respect of the same subject matter, we see no basis in depriving a person's common law right to bring a CDA simply because another person has commenced a SDA or vice versa.

Conduct of proceedings

14. There have been concerns about the conduct of proceedings and, in particular, the discovery of documents i.e. the shareholder, who commences the proceedings, does not have the possession or the power to gain access to company documents. Under the proposed SDA, the action is brought by the shareholder in the name of the company. This is different from the common law position in which the shareholder will be the plaintiff and the company will be joined as a nominal defendant for the purpose of discovery of documents. As commented by Gower, the latter arrangement is highly misleading in that an action enforcing the company's rights takes the form, apparently, of an action against the company⁶. It should also be noted that although the company, being the nominal defendant, can be called upon to give disclosure of documents, it is unlikely that the company (as opposed to other defendants who are alleged to have committed the wrongdoing in respect of which the claim is brought) will

⁶ Gower's Principles of Modern Company Law, Sixth Edition 1997, Paul L. Davies page 666

take much, if any, active part in the proceedings⁷.

15. We consider that the concerns about the conduct of proceedings under the proposed SDA can be addressed. We have built in a number of channels in the Bill to facilitate the discovery of documents. While the company is named as a plaintiff in the SDA, the conduct of the proceedings would be in the hands of the shareholder who has obtained leave to commence the SDA. If the directors of the company refuse to produce discovery, we believe that the shareholder 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 of the Rules of High Court, Cap. 4A). Since the shareholder has the conduct of the proceedings on behalf of the company, we believe that the shareholder would be able to take any steps in the proceedings including discovery. In addition, the shareholder could apply under either the proposed section 168BF (providing 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.

16. Our proposal is in fact similar to the legislative provisions in Australia and Singapore in that the company is named as the plaintiff. We have consulted our counterparts in Australia and Singapore who do not appear to be aware of any practical problems in terms of discovery.

17. As regards other procedural issues arising from the conduct of proceedings for SDA such as whether the application should be made by means of an originating summons, petition or otherwise and supported by an affidavit, whether the company or other party should be named as a respondent, we consider that the power in the proposed section 168BI should suffice for this purpose. Hence, we do not propose any other CSAs to address this issue.

Scope of proceedings

18. There have also been some concerns about the scope of proceedings, in particular, whether the SDA should be restricted to certain wrongs such as fraud, negligence, default, breach of duty. However, the

⁷ Minority Shareholders: Law, Practice and Procedure, Butterworths, 2000, Victor Joffe, page 34

CDA which involves a shareholder's rights to sue on behalf of a company, is generally treated as a matter of procedural law⁸. Hence, it is not necessary to restrict the types of action that could be brought as derivative actions. There are no such restrictions on the SDAs in other jurisdictions like Australia, and Singapore. Given that it is now proposed to have a leave requirement to commence a SDA under the Bill and the application for leave is not to be made on an ex parte basis, the company should be able to make a representation before the court as to whether the action is in the best interests of the company. We believe that lawful and reasonable commercial transactions of a company *per se* should normally be excluded from the scope of the SDA as it would be difficult to establish that it would be in the best interests of the company for its shareholders to commence an SDA involving such commercial transactions. Hence, we do not propose any other CSAs to address this issue.

Way Forward

19. We invite all relevant parties to express their views on the CSAs as well as those issues together with our responses mentioned in paragraphs 7 to 18 above.

Financial Services Branch
Financial Services and the Treasury Bureau
April 2004

⁸ According to Gower, the basic rule in *Foss v Harbottle* is part of the law of civil procedure (see Gower's Principles of Modern Company Law, Sixth Edition 1997, Paul L. Davies page 665).

Proposed sections 168BA to 168BI

PART IVAA

BRINGING OR INTERVENING IN PROCEEDINGS ON
BEHALF OF SPECIFIED CORPORATION

168BA. Definition

In this Part, unless the context otherwise requires,
“proceedings” (法律程序) means any proceedings (other than criminal
proceedings) within the jurisdiction of the court.

**168BB. Members may bring or intervene
in proceedings**

(1) A member of a specified corporation may -

- (a) without leave of the court, bring proceedings
before the court on behalf of the specified
corporation; or
- (b) with the leave of the court granted under
subsection (3), intervene in any proceedings
before the court to which the specified
corporation is a party for the purposes of
continuing, discontinuing or defending those
proceedings on behalf of the specified
corporation.

