(b) the Registrar refuses to register the document under section 35(3).

(2) The Registrar must send a notice of the refusal, and the reasons for the refusal, to—

(a) the person who is required to deliver the document to the Registrar for registration under the Ordinance or, if there is more than one person who is so required, any of those persons; or

(b) if another person delivers, on behalf of the person so required, the document to the Registrar for registration, that other person.

(3) If a notice is sent to a person under subsection (2) with respect to a document, the period specified in subsection (4) is to be disregarded for the purpose of calculating the daily penalty under an Ordinance that makes it an offence for failing to comply with a requirement to deliver the document and that imposes a penalty for each day during which the offence continues.

(4) The period is one beginning on the date on which the document was delivered to the Registrar and ending with the fourteenth day after the date on which the notice is sent under subsection (2).

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### [38.01] History

This section is derived from s 346(2)–(4) of the former Companies Ordinance (Cap 32).

### [38.02] Overview

Where a document is delivered to the Registrar for registration and the Registrar refuses to register the document under s 35(3), the Registrar must send a notice of refusal and the reasons for refusal to the presentor of the document. If such notice is sent, the period referred to in subsection (4) will be disregarded for the purpose of calculating the daily penalty under the Ordinance (the daily default fine) for failing to deliver the document.

Note the daily default fines in the subsequent sections.





Division 5

Registrar's Powers in relation to Keeping Companies Register

## 39. Registrar may require company to resolve inconsistency with Companies Register

(1) If it appears to the Registrar that the information contained in a document registered by the Registrar in respect of a company is inconsistent with other information relating to the company on the Companies Register, the Registrar may give notice to the company—

(a) stating in what respect the information contained in the document appears to be inconsistent with other information on the Companies Register; and

(b) requiring the company to take steps to resolve the inconsistency.

(2) For the purposes of subsection (1)(b), the Registrar may require the company to deliver to the Registrar within the period specified in the notice—

(a) information required to resolve the inconsistency; or

(b) evidence that proceedings have been commenced by the company in the Court for the purpose of resolving the inconsistency and that the proceedings are being conducted diligently.

(3) If a company fails to comply with a requirement under subsection (1)(b), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

(4) If a person is charged with an offence under subsection (3) for failure to comply with a requirement, it is a defence to establish that the person took all reasonable steps to secure compliance with the requirement.

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### [39.01] History

This section is new. It is derived from UK Companies Act 2006, s 1093(1), (3), (4).

There do not appear to be equivalent provisions in Australia or Singapore, where presumably the problem is dealt with administratively, if at all. But see Singapore

2. to adjourn the proceedings so that a satisfactory arrangement may be made for the purchase of the interests of dissenting members; and

3. to give such directions as are appropriate to facilitate or carry out any arrangement for the purchase of the dissenting shareholders' interests.

## 92. Certain alterations not binding on members

(1) Despite any provision in a company's articles, a person who is a member of the company is not bound by any alteration of the articles that takes effect after the date on which the person became a member, if and so far as the alteration—

(a) requires the person to take or subscribe for more shares than the number of shares held by the person on the date on which the alteration takes effect;

(b) in any way increases the person's liability as at that date to contribute to the company's share capital; or

(c) in any way increases the person's liability as at that date to pay money to the company.

(2) Subsection (1) does not apply if the person agrees in writing before, on or after the alteration taking effect to be bound by the alteration.

### [92.01] History

This section is derived from s 25 of the former Companies Ordinance (Cap 32).

### [92.02] Overview

Subject to the limitations set out in s 87(2) to (5), generally a company may amend, delete or add to the provisions of its articles by passing a special resolution in accordance with ss 88 to 90. An important statutory exception to this power is provided by this section, which prohibits any alteration to the articles which requires a member to subscribe for more shares than that member had already subscribed for at the date the alteration takes effect, or which in any way increases the liability of the member to contribute to the share capital of the company or to pay money to the company. This prohibition also covers changes in class rights which would have a similar effect upon the member of such a class. (See further, ss 182, 183, 193 and 623). However, any such changes can be made where the member has agreed, in writing, to take up additional shares or to increase the member's liability to contribute to the share capital or to pay money to the company.

Changes which fall short of the conduct prohibited by this section may yet be considered to be unfairly prejudicial to the interests of a member and such changes





may therefore come within the terms of s 725A. The power to alter the company's articles must be exercised bona fide for the benefit of the company as a whole. (See *Re Hong Kong Spinning, Weaving and Dyeing Co Ltd* (1917) 12 HKLR 1. A different approach was taken by the High Court of Australia in *Gambotto v WCP Ltd* (1995) 182 CLR 432 (HCA). See also Overview to s 87).

## 93. Company must incorporate alteration into articles

(1) If an alteration is made to a company's articles, the company must incorporate the alteration in every copy of the articles issued on or after the date on which the alteration takes effect.

(2) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

### [93.01] History

This section is derived from s 27 of the former Companies Ordinance (Cap 32).

### [93.02] Overview

Members are entitled to copies of articles on request: see s 97. All copies issued after an alteration must incorporate the alteration. Where there are many alterations the company should have the articles reprinted.

As to contravention, in subs (2) for 'responsible person', see s 3.

A level 3 fine is from HK$0 to HK$10,000: see Criminal Procedure Ordinance (Cap 221), s 113B and Schedule 8.

## 94. Alteration affecting status of private company

(1) If a private company alters its articles so that the articles no longer comply with section 11(1)(a), the company ceases to be a private company on the date on which the alteration takes effect.

(2) In addition to the documents required under section 88(5), the company must, within 15 days after the date on which the alteration takes effect, deliver to the Registrar for registration—

(a) a notice of the change of the company's status in the specified form; and

(b) a copy (certified by an officer of the company to be

certificate) before the company can issue the new certificate. As to the meaning of 'new certificate', see s 162.

If the application for the new certificate is not made by the registered holder of the shares nor by a person applying with the registered holder's consent, the company must first serve a copy of the notice on the registered holder: sub-s (7). After three months, the company may then publish the notice in accordance with sub-ss (2) to (4). As to the meaning of 'registered holder', see s 162 and see also the notes to s 163.

If the application for the new certificate is made by the registered holder or with the registered holder's consent, there is no need for the company to serve the notice on the registered holder. The company may simply proceed to publishing the notice immediately.

Publication of the notice is to be made on the company's website: sub-s (2). For the period of publication, see s 165(1)(a). Publication in the Gazette is also required in the circumstances listed under sub-s (2)(b). Before publication, the company is also required to deliver to the stock exchange a copy of the notice: sub-s (4). The stock exchange is also required to display the notice on the exchange's official website: sub-s (5).

