Thirdly, the defendant (or his employee or agent) must intend that the plaintiff acts or fails to act on the representation: see *Langridge v Levy* (1837) 2 M & W 519; *Peek v Gurney* (1873) LR 6 HL 377; *Andrews v Mockford* [1896] 1 QB 372.

Fourthly, the plaintiff must suffer damage as a result of his acting on the representation. Normally a claim in deceit is for economic loss but damages for consequential distress and inconvenience as well as personal injury and damage to property are also recoverable: see *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 168; *Saunders v Edwards* [1987] 1 WLR 1116; *Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769. Subsection (10)(c)(i) does not specify the measure of damages unlike subsections (10)(c)(ii) and (iii).

[71A.18] Bona fide purchaser

Subsection (12) defines a bona fide purchaser as acting in good faith and without notice of any defect in the title of the seller and the definition includes a person who becomes entitled at any time after such purchase.

72. Evidence of grant of probate

The production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate of a deceased person having been granted to some person shall be accepted by the company, notwithstanding anything in its articles, as sufficient evidence of the grant.

(Amended 6 of 1984 s 39)
[cf 1929 c 23 s 69 U.K.]

[72.01] History

This section may be compared with s 69 of the Companies Act 1929 (cf s 82 of the Companies Act 1948 and s 187 of the Companies Act 1985). The section was amended by No 6 of 1984, s 39.

[72.02] Overview

The grant of probate must be by the law of Hong Kong and a company need not act on a foreign grant: see *New York Breweries Co v AG* [1899] AC 62; First Schedule, Table A, Part I regs 29-33. In the case of a shareholder who dies while domiciled abroad, the company may not recognise his executor or administrator until probate or letters or administration have been obtained, although if a grant has been issued in a British Commonwealth country, then it can be resealed in Hong Kong: see also *Re Commercial Bank Corp of India and the East, Fernande's Executors' Case* (1870) 5 Ch App 314; *Fearnside and Dean's Case, Dobson's Case* (1886) 1 Ch App 231.

On the death of a shareholder (other than a joint holder) even if he bequeaths his shares to a specific legatee, as far as the company is concerned he is the person entitled to the shares because the executor or administrator has the legal estate: cf s 101; *Roberts v Letter 'T' Estates Ltd* [1961] AC 795 (PC), although this is normally confirmed in the articles: cf reg 29. Once the grant of probate or letters of administration have been produced to the company for registration, the company must deal with the executor or administrator in all matters relating to the shares. His title cannot be bypassed by an article purporting on the death of the holder to vest the shares in someone else: *Re Greene* [1949] Ch 333. There must be an express power of veto conferred by the articles on directors to justify a refusal to enter the name of an executor on the register of members - a directors' power of veto in relation to transfers is insufficient: *Re Bentham Mills Spinning Co* (1879) 11 Ch D 900 (CA); *Scott v Frank F Scott (London) Ltd* [1940] Ch 794 (CA); *Stothers v William Steward (Holdings) Ltd* [1994] 2 BCLC 266. For such a power see Table A, Part I, reg 30. To exercise such a right there must be a resolution of the board: see *Moodie v W & J Shepherd (Bookbinders) Ltd* [1949] 2 All ER 1044 (HL); *Re New Cedos Engineering Co Ltd* (1976) 120 Sol Jo. As to provisions in the articles to the effect that on the death of a member his

or her shares must be offered to the other members, see *Jarvis Motors (Harrow) Ltd v Carabott* [1964] 3 All ER 89, [1964] 1 WLR 1101; *Lee Chee Ngor Moreta v Prudential Enterprise Ltd* [1991] 2 HKC 499. See also *City of Glasgow Bank in Liquidation, Buchan's Case* (1879) 4 App Cas 549 at 588-589 (HL) and [67.03] and [69.08]-[69.10].

73. Issue and effect of share warrants to bearer

(1) A company limited by shares, if so authorized by its articles, may, with respect to any fully paid-up shares, issue under its common seal a warrant stating that the bearer of the warrant is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares included in the warrant.

(2) Such a warrant as aforesaid is in this Ordinance termed a share warrant.

(3) A share warrant shall entitle the bearer thereof to the shares therein specified, and the shares may be transferred by delivery of the warrant.

[cf 1929 c 23 s 70 U.K.]

[73.01] History

This section may be compared with s 70 of the Companies Act 1929 (UK): cf s 83 of the Companies Act 1948 (UK) and s 188 of the Companies Act 1985 (UK).

[73.02] Overview

The share warrant is the alternative form of title document and may only be issued to the bearer for fully paid shares. The bearer of a share warrant issued under the company's common seal is entitled to the shares specified in the warrant and those shares may be transferred by delivery of the warrant. It appears that a company may issue warrants to the bearer in respect of stock: see the definition of 'share' in s 2 and see also *Pilkington v United Railways of Havana and Regia Warehouse Ltd* [1930] 2 Ch 108, [1930] All ER Rep 649. Share warrants to bearer are judicially recognised as being negotiable instruments: see *Webb, Hale & Co v Alexandria Water Co Ltd* (1905) 21 TLR 572 (DC).

As to alterations in the register of members on the issue of share warrants and how far a bearer of share warrants is a member, see s 97 post. The bearer of a share warrant may surrender it for cancellation to the company which must then register the bearer's name in its register of members in respect of the shares specified in the warrant: s 97(2). Because of problems with theft and forgery and also the importance of knowing who a company's shareholders are, share warrants are not very common, though they occasionally feature as part of tax planning schemes with sometimes disastrous results if they are stolen. As to particulars to be entered in the annual return, see Sch 5, Part 1, para (3)(k).

[73.03] If so authorized by its articles

Schedule 1, Table A, Part I does not contain an article to this effect. The articles may also place conditions on the surrender of warrants under s 97. The issue of share warrants by a private company is prohibited in view of the restriction as to the transfer of shares: see s 29 ante.

[73.04] Common seal

See s 93(1)(b).

73A. Official seals for sealing share certificates etc.

(1) A company may have, for use for sealing securities issued by the company and for sealing documents creating or evidencing securities so issued, an official seal

which is a facsimile of the common seal of the company with the addition on its face of the word 'securities' or the expression in Chinese '證券' or both such word and expression. (Amended 3 of 1997 s 21)

(2) A company which was incorporated before the commencement of the Companies (Amendment) Ordinance 1984 (6 of 1984) and which has such an official seal as is mentioned in subsection (1) may use the seal for sealing such securities and documents as are there mentioned notwithstanding anything in any instrument constituting or regulating the company or in any instrument made before such commencement which relates to any securities or documents if they are sealed with that seal. (Added 6 of 1984 s 40)

[cf 1976 c 47 s 2 U.K.]

