HONG KONG BAR ASSOCIATION'S COMMENTS ON LANDLORD AND TENANT (CONSOLIDATION) (AMENDMENT) BILL 2001

1. Reduction in minimum period for automatic relief

1.1 One of the greatest changes made by this Bill is not an amendment to the Landlord & Tenant (Consolidation) Ordinance at all but to the High Court Ordinance. Among the 'consequential and other amendments' contained in the schedule to the Bill is one which will alter the powers of the High Court and the District Court in cases of relief against forfeiture for non-payment of rent.

1.2 At present in cases in which a landlord is seeking an order for possession on the basis of a forfeiture of the lease for non-payment of rent by the tenant and the case proceeds to trial or an application for summary judgment, both courts are empowered and required to order possession to be given to the landlord within a certain period, which must not be less than 4 weeks from the date of the order, unless the tenant pays the rent and costs into court within that period. The Bill will reduce that period to 7 days.

1.3 The period is a minimum. It is a fetter upon the court's discretion. The court must give the tenant a chance to pay up within that period at least. But it does not prevent the court from allowing the tenant a longer period in which to pay, either when making its order or upon an application by the tenant for more time.

1.4 The Bar would question whether it is necessary to spell out any minimum period. It can surely be left to the good sense of the judge to allow the tenant a reasonable time in which to pay, that time depending upon the circumstances of the case.

1.5 This point was made in response to the 1999 version of the Bill. It was not accepted, the reason being "because Court discretion will generate application for and opposition against relief" which will lengthen the process rather than shorten it: see the table annexed to the Bill showing suggestions which have not been adopted.

1.6 This reason is misplaced because it assumes, incorrectly, that the Court has no discretion already. Since the proposed 7-day limit is a minimum, it will not prevent the Court from giving the tenant more time if it wishes. In many cases the Court may feel that 7 days is too short. Even if the Court gives the tenant only the minimum time to pay, he can come back before that time expires and ask for longer.

1.7 The simple removal of the phrase "but not being less than 4 weeks from the date of the order" would achieve the object of speeding up the possession process. Indeed it would do so more effectively than the Bill's proposal to substitute "7 days" for "4 weeks" because the Court will have an unrestricted discretion (as the High Court does in England) and, in an appropriate case, may order that the order for possession take effect within a period of less than 7 days.

2. Implied power of forfeiture for non-payment of rent

2.1 The proposed new section 117(3) implies into "every tenancy" (by which is presumably meant every tenancy agreement) a covenant to pay rent on the due date and "a condition for forfeiture" for non-payment within 15 days of the due date. This is an importation into part IV of a similarly-worded provision contained in section 52(3) of the now-lapsed part II. The importation is the result of observations by the Lands Tribunal some years ago to the effect that, as the number of tenancies of more humble premises falling within part IV increased, the need for such a provision became more apparent so as to enable small landlords to repossess their property from defaulting tenants.

2.2 However, the observation of the Lands Tribunal did not take into account the fundamental differences in approach between part II and part IV and the observation has been somewhat overtaken by events.

2.3 First, though, it should be observed that there is no need for a statutory implication of a covenant to pay rent because the common law already does so. The reservation of a rent in a tenancy agreement necessarily implies an agreement to pay that rent in the

amount and at the time agreed. The real innovation of the proposed s.117(3), as with the old s.52(3), is the provision for forfeiture.

2.4 Curiously this is expressed to be a "condition for forfeiture", suggesting that it is to be a condition of the grant and continuation of the tenancy that rent shall be paid within 15 days of its falling due. In other words, if the rent is more than 15 days late, the tenancy will automatically end. Is this really what is desired? Or is what is intended that the landlord shall have a power of forfeiture, ie an option whether to terminate the tenancy or not, exercisable after the 15 days?

2.5 The previous approach under part IV has been to minimise legislative intrusion into the relationship between landlord and tenant. So the parties have been left to make their own agreement, the only interference being in respect of the termination and renewal of that agreement. Even when the Lands Tribunal orders the grant of a new tenancy, it alters the terms of the old tenancy only rarely and with reluctance. The proposed s.117(3) marks a departure from that approach by imposing upon the parties a provision to which they did not agree. It may be said to be only a small imposition but it is a fundamental one because it applies an old-fashioned, part II – style interventionist philosophy to the newer part IV.