### [164.03] Publish notice in specified form

The specified form is Companies Registry Form NS3.

### [164.04] Listed company's website

Publication of the notice on the listed company's website is a new requirement which replaces the previous requirement for publication in newspapers in the predecessor s 71A(3) of the former Companies Ordinance (Cap 32).

'Website' is defined in s 162 to mean the website on which the company is required, by the listing rules to publish announcements, notices or other documents. Under the Main Board Listing Rules of the Stock Exchange, r 2.07C, every listed company must have its own website for publishing announcements, notices or other documents.

### [164.05] At least three months after the day on which the copy was served

When a period of time running from a given day (date of service of the notice) to another day (publication of the notice) is prescribed by law, the question arises whether the computation is to be made inclusively or exclusively of the first-mentioned or last-mentioned day. Regard must be had to the context and the purpose for which the computation has to be made. As a general rule, the effect of defining a period in such a manner is to exclude the first day and include the last day. (See *Pugh v Duke of Leeds* (1777) 2 Cowp 714; *Robinson v Waddington* (1849) 13 QB 753; *Radcliffe v Bartholomew* [1892] 1 QB 161). However, when a period of time is fixed before the expiration of which an act may not be done, the person for whose benefit the delay is prescribed (here the





registered holder) has the benefit of the entire period. Accordingly, in computing the period, the day on which it runs and the day on which it expires must be excluded (see *Blunt v Heslop* (1838) 8 Ad & El 577; *R v Long* [1960] 1 QB 681, [1959] 3 All ER 559; *Rightside Properties Ltd v Gray* [1975] Ch 72), and the act may not be done before midnight on that day. (See *Page v Moore* (1850) 15 QB 684; *Weston v Fidler* (1903) 47 Sol Jo 567; *Carapanyoti & Co Ltd v Comptoir Commercial Andre & Cie SA* [1972] 1 Lloyds Rep 139 (CA); *Manorlike Ltd v Le Vitas Travel Agency and Consultancy Services Ltd* [1986] 1 All ER 573 (CA)).

## 165. Issue of new certificate

(1) A listed company may issue a new certificate on an application under section 163 if—

(a) the company has published a notice under section 164 and—

(i) if the notice is published under section 164(2)(a), the notice has been made available on the company's website throughout a period of at least one month; or

(ii) if the notice is published under section 164(2)(b), the notice has been made available on the company's website throughout a period of at least 3 months and published in the Gazette in accordance with section 164(3);

(b) the company has not received notice of any other claim in respect of the shares; and

(c) in the case of an application by an eligible person who is not the registered holder of the shares—

(i) an instrument of transfer in respect of the shares has been delivered to the company under section 150; or

(ii) if the application was made without the registered holder's consent, the company has caused an instrument of transfer to be executed on behalf of the registered holder by a person appointed by the company and executed by the applicant on the applicant's own behalf.

(2) An instrument of transfer referred to in subsection (1)(c)(ii) is to be regarded as an instrument of transfer duly delivered to the company under section 150.

(4) Subject to subsection (3), a payment referred to in subsection (5) may be made by a company only—

(a) out of the company's distributable profits; or

(b) out of capital in accordance with this Subdivision.

(5) Subsection (4) applies to a payment by a company in consideration of any of the following—

(a) the company acquiring any right with respect to the buy-back of its own shares under Subdivision 4 or 5;

(b) the variation of a contract authorized under Subdivision 5; or

(c) the release, or variation of the release, of any of the company's obligations with respect to the buy-back of any of its own shares under Subdivision 4 or 5.

### [257.01] History

This section is derived from ss 49(3), 49A(1)(a), 49B(3), 49C, 49I of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 692 (payment out of capital permitted for private companies only);
2. Australia: Corporations Act 2001, ss 254K (redemptions out of profits or proceeds of fresh issue only) and 257A(a) (buybacks must not materially prejudice company's ability to pay creditors);
3. Singapore: Companies Act (Chapter 50), s 76F (payment out of either capital or profits as long as company solvent).

### [257.02] Overview

The general rule under the former Companies Ordinance (Cap 32) (see in particular the former s 49A(1)(a)) that a share redemption or buy-back must be funded out of distributable profits or the proceeds of a fresh issue of shares no longer applies (except for on-market buy-backs, see below), but these two sources of funds can still be relied upon for redemptions or buybacks under the new Ordinance: s 257(2)(a), (b). In addition, s 257(2) (c) allows all companies to fund a redemption or buy-back out of capital (on the basis of a solvency statement in accordance with ss 258 to 266). Under s 49I of the former Companies Ordinance (Cap 32), only private companies were able to redeem or buy back shares out of capital. On the background to this change in the law, see also the notes to s 203.

Ancillary payments as set out in sub-s (5) may also be paid out of capital or distributable profits. This alters the position under s 49C of the former Companies





Ordinance (Cap 32) where such payments could only be made out of distributable profits.

As to the accounting treatment following a redemption or buy-back out of capital or profits, see s 269.

### [257.03] Redemption or buy-back of shares

For share redemptions, see Subdivision 2 of Division 4 of Part 5. For the procedures to carry out buy-backs, see Subdivisions 3 to 5 of Division 4 of Part 5.

### [257.04] Distributable profits

As to the meaning of distributable profits, see s 203(1) and see also Part 6.

### [257.05] Buy-back of shares by listed company on stock market

In the case of an on-market buy-back by a listed company under s 239, it is not possible to fund the buy-back out of capital: sub-s (3). This exception was enacted because of the practical difficulties in applying the procedural requirements and protections set out in Subdivision 6 for market transactions.

## 258. Special resolution for payment out of capital

(1) Subject to section 257(3), a company may make a payment out of capital in respect of the redemption or buy-back of its own shares by special resolution in accordance with this Subdivision.

(2) Subject to section 263, the payment out of capital and the redemption or buy-back must be made no earlier than 5 weeks and no later than 7 weeks after the date of the special resolution.

### [258.01] History

This section is derived from ss 49K(2), 49L(1) of the former Companies Ordinance (Cap 32).

For the equivalent provision in the UK, see Companies Act 2006, s 716.

### [258.02] Overview

Section 258 lays down the first of the two main conditions for a payment out of capital by a company buying back its own shares, namely the passing of a special resolution. The procedural requirements relating to the resolution are further

(ii) the Registrar has recorded the information contained in the statement, and in that instrument, for the purposes of section 27(1); or

(b) if—

(i) immediately before the commencement date of this Division, the charge was registered under Part III of the predecessor Ordinance; or

(ii) on or after the commencement date of this Division, the charge has been registered under Part III of the predecessor Ordinance having a continuing effect under Schedule 11.