[73A.01] History

This section may be compared with s 2 of the Companies Act 1976 (cf s 40 Companies Act 1985 (UK)). It was added by No 6 of 1984, s 40 and subsection (1) was amended by No 3 of 1997, s 21.

[73A.02] Overview

This section makes provision for an official seal in addition to the company's common seal which is applied for sealing securities issued by the company and documents creating or evidencing such securities. This is a matter of convenience in the light of persons who may be authorized to issue such documents: see [69A.05].

[73A.03] Common seal

See s 93(1)(b). The facsimile of the common seal must have the addition of either the word 'securities' or '證券' or both on the face of it.

[73A.04] Commencement date of No 6 of 1984

The commencement date is 31 August 1984.

74. Power to make compensation for losses from forged transfers

(1) Every company having a share capital shall have power to make compensation by a cash payment out of its funds for any loss arising from a transfer of any shares in the company in pursuance of a forged transfer or of a transfer under a forged power of attorney, and, where the shares or stock of a company have by amalgamation or otherwise become the shares or stock of another company, that other company shall have the same power under this section as the original company would have had if it had continued.

(2) Every company may provide, by insurance or reservation of capital or accumulation of income, a fund to meet claims for such compensation.

(3) For the purpose of providing such compensation, any company may borrow on the security of its property.

(4) A company may, for the purposes of this section, impose such reasonable restrictions on the transfer of shares in the company, or with respect to powers of attorney for the transfer thereof, as it may deem necessary for guarding against losses arising from forgery.

(5) Where a company compensates any person under this section for any loss arising from forgery, the company shall, without prejudice to any other rights or remedies, have the same rights and remedies against the person liable for the loss as the person compensated would have had.

(Added 6 of 1984 s 40)

[cf 1891 c 43 s 1 U.K.; 1892 c 36 s 4 U.K.]

[74.01] History

This section was inserted by No 6 of 1984. It may be compared with the Forged Transfers Act 1891, s 1.

[74.02] Overview

If a signature is forged on an instrument of transfer of shares then the instrument is void and as a result the shares are not transferred and the original holder still holds them: see *Johnston v Renton* (1870) LR 9 Eq 181; *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188. As to the rights of the original/true owner, see *Barton v North Staffordshire Railway Co* (1888) 38 Ch D 458, [1886-90] All ER Rep 288; *Welch v Bank of England* [1955] 1 All ER 811; *Foster v Tyne Pontoon and Dry Dock Co* (1893) 63 LJQB 50.

Where a person presents a forged or fraudulent transfer of shares for registration, irrespective of knowledge of the fact of forgery, and receives a share certificate, that person cannot rely on the doctrine of estoppel by representation to require the company to stand by its statement concerning ownership of the shares on the share certificate. This is because the representation merely repeats the information provided by that person: see *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188; see also *Balkis Consolidated Co Ltd v Tomkinson* [1893] AC 396. However, a company's certification of a transfer of shares is now only a representation that the documents have been produced to the company showing prima facie that the transferor has title to the shares: see s 69A(1) and note subsection (2) which deals with the company's liability for negligent certification.

It is usual for a public company to insure itself against the consequences of acting on a forged instrument of transfer or other document affecting share transfer although it is possible to use reservation of capital or accumulation of income or borrow for the purpose of making cash compensation payments under this section: subsections (2) and (3) supra.

A person who presents a transfer for registration is required by common law to indemnify the company against any liability it incurs to other persons as a result of registering the transfer, so that, for example, a broker who deposits a forged transfer in good faith is liable to the company for any loss it may suffer thereby: *Sheffield Corp v Barclay* [1905] AC 392(HL), and see also *Welch v Bank of England* [1955] Ch 508; *Yeung v Hong Kong and Shanghai Bank* [1981] AC 787 (PC); *Re Bahia & San Francisco Railway Co Ltd* (1868) LR 3 QB 584; *Dixon v Kennaway & Co* [1900] 1 Ch 833. An implied warranty of authority may also make a broker liable for representing, whether in good faith or not, that he has authority to act for the supposed transferor when in fact he does not: *Starkey v Bank of England* [1903] AC 114 (HL). As to a stranger impersonating the owner of shares and the liability of the party who identifies the stranger as being the person entitled to make the transfer, see *Bank of England v Cutler* [1907] 1 KB 889.

This section therefore gives the company power to make compensation for any loss arising from a forged transfer whether they are legally liable or not.

[74.03] Every company having a share capital

See s 4.

[74.04] Power of attorney

See generally the Powers of Attorney Ordinance (Cap 31) ('PAO'). A power of attorney is an instrument authorising one person to act for another during the absence of that other. An instrument creating a power of attorney shall be signed and sealed by, or by direction and in the presence of, the donor of the power: see PAO, s 1(1). Where by the constitution of a corporation any special mode of execution of its deeds is prescribed, or any particular formality is required to be observed in affirming the corporate seal, then in order to be completely binding, every deed of the corporation must be executed in the manner or with every formality so prescribed: see *Clarke v Imperial Gas Light and Coal Co* (1832) 4 B & Ad 315 at 324-326. Therefore, the deeds of companies regulated by the Companies Ordinance must be executed with the formalities (if any) prescribed by the company's articles of association in order to be completely binding. Where a power of attorney is expressed to be irrevocable and is given as a security of a proprietary interest of the donee (of the power) or the performance of an obligation owed to the donee, if the donor is a corporation, its winding up or dissolution does not have the effect of revoking the power: see PAO, s 4.

As to the execution of instruments, etc by the donee of the power of attorney, see PAO, s 6. An attorney executing in his own name, even though for and on behalf of his principal, may be made personally liable: see *Tanner v Christian* (1955) 4 E & B 591. The execution of a deed will sensibly contain a reference to the power of attorney whichever form of signature is adopted and the principal and not the attorney must, in any case, be named as the party to the deed: see *Re Whitley Partners Ltd* (1886) 32 Ch D 337. An attorney cannot do an act which only his principal is competent to do such as swearing an affidavit: see *Clauss v Pir* [1987] 2 All ER 752, [1987] 3 WLR 93.

As a general rule, a power of attorney must be exercised in strict accordance with the terms and conditions of the instrument creating it: see *Jonmenjoy Coondoo v Watson* (1884) 9 App Cas 561 (authority to sell does not include authority to pledge); *Green v Whitehead* [1930] 1 Ch 38 (a power of attorney expressed to give 'sole control of all property whether owned by me solely or jointly with others' only applies to property held in beneficial ownership, not to property held on trust). Even broadly worded powers of attorney may not prevent or preclude the principal from objecting to a dealing with his property by a person who has notice that the agent is exceeding his authority actual and ostensible such as where the power stated 'the principal ... ratifies and confirms and agrees to ratify and confirm whatsoever the attorney shall do ... by virtue of those presents': see *Midland Bank Ltd v Reckitt* [1933] AC 1 (HL).

