

**CONSULTATION PAPER ON THE PROPOSAL TO EMPOWER THE
SECURITIES AND FUTURES COMMISSION TO INITIATE A DERIVATIVE
ACTION ON BEHALF OF A COMPANY**

FINANCIAL SERVICES AND THE TREASURY BUREAU
SECURITIES AND FUTURES COMMISSION
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PART I INTRODUCTION

INTRODUCTION

1. The Financial Services and the Treasury Bureau (the FSTB) and the Securities and Futures Commission (the SFC) jointly publish this paper to consult the public on the proposal to empower the SFC to initiate, without Court approval, a derivative action against wrongdoers in relation to a company listed on the Stock Exchange of Hong Kong (the SEHK)) (the Proposal), on grounds including -

- (a) fraud;
- (b) negligence;
- (c) default in relation to any legislation; or
- (d) breach of fiduciary or statutory duty,

where the company is unwilling or unable to do so, and where the exercise of the power is both in the public interest and in the interest of the company concerned.

2. It should be noted that whilst the Proposal arose out of a consideration of various inadequacies of shareholders' remedies under the current legal framework, in this consultation paper, we have attempted only to highlight some of these inadequacies. Readers interested in a detailed legal analysis of this subject may refer to Chapters 12 to 20 of the "Corporate Governance Review by the Standing Committee on Company Law Reform – A Consultation Paper on Proposals made in Phase I of the Review", published in July 2001 (available at www.info.gov.hk/cr). Indeed, we recommend that readers, in assessing the Proposal, refer to this document published by the Standing Committee on Company Law Reform (the SCCLR) which first recommended the Proposal and also for a comprehensive account of the different forms of remedies for addressing shareholders' grievances.
3. Respondents may submit their comments by any of the following methods -

By mail to:	FSB (Derivative Action Consultation) Rooms 1801-4, Tower I, Admiralty Centre, 18 Harcourt Road, Admiralty, Hong Kong <u>Attn : Division 1</u>	SFC (Derivative Action Consultation) 12/F., Edinburgh Tower The Landmark 15 Queen's Road Central Hong Kong <u>Attn: Corporate Planning</u>
By fax to:	(852) 2294 0460	(852) 2293 4099
By email to:	consult@fstb.gov.hk	corp.plan@hksfc.org.hk
By online submission to:	http://www.info.gov.hk/fstb	http://www.hksfc.org.hk

4. Please note that the names of respondents and their comments may be posted on the website of the SFC and the FSTB or referred to in other documents we publish. If you do not wish your name to be disclosed, please state that you wish your name to be withheld from any publication when making your submission.

BACKGROUND

5. Good corporate governance is fundamental to maintaining a market in which investors have confidence. The Financial Secretary announced in his 2000/01 Budget Speech that a comprehensive review of corporate governance should be undertaken to identify and plug any gaps in Hong Kong's corporate governance regime. This is of utmost importance. Notwithstanding the leading status of Hong Kong in good corporate governance in Asia, enhancement of corporate governance is a global trend (more so after the failure of Enron and other high profile companies around the world) and we need to stay ahead in order to maintain and enhance our competitiveness as a leading financial centre and the premier capital formation centre for our country.
6. In April 2000, the Financial Secretary invited the SCCLR to undertake a comprehensive review of corporate governance in Hong Kong. The SCCLR has completed the Phase I review. This consultation paper takes

forward one of the recommendations of the SCCLR, namely, that the SFC should be able to initiate, without Court approval, a derivative action against wrongdoers in relation to a company listed on the SEHK.

7. We wish to emphasize that corporate governance is a systemic issue involving different levels of checks and balances, namely, the companies themselves, corporate professionals, regulators and the Courts. The Proposal forms only part of the Corporate Governance Action Plan for 2003 announced by the Secretary for Financial Services and the Treasury in January 2003.

PART II THE PROPOSAL

BASIC PROPOSAL

8. To provide the SFC with a statutory right to initiate, without Court approval, a derivative action against wrongdoers in relation to a listed company on grounds including -
- (a) fraud;
 - (b) negligence;
 - (c) default in relation to any legislation; or
 - (d) breach of any fiduciary or statutory duty,

where the company is unwilling or unable to do so, and where the exercise of the power is both in the public interest and in the interest of the company concerned.