## [345.01] History

This section is derived ss 85 and 91(1) and (5) of the former Companies Ordinance (Cap 32).

For equivalent provisions:

1. UK: Companies Act 2006, s 872;
2. Australia: Corporations Act 2001, s 269;
3. Singapore: Companies Act (Chapter 50), s 136.

## [345.02] Overview

The section provides for the voluntary notification of payment, satisfaction, release or cessation of the registered charge.

Section 85 of the former Companies Ordinance (Cap 32) provided for satisfaction and release of the property from the charge by entry of a memorandum of satisfaction, in whole or in part, of the charge. The application had to be accompanied by evidence of the satisfaction, but that evidence was neither registered nor available for public inspection.

Section 85 under the former Companies Ordinance (Cap 32) was rarely used. About 50 memoranda of satisfaction/release were entered each year and usually upon applications by the same applicant. It would be convenient if someone searching the Register could ascertain from the register that a charge had been discharged, but the entries would remain on the register (so it is not really a matter of 'clearing the register', as some commentators call it).

The Fifth Annual Report of the SCCLR, 1988 at para 2.5–2.11, noted that this provision was purely voluntary, ie there was no obligation on the part of anyone connected with the original charge to arrange for the satisfaction of the debt to be entered in the register of charges. One of the provisions of Part IV of the UK





Companies Act 1989 (which was never brought into force) attempted to deal with this problem (s 403) and made it an offence to fail to file satisfaction of the debt. But some of the SCCLR members felt that this would impose further regulation and would not necessarily improve the filing rate and the SCCLR concluded that the current voluntary system should be maintained. The UK Companies Act 2006 did not make any substantive changes in respect of entries of satisfaction and release (see Companies Act 2006, s 872). Hong Kong has made a slight improvement with s 345. On an application for entry of memorandum of satisfaction/release, the Registrar already required evidence of discharge, usually in the form of a deed of release/discharge of the charge. But the evidence of discharge was neither registered nor available for public inspection. Section 345 provides for the registration of the notification of payment, satisfaction, release or cessation and of a certified copy of any instrument evidencing the payment, etc. (See FSTB Consultation Paper on Draft Companies Bill – Second Phase Consultation (May 2010), pp 92–93).

The specified form for the notification is NM2. A fee of HK$190 is payable for the application: Companies (Fees) Regulation (Cap 622K), Sch 4 Item 3(b).

For transitional and saving provisions, see Overview to s 333.

## 346. Extension of time for registration

(1) The Court may, on application by the company or registered non-Hong Kong company or by a person interested in the charge, order that—

(a) the registration period specified in section 335(5), 336(6), 338(3), 339(4), 340(5), 341(4) or 342(6) be extended;

(b) the time required for registration by section 80 or 82 of the predecessor Ordinance, or that section as extended by section 91 of that Ordinance, having a continuing effect under Schedule 11 be extended; or

(c) the time required for registration by section 91(5) of the predecessor Ordinance having a continuing effect under Schedule 11 be extended.

(2) The Court may make an order under subsection (1) on any terms and conditions that the Court thinks just and expedient.

(3) The Court must not make an order unless the Court is satisfied that—

(a) the failure specified in subsection (5)—

(i) was accidental;

(ii) was due to inadvertence or to some other sufficient cause; or

for, or taking part in the proceedings at, any meeting at which the decision is considered.

(5) For the purposes of this section—

(a) ***conduct*** (行為) includes acts and omissions;

(b) ***director*** (董事) includes a former director;

(c) a shadow director is to be regarded as a director; and

(d) a reference to an entity connected with a director has the meaning given by section 486.

(6) Nothing in this section affects—

(a) the validity of a decision taken by unanimous consent of the members of the company; or

(b) any power of the directors to agree not to sue, or to settle or release a claim made by them on behalf of the company.

(7) This section does not affect—

(a) any other Ordinance or rule of law imposing additional requirements for valid ratification; or

(b) any rule of law as to acts that are incapable of being ratified by the company.

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### [473.01] History

This section is new.

For the equivalent provision in the UK, see Companies Act 2006, s 239.

### [473.02] Overview

Prima facie, a company may ratify a director's breach of duties owed to the company such that the director will no longer be liable to the company. (*Bamford v Bamford* [1970] Ch 212 (CA)). Section 473(2) confirms the common law rule that ratification may only be made by resolution of the members. (See *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL); *Man Luen Corp v Sun King Electronic Printed Circuit Board Factory Ltd* [1981] HKC 407). 'Resolution' means an ordinary resolution: see s 562(3). This can be in the form of a written resolution instead of a resolution passed at a meeting: see ss 548 to 561. The common law doctrine of unanimous consent (as to which, see *Re Duomatic Ltd* [1969] 2 Ch 365) is preserved and can also be relied upon to effect ratification: s 473(6)(a).

Subsection (3) alters the common law in that the interested director (and connected entities, and persons holding shares on trust for the director of a connected entity) should not vote on the resolution for ratification. If they vote, their votes are to be disregarded. For the meaning of 'connected entity', see ss 473(5)(d) and 486. This





provision was enacted as one of the measures for improving corporate governance. (See Financial Services and Treasury Bureau, Consultation Paper on Draft Companies Bill – First Phase Consultation (December 2009) at p 94).

### [473.03] Ratification

This section refers to 'ratification'. The term 'ratification' is ordinarily understood to mean ratification after the breach, while the term 'authorisation' is used to refer to the situation where the members authorise, in advance, the directors to engage in the conduct that would amount to a breach. Accordingly, it appears that s 473 does not apply to authorisations made in advance.

### [473.04] Director

For the meaning of 'director', see s 2(1). The term is also extended to cover former directors and shadow directors: s 473(5)(b), (c).

### [473.05] Power of the directors to agree not to sue etc

The corporate organ which has power to sue in the name of the company is determined by the company's articles. This power is usually vested in the board of directors pursuant to the general management power as set out in the articles: for example Model Articles (private companies) art 3; Model Articles (public companies) art 2. Accordingly, the board would usually have power to make the decision whether to institute proceedings for the company or whether to settle such proceedings. (See generally *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34 (CA)). Section 473(6)(b) confirms that any such power is unaffected by the section, and so the board of directors is still entitled to exercise any such power as conferred under the articles. Such exercise of power by the directors may, however, be subject to members' remedies under Part 14 or under the common law.

### [473.06] Other additional requirements for ratification/Acts incapable of ratification

Subsection (7) makes it clear that s 473 does not exclude the application of other legal rules which limit the effectiveness or validity of ratification.

For example, notwithstanding ratification in accordance with s 473, a member may still be entitled to bring a derivative action on behalf of the company under ss 731 to 738 or pursuant to the common law: see further the notes to those sections.

