

## **PART 14**

### **REMEDIES FOR PROTECTION OF COMPANIES' OR MEMBERS' INTERESTS**

#### **Introduction**

1. Shareholder remedies provisions were substantially revised by the Companies (Amendment) Ordinance 2004 with a view to enhancing legal remedies available to members of a company. The amendments included providing for a statutory derivative action that may be taken on behalf of a company by a member of the company; facilitating members to exercise their rights to obtain access to company records; and empowering the court, on application by an affected person or the Financial Secretary, to grant an injunction restraining any person from engaging in conduct which constitutes contravention of the CO or a breach of his fiduciary or other duties owed to a company. The unfair prejudice remedy in section 168A of the CO has also been improved. It provides the court with a power to award damages to the members of a company where it was found that their interests had been unfairly prejudiced and to award such interest on the damages as the court thinks fit. The scope of the remedy has been extended to allow past members (and their personal representatives) of local companies and members and past members (and their personal representatives) of non-Hong Kong companies to commence legal action under that section.
2. Part 14 groups the existing provisions concerning shareholder remedies under the CO into a distinct part of the Companies Bill. These include:
  - (a) unfair prejudice remedy (section 168A of the CO);
  - (b) injunction order (section 350B of the CO);
  - (c) statutory derivative action (sections 168BA to 168BK of the CO); and
  - (d) court order for inspection of company records (sections 152FA to 152FE of the CO).

3. Some changes are proposed to improve the operation of the unfair prejudice remedy and statutory derivative action provisions. The existing common law derivative action is preserved in Part 14. We are consulting separately in Chapter 9 on whether the common law derivative action regime should still be maintained.

- The significant changes to be introduced under this Part are highlighted below:
  - (a) **Extending the scope of the unfair prejudice remedy to cover “proposed acts and omissions”;**
  - (b) **Enhancing the court’s discretion in granting relief in cases of unfair prejudice; and**
  - (c) **Allowing a member of an associated company to bring a statutory derivative action on behalf of the company (“multiple derivative action”).**

### **Significant Changes**

- (a) **Extending the scope of the unfair prejudice remedy to cover “proposed acts and omissions”**

#### *Background*

4. Section 168A(1) of the CO provides that a member of a company may petition to the court if the affairs of the company are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of some part of the members. There is some uncertainty whether, under the current provisions, a member can bring an action for unfair prejudice where a course of action is only at the proposal stage, or where there is only a threat to do or not to do something. We propose to clarify the scope of the unfair prejudice provision to cover “proposed acts or omissions” along the lines of a similar provision in the UKCA 2006.<sup>1</sup>

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<sup>1</sup> Section 994(1) of the UKCA 2006.

### Proposal

5. **Clauses 14.1 to 14.7** restate the unfair prejudice remedy provisions under section 168A of the CO. **Clause 14.3(1)(b)** provides that the court may exercise the power to grant remedies under these provisions if there is any actual or proposed act or omission of the company (including one done or made on behalf of the company) which is or would be prejudicial to the interests of the members. The provision is intended to cover threatened or proposed conduct which has not yet taken place. As such, the remedies that may be granted by the court under **Clause 14.4** are also extended to cover an order restraining the proposed act or requiring the doing of an act that the company has proposed to omit to do.
- (b) **Enhancing the court’s discretion in granting relief in cases of unfair prejudice**

### Background

6. Section 168A(2) of the CO provides that orders made by the court (other than damages and interest awarded) must be “with a view to bringing to an end the matter complained of”. This may prevent the court from granting a remedy which is unable to meet that requirement. The corresponding provision in the UKCA 2006 is more flexible and allows the court to make such order “as it thinks fit for giving relief in respect of the matter complained of”.<sup>2</sup>
7. Section 168A(6) of the CO states that section 296 shall apply in relation to a petition under section 168A as it applies in relation to a winding-up petition. Section 296 empowers the Chief Justice to make rules relating to the winding-up of companies. Currently the rules in the Companies (Winding-up) Rules made under section 296 apply to proceedings under section 168A in so far as they are applicable. In the interest of plain language drafting an express rule making power is desirable and the Judiciary will be consulted on the matter.

### Proposal

8. **Clause 14.4** provides that the court may make any order that it thinks fit for giving relief in respect of the matter complained of. **Clause 14.6** provides

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<sup>2</sup> Section 996(1) of the UKCA 2006.

for an express rule making power on the Chief Justice in relation to unfair prejudice proceedings under Part 14.