9. The sections below seeking comments on “circumstances that should trigger a consideration of whether or not the SFC should exercise the statutory right proposed” and “case selection criteria” (paragraphs 26 to 30 below), and “application of the Proposal to overseas companies listed on the SEHK” (paragraphs 32 to 34 below) are relevant to the determination of the detailed scope of the Proposal.

WHAT IS A DERIVATIVE ACTION?

10. A derivative action refers to civil proceedings brought by a minority of company members (shareholders) in their own names seeking a remedy for the company in respect of a wrong done to it¹. It should be noted that any damages awarded by the Court would go to the company, instead of to the members initiating the derivative action.

¹ *Oxford Dictionary of Law*

THE SCCLR PHASE I REVIEW

11. If a wrong has been inflicted on a company, the proper plaintiff is the company itself. As the decision on whether or not to pursue legal action rests with the directors or, where applicable, the majority shareholders, of the company, minority shareholders may not be able to seek redress, especially if the wrongdoers are the directors or the majority shareholders. Under common law, there are exceptions where the Court has allowed a derivative action to be initiated by minority shareholders on behalf of the company concerned, but in accordance with very restrictive principles which have been derived from different cases and are difficult to apply in practice.

12. Also, there are practical considerations that discourage aggrieved shareholders from initiating derivative actions, including the following -
 - (a) any damages awarded by the Court go to the company and not to the aggrieved shareholders initiating the derivative action;
 - (b) aggrieved shareholders initiating the derivative action are potentially liable for the costs of the action;
 - (c) the funds of the company could be used by the wrongdoers to defend the action by aggrieved shareholders; and
 - (d) aggrieved shareholders may not have access to all the requisite information necessary to initiate a proper action.

13. The SCCLR in its Phase I review came up with five main recommendations to address the perceived difficulties that shareholders encounter in this area -
 - (a) providing any shareholder of a company with a statutory right to initiate a derivative action where the company is unwilling or unable to do so. Pursuing such action should not require prior leave of the Court. Moreover, the Court should have a general power to order costs in favour of the shareholder provided that

there is no evidence of bad faith on his part and there were reasonable grounds for initiating the derivative action;

- (b) providing the Court with a statutory power to grant orders for inspection so as to allow any shareholder of a company access to records of the company if the shareholder is acting in good faith and for a proper purpose;
 - (c) expanding the shareholders' existing rights under section 168A Companies Ordinance (Cap. 32) (CO) to initiate an action for unfair prejudice by empowering the Court to award damages to shareholders;
 - (d) enabling an affected person (including shareholders) and a relevant authority to seek an injunction against any person engaging in conduct which would constitute a breach of the CO or that person's fiduciary duties (the Court has the power to award damages); and
 - (e) providing the SFC with a statutory right to initiate a derivative action in terms similar to that accorded to a shareholder of a company as mentioned in subparagraph (a), but with the additional condition that the SFC can only exercise the power when it is in the public interest and in the interest of the listed company concerned.
14. These recommendations have been made by the SCCLR taking into account comments received during the relevant consultation. The first four recommendations are being pursued and the necessary legislative amendments are planned for introduction into the Legislative Council by July 2003. The Proposal deals with the remaining recommendation in paragraph 13(e).

COMMENTS SOUGHT

15. This consultation paper seeks comments on –

- (a) necessity for and efficacy of granting a statutory right to the SFC to initiate a derivative action (paragraphs 16 to 25 below);

and if the Proposal is to be pursued, the following detailed aspects of such a right -

- (b) circumstances that should trigger a consideration of whether or not the SFC should exercise the statutory right proposed and case selection criteria (paragraphs 26 to 30 below);
- (c) settlement of derivative action cases (paragraph 31 below);
- (d) application of the Proposal to overseas companies listed on the SEHK (paragraphs 32 to 34 below); and
- (e) funding of the Proposal (paragraphs 35 to 39 below).

NECESSITY FOR AND EFFICACY OF GRANTING A STATUTORY RIGHT TO THE SFC TO INITIATE A DERIVATIVE ACTION

Developments after the recommendations made by the SCCLR

- 16. The five recommendations under the SCCLR Phase I Review, as set out in paragraph 13 above, were made in January 2002. Since then, there have been certain developments that –
 - (a) enhance the powers of the SFC in the regulation of listed companies, and in initiating or taking part in proceedings for seeking remedies to individual shareholders; and
 - (b) impact upon the power of individual shareholders in seeking compensation for wrongs done to them.
- 17. Therefore, we would like to seek comments on whether, and if so, how the Proposal recommended by the SCCLR should be pursued in the light of these new developments.