There are also certain matters on which the members are unable to effect valid ratification under the general law. For example, where the directors procure the company to engage in some act which the company cannot lawfully do (such as a reduction of capital in breach of the capital maintenance doctrine and in breach of the Ordinance: see the notes to s 210), the conduct cannot be ratified by the members (see *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016). Subsection (7)(b) confirms that such rules still apply.

(3) For the purposes of subsection (2), a conviction, judgment or refusal of relief—

(a) if not appealed against, becomes final at the end of the period for bringing an appeal; or

(b) if appealed against, becomes final when the appeal, or any further appeal, is disposed of.

(4) For the purposes of subsection (3)(b), an appeal is disposed of if—

(a) it is determined, and the period for bringing any further appeal has ended; or

(b) it is abandoned or otherwise ceases to have effect.

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### [507.01] History

This section is new.

For equivalent provisions:

1. UK: Companies Act 2006, s 205; and
2. Australia: Corporations Act 2001, s 212(2).

### [507.02] Overview

This section sets out a new exception to the prohibitions on loans, quasi-loans and credit transactions (under ss 500 to 503), allowing a company to enter into such a transaction to provide funds to meet expenditure of a director incurred in defending certain civil or criminal proceedings or in applying for relief from liability under s 903 or 904. The types of proceedings within the exception are set out in s 507(1)(a). Essentially the exception only applies if the director is successful in defending the proceedings or in obtaining the relief under s 903 or 904, as otherwise the director is required to repay the funds to the company by the time when the court's decision becomes final: see sub-ss (2) and (3).

### [507.03] Indemnities

As to the company's power to provide an outright indemnity to the director to reimburse the director's legal costs, see s 469.

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## 508. Exception for expenditure in connection with investigation or regulatory action

(1) If the condition specified in subsection (2) is satisfied, a company is not prohibited by section 500, 501, 502 or 503 from entering into any transaction—





(a) to provide a director of the company or of a holding company of the company with funds to meet expenditure incurred or to be incurred by the director in putting up a defence in an investigation, or against any action taken or proposed to be taken, by a regulatory authority in connection with any alleged misconduct by the director in relation to the company or an associated company of the company; or

(b) to enable such a director to avoid incurring such expenditure.

(2) The condition is that the transaction in question is entered into on the terms—

(a) that the funds are to be repaid, or any liability of the company incurred in relation to that transaction is to be discharged, if the director is found in the investigation or action to have committed the misconduct; and

(b) that the funds are to be so repaid, or such liability is to be so discharged, not later than the date when the finding becomes final.

(3) For the purposes of subsection (2)—

(a) a finding subject to review—

(i) if no application for review has been made, becomes final at the end of the period for making an application for review; or

(ii) if an application for review has been made, becomes final when the review, or any further review, is disposed of;

(b) a finding subject to appeal—

(i) if not appealed against, becomes final at the end of the period for bringing an appeal; or

(ii) if appealed against, becomes final when the appeal, or any further appeal, is disposed of; and

(c) a finding not subject to review or appeal becomes final when it is made.

(4) For the purposes of subsection (3)(a)(ii) or (b)(ii), a review or appeal is disposed of if—

(a) it is determined, and the period for bringing any further review or appeal has ended; or

(b) it is abandoned or otherwise ceases to have effect.

536(2). For the meaning of 'entity connected with a director', see s 486. For the situation where the director is not aware of the interest, see s 536(4)(a) and the notes below.

### [536.05] Director not aware of interest or of transaction etc

There is no contravention of s 536 if the director is not aware of the interest or of the transaction, arrangement or contract in question: s 536(4)(a). This exception is new and would be particularly important in the case of interests of connected entities of which the director might not be aware or where the director only has an indirect interest in the transaction, arrangement or contract. However, a director is to be regarded as being aware of matters of which he ought reasonably to be aware: s 536(5).

Although the director may not be aware of the material interest at the time when the transaction, arrangement or contract is proposed, it seems that once the director becomes aware of the interest, it is necessary for the director to declare the interest even though the transaction, arrangement or contract has already been entered into by that time: see also s 537(1).

### [536.06] Director's service contract

There is no need for a director to declare his interests in a service contract entered into with him: see s 536(4) (b).

### [536.07] Effect of disclosure

The disclosure of matters in compliance with s 536 does not of itself serve to validate a transaction as the transaction may yet be voidable for breach of a director's common law duty not to allow his or her interest to conflict with the interests of the company. There is also a duty placed upon directors to account for any benefit which they may have obtained as a result of a transaction in respect of which they had a conflict of interest. (See *Chan v Zacharia* (1984) 53 ALR 417; *Regal Hastings Ltd v Gulliver* [1967] 2 AC 134 (HL); *New Zealand Netherlands Society 'Oranje' Incorporate v Kuys* [1973] 2 All ER 1222 (PC) at 1225; *Keech v Sandford* (1726) 25 ER 223). These principles apply in addition to the statutory requirements, as s 536 does not prejudice the operation of any other rule of law which restricts a company's directors from having an interest in transactions of the company: s 536(6).

In *Man Luen Corp v Sun King Electronic Printed Circuit Board Factory Ltd* [1981] HKC 407, the directors' meeting (but not the general meeting of shareholders) of Sun King approved an arrangement whereby the directors of Sun King formed the plaintiff firm to save Sun King from financial difficulties. The plaintiff then entered into various contracts with Sun King and later claimed from the defendant the balance of the price of the goods which had been supplied to Sun King. Plaintiff firm counterclaimed for an account of profits obtained by the plaintiff. In allowing both the claim and the counterclaim, Fuad J considered the former s 162 and observed, at 413–14, that:

> It is well settled that provisions similar to s 162 of the Ordinance merely





> supplement the duties imposed by general law upon directors in relation to their contracts. The statutory duties do not go so far as those insisted upon by the general law and, unlike the latter obligations, they cannot be waived by the articles ... . These [general law] equitable rules relating to the duties of directors developed in the cases, are extremely strict. Their foundation is that directors must not place themselves in a position where a conflict with their private interest might arise and to a certain degree their position is not far different from that of trustees ... . [T]he rule is so strict that the court is prohibited from going into questions of the fairness or unfairness of a relevant contract.

### [536.08] Effect of non-disclosure

Where a director fails to satisfy the disclosure requirements of s 536, an offence may be committed: see s 542.

In *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98, the English Court of Appeal held that if a director does not declare his interest, s 536 renders a contract voidable by a company under the general law. If it is too late to rescind, it is fully enforceable against the company.

