

**Submission of the Hong Kong Bar Association for the Meeting of
the Legislative Council Panel on Administration of Justice and Legal Services
to be held on 28th March 2011 (Monday)**

Overview

1. This is the Submission of the Hong Kong Bar Association on the proposals contained in the paper entitled "Review of the Supplementary Legal Aid Scheme" (March 2011), LC Paper No. CB(2)1320/10-11(01) - the "Proposal".
2. We are happy that a number of the recommendations previously made by the Bar have now been accepted and adopted by the Administration.
3. That said, notwithstanding the motion passed by the AJLS Panel in July 2010 requiring the Administration to consider in a holistic manner the Bar's package of recommendations, the Proposal does not set out the Administration's position on each of the Bar's recommendations and Draft Bill *seriatim*. Hence this submission seeks to assist Legislative Council to take stock of the progress and to identify areas in which **further improvement is required** so that the best is made out of this series of meetings of the Panel since 2009 (see July 2010 Draft Bill).

Guiding Principles

4. Whilst financial viability and sustainability are relevant consideration in the administration and operation of SLAS, it is important to bear in mind that "*high chance of success with good damages to costs ratio*" and "*the likelihood for payment of damages*" should **not** be elevated to become the criterion or factor dictating the selection of types of cases which should be covered by the expanded of SLAS.
5. Unfortunately, it would appear that the Administration is still labouring under the misconception that recoverability and good damages to costs ratio are governing principles for granting of SLAS. This is a **fundamental conceptual error**. The legal principles and legislative intent behind the establishment of SLAS have been repeatedly identified and discussed in the Bar's previous submissions.
6. Once and for all, the Bar will reiterate that primarily SLAS is to enhance "**Access to Justice**", which is a right enshrined in Article 35 of the Basic Law, so that any person with a genuine cause of action but limited means will not be deprived of his day in court with proper legal representation for want of means or fear of financial hardship in the event of adverse outcome.
7. Under s.10(3) of the Legal Aid Ordinance (Cap. 91), an applicant for legal aid only needs to show that "*he has reasonable grounds for taking, defending, opposing or continuing such proceedings*".

The Administration's Proposal

8. Subject to the elaborations or qualification hereinbelow, the Bar agrees with expansion of SLAS to cover the types of cases set out in Paragraph 6 of the Proposal.
9. However, it is emphasized that there is still room for further improvement and refinement. The Bar would impress upon the Administration to seize the opportunity to include **all types of deserving cases** with due regard for the need for **a holistic package rather than piecemeal approach**.
10. Further, we maintain that no convincing reason has been given by the Administration in its refusal to adopt the recommendation of the Bar to increase the **Financial Eligibility Limit** (FEL) to \$350,000 for OLAS and \$3.0m for SLAS.

Scope of Expansion

(i) Professional Negligence Claims

11. The Bar welcomes the decision to expand SLAS to cover the causes of action against the various professionals listed in Paragraph 12 of the Proposal. However, the list is not exhaustive and should be kept under constant review and up-dated in due course in another stage.
12. One concern of the Administration seems to be that some professionals (or quasi-professionals) are not regulated by legislation such as **Independent Financial Consultants** or they may not be adequately insured or at all. Contrary to the assertion of the Administration at Paragraph 14 that there is no regime governing such profession, the Bar points out that:
 - (a) Regardless of the variation in the descriptions used by financial advisors trained and qualified in different jurisdictions, they form a readily identifiable body of professionals providing financial advisory services to members of the public.
 - (b) A number of these financial advisors are members or charter holders of professional organizations (e.g. Certified Financial Advisors Institute) which prescribed the professional standards and codes of ethics governing their members.
 - (c) In order to recommend and arrange and conduct transactions involving the sales of financial products, these financial advisors have to be registered under the Securities and Futures Ordinance (Cap. 571) and will therefore be also be subject to the regulation and code of conduct laid down and the disciplinary regime administered by the Securities and Futures Commission (see Code of

Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (March 1996, revised in September 2010).