2.6 It may also be said that s.117(3) is practical : that if the tenant has stopped paying rent, the landlord must be able to do something. The answer to that is that he is able to do something already. He can sue for the rent without the assistance of the proposed subsection. He can deduct the overdue rent from the deposit. Furthermore, he can now terminate the tenancy by treating non-payment of rent as a breach of a fundamental term.

2.7 This is possible under the law of repudiation and acceptance, a contractual doctrine which until the early 1980s it was not clear applied to tenancies. That may explain why s.52(3) was thought to be needed when it was introduced, long before judicial recognition that the doctrine applied to tenancies. Now, however, a landlord who is faced with a persistent or grievous failure to pay rent may treat the tenant as being in

repudiation and accept that repudiation thus 'rescinding' their agreement. So the need for s.117(3) is debateable.

3. Reform of termination and renewal procedure

3.1 The reduction in the period for the landlord's giving notice of termination (form CR101) from 6-7 months to 3-4 months prior to date of termination and in the tenant's response (CR102) from a maximum of 2 months to a maximum of 1 month after receipt of notice of termination are to be welcomed since the existing periods have proved unnecessarily lengthy in practice. The same may be said of the similar reductions in the periods for the tenant's making a request for a new tenancy (CR103) and for the landlord's response (CR104).

3.2 The abolition of the absolute bar upon a tenant applying for a new tenancy after the date stated for the termination of the current tenancy is also to be welcomed. Often the tenant fails to apply in time because he is lulled by the apparent progress of negotiations with, and does not wish to antagonise, the landlord, or is ill-served by his advisers, or is simply ignorant of the disastrous consequences of missing the deadline.

3.3 However, the combined effect of the abolition of that absolute bar and the repeal of the provision whereby the landlord can require the tenant to hurry-up with his application (by serving form CR105) may be unfortunate.

3.4 The current procedure for termination and renewal of domestic tenancies provides generous periods of time for the taking of the various steps. Those periods certainly can be reduced but when introduced in 1981 they were made deliberately lengthy in order to give the parties adequate time to consider their position and take advice, to negotiate and to apply and prepare for a Lands Tribunal hearing and yet still have the dispute resolved before the existing tenancy ended. The length of those periods proved to be a blessing during the prolonged rental boom of the 10 years to late 1997 for there were then many disputes and the waiting time for a Lands Tribunal hearing (from lodging of application) was several months. That has changed because it is now, and has been for several years, a tenant's market and also because there are more

tribunal officers and members. But if we return to a period of rent inflation, there is a risk that as a result in the reduction in the period of notice, delays in the hearing of disputes will also return and applications for new tenancies will be heard well after the date of termination of the tenancy. This risk is increased by the abolition of the CR105 procedure whereby the landlord can give the tenant a deadline for application to the tribunal.

3.5 The flow charts annexed to the Legislative Council Brief suggest that the tenant must apply for a new tenancy after one month from receiving form CR101 notice of termination from the landlord and before the date of termination stated in the form, which could be a further 2 or 3 months later. In other words, despite the shortening of the periods for giving notice, the period for making an application to the tribunal has in effect been extended, because the landlord is no longer able to serve CR105 requiring the tenant to apply within 2 months. Furthermore, since the expiry of the notice of termination is no longer to be a deadline after which an application for a new tenancy will not be entertained, there is no longer any absolute cut-off date for applying for a new tenancy. So the tenant can drag his feet, wait for the landlord to apply for possession after termination of the tenancy and only then apply to the Lands Tribunal, saying that he had overlooked or misunderstood the need to apply and asking the tribunal to entertain his late application.

3.6 Consequently the Bar believes that it is not correct to say, as the Legco Brief does in paragraph 7(b), that the CR105 procedure is "redundant". The Bar thinks that consideration should be given to enacting some means of requiring the tenant who says he wants a new tenancy to apply for one promptly, well before expiry of the notice of termination. Alternatively once the tenant says that he wants a new tenancy (by CR102 or CR103), the landlord should be allowed to apply for an order that the tenant takes a new tenancy.