However, if there is no formal declaration as required by s 536 but each of the company's shareholders knows the precise nature of the other's interest and in substance there is a unanimous shareholder agreement, so that no amount of formal disclosure by each to the other will increase the other's relevant knowledge, the court may hesitate to find a breach of s 536. (See *Lee Panavision Ltd v Lee Lighting Ltd* [1992] BCLC 22 (CA) at 33; *Runciman v Walter Runciman plc* [1992] BCLC 1084; and *MacPherson v European Strategic Bureau Ltd* [1999] 2 BCLC 203. See also *Pacific Foundation Finance Ltd v Fairyoung Holdings Ltd* [1999] 3 HKC 448 (CA)).

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## 537. Declaration to directors: timing

(1) A declaration of interest under section 536 in a transaction, arrangement or contract that has been entered into must be made as soon as reasonably practicable.

(2) A declaration of interest under section 536 in a proposed transaction, arrangement or contract must be made before the company enters into the transaction, arrangement or contract.

(3) Failure to comply with subsection (1) or (2) does not affect the underlying duty to make the declaration.

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### [537.01] History

This section is new, but may be compared with s 162(1) of the former Companies Ordinance (Cap 32).

Similarly, it has been emphasised that the section is not concerned with board meetings and that it is not an appropriate vehicle for resolving deadlocks between two equal shareholders since it does not empower the court to break a deadlock at either a board or general meeting: see *Ross v Telford* [1998] 1 BCLC 82 (CA). But, if the company's articles provide a means to break a deadlock, the court may order an EGM: see *Re Realder & Marine Supply Co Ltd* [2002] 2 HKLRD 387, [2002] HKCU 556. In *Payne v Coe* [1947] 1 All ER 841, where the register of members had been destroyed by enemy action, the court directed a meeting to be convened by notice in the ordinary way to all members whose names and addresses were known, and by advertisement to those whose names and addresses were not known.

The degree to which the court is willing to exercise its discretion is influenced by the existence of a concurrent or the possibility of a proposed action for unfairly prejudicial conduct under s 724, below. In *Re Sticky Fingers Restaurant Ltd* [1992] BCLC 84 the court exercised its discretion under the English equivalent of s 570 to enable an effective board of directors to operate in order that pressing but routine affairs could be expedited without affecting a pending unfair prejudice petition. The court directed that newly appointed directors should undertake not to exercise their rights to exclude the petitioner from the daily running of the business or his directorship or to dismiss the petitioner as a director: see also *Re Long Prime Ltd* [2001] 3 HKC 51. In *Re Whitchurch Insurance Consultants Ltd* [1993] BCLC 1359, Harman J held that an unfair prejudice petition may be a bar to the court exercising its discretion under the section (s 570), but that it is not inevitably a bar, rather it is a matter which bears upon the discretion of the court. The existence of an unfair prejudice petition is not something which prevents the court exercising its power under the section. However, in the Manfield Coatings case (supra) Cheung J (as he then was) preferred the approach of Dillon LJ in *Harman v BM Ltd* (supra) that it is not the function of the court to make a new shareholders' agreement between the parties and to impose it on them by extracting various undertakings from the parties. Therefore, where the evidence shows that there has been an agreement between the parties to the application under this section (however informal it may be) that relates to the management and control of the company and which impacts directly or indirectly on the quorum requirements of the company, the Hong Kong courts may exercise restraint in their discretion to order a meeting under s 570. The courts have used their powers under the unfair prejudice provision to make interim orders restraining a company from holding an extraordinary general meeting at which resolutions proposing to remove some of the company's directors were to be voted on: see *Re Whyte, Petitioner* 1984 SLT 330 and cf cases referred to in Overview to s 724. As to the discretion of the court under s 570 and the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189, see *Re Downs Wine Bar Ltd* [1990] BCLC 839. For an example of a court refusing to exercise its discretion because of deadlock caused by the applicant, see *Re Morris Funeral Service Ltd* [1957] OJ No 80; (1957) 7 DLR (2d) 642 (Ontario CA); *Ross v Telford* [1998] 1 BCLC 82 (CA). The existence of a winding up petition is not a bar to an order being made under s 570: see *Re K Vision International Investment (HK) Ltd* [2007] HKCU 28 (unreported, HCMP 1607/2005, 22 December 2006).

Section 570 is the procedure provided by statute for addressing problems in realizing the right given by s 462 to the majority to remove a director: *Re Mandarin Capital Advisory Ltd* [2011] 2 HKLRD 1003; *Re ACOS (China) Ltd* [2012]





HKCU 259 (unreported, HCMP 1978/2011, 12 January 2012); *Re China NTG Investment Ltd* [2012] 2 HKLRD 296; *Kim Lung Transportation Services Ltd v Ip Man Fai* [2012] HKCU 1202 (unreported, HCMP 1002 & 1003/2012, 6 June 2012).

The Hong Kong courts have also been reluctant to exercise their discretion under the section where some other preliminary issue ought to be decided first: see *Cheng Yuk Lin v Chan Choi Wah* [1993] 1 HKC 52 (CA) (determination of the beneficial ownership of shares held by applicant, allegation that second respondent was true beneficial owner of shares held by applicant; the Court of Appeal held that beneficial ownership of shares was to be determined before the court could exercise its discretion under the section); *Shenzhen Cau Technology Co Ltd v China Merchants Kin Swiss Transportation Co Ltd* [2014] HKCU 1919 (unreported, HCMP 333/2014, 16 July 2014). Nor have they been sympathetic to attempts by trustees of the estate of a de ceased shareholder to use the section to gain control of a company: see *Standard Chartered Equitor Trustee HK Ltd v George Zee & Co Ltd* [1995] 2 HKLR 153, [1995] HKCU 298. Section 570 may not be the correct provision to invoke in other situations as well. In *Re Duncan Interior Ltd* [2009] 1 HKLRD 443, all the company's directors had vacated office resulting in default in holding the AGM, and so, the correct provision would be an application under s 610(7) for an AGM to be held.

For examples of the court directing that one person shall be deemed to be a quorum, see *Re Ying Hai Ltd* [2008] HKCU 355 (unreported, HCMP 155/2008, 5 March 2008), and other such cases referred to above.

An application under s 570 is by way of originating summons: see Rules of the High Court Ord 102 r 2.

The predecessor section, s 114B of the former Companies Ordinance (Cap 32), was resorted to in the past when reg 56 of former Table A with its reference in relation to an adjourned meeting of the 'members present' being a quorum was construed as requiring at least two members present. More recent cases, eg *Re Goldsort Co Ltd* [2011] 6 HKC 46 and *Re China Star Enterprise Hong Kong Ltd* [2013] 5 HKLRD 271; sub nom *China Star Enterprise Hong Kong Ltd v Hung Wing San Tony* [2014] 1 HKC 132 (CA) had held that one member was sufficient. That latter construction is now reflected in the Model Articles with the specific reference to 'the member or members present': see Companies (Model Articles) Notice (Cap 622H), Sch 1 art 42(2), Sch 2 art 42(2).

