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27 May 2004

Mr Arthur Au
Office of the Secretary for Financial Services

By Email: hsuen@fstb.com.hk

Dear Mr Au

Companies (Amendment) Bill: Committee Stage Amendments

Thank you for sending me the summary of comments and marked-up sections.

First of all, I think it would be exceedingly unfortunate if the well-intentioned shareholder were to find his putative derivative action frustrated not because of any inability to meet the desired leave requirement, but for the simple reason that his shares were not registered in his name at the time of the alleged wrongdoing.

Institutional and nominee arrangements are by far the more usual means through which share ownership is organised when it comes to listed companies. These companies are of course still formally prohibited by reason of section 101 of the Companies Ordinance from entering notices of beneficial ownership on their registers of members, but that prohibition is nowhere near as sacred as the wording suggests: most large listed companies in the UK routinely analyse who lies behind the institutional and nominee accounts on their register and "section 212 notices" requiring disclosure of beneficial interests are a daily chore for many in-house counsel.

By all means insist on only registered shareholders being entitled actually to commence a derivative action, but please ensure that the provisions are drafted so that only shareholders who were beneficial owners in shares at the time of the alleged wrongdoing are permitted to commence this type of action. I feel sure the Bills Committee would not wish to sanction drafting which would entitle registered shareholders who are bare nominees to commence derivative actions.

The more important issue concerns leave. I have no problem with the Bills Committee's wish to introduce a mechanism intended to stop frivolous actions, provided it does not at the same time stultify what this reform is all about. The essential elements justifying a derivative have to be just two: (a) the applicant's

good faith and (b) the fact that it is in the interests of the company that the proceedings be instituted in circumstances where the company itself has failed to do so. The question of whether there is a triable issue (please, not a ”serious” issue to be tried) is a matter for argument between plaintiff and defendant, not between the plaintiffs themselves. By introducing the requirement to demonstrate that there is any kind of issue to be tried, then I fear the Bills Committee risks turning the so-called simple leave application into a three-cornered fight.

I trust you will find these comments of assistance.

JRB