

**Bills Committee on
Companies (Amendment) Bill 2003
Schedule 4 – Amendments to the Companies Ordinance
relating to Shareholder remedies
Clause-by-clause examination**

At **Annex** is a draft mark-up version (as at 19 May 2004) of those provisions relating to derivative action in Schedule 4 of the Companies (Amendment) Bill 2003 to which the Administration would like to propose amendments, having taken into account views expressed at previous meetings of the Bills Committee and by deputations. The reasons for the amendments are set out in the footnotes.

Financial Services Branch
Financial Services and the Treasury Bureau
May 2004

**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.

168BAA. Application

This Part applies to proceedings in relation to fraud,
negligence, default in compliance with any law or rule or breach
of duty committed against a specified corporation¹.

**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~~

¹ Having regard to the views of various organizations on this issue, we propose, as agreed by the Bills Committee, to restrict the scope of the statutory derivative actions to those proceedings in respect of any fraud, negligence, default in relation to any law or rules, breach of duty in relation to the specified corporation.

~~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 corporation².

(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~~

² In response to Members' suggestion, these amendments aim to impose a leave requirement for commencing a statutory derivative action.

- ~~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.~~

(3) The court may, on the application of a member of a specified corporation, grant leave for the purpose of subsection (1) if

- (a) it appears to the court that there is a prima facie case that granting leave to the applicant is in the interests of the specified corporation; and
- (b) the court is satisfied that -
- (i) the applicant is acting in good faith;
- (ii) if the applicant is applying for leave to bring proceedings under subsection (1)(a), there is a serious question to be tried and the specified corporation has not itself brought the proceedings;
- (iii) if the applicant is applying for

leave to intervene in proceedings under subsection (1)(b), the specified corporation has not diligently continued, discontinued or defended those proceedings; and

(iv) 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 168BC³.

(4) Subject to other provisions in this Part, ~~F~~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.

³ Having regard to the views of various organizations on this issue, we agree to introduce, as proposed by the Bills Committee, a leave requirement, and to lower the thresholds for granting leave: (a) it appears to be prima facie in the interests of the specified corporation that the proceedings be brought, continued, discontinued or defended; (b) the applicant is acting in good faith; (c) if the applicant is applying for leave to bring proceedings on behalf of the specified corporation, there is a serious question to be tried and the specified corporation does not bring the proceedings; (d) if the applicant is applying for leave to intervene in proceedings on behalf of the specified corporation, the specified corporation does not diligently continue, discontinue or defend the proceedings; (e)

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)⁴ 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~~ apply for leave under section 168BB(3)⁵ 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.

168BCA. Court's power to dismiss application for leave under section 168BB(3)

The court may dismiss an application for leave under section

except where leave is granted by the court, the member has served a written notice on the specified corporation.

⁴ See Footnote (2).

⁵ See Footnote (2).

168BB(3) if the applicant has, in respect of the same subject matter, brought proceedings on behalf of the specified corporation, or intervened in any proceedings to which the specified corporation is a party under common law⁶.

168BCB. Court's power to strike out proceedings brought or intervention in proceedings by members under common law

(1) Where leave has been granted to a member of a specified corporation under section 168BB(3), if the member brings proceedings on behalf of the specified corporation, or intervenes in any proceedings to which the specified corporation is a party under common law in respect of the same subject matter, the court may –

(a) order to be struck out or amended any pleading or the indorsement of any writ in the proceedings or intervention under common law, or anything in such pleading or indorsement; and

(b) order the proceedings or intervention under common law to be stayed or dismissed or judgment to be entered accordingly.

⁶ Having regard to the views of various organizations on this issue, we propose to empower the court to deal with the co-existence or duplicity of a statutory derivative action and a common law derivative action: (a) Add a new section to empower the court to dismiss an application for leave to commence a statutory derivative action if a common law derivative action has been commenced by the same member in respect of the same subject matter; (b) Add a new section to empower the court to prevent a member from commencing a common law derivative action if leave has been granted to the same member to commence a statutory derivative action in respect of the same subject matter; and (c) Add a new section to empower the court to make any order and give any direction it considers appropriate in relation to items (a) and (b) above

(2) This section is in addition to and does not derogate from any power of the court conferred by any enactment or rule of law⁷.

168BCC. Court's power to make orders and give directions in relation to sections 168BCA and 168BCB

The court may make any order and give any direction it considers appropriate in relation to sections 168BCA and 168BCB⁸.

~~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.⁹~~

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~~

⁷ See footnote (6).

⁸ See footnote (6).

⁹ See Footnote (2). After the introduction of the leave requirement, the striking out mechanism can be deleted.

~~brought by the member, or~~¹⁰ 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

¹⁰ See Footnote (9).

(1) The court may, at any time,¹¹ 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~~¹²;
- (c) an order directing the specified corporation, or an officer of the specified corporation, to do, or not to do, any act (including the provision of such information or assistance as the court may think fit for the purpose of the proceedings or application)¹³; 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

¹¹ These amendments aim to improve the clarity of the proposed section 168BF(1).

¹² In response to the suggestion made by Mr Winston Poon, SC, these amendments aim to delete the phrase “including requiring mediation”.

¹³ Having regard to the views of various organizations on this issue, we propose to amend the proposed section 168BF(1)(c) to make it clear that the court may make an order directing the specified corporation or its officers to provide information or assistance in relation to the statutory derivative action.

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 or application¹⁴;

(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.

¹⁴ In responses to Members' comments, these amendments aim to make it clear that "parties to the proceedings" include "parties to the application".

168BFA. Protection of personal data

Nothing in section 168BF(1)(c), (d) and (2) shall authorize the collection, retention or use of personal data in contravention of the Personal Data (Privacy) Ordinance (Cap. 486)¹⁵.

**168BG. Power of court to make orders
about 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.~~

(1) The court may, at any time (including on granting leave under section 168BB(3)), make any order it considers appropriate about the costs incurred or to be incurred by the following persons in relation to an 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) -

- (a) the member ;

(b) the specified corporation; and
(c) any other parties to the application or
proceedings¹⁶ .

~~(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.~~

(2) An order made under subsection (1) may require the specified corporation to indemnify out of its assets against the costs incurred or to be incurred by the member in making the application or in bringing or intervening in the proceedings.

(3) The court may only make an order about costs (including the requirement as to indemnification) under this section in favour of the member if it is satisfied that the member was acting in

¹⁵ In response to the comments made by the Office of the Privacy Commissioner for Personal Data, we propose to add a new provision along the lines in the proposed section 152FE to enhance the protection of the personal data obtained under the proposed section 168BF.

¹⁶ 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.

good faith in, and had reasonable grounds for, bringing or intervening in the proceedings, or making the application¹⁷.

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."

¹⁷ In response to Members' comments, these amendments aim to improve the clarity of the proposed sections 168BG(2) and (3).