

立法會
Legislative Council

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LC Paper No. CB(2)2537/10-11

(These minutes have been seen
by the Administration)

Bills Committee on Legal Practitioners (Amendment) Bill 2010

Minutes of meeting
held on Thursday, 27 January 2011, at 10:45 am
in Conference Room B of the Legislative Council Building

- Members present** : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Hon LAU Kong-wah, JP
Hon Audrey EU Yuet-mee, SC, JP
- Member absent** : Hon Miriam LAU Kin-yee, GBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Paul TSE Wai-chun
- Public Officers attending** : Ms Adeline WAN
Senior Assistant Solicitor General
Department of Justice
- Ms Betty CHEUNG
Senior Assistant Law Draftsman
Department of Justice
- Mr Christopher NG
Senior Government Counsel
Department of Justice
- Ms Ida CHAN
Senior Government Counsel
Department of Justice
- Mr Bernard YUE
Government Counsel
Department of Justice

Ms Karmen KWOK
Government Counsel
Department of Justice

Clerk in attendance : Miss Mary SO
Chief Council Secretary (3) 3

Staff in attendance : Miss Winnie LO
Assistant Legal Adviser 7

Ms Maisie LAM
Senior Council Secretary (2) 6

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I. Meeting with the Administration
[LC Paper No. CB(2)888/10-11(01)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

2. Senior Assistant Solicitor General ("SASG") advised that since the last Bills Committee meeting, the Administration had held two further meetings with The Law Society of Hong Kong ("LS") to discuss the issues related to the proposed sections 7AC(3) and 7AI.

Proposed section 7AC(3) - Effects on liabilities of partners in limited liability partnership

3. SASG said that the Administration would replace the constructive knowledge element of the proposed section 7AC(3) with a requirement for a solicitor firm operating as an limited liability partnership ("LLP") to serve a written notification on its clients confirming the identities of its responsible partner for each matter. The notice had to be given as soon as practicable, and in any event not later than 30 days after the LLP accepted instructions in respect of the matter. The consequence of breaching this notification requirement would be that all partners of an LLP should be barred from relying on the proposed section 7AC(1) for protection in the particular case where the LLP had failed to comply with this requirement. SASG further said that taking into account the concern of LS, the Administration would propose that in the event that an LLP could prove that a client had actual knowledge of the identity of the responsible partner(s) and such actual knowledge was acquired prior to the occurrence

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of the default and within 30 days from the firm's acceptance of instructions in respect of his/her matter, all other partners of the LLP would continue to be allowed to rely on the proposed section 7AC(1) for protection in the particular case concerned even if the notification requirement was not observed by the LLP.

4. On the LS's position on the notification requirement, SASG advised that LS did not agree to the proposed sanction of loss of LLP status against an LLP which failed to comply with the notification requirement. LS considered that the LLP concerned should be subject to LS's disciplinary proceedings.

5. Mr Albert HO enquired whether all fee earners of a matter had to act as the responsible partners in respect of that matter. SASG replied in the negative, and clarified that there would be no specific requirement for the appointment of the responsible partners under the Bill. It would be up to the LLP to decide who would be the responsible partner(s) for each and every individual matter it handled throughout the course of the matter. SASG however stressed that compliance with the aforesaid notification requirement would not exonerate any members of the LLP, including members who were not named in the notice, from their common law liability, including liability for negligence.

Proposed section 7AI - Provisions regulating distribution of partnership property

6. SASG said that the Administration originally proposed a limitation period of two years from the date the claimant discovered the distribution made or could with reasonable diligence had discovered it for the proceedings under the proposed section 7AI(3). Taking into account LS's concern that the effective limitation period for clawback actions under the above proposal would be uncertain, the Administration would revise its proposal that the limitation period would be six years from the date of distribution. SASG explained that in drawing up the revised proposal, the Administration had made reference to section 4(1) of the Limitation Ordinance (Cap. 347) which provided, inter alia, that actions to recover any sum recoverable by virtue of any Ordinance, other than a penalty or forfeiture or sum of penalty or forfeiture, should not be brought after the expiration of six years from the date on which the cause of action accrued. SASG further said that the Administration objected to LS's proposal of two years' limitation period from the date of distribution, as clients were not privy to information about distribution of profits and assets by an LLP to its partners and it usually took more than two years for a client to obtain a first instance judgement on his claim for negligence against a law firm

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before he/she was in a position to enforce the judgment debt. The revised proposal of the Administration had struck a proper balance between protecting the interests of consumers and that of the LLPs.

7. Mr Albert HO sought explanation from the Administration as to whether a distribution was liable to be clawed back was determined by the date when the LLP concerned received a letter before action. Mr LAU Kong-wah asked whether the determining factor was when the LLP had been negligent. Referring to the liquidity test described in the proposed section 7AI(1)(a), Ms Audrey EU sought clarification on how to define when the partnership obligations were due.