Enhancement of the powers of the SFC

18. The SFO, which commenced on 1 April 2003, brings several enhanced powers for the SFC including the following which are relevant here -
- (a) the SFC's power to take action under section 37A Securities and Futures Commission Ordinance (Cap. 24) in cases of unfair prejudice to shareholders has been expanded in section 214 SFO, namely that the scope has been enlarged to cover also conduct -
 - (i) which is oppressive to the members of a company or any part of its members;
 - (ii) involving defalcation, fraud, misfeasance or other misconduct towards such members; or
 - (iii) which results in such members not having been given all the information with respect to the business affairs of the company that they might reasonably expect;
 - (b) the SFC's power to take action under section 384 SFO against those who make false disclosures in the context of the new dual-filing arrangements brought in by the Securities and Futures (Stock Market Listing) Rules (Cap.571V);
 - (c) the availability of section 277 SFO to enable intentional, reckless or negligent disclosure of false or misleading information to induce transactions to be referred to the Market Misconduct Tribunal; and
 - (d) the SFC's power to intervene in third party civil proceedings under section 385 SFO, for example, where a shareholder instituted a derivative action it could intervene in the public interest to assist the process.

Empowerment of shareholders

19. As mentioned in paragraph 14 above, the first four recommendations made under the SCCLR Phase I review to enhance the powers of shareholders in protecting their interests are being pursued and the necessary legislative amendments are planned for introduction into the Legislative Council by July 2003. These are new powers, which ought to enable minority shareholders to take action more effectively to protect their interests. Moreover, the Judiciary released in November 2001 an interim report and consultation paper on Civil Justice Reform with a view to recommending changes that will ensure and improve access to justice at reasonable cost and speed. In particular, one of the proposals under consultation is on the principle to adopt a group litigation scheme in Hong Kong, subject to further investigation of appropriate models in other jurisdictions, such as the class action procedures which have been adopted in Australia by the Federal Court and Victoria.

Arguments for the Proposal

20. While the SCCLR recommendations are being pursued to empower shareholders and enhance remedies available to them, there may still be inaction on their part. They may be deterred by the cost of initiating litigation including the risk of being liable for their own and the defendant's costs in the event of failure. Such inaction especially in the face of blatant abuses and infringement of the law, would send out a very negative message to the market. Giving the SFC a similar right, to be exercised as a last resort and where it is in the public interest, may serve as a deterrent.
21. As mentioned in paragraph 18(a) above, under section 214 SFO, the SFC may seek remedies for individual shareholders. In particular, it may apply to the Court for an order, among other things, to direct a listed corporation to initiate legal action against specified persons on specified terms. The Proposal would enhance this remedy in the following manner

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- (a) the SFC may intervene where there is actionable negligence or breach of any duty (whether fiduciary or statutory), thereby providing a clear statutory remedy in such cases where the conduct complained of falls short of abuse of power or use of power for an ulterior motive;
- (b) the SFC may apply under section 214 to the Court for an order to direct a listed corporation to initiate legal action against persons specified - the Proposal would remove the requirement for what is in effect a “trial within trial” by empowering the SFC to initiate a derivative action without prior Court approval; and
- (c) under section 214, the corporation, the control of which may be vested in directors alleged to be the wrongdoers, is the party ordered to initiate legal action – under the Proposal, subject to the circumstances in each case and to any orders that the Court may make, it may be more effective for the SFC to conduct the relevant proceedings.

Arguments against the Proposal

- 22. The primary role of a regulator should be to administer an appropriate regulatory framework and to ensure compliance therewith; and the international norm is for self-help by shareholders. Generally, it is inappropriate for a regulator to expend public resources on private commercial disputes. In any event, the SFC already has certain powers, particularly, section 214 SFO, which would enable it to take civil action as a last resort.
- 23. Another consideration is that while the various recommendations of the SCCLR to enhance shareholders’ powers to seek remedies are being pursued and have yet to be tried in practice, having parallel powers for both shareholders (paragraph 13(a) above) and the SFC to initiate derivative actions in similar circumstances may result in a reduced likelihood of shareholders taking action to help themselves as they do in other jurisdictions.