(2) Any proceedings brought under subsection (1) on behalf of

a specified corporation shall be brought in the name of the specified corporation.

(3) The court may, on the application of a member of a specified corporation, grant leave for the purpose of subsection (1)(b) if it is satisfied that -

- (a) the intended intervention is in the best interests of the relevant specified corporation;
- (b) the member is acting in good faith in the application for leave to intervene in the proceedings; and
- (c) except where leave is granted by the court under section 168BC(4), the member has served a written notice on the specified corporation in accordance with section 168BC.

(4) This Part shall not affect any common law right of a member of a specified corporation to bring proceedings on behalf of the specified corporation, or intervene in any proceedings to which the specified corporation is a party.

(5) For the avoidance of doubt, this section does not prevent a member of a specified corporation from bringing proceedings in respect of the specified corporation, or intervening in any proceedings to which the specified corporation is a party, on his own behalf in respect of his personal right.

168BC. Service of written notice

(1) Subject to subsection (4), a member of a specified corporation shall serve a written notice on the specified corporation at least 14 days before he brings or applies for leave to intervene in proceedings under section 168BB in respect of the specified corporation.

(2) Service of a written notice under this section shall be effected by leaving it at -

- (a) in the case of a company, its registered office;
- (b) in the case of a non-Hong Kong company, the address of its authorized representative that is registered under section 333.

(3) A written notice under this section shall state -

- (a) the intention of the member to bring or apply for leave to intervene in proceedings under section 168BB in respect of the specified corporation; and
- (b) the reasons for his intention.

(4) The court may grant leave to dispense with the service of a written notice required by this section.

**168BD. Court's power to strike out
proceedings brought by members**

(1) On application by any party to any proceedings brought by a member of a specified corporation under section 168BB(1), the court may, on any of the grounds mentioned in subsection (2), at any time after the proceedings were brought -

- (a) order to be struck out or amended any pleading or the indorsement of any writ in the proceedings brought by the member, or anything in such pleading or indorsement; and
- (b) order the proceedings brought by the member to be stayed or dismissed or judgment to be entered accordingly.

(2) The grounds referred to in subsection (1) are -

- (a) the bringing of proceedings under section 168BB(1) is not in the best interests of the relevant specified corporation;
- (b) the proceedings have not been brought by the relevant member of the specified corporation in good faith;
- (c) except where leave is granted by the court under section 168BC(4), the written notice required to be served on the relevant specified corporation under section 168BC has not been served on it or has not been served in accordance with section

168BC; or

- (d) leave granted under section 168BC(4) has been set aside by the court.

(3) This section is in addition to and does not derogate from any power of the court conferred by any enactment or rule of law.

168BE. Effect of approval or ratification

(1) The approval or ratification by the members of a specified corporation of any conduct shall not have the effect of -

- (a) preventing a member of the specified corporation from bringing or intervening in any proceedings under section 168BB(1), or from applying for leave under section 168BB(3);
- (b) requiring the court to strike out the proceedings brought by the member, or refuse to grant leave under section 168BB(3); or
- (c) requiring the court to determine the proceedings brought or intervened in by the member in favour of the defendant.

(2) Notwithstanding subsection (1), the court may, after having regard to the following matters in respect of the members of a specified corporation who approved or ratified the relevant conduct, take into account the approval or ratification in

deciding what judgment or order (including any order as to damages) to make in respect of any proceedings brought or intervened in by a member of the specified corporation under section 168BB(1), or in respect of an application for leave made under section 168BB(3) -

- (a) the extent of the members' independence of the conduct when they approved or ratified it;
- (b) how well-informed about the conduct they were when deciding whether or not to approve or ratify it; and
- (c) whether or not they were acting for proper purposes having regard to the interests of the specified corporation when they approved or ratified it.

168BF. General powers of court

(1) The court may make any order and give any direction it considers appropriate in respect of any proceedings brought or intervened in by a member of a specified corporation under section 168BB(1), or in respect of an application for leave made under section 168BB(3), including -

- (a) interim orders pending the determination of the proceedings or application;
- (b) directions concerning the conduct of the proceedings or application, including requiring

mediation;

- (c) an order directing the specified corporation, or an officer of the specified corporation, to do, or not to do, any act; and
- (d) an order appointing an independent person to investigate and report to the court on -
 - (i) the financial position of the specified corporation;
 - (ii) the facts or circumstances that gave rise to the proceedings; or
 - (iii) the costs incurred by the parties to the proceedings, and by the member who brought or intervened in the proceedings, or made the application.