4. <u>Grounds of opposition</u>

4.1 The purpose of the amendment to section 119E(1) is stated in the Brief to be to allow the landlord to change or add grounds of opposition to a tenancy renewal application

owing to a change in circumstances arising after he has served his form CR101 (or CR104) notice. The amendment, which removes the restriction that the grounds of opposition be such as may be stated on those forms and substitutes for it, by way of clarification, that they may be relied upon whether or not they were stated on the forms, will do this; but it will also permit a landlord deliberately to mis-state his grounds of opposition on the form and then use different grounds before the Lands Tribunal. In others words, the amendment is not limited by reference to changes in circumstances.

4.2 The main changes in circumstances encountered in practice are that, during the period between the sending of the form and service of notice of opposition in the Lands Tribunal procedure, the tenant breaks the terms of the tenancy agreement (e.g. by not paying rent) or the landlord develops a desire to use the premises for himself. The latter may be caused by a change of landlord - that is to say, the original landlord, having given notice by CR101 (or CR104) that he will oppose an application for a new tenancy and having stated grounds which do not include self-use, sells the premises to a new landlord who wishes to use the premises himself and buys with knowledge of the tenancy and of the tenant's application for a new tenancy. It might be felt that in those particular circumstances it would be unfair to allow the new landlord to oppose the tenant's application. Under the old part II the Lands Tribunal had power to delay the effect of its order for possession in favour of a new landlord for a period of at least 12 months and up to 18 months after he had purchased the property.

5. Penalties for harassment

5.1 The increase in maximum penalties will have little or no effect upon the incidence of pressure and threats upon tenants to leave. This is because of the way in which the harassment is commonly organised. The public perception is that staff of the landlord-developer carry out the harassment so that responsibility is easily pinned upon the landlord, but the landlord would be extremely stupid to act in this way. Indeed it is quite possible that the developer is genuinely ignorant that harassment is occurring or who is carrying it out. This happens when a group of people, who call

themselves estate agents, identify an old building in multiple occupation which has potential for redevelopment and buys up all or many of the flats in that building, using companies to do so. They then approach a developer with a 'package' proposal: that they can deliver all the flats in the building with vacant possession by a certain date at a certain price. The developer may be told that the tenants have all agreed to leave by that date. The proposal is attractive to the developer because he is saved from the difficulty of acquiring the flats piecemeal and thereafter of ousting the tenants and paying compensation, so he agrees to it. Pressure is then exerted on the tenants to leave by the sellers who become increasingly desperate as the date for completion of their sale to the developer approaches. The developer may know nothing about this.

5.2 One possible solution would be to make the developer strictly liable for any hassassment which would accrue to his benefit.

6. Small tenements recovery

6.1 The Bill proposes to breath life into the provisions for summary possession contained in part VI of the ordinance by increasing the rateable value of premises caught by part VI form $30,000.00 to $100,000.00 (section 129). This is in effect an increase in the summary jurisdiction of the District Court - and at a time when rateable values are falling, so the increase in jurisdiction is even greater than it appears to be.

6.2 The procedure for recovery of small tenements in part VI is based upon elderly and defunct English legislation. The Hong Kong legislation is itself more than 100 years old. It is a form of summary judgment which is anomalous in that there is a better and fairer procedure available in the High Court (Order 113) and the procedure is quite different from normal District Court practice. More importantly, the rules of the District Court have recently been changed to permit summary judgment in all cases, but by a fairer procedure. The part VI procedure involves the landlord making an application to the Court without reference to the tenant and the Court then summoning the tenant. This kind of one-sided "ex parte" application is fundamentally unfair and so is nowadays allowed only in cases of real emergency. It is misleading to call this

(as paragraph 22 of the Brief does) a "technical amendment". We would question whether this change is necessary.

6.3 At present the part VI provisions are rarely used because they apply only if the rental value is about $2,000.00 per month. The proposed increase will bring a large number of domestic premises within its potential reach - those with rents approaching $10,000.00 per month, hardly "small tenements". The Brief (paragraph 22) states that the increased jurisdiction will cover most domestic units sized below $75m^2$. A flat of $75m^2$ is not small in Hong Kong terms.