24. The combination of significant new powers in the SFO, which has only just come into force, together with the impending empowerment of minority shareholders in the legislative amendments to the CO planned for introduction into the Legislative Council by July 2003, constitute major changes. In view of these new developments, we consider it prudent to consult the public on whether the Proposal should be pursued, and if so, how. It is also for consideration whether the Proposal should be held in abeyance for the moment and evaluated later in the light of the implementation experience of the provisions of the SFO and the proposed new provisions of the CO to improve the lot of minority shareholders, as well as the conclusions on the Civil Justice Reform. The Working Party on Civil Justice Reform targets to come up with recommendations to the Chief Justice in a final report at around the end of this year.
25. If readers consider the Proposal should be pursued, then we would appreciate comments on certain detailed aspects of the Proposal sought in the following paragraphs. To assist readers' consideration, brief information on the legal framework in other comparable jurisdictions is provided at **Annex A**.

CIRCUMSTANCES THAT SHOULD TRIGGER A CONSIDERATION OF WHETHER OR NOT THE SFC SHOULD EXERCISE THE STATUTORY RIGHT PROPOSED AND CASE SELECTION CRITERIA

26. The SCCLR recommends that the SFC should only exercise the right envisaged by the Proposal if it is in the public interest. We propose for consultation that if the Proposal is to be pursued the SFC should be able to act on -
- (a) its own findings;
 - (b) findings of inspectors appointed by the Financial Secretary;
 - (c) findings of the Market Misconduct Tribunal established under the SFO;

- (d) findings of other public bodies and law enforcement agencies; and
 - (e) complaints of any person (after necessary investigation).
27. Readers will, however, appreciate that such a wide range of sources may result in much pressure on the SFC to initiate derivative actions and thus the importance of a strict set of case selection criteria that reflects the public interest consideration.
28. While public interest cannot be limited to any finite set of criteria, the more common considerations the SFC may take into account in administering the right include the following -
- (a) how closely the subject matter aligns with the regulatory objectives of the SFC set out in section 4 SFO;
 - (b) likely deterrent effect of a successful action;
 - (c) value in assisting advancement of case law or clarification of unresolved issues;
 - (d) seriousness of the relevant conduct and the quantum of loss involved;
 - (e) availability of other remedies, including whether members suffering loss can pursue remedies directly available to them;
 - (f) quality of evidence and prospect of action succeeding;
 - (g) likelihood of recoverable assets in a successful action; and
 - (h) whether the wrongdoers might be substantial beneficiaries of any recovery of damages.
29. It should be highlighted that on a practical level and with a view to the responsible management of public money, the SFC can only take on a very small number of cases and may have to reject doing so by reference

to the availability of funding and the likely cost involved. Careful case selection is therefore of utmost importance to maximize the impact of the message to be sent to the market through the derivative actions initiated.

30. Moreover, we believe that the SFC, being the body entrusted with the authority to regulate the market, should have absolute discretion in determining whether or not to take on a case. If respondents are amenable to this view, such discretion would be reflected accordingly in the relevant legislative amendments, in order to protect the SFC from unmeritorious legal challenge regarding its determinations. It is worth noting that the Australian Securities and Investment Commission (ASIC) has been the subject of several judicial reviews regarding its decisions to initiate action under section 50 ASIC Act.

SETTLEMENT OF DERIVATIVE ACTION CASES

31. Readers will appreciate that at a certain stage of the legal proceedings the SFC may form the view that it is in the public interest or the interests of the company concerned to settle the case. As the SFC will be suing on behalf of the company, any settlement agreement it enters into with the wrongdoers will be binding on the company including its members. The implication of this is that aggrieved shareholders will no longer be able to initiate a derivative action in respect of the same wrongs. This notwithstanding, if the Proposal is to be pursued, it is essential that the SFC has the discretion to settle a case without the agreement of all aggrieved shareholders, and as a check against the exercise of such discretion, we propose to require the SFC to obtain court sanction before it may commit to any settlement agreement. Aside from inviting comment on this, we would also wish to draw the attention of readers to this “restriction”.

APPLICATION OF THE PROPOSAL TO OVERSEAS COMPANIES LISTED ON THE SEHK

32. Section 165 CO provides that any provision (whether contained in the articles of a company or in any contract with a company or otherwise) for

exempting any officer of the company from, or indemnifying him against, any liability in respect of any negligence, default, breach of duty or trust of which he may be guilty in relation to the company, shall be void.² The Companies (Amendment) Bill 2002, now before the Legislative Council, proposes to allow a company to maintain insurance for an officer of the company against such potential liabilities. The provision, however, applies only to companies incorporated under the CO. Legislation in some overseas jurisdictions permits a much wider scope of directors' indemnification. By way of example, the Companies Act in Bermuda permits companies incorporated in Bermuda to exempt directors from, or indemnify them against, liability except for fraud or dishonesty but including "wilful negligence" and "wilful default". Unless this issue is addressed in legislation to implement the Proposal, an overseas company ultimately may be paying for the damages and costs awarded to it in a derivative action initiated by the SFC against directors, through the indemnity or by payment of the insurance premium.

