HONG KONG BAR ASSOCIATION'S COMMENTS ON

LANDLORD AND TENANT (CONSOLIDATION) (AMENDMENT) BILL 2001

1. Clause 11 of this Bill as presently drafted states that there shall be implied into a tenancy entered into after the Bill's enactment certain covenants to be contained in a new section 117(3) of the principal ordinance, including:

> (d) a covenant that the tenant not alter or add to, or suffer or permit the alteration or addition to, the premises or any part thereof without the consent of the landlord and a condition for forfeiture if that implied covenant is broken.

The other three proposed implied covenants concern non-payment of rent, immoral or illegal use and nuisance.

2. The Bar Council has already commented upon these proposed changes, pointing out in particular that they mark a departure from a 20-year-old governmental policy of disengagement from interference in the landlord and tenant relationship. The Bar therefore assumes that the request from the Bills Committee to comment on Clause 11 is an invitation to consider the clause from a technical and drafting point of view.

3. Before doing so, the Bar would observe that in press briefings during the week 23rd-26th September 2002 concerning the government's policy towards the housing market and desire to see prices stabilise and increase, the administration's spokesman seemed to suggest that the new statutory covenants were part of a number of measures designed to help property owners. It is the Bar's understanding, however, that the proposal of these covenants long pre-dates the change in government policy and is intended to assist landlords (who are not necessarily owners) to be rid of undesirable tenants rather than to increase the amount of rental or the capital value of their property.

4. Our first observation concerning the text of section 117 is that it applies to all tenancies, not just to oral tenancies. The government's paper in support of the proposed s117(3)(d) says that in introducing implied forfeiture clauses, "the intention of the Administration is to facilitate landlords to repossess premises let out on oral tenancy agreements". The proposals will certainly do that, but they will also assist a landlord whose written tenancy agreement does not include all the covenants which are proposed or does not contain covenants which are as widely drafted as those in s117(3). Subsection (4) states that in the case of an inconsistency between the terms of a tenancy and a provision of s117(3), those terms shall prevail. This does not mean that if the written agreement contains a covenant dealing with the same subject-matter as one of the implied covenants, the implied covenant does not apply at all. It means only that if, and to the extent that, there is an inconsistency, the written term will prevail. So, for instance, if the written agreement contains a covenant to pay rent but no provision for forfeiture in the event that rent is unpaid (as is the case with one of the printed forms of agreement available from stationers), that will be supplemented by the statutorily implied term insofar as s117(3)(a) imposes such a condition for forfeiture for non-payment of rent if the rent is unpaid for 15 days. Is this what the legislature intends?

5. The word 'or' at the end of the proposed section 117(3)(c) appears to be an error. Presumably (c) and (d) are not intended to be alternatives, so 'and' should be used.

6. Turning to 117(3)(d), the drafting would be grammatically improved by the insertion of 'of' after 'alteration'.

7. The concerns of the Bills Committee are whether (d) reproduces a common clause in domestic tenancy agreements and whether its present wording would be restrictively interpreted so that only material alterations or additions would be affected by it.

8. There is no standard wording for a covenant against alterations and the like. It is however common for such a covenant to be included in tenancy agreements. The wording invariably forbids the making of alterations to the premises. Sometimes the phrase used is ‘structural alterations’. Sometimes the wording mentions additions, sometimes not. Occasionally the covenant will forbid the cutting and maiming of walls as well as the making of alterations. Occasionally also it will specifically forbid the installation of fixtures and partitioning and the removal of landlord's fixtures. More often than not, the covenant will be qualified by permitting alterations with the consent of the landlord, as (d) does, although the consent is usually stipulated to be written consent.

9. As for the interpretation of the words 'alteration' and 'addition', it is not possible to predict with certainty whether a judge would take a restrictive or liberal attitude. This is because his task will be to discern the legislative intent from the content, context and scheme of the statute and from the wording of the particular provision, but not, usually, from the views expressed by legislators prior to the enactment. The judge might, for instance, conclude that legislators would have had in mind existing case law concerning the interpretation of similar covenants in contracts and therefore apply that case law to the interpretation of the statutory words, or he might think that a statute is different from a contract and that the evident intent of inserting these covenants into tenancy agreements was to protect and promote the interests of the landlord and that therefore that he should give the wording an interpretation favourable to the landlord. Equally he might reason that part of the context of the statute, special to Hong Kong and which would have been known to legislators, is that virtually all building works are forbidden unless expressly permitted, so that alterations and additions should be construed as including all building work: the definition of building works in the Buildings Ordinance is very wide indeed and is regarded by the Building Authority as including certain items, such as small metal struts used to secure air conditioning units in their portals, which most people would not regard as building work.

10. So it is possible that 'alteration or addition' will be given a wide interpretation and might even be construed to embrace alterations and additions of all types and of any description rather than being confined to 'material' alterations and additions. Incidentally, the Bar is not entirely clear what the Bills Committee has in mind by 'material'. Is it meant to indicate an addition or alteration involving the material of the premises? Does it mean an alteration or addition which is material to the particular letting or the particular landlord and tenant? Or is it merely a short way of referring to alterations and additions which are of sufficient gravity to justify complaint by the landlord?

11. Whichever it is, the concerns of the committee would be met if, but only if, the court were to apply to the interpretation of the statutory words no other consideration except the case law concerning the meaning of 'alteration' in a tenancy agreement. In *Bickmore v Dimmer* [1903] 1 Ch 158 it was observed that an alteration is effected only when the construction or fabric of the building is altered. Consistent with this, the illustrations of breach of the covenant against alterations given in the landlord and tenant textbooks concern major

works: for instance, the conversion of a house into flats (*Duke of Westminster v Swinton* [1948] 1 KB 524). Presumably it is because of this that landlords often expressly forbid the cutting of walls and the erection of partitions, for these acts may not constitute the making of alterations.

12. However, in Bickmore v Dimmer as in all cases, the court was construing the words of the covenant in the light of the purpose for which the premises were let (in that case, a watch and jewellery shop) and the contents of the other covenants in the lease, in order to discren what limitation upon the word 'alteration' was intended. In each case it is a question of whether the particular work which has been done constitutes an alteration within the meaning of that word as used in the lease, as was pointed out by Morritt J in Taylor v Vectapike [1990] 2 EGLR 12.

13. If the committee wishes to protect tenants from 'alteration or addition' being given too wide a scope, a subsection could be inserted stipulating that these mean an alteration or addition to the fabric of the premises or the structure of the building containing the premises.

14. The interplay between the proposed statutory covenants and section 58 of the Conveyancing and Property Ordinance has rightly been addressed by the proposed amendments. Section 58 requires notice of breach to be served upon the tenant as a pre-requisite to the exercise of the power of forfeiture in cases of breach of covenant excluding breach of a covenant to pay rent. If the Bar understands the proposed s117(5) correctly, the intention is that a landlord must follow the formalities laid down in s58 where the proposed statutory covenants have been broken but not in the case of covenant (a) concerning non-payment of rent. The provisions of s117(5)(a) and (b) no doubt achieve this but they do seem convoluted. The Bar wonders whether the drafting might be simplified.

15. Finally, s117(5)(c) is awkwardly phrased. The Bar would suggest that it read: "For purposes of subsection (3)(c), persistent delay in payment of rent constitutes unnecessary annoyance, inconvenience or disturbance."

18th October 2002