- (c) **Allowing a member of an associated company to bring a statutory derivative action on behalf of the company (“multiple derivative action”)**

Background

9. Statutory derivative action (“SDA”) provisions in Part IVAA of the CO allow a member of a company to bring an action or intervene in proceedings on behalf of the company in respect of “misfeasance” committed against the company. “Misfeasance” means fraud, negligence, default in complying with any statutory provision or rule of law or breach of duty. Unlike some comparable jurisdictions<sup>3</sup>, only members of the company (vis-à-vis members of a related company of the company) have standing under section 168BC(1) of the CO to seek leave to commence a SDA. In other words, only “simple” derivative actions, as opposed to “multiple” derivative actions, can be brought under the SDA provisions.
10. However, in a recent case *Waddington Ltd v Chan Chun Hoo and Others*<sup>4</sup>, both the Court of Appeal and the Court of Final Appeal ruled that a “multiple” derivative action is maintainable in Hong Kong under the common law. The reasons for allowing members to bring a simple derivative action also justify a multiple derivative action, as the wrongdoers' control of both a parent company and its subsidiary can preclude the subsidiary from taking action against the wrongdoers. Giving standing to a member of the parent company to bring an action on behalf of the subsidiary company is appropriate since the member may otherwise suffer a real loss if no action on behalf of the subsidiary is taken. In addition to allowing a multiple derivative action under the common law, the Court of Final Appeal stated that it was appropriate for the CO to be amended to take in “multiple” derivative actions as there was no justification for excluding them from the statutory scheme.<sup>5</sup>

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<sup>3</sup> For example, in Australia, provision is made (subject to leave of the court) for proceedings to be brought by a person who is “a member... of the company or of a related body corporate (section 236(1)(a), ACA). New Zealand has taken the same approach under NZCA, section 165(1)(a). In Canada, a complainant bringing a derivative action may be a shareholder of the corporation or any of its affiliates and may sue on behalf of the corporation or any of its subsidiaries (Canadian Business Corporations Act 1985, sections 238 and 239(1)). In Singapore, the immediate members of the corporation and any other person who in the discretion of the court is a proper person may apply for leave to sue on behalf of the relevant company (SCA, section 216A(1)).

<sup>4</sup> [2006] 2 HKLRD 896; (2008) 11 HKCFAR 370.

<sup>5</sup> Paragraph 26 of the Court of Final Appeal judgment per Ribeiro PJ.

11. Following the *Waddington* case the SCCLR recommended that the SDA provisions in the CO should be expanded to allow a multiple derivative action by a shareholder of a parent company on behalf of a subsidiary or on behalf of a second or lower tier subsidiary.
12. The *Waddington* case was concerned with a multiple derivative action in the context of a parent-subsidiary relationship and the reasoning of the Court of Final Appeal was discussed in that context. The same reasoning can however be applied to situations where a member of a subsidiary seeks to bring a derivative action on behalf of another subsidiary of the same holding company.
13. Based on the SCCLR's recommendation and in order to bring the position of Hong Kong more in line with the legislation of comparable jurisdictions, we propose to extend the scope of the SDA provisions to allow a member of a related company to bring or to intervene in an action on behalf of the company.

*Proposal*

14. **Clause 14.13** will give standing to members of associated companies<sup>6</sup> and thereby expand the scope of SDA to cover “multiple” derivative actions which would provide a simple and effective mechanism for members of an associated company to commence SDA on behalf of the company. The proposal would further enhance the protection of the interests of minority shareholders.
15. To expedite implementation of the amendments, the proposal on enabling multiple statutory derivative actions will be incorporated into a Companies (Amendment) Bill scheduled to be introduced into the LegCo in early 2010.

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<sup>6</sup> An “associated company” in relation to a company (which includes both a company incorporated in Hong Kong and a non-Hong Kong company) means any company that is (a) a subsidiary of the company; (b) a holding company of the company; or (c) the subsidiary of such a holding company.

## PART 15

### DISSOLUTION BY STRIKING OFF OR DEREGISTRATION

#### Introduction

1. At present, there are two ways in which a defunct company may be dissolved without formally being wound up:
  - (a) striking off the register by the Registrar or by the court; or
  - (b) deregistration upon application to the Registrar.
2. There are two routes available for companies which have been dissolved to be restored or reinstated to the register by application to the court under sections 291(7) or 291AB(2) of the CO.<sup>1</sup>
3. Part 15 sets out provisions on striking off and deregistration of defunct companies, restoration of companies that have been struck off or deregistered, and related matters, including treatment of the property of dissolved companies. The amendments aim at streamlining the existing procedures for striking-off and restoration of companies while imposing certain new requirements to prevent possible abuse of the deregistration procedure.