## Subdivision 5
## Notice of Meetings

### 571. Notice required of general meeting

(1) A general meeting of a company (other than an adjourned meeting) must be called by notice of—

(a) in the case of an annual general meeting, at least 21 days; and

(b) in any other case—

(2) A person authorised under subsection (1) is entitled to exercise the same powers on behalf of the body corporate as that body corporate could exercise if it were an individual member, creditor, or holder of debentures, of the company.

### [606.01] History

This section is derived from s 115(1) and (2) of the former Companies Ordinance (Cap 32) and s 323 of the UK Companies Act 2006.

For equivalent provisions:

1. Australia: Corporations Act 2001, s 250D;
2. Singapore: Companies Act (Chapter 50), s 179(3)(a).

### [606.02] Overview

This provision expressly provides for the appointment of a corporate representative. The corporate representative will be entitled to vote and exercise other powers on behalf of the body corporate member at meetings. The corporate representative must be counted in determining whether a quorum is present: see *Re Kelantan Coconut Estates Ltd* (1920) WN 274. It is usual for a corporate representative to be provided with a certified copy of the board resolution of the appointing corporation to give documentary evidence of his right to attend and vote at the meeting. Standard articles do not require any specific evidence of an appointment as corporate representative, in contrast to the position with proxies (as to which see Overview to s 600).

Most corporate shareholders or creditors take advantage of s 606, rather than appoint a proxy to act on their behalf. This is because a corporate representative enjoys the same rights and powers of a meeting as the appointing body corporate could exercise were it an individual member etc.

## 607. Representation of recognized clearing house at meetings

(1) A recognized clearing house within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571) may, if it or its nominee is a member of a company, authorize any person or persons it thinks fit to act as its representative or representatives, at any meeting of the company.

(2) If more than one person is authorised under subsection (1), the authorisation must specify the number and class of shares in respect of which each person is so authorised.

(3) A person authorised under subsection (1) is entitled to exercise





the same powers on behalf of the recognized clearing house (or its nominee) as that clearing house (or its nominee) could exercise if it were an individual member of the company.

### [607.01] History

This section is derived from s 115(1A) and (3) of the former Companies Ordinance (Cap 32).

For an equivalent provisions in Singapore, see the Singaporean Companies Act (Chapter 50), s 179(3)(b).

### [607.02] Overview

This provision allows a recognised clearing house (or its nominee) to authorise one or more persons to act as its representatives at any meeting of a company. Unlike the position for other body corporate members dealt with under s 606, in the case of a recognised clearing house, it may appoint more than one corporate representative provided that the authorisation specifies the number and class of shares in respect of which each representative is authorised. In other words, multiple corporate representatives can be appointed to represent the shares held by the recognised clearing house. Since the recognised clearing house holds the legal title of listed shares as nominee for those investors who choose to only hold the beneficial interests but not legal title, the possibility of the clearing house appointing multiple corporate representatives enables such investors to vote in respect of their own shares at meetings of the company.

## 608. Saving for more extensive rights given by articles

Nothing in this Subdivision prevents a company's articles from giving more extensive rights to members or proxies than are given by this Subdivision.

### [608.01] History

This is a new provision. It is derived from s 331 of the UK Companies Act 2006.

There are no equivalent provisions elsewhere.

### [608.02] Overview

This section makes it clear that the company's articles may confer more extensive rights than are provided for under the provisions of the Ordinance on members and their proxies. If the articles purport to cap the maximum number of proxies at 2, this would be void as being restrictive of the rights given by s 596.

### [637.02] Overview

This section makes provisions regulating the keeping and use of overseas branch registers of members. The branch register must be kept in the same manner as the main register: s 637(1). However, any advertising relating to closure of the register must be in the place where the branch register is kept and a copy of every entry in the branch register must be sent to the company's registered office and a duplicate branch register must be kept with the main register: s 671(3).

## 638. Transactions in shares registered in branch register

(1) The shares registered in a branch register of a company must be distinguished from those registered in the company's register of members.

(2) No transaction with respect to any shares registered in a branch register may, during the continuance of that registration, be registered in any other register.

### [638.01] History

This provision is derived from s 104(4) of the former Companies Ordinance (Cap 32); s 133 of the UK Companies Act; and s 196(5) of the Singapore Companies Act.

For an equivalent provision in Australia, see the Australian Corporations Act 2001, s 178(2)(c).

### [638.02] Overview

This section requires that shares registered in the branch register must be distinguished from shares entered in the main register. Similarly no transaction relating to shares in the branch register may be registered in any other register.

## 639. Discontinuance of branch register

(1) A company may discontinue a branch register.

(2) If a company discontinues a branch register, all the entries in that register must be transferred to—

(a) some other branch register kept in the same place outside Hong Kong by the company; or

(b) the company's register of members.

(3) If a company discontinues a branch register, it must within 15 days after the discontinuance deliver to the Registrar for





registration a notice in the specified form informing the Registrar of—

(a) the discontinuance; and

(b) the register to which all the entries have been transferred.

(4) If a company contravenes subsection (3), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

### [639.01] History

This section is derived from s 104(5) of the former Companies Ordinance (Cap 32); s 135 of the UK Companies Act 2006; and s 196(2), (6) and (9) of the Singapore Companies Act (Chapter 50).

### [639.02] Overview

This section provides for the discontinuance of a branch register by a company and requires that in such circumstances, all entries in the branch register must be transferred either to another branch register or the company's register of members. The company must notify the Registrar within 15 days by specified form NR4.

For 'responsible person', see s 3. A level 4 fine is HK$0 to $25,000.

## 640. Provisions as to branch registers of non-Hong Kong companies kept in Hong Kong

If under the law in force in any place outside Hong Kong, companies incorporated under that law have power to keep in Hong Kong branch registers of their members resident in Hong Kong, the Financial Secretary may by order direct that—

(a) those branch registers must be kept at a place in Hong Kong as specified in the order;

(b) sections 631 and 633, subject to any modifications and adaptations specified in the order, apply to and in relation to those branch registers kept in Hong Kong as they apply to and in relation to the registers of members.

## [674.02] Overview

The section sets out the requirements for agreement between creditors or members of a proposed scheme.

The position under s 166(2) of the former Companies Ordinance (Cap 32), was that where a majority in number (headcount test) representing three-fourths in value (share value or creditor value test) of the creditors or members (or their classes) present and voting at the meeting agree to the proposed scheme, the arrangement or compromise, when sanctioned by the Court, would be binding.