7. Time for making distress

7.1 The change to section 86, altering the hours between which distress may be levied from "after sunrise and before sunset" to "after 9 am and before 5 pm" was in 1999 presented in the explanatory memorandum as a removal of archaic terminology. This explanation has been dropped but the change is still proposed. Obviously the change will reduce the hours within which distress can be levied since the sun always rises before 9 am and sets after 5 pm, so it is a change in the law as well as in terminology. Under part III of the ordinance the seizure of goods in distress is carried out by the Court bailiff, not (as in England) the landlord's representatives. Presumably 9 am to 5 pm are the hours of work of the bailiff's staff.

7.2 The restriction on levying distress to daylight hours is ancient, but it has a purpose which is to enable the tenant to tender the rent owing and thereby prevent the impounding of his goods. This will not be prevented by the proposed limitation on the hours. There is however an argument for permitting distress to be levied in the early evening : in the case of domestic premises the tenant is more likely to be at home then and shop premises are usually open then, so entry can more easily be made and the tenant is better able to respond promptly to the distraint.

8. Powers to amend fees and forms

8.1 These powers in section 114, which are now with the Chief Executive, are to be given to the Secretary for Housing. This seems strange in that distress is not a subject restricted to domestic tenancies and that the main form is an affidavit, ie a legal document. One would have thought that these matters would be better left to the District Court registrar or should be set out in the District Court Rules.

9. Extension of part V protection

9.1 In the background papers a suggestion that part V of the LTO be extended to public sector (Housing Authority) commercial leases and licences is considered and rejected. The main reason given for this rejection is that it has always been the government's policy to ensure minimum interference in the market mechanism.

9.2 The Bar had thought that the reason was that the Housing Authority and other public sector lessors were considered to be responsible landlords. The policy of minimising interference was introduced only in the 1980s.

9.3 If the reason given were accurate, part V would never have been enacted for its purpose and effect is to interfere with the market, although only to a modest extent. Part V requires private landlords who have granted shorter commercial tenancies to give their tenants a minimum of 6 months notice of termination whereas the common law requires either no notice (in the case of a tenancy of fixed duration) or shorter notice (eg, in the case of a monthly tenancy, one full month).

9.4 The proposal is to impose this modest requirement also upon public landlords.

9.5 The justification usually given for part V, that it reduces disruption to businesses, would appear to apply irrespective of the nature of the landlord.

9.6 Part V was, however, enacted in a different era, one in which small business tenants were often at the mercy of landlords. The policy of reducing interference in the relationship of landlord and tenant began many years after what became part V was first enacted (1962). If the Administration really desires to have minimum interference

with the market and to give respect to a freely-negotiated contract, there could hardly be a better time at which to abolish part V.

10. Illegal use and illegal structures

10.1 The suggestion here is to enact provisions which will enable landlords of domestic premises to repossess properties which have been used for illegal purposes or upon which the tenant has constructed unauthorised building works. The Administration has accepted this suggestion and is considering adopting one of two approaches, to enact either a ground of possession or an implied right of forfeiture.

10.2 It should be noted that use of premises for illegal purposes is quite separate from construction of illegal structures. The erection on a property of building works without the permission of the Building Authority is not an illegal use of that property and is a matter for the Buildings Department of the government. The use of property for illegal purposes, such as prostitution, is a matter for the police. The coincidence of the use of the word 'illegal' does not make it appropriate to link these matters or to deal with them together.

a. As the background paper correctly observes, the introduction of a ground for possession would be a fundamental change, in fact a complete departure from the existing policy toward part IV. That policy has been in effect since 1981 and should not be lightly abandoned. It is that there should be a minimum of interference in the landlord-tenant relationship : the parties should be free to make their own agreement and the terms of that agreement should govern their relationship throughout the agreed period of their tenancy. At or towards the end of that period there should be an exchange of notices which, besides having the effect of ending the tenancy at or after the time already agreed, serve to exchange information as to the parties' position concerning a renewal of the tenancy so that they may enter into negotiations for a fresh agreement. The statutory interference comes only if they cannot agree on a renewal. The tenant has a right to a new tenancy at a market rent but that right is qualified in that there are 6 grounds upon which the landlord may oppose the grant of a new tenancy. Those grounds (unlike the old grounds for possession under part II) do

not include that the tenant has used the premises for an immoral or illegal purpose: presumably this was deliberate and for a reason. The grounds of opposition come into play only at the end of the tenancy, when a renewal is being considered. During the term of the original tenancy and of any agreed replacement, the relationship is governed by what the parties have agreed.