8. SASG explained that whether or not a distribution was liable to be clawed back was neither determined by whether or when the LLP had been negligent, nor whether or when a letter before action and/or writ was issued. It was only when the LLP failed to meet the liquidity test set out in the proposed section 7AI(1)(a) (i.e. the LLP would be unable to pay its partnership obligations as they became due) or the asset test described in the proposed section 7AI(1)(b) (i.e. the value of the LLP's remaining property would be less than its obligations) after taking into account the partnership obligation arising from the negligence case that the clawback provision under the proposed section 7AI would come into play. In these circumstances, the limitation period for clawback actions would be six years from the date of distribution. Accordingly, once it was ascertained that the LLP was unable to pass the liquidity or asset test as a consequence of a distribution and it owed a partnership obligation toward the client at the time of the distribution, the distribution should be liable to be clawed back by the client provided that the clawback action was commenced within six years from the distribution. SASG stressed that without failing the liquidity or asset test, the fact that an LLP was negligent before or after a distribution did not render that particular distribution liable to be clawed back.

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9. At the request of the Chairman, SASG undertook to provide after the meeting a paper to explain the relationship between the liability for clawing back distributions and the LLP's negligence, as well as how the clawback provisions of the proposed section 7AI would operate in practice.

Way forward

Clerk

10. Members agreed that upon receipt of the paper provided by the Administration, the Clerk would circulate it to LS, the Hong Kong Bar Association and the Consumer Council to invite them to give further views on the Bill in the light of the Administration's latest policy position on the

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constructive knowledge element of the proposed section 7AC(3)(a) and the limitation period for clawback actions under the proposed section 7AI. The Clerk would schedule the next meeting in consultation with the Chairman upon receipt of submissions from the above parties in response to the Administration's latest policy position.

11. The Chairman suggested that the Bills Committee would proceed to commence clause-by-clause examination of the Bill when the actual text of the Committee Stage amendments to be proposed by the Administration to amend the proposed sections 7AC and 7AI became available. Members agreed.

II. Any other business

12. There being no other business, the meeting ended at 11:40 am.

Council Business Division 2
Legislative Council Secretariat
24 August 2011

**Proceedings of the meeting of the
Bills Committee on Legal Practitioners (Amendment) Bill 2010
on Thursday, 27 January 2011, at 10:45 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000652	Chairman	Opening remarks	
000653 - 001150	Chairman Admin	Briefing by the Administration on its policy position on the constructive knowledge element of the proposed section 7AC(3)(a) as requested by the Bills Committee at the meeting on 25 November 2010 [LC Paper No. CB(2)888/10-11(01)]	
001151 - 001351	Mr LAU Kong-wah Admin Chairman	The Administration explained that compliance with the requirement to serve a written notification confirming the identities of its responsible partner for each matter would not exonerate any members of the limited liability partnership ("LLP"), including members who were not named in the notice, from their common law liability	
001352 - 001642	Chairman Mr Albert HO Admin	Whether all fee earners of a matter had to act as the designated partners	
001643 - 001802	Chairman Mr Albert HO Admin Mr LAU Kong-wah	Position of The Law Society of Hong Kong ("LS") on the Administration's proposed notification requirement	
001803 - 002013	Chairman Admin	Briefing by the Administration on its policy position on the limitation period for clawback actions under the proposed section 7AI as requested by the Bills Committee at the meeting on 25 November 2010 [LC Paper No. CB(2)888/10-11(01)]	
002014 - 004313	Admin Mr Albert HO Chairman Mr LAU Kong-wah Ms Audrey EU	The Administration's explanation on which would be the relevant distribution under its proposal of six years' limitation period for clawback actions under the proposed section 7AI	
004314 - 004405	Chairman	<p>The Administration was requested to provide a paper to explain the relationship between the liability for clawing back distributions and the LLP's negligence, as well as how the clawback provisions of the proposed section 7AI would operate in practice</p> <p>The Chairman's proposal to proceed with clause-by-clause examination of the Bill when the actual text of the Committee Stage amendments to be proposed by the Administration to amend the proposed sections 7AC and 7AI became available</p>	Admin (para.9 of the minutes refers)

Time marker	Speaker	Subject	Action required
004406 - 005138	Chairman Mr Albert HO Mr LAU Kong-wah	Invitation of submissions from LS, the Hong Kong Bar Association and the Consumer Council on the Administration's latest policy position on the proposed sections 7AC and 7AI	
005139 - 005554	Chairman Admin Mr LAU Kong-wah	Date of next meeting	

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