[74.05] Amalgamation

An amalgamation, also called a merger, may be achieved by a scheme of arrangement under ss 166-167 or a takeover under s 168: Schedule 9. It is a transaction whereby two or more companies are combined in some way in united ownership: see *Re South African Supply and Cold Storage Co Ltd, Wild v Same* [1904] 2 Ch 268.

[74.06] Reasonable restrictions ... for guarding against loses arising from forgery

See for example Schedule 1, Table A, Part I, reg 25(b). The restrictions must objectively be reasonable although the company has the right to deem what is necessary. Article 25(b) for example requires such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer.

[74.07] Company's rights and remedies

See generally [71A.17] and [74.02]. In addition to the rights and remedies which the company would have, it has the rights and remedies of the person compensated for loss arising from the forgery.

Special Provisions as to Debentures

74A. Company's register of debenture holders

(1) Any company which issues a series of debentures or debenture stock not transferable by delivery shall keep a register, either in English or Chinese, of the holders of such debentures or debenture stock, and shall enter therein the following particulars- (Amended 83 of 1995 s 9)

(a) the names and addresses, and the occupations or descriptions, of the holders and a statement of the amount of such debentures or debenture stock held by each holder; (Amended 83 of 1995 s 9)

(b) the date at which each person was entered in the register as the holder of such debentures or debenture stock;

(c) the date at which any person ceased to be a holder of any such debentures or debenture stock.

(2) The register of holders of debentures of a company shall be kept-

(a) at the registered office of the company; or

(b) if the work of making it up is done at an office of the company other than the registered office of the company, at that other office; or

(c) if the company arranges with some other person for the making up of the register to be undertaken on behalf of the company by that other person, at the office of that other person at which the work is done,

so, however, that it shall not be kept at a place outside Hong Kong.

(3) Every company shall send notice to the Registrar in the specified form of the place where the register required to be kept by the company under this section is kept, and of any change in that place. (Amended 3 of 1997 s 22)

(4) Where a company makes default in complying with subsection (1) or (2) or makes default for 14 days in complying with subsection (3), the company and every officer of the company who is in default shall be liable to a fine and, for continued default, to a daily default fine.

(Added 6 of 1984 s 41; Amended 7 of 1990 s 2)

[cf 1948 c 38 s 86 U.K.]

[74A.01] History

This section was added in 1984 and is based upon s 86 of the Companies Act 1948 (UK) (cf s 190 Companies Act 1985 (UK)). It was amended in 1990 with respect to the consequences of default and in 1995 to allow for the register to be kept in English or in Chinese. Subsection (3) was amended to allow the Registrar to specify the appropriate form. The provisions allowing the use of either language came into force on 10 February 1997 (L.N. 56 of 1997).

[74A.02] Overview

Section 74A requires a company to keep a register of debenture holders. However, it does not require that details of all its debenture holders be registered. This is thought to be due to the fact that 'debenture' has a wide and imprecise meaning: para 3.82 of the Report of the Companies Law Revision Committee, 1973. The requirement to keep a register of debenture holders applies only when a company issues a series of debentures or debenture stock.

[74A.03] The meaning of 'a series of debentures' and 'debenture stock'

A precise definition of 'debenture' has yet to be found and the term is applied to a wide range of documents which evidence indebtedness. In *Levy v Abercorris Slate and Slab Co* (1887) 37 Ch D 260, Chitty J states "In my opinion a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a 'debenture'. I cannot find any precise legal definition of the term, it is not in law or commerce a strictly technical term, or what is called a term of art."

However, the term 'debenture' does not apply to all such documents and in practice is restricted to loans of some permanence. It does not for example include a promissory note: see *Gower's Principles of Modern Company Law* (1992, 4th edn, Sweet and Maxwell, p 402). As to whether a particular document is a promissory note or a debenture for the purposes of paying stamp duty, see *British India Steam Navigation Co v IRC* (1881) 7 QBD 165. The use or non-use of the term 'debenture' does not determine whether the instrument is a debenture: see *Speyer Bros v IRC* [1908] AC 92 at 95, (HL).

Essentially there are two forms of debentures: individual debentures evidencing separate and distinct debts, which are sometimes described as 'bonds', and 'debenture stock' which is a loan that can be divided among a class of lenders. Debenture stock, like shares which have been converted into stock, has an advantage over individual debentures in that it can be subdivided and transferred in any fraction which the holder wishes. Both individual debentures and debenture stock may or may not be secured by a charge over a company's property.

If a company creates a number of separate and distinct loans on the same terms ranking pari passu, they will constitute a series. A series of debentures constitutes a class of debentures and a parties themselves could not have agreed to without the court's assistance. Contracts of employment are not transferable under the section (*Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014), though they may be transferable in appropriate circumstances of the transfer or takeover of a business under the Employment Ordinance (Cap 57).

168. Rights of company and minority shareholders in case of successful take-over offer

(1) This section and the Ninth Schedule shall apply where a company (in this section and the Ninth Schedule referred to as 'the transferee company'), whether a company within the meaning of this Ordinance or not, makes an offer to acquire all the shares, or all the shares of any class or classes, not already held by it in another company (in the Ninth Schedule referred to as 'the transferor company') on terms which are the same in relation to all the shares to which the offer relates or, where those shares include shares of different classes, in relation to all the shares of each class.

(2) This section and the Ninth Schedule shall apply in relation to debentures convertible into shares or any rights to subscribe for shares as if those debentures or rights were shares of a separate class, and references to shares, the shareholder and a share warrant shall be construed accordingly.

(3) For the purposes of this section and the Ninth Schedule-

(a) shares held or acquired-

(i) by a nominee on behalf of the transferee company; or

(ii) where the transferee company is a member of a group of companies, by, or by a nominee on behalf of, a company which is a member of the same group of companies,

shall be treated as held or acquired by the transferee company;

(b) where an offer referred to in subsection (1) relates to debentures convertible into shares, such debentures shall be treated as so convertible whether or not any rights of conversion thereunder are exercisable at the time of the offer or at any time thereafter, and whether or not they are contingent upon the happening of any event; and such debentures shall, if such rights are exercisable at the time of the offer, be treated as shares to which such rights relate;

(c) references to value are references to nominal value or, in relation to debentures convertible into shares, the amount payable on such debentures.

(4) In relation to a case where an offer in respect of any scheme or contract involving the transfer of shares in a company to another company was made before the commencement of the Companies (Amendment) Ordinance 1984 (6 of 1984), the provisions of this section in force immediately before the commencement of that Ordinance shall continue to have effect as if that Ordinance had not been enacted.