(2) Where the court makes an order under subsection (1)(d), it may make any other orders it considers appropriate for the purposes of that subsection.

(3) Where the court orders the appointment of an independent person under subsection (1)(d), the court may, at any time -

- (a) order any or all of the following persons to be liable for any expenses arising out of the investigation -
 - (i) the specified corporation;

- (ii) the parties to the proceedings;
- (iii) the member who brought or intervened in the proceedings, or made the application; and

(b) review, vary or revoke an order made pursuant to paragraph (a).

(4) If an order made pursuant to subsection (3)(a), or the order as varied pursuant to subsection(3)(b), makes 2 or more persons liable for the relevant expenses, the court may also determine the nature and extent of the liability of each of those persons.

**168BG. Power of court to make orders
as to costs**

(1) The court may, at any time, make any orders it considers appropriate as to the liabilities of the following persons in relation to the costs of any proceedings brought or intervened in by a member of a specified corporation under section 168BB(1), or any proceedings on an application for leave made under section 168BB(3) -

- (a) the specified corporation;
- (b) the parties to the proceedings; and
- (c) the member who brought or intervened in the proceedings, or made the application.

(2) An order made under subsection (1) may require

indemnification of costs, which may require indemnification, out of the assets of the relevant specified corporation, against the costs incurred or to be incurred by the member referred to in subsection (1)(c) in bringing or intervening in the proceedings, or making the application.

(3) The court may only make an order as to costs under this section in favour of the member referred to in subsection (1)(c) if it is satisfied that the member was acting in good faith in, and had reasonable grounds for, bringing or intervening in the proceedings, or making the application.

168BH. Discontinuance or settlement

Proceedings brought or intervened in by a member of a specified corporation under section 168BB(1) shall not be discontinued or settled without the leave of the court.

168BI. Rules of court

The Rules Committee constituted under section 55 of the High Court Ordinance (Cap. 4) may make rules of court for giving effect to this Part as appears to the Committee to be necessary or expedient."

**A marked-up version of the
Committee Stage Amendments
to the proposed sections 168BA to 168BI**

PART IVAA

BRINGING OR INTERVENING IN PROCEEDINGS ON
BEHALF OF SPECIFIED CORPORATION

168BA. Definition

In this Part, unless the context otherwise requires,
“proceedings” (法律程序) means any proceedings (other than criminal
proceedings) within the jurisdiction of the court.

**168BB. Members may bring or intervene
in proceedings**

~~—(1) A member of a specified corporation may—~~

~~(a) without leave of the court, bring proceedings
before the court on behalf of the specified
corporation; or~~

~~(b) with the leave of the court granted under
subsection (3), intervene in any proceedings
before the court to which the specified
corporation is a party for the purposes of
continuing, discontinuing or defending those
proceedings on behalf of the specified
corporation.~~

(1) A member of a specified corporation may, with the leave

of the court granted under subsection (3) -

(a) bring proceedings before the court on behalf
of the specified corporation; or

(b) intervene in any proceedings before the court
to which the specified corporation is a party
for the purposes of continuing, discontinuing
or defending those proceedings on behalf of
the specified corporation.¹

(2) Any proceedings brought under subsection (1) on behalf of a specified corporation shall be brought in the name of the specified corporation.

~~(3) The court may, on the application of a member of a specified corporation, grant leave for the purpose of subsection (1)(b) if it is satisfied that—~~

~~(a) the intended intervention is in the best interests of the relevant specified corporation;~~

~~(b) the member is acting in good faith in the application for leave to intervene in the proceedings; and~~

~~(c) except where leave is granted by the court under section 168BC(4), the member has served a written notice on the specified corporation in accordance~~

¹ In response to Members' suggestion, these amendments aim to impose a leave requirement for commencing a statutory derivative action.