10.4 This means that during the agreed term the landlord may seek possession if the agreement gives him power of forfeiture in the event of a breach of the agreement by the tenant, as it almost inevitably does if the agreement is written and not 'home-made'. It is quite normal to find a covenant against illegal and immoral use of the premises in standard-form and professionally-drafted agreements. It is not normal to find a covenant against the erection of unauthorised structures as such. However, a covenant against breach of the deed of mutual covenant and breach of government regulations is common and a modern DMC will always forbid the erection of unauthorised structures. Consequently the problems which are perceived will arise in only a very few cases.

10.5 Those cases will be where there is no written agreement or the landlord has used an inadequate form of agreement. It may be questioned whether it is desirable to abandon the previous hands-off approach for the sake of a small minority of tenancies especially given that the problem is self-inflicted.

10.6 Furthermore, the problems will be temporary in that the illegal structure will be removed if the Building Authority acts (by complaining to the tenant or itself removing the structure) or if the police prosecute in respect of the illegal use. It is the Building Authority's policy to give priority to the removal of new unauthorised structures.

10.7 The problems would also be temporary if new grounds of opposition dealing with them were to be introduced for then the landlord would have to wait only until he has terminated the tenancy, usually a matter of a few months, before using the illegal use or the illegal structure as a basis for opposing the grant of a new tenancy. The

introduction of new grounds of opposition would preserve the integrity of the existing approach and minimise the degree of interference in the bargain struck by the parties.

10.8 By contrast, the introduction of grounds of possession would signal a reversion to the old policy of government interference in the landlord-tenant relationship, a policy from which the administration took many years to disengage. Worse, that interference would occur during the term of the original lease, something which even the grounds for possession under the old part II did not achieve. Once grounds for possession are introduced, there is no reason to limit them to illegal structures or illegal usage.

10.9 The enactment of a statutory implied power of forfeiture is from that point of view less objectionable but would still be an interference with the contract made by the parties. Presumably what the Administration has in mind is not really "an implied forfeiture clause" as the background paper says but that there shall be a statutory power of forfeiture in the event of the occurrence of certain matters. Or it may be that what is envisaged is that, where the agreement contains an express power of forfeiture (as is usually the case with written agreements), the events spelt out in the agreement as triggering that power shall be extended to cover illegal use and erection of illegal structures if they do not do so already. We say this because the paper asserts that section 58 of the Conveyancing and Property Ordinance (which requires the landlord to serve notice upon the tenant before enforcing a forfeiture) will apply and s.58(1) says that a right of forfeiture "under any proviso or stipulation in a lease for a breach of covenant or condition in a lease" shall not be enforceable unless notice is given : if the right of forfeiture were given by the LTO, the right would not arise under the lease but under the statute so s.58 would not apply.

10.10 However, the Bar would suggest that since the problems which this proposal is designed to cure are quite rare and since they are to a certain extent the landlord's own fault for not using an adequate form of tenancy agreement, the appropriate response would be to extend the grounds of opposition and not to attempt to supplement the tenancy agreement with implied terms, still less to introduce grounds for possession.

11. <u>Persistent failure to pay rent</u>

11.1 The proposal here is to introduce another ground for possession, alternatively another implied forfeiture clause, based on persistent late payment of rent.

11.2 The Bar's reservations concerning this reflect those concerning the other proposed grounds of possession, namely:

(1) it would be a fundamental change of approach;
(2) the problem is the result of an inadequate tenancy agreement; and
(3) the problem would be temporary because persistent late payment can amount to a ground of opposition to the grant of a new tenancy.

11.3 Repeated late payment of rent, as opposed to non-payment, is not a repudiatory breach of the tenancy agreement. The landlord can, and often does, protect himself from late payment by taking a deposit (upon which he does not pay interest to the tenant), requiring by a clause in the agreement that the tenant pays interest upon rent which is overdue by a certain number of days and inserting in the agreement a power of forfeiture exercisable in the event of breach which includes non-payment of rent after so-many days. So, to avoid this problem, landlords do not need to be given greater protection by the law, they just need better legal advice.

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