(Replaced 6 of 1984 s 125)

[cf 1948 c 38 s 209 U.K.]

[168.01] History

The section is derived from s 155 of the Companies Act 1929 (UK). The purpose of the section is to facilitate a takeover. Where nine-tenths have agreed to the scheme the dissentient minority may be forced to sell to the transferee company: see *Blue Metal Industries Ltd v Dilley* [1970] AC 827, 847 (PC) generally on the origins of the section. The Cohen Committee (1945) found three defects in the original section:

(1) the procedure was not available to a company where it held more than 10% of the shares or class of shares which it desired to acquire;

(2) while a company, if it obtained 90% of the shares or class of shares comprised in a scheme or contract, could compel the dissentient minority to sell their shares, the dissentient minority had no power to compel the company to acquire the shares held by them;

(3) the provisions of the original subsection (2) resulted in the shares of the dissenting shareholders being transferred to the transferee without an instrument of transfer being executed (which was inconsistent with s 66).

These defects were remedied in the replacement s 209 of the Companies Act 1948 (UK), but that new section was itself criticised at length by the Jenkins Committee (1962), which made various recommendations for amendment (para 294(1) of its report). The amendments recommended by the Jenkins Committee were considered in the Second Report (1973) of the Companies Law Revision Committee, paras 5.86 to 5.94, which recommended that s 168 be replaced by a section on the lines of s 209 of the 1948 Act, but amended in accordance with the recommendations of the Jenkins Committee. Many of the latter's recommendations were picked up in the First Schedule to the Companies Act 1976 (UK) and the provisions are now contained in ss 428 to 430F of the Companies Act 1985 (UK). The 1985 Act provisions were substantially amended by the Financial Services Act 1986 (UK), s 172 and the Twelfth Schedule.

The format of the current Hong Kong provisions is different from the Companies Act but in substance the provisions are similar. Minor amendments were made to the Ninth Schedule, Part I, paras 1 and 2 by the substitution of 'the Unified Exchange' for 'a recognized stock exchange'. This followed the establishment of the Stock Exchange of Hong Kong as the Unified Exchange pursuant to the Stock Exchanges Unification Ordinance (Cap 361). The term 'recognized stock market' has however been reinstated by the Securities and Futures Ordinance 2002 (No 5 of 2002).

The section applies to all companies, whether registered under the Ordinance or not: subsection (1).

For other equivalent sections see the Corporations Act 2001 (Aust), s 414 and the Companies Act (Cap 50) (Sing), s 215.

[168.02] Overview

As indicated above the purpose of the section is to facilitate a takeover. Unlike ss 166 to 167 and the wording of the pre-1984 s 168, it is not linked to a scheme of arrangement, though, of course, a takeover may be part of a scheme. The substance of the provisions is to be found in the Ninth Schedule, Part I of which deals with the right of the company to buy out the minority shareholders and Part II deals with the right of the minority shareholders to be bought out by the company.

Since the 1984 amendments the transferee company can make an offer subject to the provisions of the section even if it already holds 10% or more of the shares of the target company. There must be an offer to acquire all the shares or all the shares of a class, not already held by the transferee company. The terms of the offer must be the same for all.

Subject to the Takeovers Code, the transferee company may make an offer for only a class of shares, thus freezing shareholders in other classes: see Bates The Companies (Amendment) Ordinance 1984 in Perspective, 1985 Hong Kong Law Journal Ltd 83 (also to be found in (1985) 15 HKLJ 336).

Unlike the United Kingdom there is no exception in the Ordinance for an offer to provide special terms to comply with the laws of foreign countries in which shares are held: *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11.

The transferee company must make an offer before the section can apply. Where shareholders offer their shares to the transferee company, the transferee company is not making an offer: *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192.

The section was extended to offers for debentures convertible into shares or for warrants or other rights to subscribe for shares by the 1984 amendment: subsection (2). Such debentures or rights form a separate class: subsection (2); and see subsection (3)(b), (c). Shares held by a nominee or associate of the transferee company are treated as held by the transferee company: subsection (3)(a).

For the meaning of shares and how to calculate acceptances see *Re Simo Securities Trust Ltd* [1971] 1 WLR 1455.

[168.03] Conditions for compulsory acquisition

These are set out in Part I of the Ninth Schedule. By virtue of paras 1 and 2, the transferee company may start the acquisition process as soon as it has acquired the 90% acceptance level. Previously it had to wait until the end of the four-month period.

Notice of acquisition must be given within five months of the date of the offer: para 3.

Unlike the United Kingdom there is no provision in the Ninth Schedule relating to an revised offer being capable of being treated as the original offer. Accordingly, *Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192 (where the deadline was varied) is relevant in Hong Kong.

Dissenting shareholders have two months (previously one month) within which to make an application to the court to oppose the compulsory acquisition of their shares: para 5.

[168.04] Notice of acquisition

Companies Registry Form RE1 is used to give notice to dissenting shareholders of the right of the company to buy out minority shareholders, and Form RE2 to give them notice of the right of minority shareholders to be bought out by the company.

Such notice must be given to dissenting shareholders, either personally or by sending it by registered post to the dissenting shareholders at their addresses in Hong Kong registered in the books of the transferor company or if no address is registered to the address, if any, in Hong Kong supplied by the shareholder to the transferor company for the giving of notice to him: Companies (Forms) Regulations, reg 8(1). Where the shareholder has no address the transferee company may apply to the Registrar of Companies for a direction as to the manner in which such notice shall be given: reg 8(2).

Paragraph 3 deals with the form and timing of the notice and paras 5 and 6 of Part I of the Ninth Schedule specify the contents of the notice in appropriate circumstances. Paragraph 5 about the choice of terms clarifies earlier difficulties about what terms applied in default of election: see *Re Carlton Holdings Ltd* [1971] 1 WLR 918. The notice must specify this. Paragraph 6 may be of use where a merchant bank offers an underwritten cash alternative or offer to acquire shares issued by the transferee company, because holding that alternative offer open for the full period might be expensive or otherwise impractical: see Bates The Companies (Amendment) Ordinance 1984 in Perspective, The Hong Kong Law Journal Ltd 1985, 84 (also (1985) 15 HKLJ 337).

Paragraph 7 provides that on the expiration of two months from the date of the notice or after the dismissal of a dissenting shareholder's application to the court, the transferee company will transmit a copy of the notice to the transferor company together with an instrument of transfer executed on behalf of the shareholder on whom the notice was served by any person appointed by the transferee company and shall pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of Part I of the Ninth Schedule the transferee company is entitled to acquire. The transferor company shall then register the transferee company as the holder of those shares. No instrument of transfer shall be required for any share for which a share warrant is, for the time being, outstanding.