The headcount test is often criticised, but in Hong Kong between 1 January 2005 and the end of 2011, a majority in number had only failed to be reached in two members' schemes in which a majority in value had also not been obtained. The head count requirement was criticised in *Re PCCW Ltd* [2009] HKCU 494 (unreported, HCMP 2382/2008, 6 April 2009), reversed on appeal [2009] 3 HKC 292 (application for leave to appeal to CFA dismissed), where there had been share splitting and it was reviewed as part of the Companies Ordinance Rewrite (See FSTB Consultation Paper on Draft Companies Bill – First Phase Consultation (December 2009), Ch 6).

During the discussions of the Bills Committee on the draft Companies Bill of the Legislative Council, the headcount test was criticised as being contrary to the 'one share, one vote' principle, and as having inherent problems, such as vote manipulation through share splitting and the difficulty of reflecting the wishes of the overwhelming majority of listed shares held in the names of nominees and custodians. However, it was also considered that the headcount test was necessary to safeguard the interests of minority shareholders, as only the share value test would remain if the headcount test was abolished and this was unsatisfactory given the binding nature of these schemes.

To strike a balance, in this new section, for proposed members' schemes where the scheme involves a general offer (see s 707) or takeover offer (see s 674(5)), the headcount test is replaced with a new test where the votes cast against the scheme at the meeting do not exceed 10% of the total voting rights attached to all 'disinterested shares' (or disinterested shares of that class) in the company: subss (2)(a)(ii), 2(b)(ii). This test was applied in *Re Cheung Kong (Holdings) Ltd* [2015] 2 HKLRD 512, [2015] 2 HKC 567 for a scheme involving a cancellation of shares that was within the meaning of 'takeover offer' in s 674(5)(b).

The term 'disinterested shares' refers to shares held by non-interested parties (see definition in subs (3)). Parties that may be included as 'interested parties' are, in the case of schemes involving a general offer, the company which makes the buy-back offer and the non-tendering member, plus their associates and nominees, and in the case of a takeover offer, the offeror and his associates and nominees. The term 'associate' is defined in s 667.

This new 10% rule is derived from Rule 2.10(b) of the Code on Takeovers and Mergers which applies to listed companies. For other proposed members' schemes (not concerning a general offer or takeover offer), the headcount test is retained although the Court is granted a new discretion to dispense with the test: subss (1)(c)(ii), (1)(d)(ii) ('unless the Court orders otherwise').





For proposed creditors' schemes (see subs (1)(a) and (b)), the headcount test is retained in addition to the creditor value test as the concern for vote manipulation and problems arising from nominee shareholdings do not exist. As it is unlikely for small creditors who oppose a proposed scheme to manipulate the outcome of voting by assigning part of their debts to other persons, there is therefore no need to extend the court's discretion to dispense with the headcount test to cover creditors' schemes.

For proposed creditors' schemes (see subs (1)(a) and (b)), the headcount test is retained in addition to the creditor value test as the concern for vote manipulation and problems arising from nominee shareholdings do not exist. As it is unlikely for small creditors who oppose a proposed scheme to manipulate the outcome of voting by assigning part of their debts to other persons, there is therefore no need to extend the court's discretion to dispense with the headcount test to cover creditors' schemes.

## 675. Court's additional powers to facilitate reconstruction or amalgamation

(1) This section applies if—

(a) an application is made for the purposes of section 673(2) to sanction the arrangement or compromise; and

(b) it is shown to the Court that—

(i) the arrangement or compromise is proposed for the purpose of, or in connection with, a scheme for the reconstruction of one or more companies, or for the amalgamation of 2 or more companies; and

(ii) under the scheme, the property or undertaking of any company concerned in the scheme, or any part of that property or undertaking, is to be transferred to another company.

(2) If the Court sanctions the arrangement or compromise, it may, by the order or a subsequent order, make provision for any or all of the following—

(a) the transfer of the transferor's property, undertaking or liabilities, or any part of it or them, to the transferee;

(b) the allotting or appropriation by the transferee of any shares, debentures, policies, or other like interests in the transferee which, under the arrangement or compromise, are to be allotted or appropriated by the transferee to or for any person;

(b) the proceeds of any sale under subsection (2); and

(c) any interest, dividend or other benefit that has accrued from the consideration.

(4) The trust terminates on the payment being made under subsection (3).

(5) The expenses of the following may be paid out of the consideration held on trust—

(a) the enquiries mentioned in subsection (1)(b);

(b) the sale mentioned in subsection (2);

(c) the proceedings relating to the payment into court mentioned in subsection (3).

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**[717.01] History**

This is a new section. Cf s 699 of Cap 622.

**[717.02] Overview**

The section deals with a situation where the persons entitled to receive consideration held on trust for the bought back shares cannot be located, after reasonable and regular enquiries by the company, after a period of 12 years since payment of the consideration or where the company is wound up: subs (1).

In such a situation, the non-cash consideration and any benefit must be sold by the company or its liquidators and the proceeds of sale and cash consideration and any accrued benefit paid into Court, upon which the trust is terminated: subs (4). Expenses identified in subs (5) may be settled out of the consideration.

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Subdivision 3
'Sell-out'

**718. Repurchasing company may be required to buy out minority**

(1) This section applies if a member or members of the repurchasing company has or have given notice under section 711 that the member or members will not tender any shares to be bought back by that company under a general offer.

(2) If, in the case of a general offer that does not relate to shares of different classes—

(a) the repurchasing company has, by virtue of acceptances of the offer, bought back, or contracted unconditionally to buy back, some but not all of the





shares to which the offer relates; and

(b) at any time before the end of the offer period, the shares in the repurchasing company controlled by that company, with or without the shares in the repurchasing company held by the non-tendering member, represent at least 90% in number of the shares in the repurchasing company,

the holder of any shares to which the offer relates who has not accepted the offer before the end of that period may, by a letter addressed to the repurchasing company, require that company to buy back those shares.

(3) If, in the case of a general offer that relates to shares of different classes—

(a) the repurchasing company has, by virtue of acceptances of the offer, bought back, or contracted unconditionally to buy back, some but not all of the shares of any class to which the offer relates; and

(b) at any time before the end of the offer period, the shares of that class controlled by the repurchasing company, with or without the shares of that class held by the non-tendering member, represent at least 90% in number of the shares of that class,

the holder of any shares of that class to which the offer relates who has not accepted the offer before the end of that period may, by a letter addressed to the repurchasing company, require that company to buy back those shares.

(4) Rights given to the holder of any shares by this section to require a repurchasing company to buy back the shares are only exercisable within 3 months after whichever is the later of the following—

(a) the end of the offer period;

(b) the date of the notice given to the holder under section 719.

