



# Companies Act 2006

## 2006 CHAPTER 46

### PART 11

#### DERIVATIVE CLAIMS AND PROCEEDINGS BY MEMBERS

#### CHAPTER 2

##### DERIVATIVE PROCEEDINGS IN SCOTLAND

#### **265 Derivative proceedings**

- (1) In Scotland, a member of a company may raise proceedings in respect of an act or omission specified in subsection (3) in order to protect the interests of the company and obtain a remedy on its behalf.
- (2) A member of a company may raise such proceedings only under subsection (1).
- (3) The act or omission referred to in subsection (1) is any actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
- (4) Proceedings may be raised under subsection (1) against (either or both)—
  - (a) the director referred to in subsection (3), or
  - (b) another person.
- (5) It is immaterial whether the act or omission in respect of which the proceedings are to be raised or, in the case of continuing proceedings under section 267 or 269, are raised, arose before or after the person seeking to raise or continue them became a member of the company.
- (6) This section does not affect—
  - (a) any right of a member of a company to raise proceedings in respect of an act or omission specified in subsection (3) in order to protect his own interests and obtain a remedy on his own behalf, or

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- (b) the court’s power to make an order under section 996(2)(c) or anything done under such an order.

(7) In this Chapter—

- (a) proceedings raised under subsection (1) are referred to as “derivative proceedings”,
- (b) the act or omission in respect of which they are raised is referred to as the “cause of action”,
- (c) “director” includes a former director,
- (d) references to a director include a shadow director, and
- (e) references to a member of a company include a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

## **266 Requirement for leave and notice**

- (1) Derivative proceedings may be raised by a member of a company only with the leave of the court.
- (2) An application for leave must—
  - (a) specify the cause of action, and
  - (b) summarise the facts on which the derivative proceedings are to be based.
- (3) If it appears to the court that the application and the evidence produced by the applicant in support of it do not disclose a prima facie case for granting it, the court—
  - (a) must refuse the application, and
  - (b) may make any consequential order it considers appropriate.
- (4) If the application is not refused under subsection (3)—
  - (a) the applicant must serve the application on the company,
  - (b) the court—
    - (i) may make an order requiring evidence to be produced by the company, and
    - (ii) may adjourn the proceedings on the application to enable the evidence to be obtained, and
  - (c) the company is entitled to take part in the further proceedings on the application.
- (5) On hearing the application, the court may—
  - (a) grant the application on such terms as it thinks fit,
  - (b) refuse the application, or
  - (c) adjourn the proceedings on the application and make such order as to further procedure as it thinks fit.

## **267 Application to continue proceedings as derivative proceedings**

- (1) This section applies where—
  - (a) a company has raised proceedings, and
  - (b) the proceedings are in respect of an act or omission which could be the basis for derivative proceedings.

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- (2) A member of the company may apply to the court to be substituted for the company in the proceedings, and for the proceedings to continue in consequence as derivative proceedings, on the ground that—
  - (a) the manner in which the company commenced or continued the proceedings amounts to an abuse of the process of the court,
  - (b) the company has failed to prosecute the proceedings diligently, and
  - (c) it is appropriate for the member to be substituted for the company in the proceedings.
- (3) If it appears to the court that the application and the evidence produced by the applicant in support of it do not disclose a prima facie case for granting it, the court—
  - (a) must refuse the application, and
  - (b) may make any consequential order it considers appropriate.
- (4) If the application is not refused under subsection (3)—
  - (a) the applicant must serve the application on the company,
  - (b) the court—
    - (i) may make an order requiring evidence to be produced by the company, and
    - (ii) may adjourn the proceedings on the application to enable the evidence to be obtained, and
  - (c) the company is entitled to take part in the further proceedings on the application.
- (5) On hearing the application, the court may—
  - (a) grant the application on such terms as it thinks fit,
  - (b) refuse the application, or
  - (c) adjourn the proceedings on the application and make such order as to further procedure as it thinks fit.

## **268 Granting of leave**

- (1) The court must refuse leave to raise derivative proceedings or an application under section 267 if satisfied—
  - (a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to raise or continue the proceedings (as the case may be), or
  - (b) where the cause of action is an act or omission that is yet to occur, that the act or omission has been authorised by the company, or
  - (c) where the cause of action is an act or omission that has already occurred, that the act or omission—
    - (i) was authorised by the company before it occurred, or
    - (ii) has been ratified by the company since it occurred.
- (2) In considering whether to grant leave to raise derivative proceedings or an application under section 267, the court must take into account, in particular—
  - (a) whether the member is acting in good faith in seeking to raise or continue the proceedings (as the case may be),

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- (b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to raising or continuing them (as the case may be),
  - (c) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—
    - (i) authorised by the company before it occurs, or
    - (ii) ratified by the company after it occurs,
  - (d) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company,
  - (e) whether the company has decided not to raise proceedings in respect of the same cause of action or to persist in the proceedings (as the case may be),
  - (f) whether the cause of action is one which the member could pursue in his own right rather than on behalf of the company.
- (3) In considering whether to grant leave to raise derivative proceedings or an application under section 267, the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.
- (4) The Secretary of State may by regulations—
- (a) amend subsection (1) so as to alter or add to the circumstances in which leave or an application is to be refused,
  - (b) amend subsection (2) so as to alter or add to the matters that the court is required to take into account in considering whether to grant leave or an application.
- (5) Before making any such regulations the Secretary of State shall consult such persons as he considers appropriate.
- (6) Regulations under this section are subject to affirmative resolution procedure.

**269 Application by member to be substituted for member pursuing derivative proceedings**

- (1) This section applies where a member of a company (“the claimant”)—
- (a) has raised derivative proceedings,
  - (b) has continued as derivative proceedings raised by the company, or
  - (c) has continued derivative proceedings under this section.
- (2) Another member of the company (“the applicant”) may apply to the court to be substituted for the claimant in the action on the ground that—
- (a) the manner in which the proceedings have been commenced or continued by the claimant amounts to an abuse of the process of the court,
  - (b) the claimant has failed to prosecute the proceedings diligently, and
  - (c) it is appropriate for the applicant to be substituted for the claimant in the proceedings.
- (3) If it appears to the court that the application and the evidence produced by the applicant in support of it do not disclose a prima facie case for granting it, the court—
- (a) must refuse the application, and
  - (b) may make any consequential order it considers appropriate.

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- (4) If the application is not refused under subsection (3)—
  - (a) the applicant must serve the application on the company,
  - (b) the court—
    - (i) may make an order requiring evidence to be produced by the company, and
    - (ii) may adjourn the proceedings on the application to enable the evidence to be obtained, and
  - (c) the company is entitled to take part in the further proceedings on the application.
- (5) On hearing the application, the court may—
  - (a) grant the application on such terms as it thinks fit,
  - (b) refuse the application, or
  - (c) adjourn the proceedings on the application and make such order as to further procedure as it thinks fit.