33. More than 75% of the corporations listed on the SEHK are incorporated overseas. We are inclined to introduce legislative amendments having extra-territorial application to override, solely for application in relation to the Proposal, the wide exemption mentioned above and to permit officers of overseas companies only the same level of exemption available to officers of companies incorporated in Hong Kong.
34. Respondents' views on this (both in relation to companies incorporated overseas but which operate substantially or even exclusively in Hong Kong, as well as companies incorporated overseas with management and activities located overseas and which are listed on the SEHK mainly for obtaining funding for their overseas activities) would be valuable in helping us reach a decision and also for consideration by the legislature in vetting the relevant legislative amendments. It should be noted, however, that even with such legislative amendments in place, there are uncertainties in enforcing the judgment of a local Court overseas - a judgment obtained by the SFC in Hong Kong may not be enforceable in the place of domicile of the delinquent officers or the company as

² This is subject to the exception where the relevant judgment is given in his favour or in connection with any application under section 358 CO in which relief is granted to him by the Court.

overseas jurisdictions may not accept Hong Kong law as the overriding law.

FUNDING OF THE PROPOSAL

35. If the SFC is to be granted this statutory right, we would need to consider new possible sources of funding. The SFC is financed through public money comprising mainly (a) levies on transactions on the SEHK and the Hong Kong Futures Exchange; (b) fees collected under relevant legislation; and (c) where (a) and (b) are insufficient, allocation from the General Reserves of the Government by the Legislative Council, though there has been no such allocation for a decade.
36. Taking into consideration that (a) the resource implication of each case pursued may potentially run to tens of millions of dollars (see the indicative cost analysis at **Annex B**); and (b) the SFC should not be overly restrained by resource consideration in determining whether to pursue a case, it is essential that the SFC is provided with an extra and appropriate source of funding (to be drawn down only when there is a case and only for financing costs incurred in relation to the case) for this new role.
37. We would like to take this opportunity to invite public views on making available the proposed new source of funding also to the exercise by the SFC of its powers under section 214 SFO. As we mentioned earlier, section 214, which is modeled on section 37A Securities and Futures Commission Ordinance but covers a wider range of misconduct, also provides the SFC with the reserve power to intervene in individual commercial disputes. We see arguments and the need for ensuring the SFC has sufficient resources and an appropriate source of funding to properly administer this enhanced power.
38. As for the actual source of funding, we propose to divert the levy on securities and futures transactions collected for the Investor Compensation Fund established under the SFO for the purpose. It is estimated that the safety funding level for the Investor Compensation Fund is \$1 billion. The fund was established upon commencement of the

SFO on 1 April. When it has accumulated \$1 billion, we propose to divert the levy to build up an Action Fund to finance the implementation of the Proposal and section 214 SFO. We further propose that a review be conducted when the Action Fund reaches the level of say, \$200 million. Continuation or otherwise of the levy arrangement will be subject to the respective balances of the Investor Compensation Fund and the Action Fund. In this connection, the function of the independent Investor Compensation Company recognized under the SFO to manage the Investor Compensation Fund can be extended to cover also the management of the Action Fund in a similar manner. All this would require legislation of course.

39. With a view to minimizing the need for replenishment of the Action Fund through the levy, we wish to propose for discussion whether the SFC should, in addition to being entitled to seek recovery from the defendant of costs incurred in a derivative action under a costs order of the Court, be allowed to share with the company damages awarded to it in order to cover part of the SFC's cost incurred in excess of the amount recoverable under a costs order, subject to the condition that the company should be able to receive a certain minimum percentage, say 70%, of the damages awarded. The idea is proposed for discussion bearing in mind that the company will receive the benefit of an award of damages and should have been the plaintiff and that public money is involved. By way of information, the Consumer Legal Action Fund has adopted a similar arrangement - the fund shares the damages awarded to a plaintiff whose legal action with respect to his consumer rights is funded by it, subject to the condition that the plaintiff receives not less than 50% of the damages awarded in a case before the District Court.