~~with section 168BC.~~

~~(3) The court may, on the application of a member of a specified corporation, grant leave for the purpose of subsection (1) if it is satisfied that -~~

~~(a) it is in the best interests of the specified corporation that the applicant be granted leave;~~

~~(b) the applicant is acting in good faith;~~

~~(c) if the applicant is applying for leave to bring proceedings under subsection (1)(a), there is a serious question to be tried and it is probable that the specified corporation will not itself bring the proceedings;~~

~~(d) if the applicant is applying for leave to intervene in proceedings under subsection (1)(b), it is probable that the specified corporation will not itself properly take responsibility for those proceedings; and~~

~~(e) except where leave is granted by the court under section 168BC(4), the member has served a written notice on the specified corporation in accordance with section~~

168BC.²

(4) This Part shall not affect any common law right of a member of a specified corporation to bring proceedings on behalf of the specified corporation, or intervene in any proceedings to which the specified corporation is a party.

(5) For the avoidance of doubt, this section does not prevent a member of a specified corporation from bringing proceedings in respect of the specified corporation, or intervening in any proceedings to which the specified corporation is a party, on his own behalf in respect of his personal right.

168BC. Service of written notice

(1) Subject to subsection (4), a member of a specified corporation shall serve a written notice on the specified corporation at least 14 days before he ~~brings or applies for leave to intervene in proceedings under section 168BB~~ applies for leave under section 168BB(3)³ in respect of the specified corporation.

(2) Service of a written notice under this section shall be effected by leaving it at -

- (a) in the case of a company, its registered office;
- (b) in the case of a non-Hong Kong company, the address of its authorized representative that is

² In response to Members' suggestion, these amendments aim to add two new requirements, along the lines in section 237(2) of the Australian Corporations Act 2001, for the court to grant leave to a member to commence a statutory derivative action i.e. (a) it is probable that the specified corporation concerned will not bring the proceedings, or take responsibility for them; and (b) there is a serious question to be tried.

³ See Footnote (1).

registered under section 333.

(3) A written notice under this section shall state -

- (a) the intention of the member to ~~bring or apply for leave to intervene in proceedings under section 168BB apply for leave under section 168BB(3)~~⁴ in respect of the specified corporation; and
- (b) the reasons for his intention.

(4) The court may grant leave to dispense with the service of a written notice required by this section.

~~168BD. Court's power to strike out
proceedings brought by members~~

~~(1) On application by any party to any proceedings brought by a member of a specified corporation under section 168BB(1), the court may, on any of the grounds mentioned in subsection (2), at any time after the proceedings were brought—~~

- ~~(a) order to be struck out or amended any pleading or the indorsement of any writ in the proceedings brought by the member, or anything in such pleading or indorsement; and~~
- ~~(b) order the proceedings brought by the member to be stayed or dismissed or judgment to be entered accordingly.~~

~~(2) The grounds referred to in subsection (1) are—~~

- ~~(a) the bringing of proceedings under section 168BB(1)~~

⁴ See Footnote (1).

~~is not in the best interests of the relevant specified corporation;~~

~~(b) the proceedings have not been brought by the relevant member of the specified corporation in good faith;~~

~~(c) except where leave is granted by the court under section 168BC(4), the written notice required to be served on the relevant specified corporation under section 168BC has not been served on it or has not been served in accordance with section 168BC; or~~

~~(d) leave granted under section 168BC(4) has been set aside by the court.~~

~~(3) This section is in addition to and does not derogate from any power of the court conferred by any enactment or rule of law.⁵~~

168BE. Effect of approval or ratification

(1) The approval or ratification by the members of a specified corporation of any conduct shall not have the effect of -

- (a) preventing a member of the specified corporation from bringing or intervening in any proceedings under section 168BB(1), or from applying for leave under section 168BB(3);
- (b) requiring the court to ~~strike out the proceedings~~

⁵ See Footnote (1). After the introduction of the leave requirement, the striking out mechanism can be deleted.

~~brought by the member, or~~⁶ refuse to grant leave
under section 168BB(3); or

- (c) requiring the court to determine the proceedings brought or intervened in by the member in favour of the defendant.

(2) Notwithstanding subsection (1), the court may, after having regard to the following matters in respect of the members of a specified corporation who approved or ratified the relevant conduct, take into account the approval or ratification in deciding what judgment or order (including any order as to damages) to make in respect of any proceedings brought or intervened in by a member of the specified corporation under section 168BB(1), or in respect of an application for leave made under section 168BB(3) -

- (a) the extent of the members' independence of the conduct when they approved or ratified it;
- (b) how well-informed about the conduct they were when deciding whether or not to approve or ratify it;
and
- (c) whether or not they were acting for proper purposes having regard to the interests of the specified corporation when they approved or ratified it.