The purchase consideration paid to the transferor company shall be paid into a separate bank account and held by the transferor company on trust for the dissenting shareholders. It will only be paid out on production of the relevant share certificate or other evidence of title or a satisfactory indemnity in lieu: para 8.

[168.05] Applications to the court

Applications to the court will rarely succeed on substantive merit, though they may on some

technical defect in the process. Once the transferee company has acquired a 90% shareholding of a company it should not be prevented from converting the target company into a wholly owned subsidiary by acquiring the holding of the minority: *Blue Metal Industries Ltd v Dilley* [1970] AC 827 at 848-849. All the more so when the takeover is part of a scheme which has been sanctioned by the court under s 166. The onus then rests on the dissentient to show that the scheme is not fair so that he should not be compulsorily deprived of his shares: *Re Everite Locknuts* [1945] Ch 220; *Re Press Caps Ltd* [1949] Ch 434 (CA); *Re Grierson, Oldham & Adams Ltd* [1968] Ch 17 at 31. But 90% acceptance carries little weight where there is substantial identity of interest between the transferee company and the shareholders who have accepted (*Re Bugle Press Ltd* [1961] Ch 270 (CA), or where the shareholders who did accept were misled by erroneous advice (*Re Lifecare International plc* [1990] BCLC 222) or have not received the information they are entitled to under the Takeovers Code (*Re Chez Nico (Restaurants) Ltd* [1992] BCLC 192).

The application should be made by originating summons: O 102, r 2 of the Rules of the High Court. For the form of the originating summons and supporting affidavit see Atkin's Court Forms (1995 issue) pp 380-381 and for the form of order p 381.

[168.06] Dissentient's right to be bought out

The rights of the dissenting minority to be bought out by the transferee company are set out in Part II of the Ninth Schedule.

If not later than the expiry of the offer period the transferee company is the holder of not less than nine-tenths in value of the shares or relevant class of shares, a shareholder who has not accepted the offer may by letter addressed to the transferee company require the transferee company to acquire his shares: paras 9 and 10. Since a dissenting shareholder is unlikely to know whether the transferee has acquired a 90% holding in the transferor company, this method of the dissenting shareholder is unlikely to be used very often and it does not exist under s 429 of the Companies Act (UK). The more likely procedure is that under paras 11. Within one month of the expiration of the offer period the transferee company must then give notice to the dissenting shareholder in Companies Registry Form RE2 (as to Forms RE1 and RE2 see [168.04] and for mode of delivery of notice, etc) calling on the dissenting shareholder to decide whether or not to require the company to buy him out. The election must be made within two months after the notice was given: para 11. The election must be addressed to the transferee company: paras 9 and 10.

Where the dissenting shareholder elects to be bought out the transferee company shall be entitled and bound to acquire the shares on the terms of the offer or on such terms as may be agreed or as the court, on the application of the holder of the shares or the transferee company, thinks fit to order.

Applications to the court should be made by originating summons: O 102, r 2 of the Rules of the High Court (HK). For form of originating summons see Atkin's Court Forms (1995 issue) p 382; for supporting affidavit see p 384.

Part II also contains provisions as to choice of terms and options equivalent to paras 5 and 6 of Part I, as to which see [168.04]: paras 13 to 15.

Minorities

168A. Alternative remedy to winding up in cases of unfair prejudice

(1) Any member of a specified corporation who complains that the affairs of the specified corporation 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 (including himself) or, in a case falling within section 147(2)(b), the Financial Secretary, may make an application to the court by petition for an order under this section. (Amended 72 of 1994 s 8)

(2) If on any petition under subsection (1) the court is of opinion that the specified corporation's affairs 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 (including the member who presented the petition), whether or not such conduct consists of an isolated act or a series of acts-

(a) the court may, with a view to bringing to an end the matters complained of-

  (i) make an order restraining the commission of any such act or the continuance of such conduct;

  (ii) order that such proceedings as the court may think fit shall be brought in the name of the specified corporation against such person and on such terms as the court may so order;

  (iii) appoint a receiver or manager of the whole or a part of a specified corporation's property or business and may specify the powers and duties of the receiver or manager and fix his remuneration; and

  (iv) make such other order as it thinks fit, whether for regulating the conduct of the specified corporation's affairs in future, or for the purchase of the shares of any members of the specified corporation by other members of the specified corporation or by the specified corporation and, in the case of a purchase by the specified corporation, for the reduction accordingly of the specified corporation's capital, or otherwise; and

(b) the court may order payment by any person of such damages and interest on those damages as the court may think fit to any members (including the member who presented the petition) of the specified corporation, whose interests have been unfairly prejudiced by the act or conduct. (Replaced 30 of 2004 s 2)

(2A) Any past member of a specified corporation who complains that the affairs of the specified corporation were, at the time when he was a member of the specified corporation, conducted in a manner unfairly prejudicial to the interests of the then members generally or of some part of the then members (including himself), may make an application to the court by petition for an order under this section. (Added 30 of 2004 s 2)

(2B) If on any petition under subsection (2A) the court is of opinion that the specified corporation's affairs were conducted in a manner unfairly prejudicial to the interests of the then members generally or of some part of the then members (including the past member who presented the petition), whether or not such conduct consists of an isolated act or a series of acts, the court may order payment by any person of such damages and interest on those damages as the court may think fit to any then members (including the past member who presented the petition) of the specified corporation, whose interests were unfairly prejudiced by the act or conduct. (Added 30 of 2004 s 2)

(2C) For the avoidance of doubt, the damages that may be ordered by the court under subsections (2)(b) and (2B) does not entitle a member, past member or then member of a specified corporation to recover by way of damages any loss that is solely reflective of the loss suffered by the specified corporation which only the specified corporation is entitled to recover under the common law. (Added 30 of 2004 s 2)

(3) Where an order under this section makes any alteration in or addition to the memorandum or articles of a specified corporation, then, notwithstanding anything in any other provision of this Ordinance but subject to the provisions of the order, the specified corporation shall not have power without the leave of the court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but, subject to the provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the specified corporation and the provisions of this Ordinance shall apply to the memorandum or articles as so altered or added to accordingly. (Amended 30 of 2004 s 2)

(4) An office copy of any order under this section altering or adding to, or giving leave to alter or add to, a specified corporation's memorandum or articles shall, within 14 days after the making thereof, be delivered by the specified corporation to the Registrar for registration; and if a specified corporation makes default in complying with this subsection, the specified corporation and every officer of the specified corporation who is in default shall be liable to a fine and, for continued default, to a daily default fine. (Amended 7 of 1990 s 2)

(5) The personal representative of a person who, at the date of his death, was a member of a specified corporation, or any trustee of, or person beneficially interested in, the shares of a specified corporation by virtue of the will or intestacy of any such person, may apply to the court under subsection (1) for an order under this section and, accordingly, any reference in that subsection to a member of a specified corporation shall be construed as including a reference to any such personal representative, trustee or person beneficially interested. (Amended 30 of 2004 s 2)

(5A) The personal representative of a person who, at the date of the person's death, was a past member of a specified corporation, may apply to the court under subsection (2A) for an order under this section and, accordingly, any reference in that subsection to a past member of a specified corporation shall be construed as including a reference to any such personal representative. (Added 30 of 2004 s 2)

(5B) For the purposes of this section, a person shall not be treated as a past member of a specified corporation if he ceased to be a member of the specified corporation before the commencement of section 4 of Schedule 3 to the Companies (Amendment) Ordinance 2004 (30 of 2004). (Added 30 of 2004 s 2)

(6) Section 296 shall apply in relation to a petition under this section as it applies in relation to a winding-up petition.