THE CONSULTATION

40. Set out in the preceding paragraphs are key areas in respect of which we particularly welcome public views. Interested parties are invited to send their comments to the FSTB and the SFC by 26 July 2003.

Overseas practices

Brief information on the legal framework in other comparable jurisdictions with regard to the provision of a statutory right to initiate a derivative action is set out below to assist readers' consideration of whether the Proposal should be pursued -

- (a) US: Shareholders in the US may have recourse to class action suits and contingency fees which are not available in Hong Kong. There is no statutory right to initiate derivative action by any shareholder or the regulator.
- (b) UK: At present, there is no statutory right to initiate derivative action by any shareholder or the regulator. However, the UK plans to codify the common law right to initiate a derivative action by any shareholder in a comprehensive Companies Bill to be introduced in Parliament within the next legislative session.
- (c) Canada, Singapore and New Zealand: Individual shareholders have a statutory right to initiate a derivative action. There is no statutory right to initiate a derivative action by the regulator.
- (d) Australia: Individual shareholders have a statutory right to initiate a derivative action. Moreover, section 50 Australian Securities and Investment Commission (ASIC) Act confers upon ASIC the power to cause civil proceedings to be brought either in the name of any person or a company³. This power of the ASIC should be assessed in the light of its policy that "(it) is reluctant to undertake

³ Section 50 Australian Securities and Investment Commission Act provides that - Where, as a result of an investigation or from a record of an examination, it appears to the Commission to be in the public interest for a person to begin or carry on a proceeding for (a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct committed in connection with a matter to which the investigation or examination related; or (b) recovery of property of the person; the Commission (if the person is a company) may cause or (if otherwise) may, with the person's written consent, cause, such a proceeding to be begun and carried on in the person's name.

civil proceedings where there is a potential plaintiff with sufficient funds to bring those proceedings, but [who] is not prepared to do so”.⁴

⁴ ASIC Policy Statement 4: Intervention, issued 3 June 1991.

Legal costs in corporate governance-type cases

1. Civil cases involving corporate law are seldom simple. Even a moderately complex case will almost certainly be preceded by a lengthy investigation which, in turn, is likely to produce a large volume of evidence in the form of witness statements and documents.
2. It is the preliminary evaluation of this evidence by the legal team in order to give the go ahead for proceedings and, the green light having been given, the subsequent preparation for and presentation of that evidence at trial, which accounts for the high cost of most court actions. Indeed, the time spent on preparation may well exceed the actual hearing time in court.
3. Moreover, the anticipated cost of the court proceedings themselves can be inflated considerably by the defence making interlocutory applications both before and during the trial itself, seeking judicial review and appealing any decision which goes against it. A defendant with deep pockets can unilaterally create an inordinate amount of extra legal costs.
4. A moderately complex case brought in the High Court, requiring senior counsel, junior counsel and external solicitors, is likely to cost in the region of HK\$150,000 per court day. This figure would be increased if verbatim reporters were used, which is common in complex commercial cases. The need for expert evidence, such as forensic accountancy, would further inflate the costs.
5. On this basis, the actual trial of such a case could alone consume in the region of HK\$0.75 million per week in legal fees. Preparation work, largely by external solicitors but including counsel for certain tasks, could require further expenditure at the rate of anywhere from HK\$0.3 million to HK\$0.5 million per week.
6. Thus a routine trial lasting 4 weeks, requiring 5 to 6 weeks or more of preparation, could cost at least HK\$6 million. This figure would be

increased if expert evidence was required or if interlocutory applications were made before or during trial. A total figure of HK\$10 million in these circumstances would be perfectly possible.

7. Equally, an exceptionally complex matter, requiring a protracted investigation over many months if not years, will be much more costly, both in preparation and trial time. For example, the initial investigation, preparation of the Petition and subsequent trial in Mandarin Resources spanned several years and generated legal fees exceeding \$30 million. In one recent lengthy civil trial senior counsel was reported to be earning at least \$90,000 per day.
8. Given the amount of costs likely to be involved and the fact that costs normally follow the event, the assessment of the prospects of success is critical. Even so, nothing is certain in litigation.
9. Even if costs are awarded in favour of the plaintiff, it is another matter as to whether they will be paid and further recovery action may be required. Even where the defendant has sufficient means, it is unlikely that more than 70% of expenditure will be recovered. Equally, if costs are awarded in favour of the defendant, the plaintiff is left paying all its own legal costs plus perhaps 70% of the defence costs.