168BF. General powers of court

⁶ See Footnote (5).

(1) The court may, at any time,⁷ make any order and give any direction it considers appropriate in respect of any proceedings brought or intervened in by a member of a specified corporation under section 168BB(1), or in respect of an application for leave made under section 168BB(3), including –

- (a) interim orders pending the determination of the proceedings or application;
- (b) directions concerning the conduct of the proceedings or application, ~~including requiring~~ mediation⁸;
- (c) an order directing the specified corporation, or an officer of the specified corporation, to do, or not to do, any act; and
- (d) an order appointing an independent person to investigate and report to the court on –
 - (i) the financial position of the specified corporation;
 - (ii) the facts or circumstances that gave rise to the proceedings; or
 - (iii) the costs incurred by the parties to the proceedings, and by the member who brought or intervened in the proceedings, or made the application.

(2) Where the court makes an order under subsection (1)(d), it

⁷ These amendments aim to improve the clarity of the proposed section 168BF(1).

⁸ In response to the suggestion made by Mr Winston Poon, SC, these amendments aim to delete the phrase “including requiring mediation”.

may make any other orders it considers appropriate for the purposes of that subsection.

(3) Where the court orders the appointment of an independent person under subsection (1)(d), the court may, at any time –

(a) order any or all of the following persons to be liable for any expenses arising out of the investigation –

(i) the specified corporation;

(ii) the parties to the proceedings or
application⁹;

(iii) the member who brought or intervened in the proceedings, or made the application; and

(b) review, vary or revoke an order made pursuant to paragraph (a).

(4) If an order made pursuant to subsection (3)(a), or the order as varied pursuant to subsection(3)(b), makes 2 or more persons liable for the relevant expenses, the court may also determine the nature and extent of the liability of each of those persons.

**168BG. Power of court to make orders
as to costs**

~~—(1) The court may, at any time, make any orders it considers appropriate as to the liabilities of the following persons in relation to the costs of any proceedings brought or intervened~~

⁹ In responses to Members’ comments, these amendments aim to make it clear that “parties to the proceedings” include “parties to the application”.

~~in by a member of a specified corporation under section 168BB(1),
or any proceedings on an application for leave made under section
168BB(3) —~~

~~(a) the specified corporation;~~

~~(b) the parties to the proceedings; and~~

~~(c) the member who brought or intervened in the
proceedings, or made the application.~~

(1) The court may, at any time (including on granting leave under
section 168BB(3)), make any order it considers appropriate as
to the liabilities of the following persons in relation to the
costs of the application for leave made under section 168BB(3) or
any proceedings brought or intervened in, or to be brought or
intervened in under section 168BB(1), by a member of a specified
corporation –

(a) the specified corporation;

(b) the parties to the proceedings or application;

and

(c) the member¹⁰ .

(2) An order made under subsection (1) may require
~~indemnification of costs, which may require such person as is
specified in the order to indemnify such other parties specified
in the order against the costs incurred or to be incurred by them,~~

¹⁰ In response to Members' suggestion, these amendments aim to make it clear that the court may grant an order as to costs for proceedings brought or intervened in by a member of the specified corporation once the leave to commence the proceedings is obtained.

including¹¹ indemnification, out of the assets of the relevant specified corporation, against the costs incurred or to be incurred by the member referred to in subsection (1)(c) in bringing or intervening in the proceedings, or making the application.

(3) The court may only make an order as to costs under this section in favour of the member referred to in subsection (1)(c) if it is satisfied that the member was acting in good faith in, and had reasonable grounds for, bringing or intervening in the proceedings, or making the application.

168BH. Discontinuance or settlement

Proceedings brought or intervened in by a member of a specified corporation under section 168BB(1) shall not be discontinued or settled without the leave of the court.

168BI. Rules of court

The Rules Committee constituted under section 55 of the High Court Ordinance (Cap. 4) may make rules of court for giving effect to this Part as appears to the Committee to be necessary or expedient."

¹¹ In response to Members' comments, these amendments aim to improve the clarity of the proposed section 168BG(2).