- The significant changes to be introduced under this Part are highlighted below:
  - (a) **Extending the voluntary deregistration procedure to public non-listed and guarantee companies with some exceptions;**
  - (b) **Imposing additional conditions for deregistration of defunct companies;**
  - (c) **Streamlining the procedures for restoration of dissolved companies by court order; and**

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<sup>1</sup> In the liquidation context, companies which have been dissolved pursuant to winding-up proceedings may, by order of the court made under section 290 of the CO, have the dissolution declared void. The provisions will be reviewed in Phase II of the CO Rewrite exercise.

**(d) Introducing a new procedure of “administrative restoration” of a dissolved company by the Registrar.**

## **Significant Changes**

**(a) Extending the voluntary deregistration procedure to public non-listed and guarantee companies with some exceptions**

*Background*

4. At present, an application may be made to the Registrar under section 291AA of the CO to deregister a private company if the following three conditions are met:
- (a) the company has not commenced operation or business or has not been in operation or carried on business for 3 months;
  - (b) it has no outstanding liabilities;<sup>2</sup>
  - (c) all the members agree to the deregistration.

The company will be dissolved upon deregistration without going through the winding-up process.

5. There has been a suggestion that non-private companies, particularly small guarantee companies which are social or community organisations, should be allowed to deregister voluntarily. Currently, they cannot apply for voluntary deregistration under section 291AA even if they satisfy the conditions in paragraph 4 above. It would be costly for them to apply to court for a members’ voluntary winding-up instead. It is noted that the UK has extended the facility of voluntary striking-off procedure to public companies under the UKCA 2006.<sup>3</sup>

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<sup>2</sup> A “no-objection” notice from the Commissioner of Inland Revenue certifying that the company has no outstanding tax liabilities is required.

<sup>3</sup> See section 1003 of UKCA 2006. This was proposed in UK Department of Trade and Industry, *White Paper on Company Law Reform* (March 2005), paragraph 4.9.

### Proposal

6. We believe that flexibility should be allowed for small non-private companies, particularly guarantee companies, to apply for voluntary deregistration. However, it would not be prudent to allow listed companies and certain categories of regulated businesses which have a public interest nature and are subject to regulation by relevant authorities (such as banks, insurance and securities companies, Mandatory Provident Fund Schemes trustees) from applying for deregistration. As trust companies registered under Part VIII of the Trustee Ordinance (Cap 29) may act as executors or administrators of estates in respect of which it may not be easy to identify all relevant beneficiaries, they should also be excluded from applying for voluntary deregistration to avoid prejudicing the beneficiaries' interests.
  7. **Clause 15.6** excludes listed companies and certain categories of businesses from applying for voluntary deregistration. The conditions for applying voluntary deregistration, particularly the requirement of consensus by all members and the additional conditions proposed in section (b) below, would prevent any possible abuse of the procedure by other public non-listed or guarantee companies.
- (b) Imposing additional conditions for voluntary deregistration of defunct companies**

### Background

8. As noted in paragraph 4 above, voluntary deregistration of private companies may be allowed if certain conditions are met. There have been cases where some companies applying for deregistration were parties to legal proceedings or were in possession of immovable property in Hong Kong with high maintenance costs attached (such as retaining walls). As a consequence, the deregistration proved to have adverse impact on third parties or the Government. For instance, the "deregistered" company might have outstanding liabilities contingent upon the outcome of the legal proceedings. The Government might have to bear high maintenance costs as the immovable property became vested in the Government as bona vacantia following dissolution of the company. To prevent the potential abuse of the deregistration procedure, we are of the view that additional conditions should be imposed on companies applying for deregistration.



### Proposal

9. **Clauses 15.7 to 15.8** mainly restate the existing deregistration provisions under section 291AA of the CO. **Clause 15.7** imposes two additional conditions for deregistration, namely that the applicant must confirm that the company is not a party to any legal proceedings and that it has no immovable property in Hong Kong. Any person who knowingly or recklessly gives false or misleading information to the Registrar in an application commits an offence.

### (c) **Streamlining the procedures for restoration of dissolved companies by court order**

#### Background

10. At present, there are two routes available for companies which have been struck off or deregistered to be restored or reinstated to the register by application to the court. They are respectively under sections 291(7) and 291AB(2) of the CO. The time of application for such a restoration or reinstatement may be up to 20 years after the company's dissolution. These two routes are very similar in nature. They should be merged into one procedure.
11. The current period of application (20 years) seems too lengthy. Under section 292(3) of the CO, former directors of a dissolved company are only obliged to keep the books and papers of the company for not less than 5 years after the dissolution. Although there are provisions in sections 291(7) and 291AB(5) to the effect that a company restored or reinstated shall be deemed to be continued in existence as if it had not been dissolved, an odd situation may arise where a dissolved company is restored or reinstated to the register more than 5 years from its dissolution when all its books and papers were destroyed. Consideration should be given to shorten the period of application.