(7) Where before the commencement of section 4 of Schedule 3 to the Companies (Amendment) Ordinance 2004 (30 of 2004), a petition has been presented for an order under section 168A of the pre-amended Ordinance, that section of the pre-amended Ordinance shall continue to apply in relation to such a petition as if section 4 of Schedule 3 to the Companies (Amendment) Ordinance 2004 (30 of 2004) had not been enacted. (Added 30 of 2004 s 2)

(8) For the purpose of subsection (7), 'pre-amended Ordinance' (修訂前的本條例) means the Companies Ordinance (Cap 32) that was in force immediately before it was amended by section 4 of Schedule 3 to the Companies (Amendment) Ordinance 2004 (30 of 2004). (Added 30 of 2004 s 2)

(Added 51 of 1978 s 6)

[cf 1948 c 38 s 210 U.K.]

[168A.01] History

This section may be compared with s 210 of the Companies Act 1948 (UK) and s 75 of the Companies Act 1980, now ss 459-461 of the Companies Act 1985. Section 168A was inserted by No 51 of 1978, s 6. The recommendation was to adopt s 210 of the Companies Act 1948 with amendments recommended by the Jenkins Committee. It was based on the recommendation of the Companies Law Revision Committee in their Second Report, 1973, paras 5.95 to 5.110.

Subsections (1) and (2) were amended by No 72 of 1994, s 8(a), in operation from 8 July 1994, by substituting 'or have been conducted in a manner unfairly prejudicial to the interests of the members generally or' for 'conducted in a manner unfairly prejudicial to the interests' in both subsections. Subsection (2)(ba), inserted by No 72 of 1994, s 8(b), has been in operation since 8 July 1994. Subsection (4) was amended by No 7 of 1990, s 2. By Companies (Amendment) Ordinance (30 of 2004), various existing subsections were amended, substituting 'specified corporation' for 'company'. For the definition of 'specified corporation' see s 2(1), ie, Hong Kong incorporated companies and non-Hong Kong companies to which Part XI applies. Therefore not

(e) provision directing accounts to be taken between any persons.

(Added 3 of 1997 s 43)
[cf 1986 c 45 s 244 U.K.]

[264B.01] History

This section was added in 1997 by the Companies (Amendment) Ordinance No 3 of 1997. It mirrors the new s 71A of the Bankruptcy Ordinance introduced by the Bankruptcy (Amendment) Ordinance, No 76 of 1996, which came into force on 1 April 1998: see L.N. 158 of 1998. Subsection (2)(b) was amended in 2003 to be consistent with the revision of s 228A.

Section 264B is derived from the Insolvency Act 1986 (UK) s 244. The UK provision was based on recommendations of the Cork Committee in Chapter 31 of its Report, themselves based on ss 140 to 149 of the Consumer Credit Act 1974. The repeal of the limitation on interest (see under s 264A) might lead to exorbitant rates of interest being included in proofs of debt, so the court should be given power to re-open exorbitant credit agreements on the application of the liquidator: see Cork Report para 1381.

[264B.02] Overview

The section applies where the company has been party to a transaction for, or involving, the provision of credit to the company. Credit is not defined. But, since the new section was introduced in the context of interest on debts of the company, credit will generally refer to loan facilities granted to the company at interest. For the background, see Law Reform Commission of Hong Kong Report on Bankruptcy paras 19.22 to 19.25. Since the Commission had earlier recommended that contractual rates of interest should be admitted to proof, but the Money Lenders Ordinance (Cap 163) only presumed a rate of interest in excess of 48 per cent to be extortionate and the court might declare interest in excess of 48 per cent but less than 60 per cent not extortionate (see ss 24 and 25), it considered that specific extortionate credit provisions were required.

Application for an order under the section may only be made by the liquidator. There is a three-year time limit for applying: subsection (2). The onus of proof is in effect on the credit provider: subsection (3). The court may make orders affecting third parties, such as sureties: subsection (4).

265. Preferential payments

(1) In a winding up there shall be paid in priority to all other debts-

(a) (Repealed 6 of 1984 s 181)

(b) any-

(i) payment from the Protection of Wages on Insolvency Fund under section 18 of the Protection of Wages on Insolvency Ordinance (Cap 380) to any clerk or servant in respect of wages or salary or both in respect of services rendered to the company if such payment was made during a period of 4 months before the commencement of the winding up; and (Amended 48 of 1987 s 8)

(ii) wages and salary (including commission provided that the amount thereof is fixed or ascertainable at the relevant date) of any clerk or servant in respect of services rendered to the company during the relevant period not exceeding, together with any payment under sub-paragraph (i), $3,000; (Replaced 12 of 1985 s 29)

(c) any-

(i) payment from the Protection of Wages on Insolvency Fund under section 18 of the Protection of Wages on Insolvency Ordinance (Cap 380) to any labourer or workman in respect of wages, whether payable for time or for piece work, in respect of services

rendered to the company if such payment was made during a period of 4 months before the commencement of the winding up; and (Amended 48 of 1987 s 8)

(ii) wages of any labourer or workman, whether payable for time or for piece work, in respect of services rendered to the company during the relevant period not exceeding, together with any payment under sub-paragraph (i), $3,000; (Replaced 12 of 1985 s 29)

(ca) any severance payment payable to an employee under the Employment Ordinance (Cap 57), not exceeding in respect of each employee $6,000; (Added 55 of 1974 s 2)

(caa) any long service payment payable to an employee under the Employment Ordinance (Cap 57), not exceeding in respect of each employee $8,000; (Added 77 of 1985 s 2)