(5) If the general offer gives the holder of shares a choice of consideration, that holder may indicate the holder's choice in the letter requiring the repurchasing company to buy back the shares.

(6) In this section, a reference to shares controlled by a repurchasing company is a reference to—

(a) shares that are held by an associate of the repurchasing company or by a nominee on the repurchasing company's behalf;

### [725.03] An order restraining the continuance of the conduct or the doing of the act

The courts have occasionally made orders restraining conduct where it was felt appropriate to do so. For example, in *Re Whyte, Petitioner* 1984 SLT 330, an injunction was ordered to prevent the removal of a director, whilst in *Re a Company (No 002612 of 1984)* [1985] BCLC 80, an allotment of shares which would have diluted the petitioner's holding was prevented by injunction. Contrast with *Re Lai Kan Co Ltd and Re Safe Steel Furniture Factory Ltd* [1988] 1 HKLR 257, [1988] HKCU 288 where the dilution of the petitioner's holding was oppressive, unfair and prejudicial but given the breakdown in personal relations, a share purchase order was felt to be appropriate. In *Re Mountforest* [1993] BCC 565, a petition was based, inter alia, on an allegation of exclusion from management. There was a proposed sale of the company's business and whilst the court declined to appoint a receiver and manager, it granted an injunction restraining the sale because the transaction was a self-dealing one and there was a complete lack of disclosure. In *Re Bondwood Development Ltd* [1990] 1 HKLR 200, [1990] HKCU 320, an injunction was granted preventing the respondent, Mr Fung, and companies he controlled from exercising any role in the companies affairs.

These cases underline the importance of including at the end of the petition the statement that the petitioner seeks any other order that the court thinks fit, in addition to specific requests under s 725(2).

### [725.04] Order proceedings be brought in the name of the company

There are few cases where the court's power to order that proceedings are brought on behalf of the company has been exercised. In *Re Little Olympian Each Ways Ltd (No 3)* [1995] 1 BCLC 636 at 684, Evans-Lombe J noted that the respondent Newco, against whom a share purchase order was made, would not be debarred in a derivative action from enforcing any claims which the company had against the other respondents but made no order in that regard. In *Re Bondwood Development Ltd* [1990] 1 HKLR 200, [1990] HKCU 320, the court ordered, inter alia, discovery of the records of companies controlled by Mr Fung which had a direct involvement with the company to enable reconstruction of the situation and the undertaking of a tracing exercise to recover assets dissipated by Mr Fung.

In one Australian case, *Re Overton Holdings Pty Ltd* (1984) 9 ACLR 225, [1983] WAR 224, proceedings were ordered on behalf of the company where the conduct complained of amounted to a breach of directors' duties. The respondent director had caused the company to borrow money which it did not need and lent it at commercially unrealistic terms and inadequately secured to another company controlled by himself and in which the lending company had no financial interest. It was stated, at 230, that the power to authorise such proceedings gave 'statutory force to the exception to the rule in *Foss v Harbottle*'. *Re Overton Holdings Pty Ltd* was considered by Kwan J in *Re Shun Tak Holdings Ltd* [2009] 5 HKLRD 743 at para 54, where she suggested that the case had been overtaken by subsequent developments in the law, including in Hong Kong. (*Re Chime Corp Ltd* (2004) 7 HKCFAR 546 (CFA) and *Waddington Ltd v Chan Chun Hoo* (2008) 11 HKCFAR 370 (CFA)). She stated at para 35 that the court has to look at the nature of the complaint together with the relief sought. If the whole gist of the





complaint is misconduct and the objective of the litigation is to seek redress for the company for the misconduct, then it is squarely a case within derivative action territory and the matter would not be within the practical jurisdiction of ss 724–725. Note that damages as a form of relief for members, including petitioner members, but not for the company, did not expressly become available until amendments made to the predecessor s 168A in the former Companies Ordinance (Cap 32) pursuant to the Companies (Amendment) Ordinance 2004. In the *Waddington* case, Lord Millett NPJ stated that it was far from clear that the court can on an unfair prejudice petition direct the petitioner to bring a multiple derivative action and that, as at present advised, he did not think that it could. In the context of unfair prejudice actions, breach of directors' duties has been considered to be a relevant factor in determining whether unfairness has been established and legitimate universal expectations have been flouted. (See the notes to s 724). There has generally been no assimilation between conduct which amounts to breach of director's duties and conduct for which the unfair prejudice provision provides a remedy. The important point here is that director's duties are owed to the company and the unfair prejudice provision does not appear to provide standing to a member to bring an action in respect of a breach of duty which is owed to the company, and no one else, in the absence of any evidence of unfair prejudice to a member or members. Nevertheless, the court is expressly given the power to order the petitioner to institute proceedings in the name of and on behalf of the company. For further consideration of this issue, see, inter alia, *Parker v National Roads & Motorists' Association* (1989) 1 ACSR 227, affd (1993) 11 ACSR 370; *Re Spargos Mining NL* (1990) 3 WAR 166; *Prime Aim International Ltd v Cosmos Parvis International Ltd* [1994] 2 HKC 545; and JG Macintosh, 'The Oppression Remedy: Personal or Derivative?' (1991) 70 Canadian Bar Review 29; L Griggs and JP Lowry, 'Minority Shareholder Remedies: A Comparative View' [1994] Journal of Business Law 463).

### [725.05] Appoint a receiver or manager

The appointment of a receiver is usually perceived in a bad light by customers and creditors of a company and hence the courts are often reluctant to appoint one in these circumstances. (See *Re Spargos Mining NL* (1990) 3 WAR 166; *Jaber v Science & Information Technology Ltd* [1992] BCLC 764; *Re Mountforest Ltd* [1993] BCC 565). Contrast with *Jenkins v Enterprise Gold Mines NL* (1992) 6 ACSR 539 at 563 where the full Court of Appeal of Western Australia expressed the view that on the facts the annual general meeting would not objectively be able to overcome any unfairness to minority shareholders and that the appointment of a receiver would enable earlier transactions which were the subject of complaint to be fully investigated. Where there is clear evidence that the respondents are not managing the company in the interests of all the members, it may be appropriate to appoint a receiver. (See *Re a Company (No 00596 of 1986)* [1987] BCLC 133). Once a receiver is appointed, the powers of the board of directors will be suspended until the receiver is eventually discharged. As to the appointment of an administrative receiver and the appropriateness of an order to purchase shares, see *Re Hailey Group Ltd* [1993] BCLC 459.

Where there were major problems of corporate governance and where the controlling directors had engaged in conduct which jeopardized the main asset of the company (a free television broadcasting licence) and the very existence of the