#### Proposal

12. **Clauses 15.23 to 15.26** replaces the two existing routes in sections 291(7) and 291AB(5) with one restoration procedure by court order. Where a company has been struck off the register by the Registrar or deregistered upon its own application, and thereby dissolved, any director or member or

creditor of the company or any interested person, including the Government, may make an application to the court for restoration of the company.

13. The application period will be shortened to within 6 years of dissolution of the company in general (**Clause 15.24**).<sup>4</sup> However, where an application is intended to enable a person to bring legal proceedings against the company for damages for personal injury, the limitation period will not apply. This will avoid jeopardising the interests of the deceased or injured persons. Under **Clause 15.16**, the period for which former directors of a dissolved company must keep the company's books and papers will be aligned to 6 years. It will reduce any uncertainty arising from the restoration procedure.

**(d) Introducing a new procedure of “administrative restoration” of a dissolved company by the Registrar**

*Background*

14. At present, where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, she may adopt the procedure set out in section 291 of the CO and strike the name of the company off from the register. Under section 291(4), the procedure may also be used where a company is being wound up and the Registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator (under sections 239 and 248 of the CO) have not been made for a period of six consecutive months.
15. There have been some cases where a company struck off seeks to be restored on the ground that, contrary to the Registrar's belief, it was actually in operation or carrying on business at the time of its striking off. This may occur because a company fails to file its annual returns, moves without notifying the CR of a change of registered office and is unaware of the proposed strike-off.<sup>5</sup> While restoration is often straightforward in such circumstances as it is unlikely to be contested, it still requires an application to the court. We believe that a simplified restoration procedure should be introduced to allow companies to be restored to the register in straightforward cases without the need for recourse to the court.

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<sup>4</sup> Companies which have been struck off or deregistered under the existing CO will be grandfathered.

<sup>5</sup> Elaborate procedures are provided for in section 291 of the CO before a company is struck off and gazette notices are published before any striking off.

## Proposal

16. **Clauses 15.18 to 15.22** enable the Registrar to restore a company which has been struck off under **Clause 15.3 or 15.4** (where it appears that the company is not in operation or carrying on business or, in the case of a company being wound up, the circumstances in section 291(4) of the CO apply). The Registrar may, on an application by a director or member of a company, restore a company having being struck off by her. In this connection, three conditions must be met:
- (a) the company must be in operation or carrying on business at the time its name was struck off;
  - (b) the applicant must bring up to date the company's records kept by the Registrar; and
  - (c) if the company has any immovable property situated in Hong Kong which has become vested in the Government as bona vacantia, the Government has no objection to the restoration.
17. The administrative restoration procedure does not apply to companies which were deregistered upon applications to the Registrar. For those cases, application for restoration should be made to the court under **Clauses 15.23 to 15.24**.

## **Other Changes**

### **(a) Streamlining striking off procedure**

18. The current process of striking off a company not in operation or carrying on business under section 291 of the CO takes approximately 5.5 months to complete. The Registrar must take the following steps before striking off a company:
- (a) send to the company by post a letter inquiring whether it is carrying on business or in operation;
  - (b) if no answer is received within one month from the date of the first, the Registrar should within 14 days send to the company a second letter by registered post;

- (c) if no answer is received within one month from the date of the second letter, a notice will be published in the Gazette stating that at the expiration of three months from the date of that notice, the company will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved. The notice will also be sent to the company by post.
19. **Clauses 15.1 to 15.3** mainly restate the existing striking off procedure with some streamlining. **Clause 15.2** streamlines the procedure by synchronising the publication of the Gazette notice with the sending of the second letter. It will shorten the striking off procedure by about one month's time.
- (b) **Requiring company to change name if it has been used by another company upon restoration**
20. **Clause 15.28** supplements the existing restoration procedure. It requires a company which is restored to the register by court order to change its name within 28 days after restoration if the name has already been used by another company or is otherwise prohibited from use under the Ordinance. If the company does not change its name, the company and every responsible person will be liable to a fine. The Registrar may substitute the name with a name comprising its registered number with the words "Company Registration Number" as the prefix. The provision addresses the situation where a company fails to change its former name after restoration where required to do so.
- (c) **Reimbursing Government reasonable costs of disposal on restoration of bona vacantia property**
21. **Clause 15.29** restates section 292A of the CO to provide that any property vested in the Government as bona vacantia will be re-vested in the company upon its restoration, subject to any liability, interest or claim that was attached to the property. If the Registrar has disposed of the property, she must pay the company the amount of the consideration, or if no consideration was received, an amount equal to the value of the property. A new provision is added in this clause to allow the Registrar to deduct from the amount payable to the company the reasonable costs in connection with the disposition of the property.