(cb) any amount due in respect of compensation or liability for compensation under the Employees' Compensation Ordinance (Cap 282) accrued before the relevant date and, where the compensation is a periodical payment, the amount due in respect thereof shall be taken to be the amount of the lump sum for which the periodical payment could, if redeemable, be redeemed on an application being made for that purpose under the Employees' Compensation Ordinance (Cap 282), but this paragraph shall not apply to any amount due in respect of compensation or liability for compensation where the company has entered into a contract with a person carrying on accident insurance business in Hong Kong in respect of its liability under the Employees' Compensation Ordinance (Cap 282) for personal injury by accident to the employee to whom the compensation or liability for compensation is due or where the company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company. (Added 4 of 1977 s 2; Amended 6 of 1984 s 259)

(cc) any wages in lieu of notice payable to an employee under the Employment Ordinance (Cap 57), not exceeding in respect of each employee one month's wages or $2,000 whichever is the lesser; (Added 4 of 1977 s 2)

(cd) all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his right) on the termination of his employment before or by the effect of the winding-up order or resolution; (Added 6 of 1984 s 181)

(ce) any payment from the Employees Compensation Assistance Fund under Part IV of the Employees Compensation Assistance Ordinance (Cap 365) representing an amount due by the company in respect of compensation or liability for compensation under the Employees' Compensation Ordinance (Cap 282) accrued before the relevant date; (Added 54 of 1991 s 47)

(cf) any amount of unpaid contribution or any amount deemed to be unpaid contribution calculated in accordance with rules made under section 73(1)(n) of the Occupational Retirement Schemes Ordinance (Cap 426) which should have been paid by the company being wound up in accordance with the terms of an occupational retirement scheme within the meaning of that Ordinance before the commencement of the winding up:

Provided that where such amount exceeds $50,000 in respect of an employee, 50% of such part of the amount that exceeds $50,000 shall not be paid in priority to all other debts under this subsection; (Added 88 of 1992 s 48)

(cg) (without prejudice to any right or liability under a trust) any amount of salaries deducted by the company being wound up from its employees' salaries for the purpose of making contributions in respect of such employees to the funds of an occupational retirement scheme within the meaning of the Occupational Retirement Schemes Ordinance (Cap 426) which have not been paid into such funds; (Added 88 of 1992 s 84)

(ch) any amount of unpaid contribution under, or any amount of unpaid contribution calculated in accordance with, the Mandatory Provident Fund Schemes Ordinance (Cap 485) which should have been paid by the company being wound up in accordance with the provisions of that Ordinance before the commencement of the winding up;

Provided that where such amount exceeds $50,000 in respect of an employee, 50% of such part of the amount that exceeds $50,000 shall not be paid in priority to all other debts under this subsection; (Added 80 of 1995 s 49)

(ci) any amount deducted by the company being wound up from the relevant income of its relevant employees for the purpose of making contributions in respect of such relevant employees to the approved trustee of a registered scheme within the meaning of the Mandatory Provident Fund Schemes Ordinance (Cap 485) which have not been paid to that approved trustee; (Added 80 of 1995 s 49)

(cj) any sum and interest thereon payable to the Mandatory Provident Fund Schemes Authority under section 17(7) of the Mandatory Provident Fund Schemes Ordinance (Cap 485); (Added 80 of 1995 s 49)

(d) all statutory debts due from the company to the Government at the relevant date and which became due and payable within 12 months next before that date; (Replaced 6 of 1984 s 181; Amended 23 of 1999 s 3)

(da) (Repealed 30 of 1999 s 18)

(db) where the company being wound up is or was a bank and, at the commencement of the winding up, held deposits, to each depositor- (Amended 7 of 2004 s 55)

(i) in respect of the deposits, or portion thereof, that the depositor holds in his own right, the aggregate amount so held on deposit, up to the limit on the total amount of compensation to which a depositor is entitled as prescribed in section 27(1) of the Deposit Protection Scheme Ordinance (Cap 581), regardless of the number of deposits;

(ii) in respect of the deposits, or portion thereof, that the depositor holds as a bare trustee for each of the beneficiaries, the aggregate amount so held on deposit, up to, subject to subsection (5J), the limit on the total amount of compensation to which a depositor is entitled as prescribed in section 27(1) of the Deposit Protection Scheme Ordinance (Cap 581), regardless of the number of deposits so held for the beneficiary;

(iii) in respect of the deposits, or portion thereof, that the depositor holds in a client account for each of the clients, the aggregate amount so held on deposit, up to, subject to subsection (5J), the limit on the total amount of compensation to which a depositor is entitled as prescribed in section 27(1) of the Deposit Protection Scheme Ordinance (Cap 581), regardless of the number of deposits so held for the client; and

(iv) in respect of the deposits, or portion thereof, that the depositor holds as a trustee (but not a bare trustee) under each of the trusts, the aggregate amount so held on deposit, up to the limit on the total amount of compensation to which a depositor is entitled as prescribed in section 27(2) of the Deposit Protection Scheme Ordinance (Cap 581), regardless of the number of deposits so held under the trust; (Added 83 of 1995 s 16. Amended 7 of 2004 s 55; 11 of 2010 s 14)

(e) where the company being wound up is an insurer, any sum payable to a person in respect of any claim (other than a claim for a refund of

premium) made under or in accordance with a contract of insurance (but not a contract of reinsurance) effected by the insurer as part of its general business carried on in or from Hong Kong, unless-

(i) such sum is, under the contract or in the ordinary course of business, payable in a place outside Hong Kong where assets of the company are maintained and under the law of that place the claim in respect of which the sum is payable is, in the event of a winding up, accorded priority with respect to those assets over claims which under the contract or in the ordinary course of business are payable at any other place; or

(ii) the person to whom the sum is payable is entitled with respect to the claim to claim compensation under any scheme designed to secure compensation to persons in circumstances where the insurer becomes insolvent; (Added 79 of 1988 s 8)

(ea) where the company being wound up is an insurer, any payment from the Employees Compensation Assistance Fund under Part IV of the Employees Compensation Assistance Ordinance (Cap 365) representing a sum payable by the company to a person in respect of any claim (other than a claim for refund of premium) made under or in accordance with a contract of insurance issued for the purposes of Part IV of the Employees' Compensation Ordinance (Cap 282) effected by the insurer as part of its general business carried on in or from Hong Kong; unless such sum is, under the contract or in the ordinary course of business, payable in a place outside Hong Kong where assets of the company are maintained and under the law of that place the claim in respect of which the sum is payable is, in the event of a winding up, accorded priority with respect to those assets over claims which under the contract or in the ordinary course of business are payable at any other place; (Added 54 of 1991 s 47)

(f) where the company being wound up is an insurer, any sum payable (after offsetting the amount of any sums owing from the claimant) to a person in respect of any claim (other than a claim for a refund of premium) made under or in accordance with a contract of reinsurance effected by the insurer, as reinsurer, as part of its general business carried on in or from Hong Kong, unless such sum is, under the contract or in the ordinary course of business, payable in a place outside Hong Kong where assets of the company are maintained and under the law of that place the claim in respect of which the sum is payable is, in the event of a winding up, accorded priority with respect to those assets over claims which under the contract or in the ordinary course of business are payable at any other place. (Added 79 of 1988 s 8)

(1A) Where the relevant date is on or after 1 June 1970 but before 1 April 1977, the sum of $6,000 shall be deemed to be substituted in each case for the sums of $3,000 referred to in paragraphs (b) and (c) respectively of subsection (1). (Added 41 of 1970 s 2; Amended 4 of 1977 s 2)

(1B) Where the relevant date is on or after the 1 April 1977, the sum of $8,000 shall be deemed to be substituted in each case for the sum of $3,000 referred to in paragraphs (b) and (c) respectively, and for the sum of $6,000 referred to in paragraph (ca), of subsection (1). (Added 4 of 1977 s 2)

(2) Subject to subsection (1)(b) and (c), where any payment on account of wages or salary, or severance payment, or long service payment or wages in lieu of notice payable under the Employment Ordinance (Cap 57), or accrued holiday remuneration, has been made to any clerk, servant, workman or labourer in the employment of a company out of money advanced by some person for that purpose, that person shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which that clerk, servant, workman or labourer would have been entitled to

priority in the winding up has been diminished by reason of the payment having been made. (Amended 6 of 1984 s 181; 12 of 1985 s 29(3); 77 of 1985 s 2)

(3) The debts specified in subsection (1)(b), (c), (ca), (caa), (cb), (cc), (cd), (ce), (cf), (cg), (ch), (ci) and (cj) - (Amended 55 of 1974 s 2; 4 of 1977 s 2; 6 of 1984 s 181; 77 of 1985 s 2; 54 of 1991 s 47; 88 of 1992 s 84; 80 of 1995 s 49)
  (a) shall have priority over the debts specified in subsection (1)(d);
  (b) shall rank equally among themselves; and
  (c) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. (Replaced 41 of 1970 s 2)

(3A) The debts specified in subsection (1)(d) shall have priority over the debts specified in subsection (1)(da), (db), (e), (ea) and (f). (Added 79 of 1988 s 8. Amended 54 of 1991 s 47; 10 of 1993 s 2; 83 of 1995 s 16)

(3AAA) The debts specified in subsection (1)(da) shall have priority over the debts specified in subsection (1)(db), (e), (ea) and (f). (Added 10 of 1993 s 2. Amended 83 of 1995 s 16)

(3AAAA) The debts specified in subsection (1)(db)-
  (a) shall have priority over the debts in subsection (1)(e), (ea) and (f);
  (b) shall rank equally among themselves; and
  (c) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. (Added 83 of 1995 s 16)

(3AA) The debts specified in subsection (1)(e) and (ea)-
  (a) shall have priority over the debts specified in subsection (1)(f);
  (b) shall rank equally among themselves; and
  (c) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. (Added 79 of 1988 s 8; Amended 54 of 1991 s 47)

(3AB) The debts specified in subsection (1)(f)-
  (a) shall rank equally among themselves; and
  (b) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. (Added 79 of 1988 s 8)

(3B) The debts specified in subsection (1) shall, so far as the assets of the company available for payment of general creditors are insufficient to meet those debts, have priority over the claims of holders of debentures under any charge created as a floating charge by the company, and shall be paid accordingly out of any property comprised in or subject to the charge. (Added 41 of 1970 s 2; Amended 10 of 1987 s 9)

(4) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(5) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within 3 months next before the date of a winding-up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof. (Amended 41 of 1970 s 2)

(5A) Any money paid under a charge under subsection (5) shall be a debt due from the company to the landlord or other person having distrained, and such debt shall be discharged so far as the assets are sufficient to meet it after payment of the debts specified in subsection (1) but before payment of the other debts proved in the winding up. (Added 41 of 1970 s 2)

(5B) Where in any winding up assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys or the giving of indemnity by creditors, or where

expenses in relation to which a creditor has indemnified a liquidator have been recovered, the court may, on the application of the Official Receiver or the liquidator or any such creditor, make such order as it deems just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk run by them in so doing. (Added 6 of 1984 s 181)

(5C) Any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period. (Added 6 of 1984 s 181)

(5D) The deposits given priority under subsection (1)(db) do not include the following-
  (a) terms deposits where the current term agreed to by the depositor at the most recent time it was negotiated exceeds 5 years;
  (b) deposits made after the date of publication of a notice in the Gazette under section 28(2)(b) of the Banking Ordinance (Cap 155) that the company has been removed from the register and has ceased to be a bank. (Added 83 of 1995 s 16)

(5E) If-
  (a) an arrangement has been entered into or carried out on or after the specified date in relation to a deposit with the company except where the arrangement is one in pursuance of a legally enforceable obligation incurred prior to that date;
  (b) the arrangement has, or would have had but for this subsection, the effect of enabling a person to become entitled to priority under subsection (1)(db), to which the person would otherwise not be entitled; and
  (c) it would be concluded, having regard to-
    (i) the manner in which, and the circumstances under which, the arrangement was entered into or carried out;
    (ii) the form and substance of the arrangement; and
    (iii) the result in relation to the operation of this Ordinance that, but for this subsection, would have been achieved by the arrangement.
  that the arrangement was entered into or carried out for the sole or dominant purpose of enabling the person, either alone or in conjunction with other persons, to become entitled to priority under subsection (1)(db), to which the person would otherwise not be entitled,

the priority given under subsection (1)(db) shall apply as if the arrangement or any part thereof had not been entered into or carried out. (Replaced 7 of 2004 s 55)

(5F) Deposits given priority under subsection (1)(db) do not include-
  (a) a deposit held for the account of the Exchange Fund established by the Exchange Fund Ordinance (Cap 66);
  (b) a deposit held by an excluded person in his own right, or, in the case of a deposit held by an excluded person and a non-excluded person in their own right (except where those persons carry on business in partnership), the portion of the deposit attributable to the excluded person's share in the deposit;
  (c) a deposit held by a depositor as a bare trustee for an excluded person, or in a client account for an excluded person as the depositor's client, or in the case of a deposit so held for an excluded person (except where those persons carry on business in partnership), the portion of the deposit attributable to the excluded person's share in the deposit; and
  (d) a deposit held by a depositor as a trustee (but not a bare trustee) for an excluded person only. (Replaced 7 of 2004 s 55)

(5G) For the purposes of subsection (5F)(b) and (c), if a deposit is held by more than one person in their own right or held for more than one person, each of those