- (d) Further, financial advisors involved in banking transactions in the course of giving advice will also be subject to the code of practice issued by the Hong Kong Monetary Authority.
- (e) Civil liability for fraudulent misrepresentation is specifically provided for under s.108 of the SFO.
- (f) Section 4 of the Securities and Futures (Insurance) Rules, Cap. 571AI requires compulsory insurance to be taken out by licensed entities for the regulated activities, which extends to Financial Intermediaries.
- (g) Financial advisors represent a class of knowledgeable and affluent professionals, who should be answerable for their own shortcomings if loss is caused by their negligence. Many of them, especially in companies, would be insured and, if not, the expansion of SLAS will certainly provide the impetus for them to procure appropriate insurance cover.
- (h) For the reasons set out above, there is no reason why they should not be included in the expanded SLAS.

(ii) Claims arising from the sale of insurance products

- 13. The Bar welcomes the Proposal to include claims arising from the sale of insurance products.
- 14. It is observed that registration of Insurance Intermediaries are governed by Part X of the Insurance Companies Ordinance (Cap. 41). The registration is dealt with by Insurance Agents Registration Board established under the Hong Kong Federations of Insurers, which is vested with statutory power to issue the Code of Conduct under s.67 of the Ordinance with Insurance Authority playing a supervisory role.
- 15. Therefore, the **Proposal should include Insurance Intermediaries** who are not too different from Estate Agents regulated by the Estate Agents Authority.
- 16. Care should be taken to avoid creating the mistaken impression that since insurance agents are acting on behalf of the insurer in procuring or entering into a contract of insurance, they are exempted from personal liability in the event of negligent acts or omissions causing loss.

(iii) Claims against developers in sale of first-hand residential properties

- 17. The Bar welcomes the Proposal to include claims against developers in sale of first-hand residential properties.

18. Again, care should be taken by the Administration not to create a false impression that by reason of the expansion of legal aid cover for this type of claims, the intended legislation to regulate the conduct of developers in the sales of first-hand residential properties can assume a lower priority.
19. **Clearly defined duties and liabilities of developers** will assist in the adjudication of the claims, which, in turn, will impact upon the effectiveness of SLAS in funding such claims to obtain access to adequate legal remedies against the developers.

(iv) ***Employees' claims on appeal from the Labour Tribunal***

20. The Bar supports the inclusion of this type of claims and the dispensation of the requirement that the claim be in excess \$60,000, the waiver of the final contribution and application fee.
21. However, the heading is ambiguous and should be amended. Upon reading Paragraph 22 of the Proposal, it seems clear that the Administration intends to include legal proceedings for the "*execution of Labour Tribunal awards, as a judgment debt arising from civil law suits*" which is part of remedies of the civil justice system.
22. This may involve a petition for bankruptcy or winding-up of the judgment debtor and resorting to other legal processes such as Garnishee Orders, Charging Orders and the like.
23. For the avoidance of doubt, it is suggested that **this heading be changed to "Employees' claims on appeal from by the Labour Tribunal and enforcement of awards granted by the Labour Tribunal."**

(v) ***Money claims in derivatives of securities, currency futures or other futures contracts when fraud, misrepresentation/deception is involved at the time of purchase.***

24. It is disappointing that the Administration has not included this type of claim under SLAS at a time of demonstrated need and hardship. The aftermath of the Lehman Brothers-induced financial tsunami can still be felt on the streets in Central. This is a well-known area of unmet needs. The Bar warned of this in about 2002 years before the event sadly proves the needs.
25. But for the current statutory constraints and if SLAS could be utilized by investors to claim against the various financial institutions involved, the SLAS fund would have grown substantially by reasons of the contributions that would otherwise be received. The degree of public hardship is seen in these figures. If the Lehman cases settled for \$20 billion had been under SLAS, at 6% the SLAS fund would have obtained \$1.2 billion by way of contribution.

26. The point is reinforced by the recent buy-back proposal brokered by the HKMA and/or the government and proffered by the liquidators of Lehman Brothers with top-up compensation provided by the 16 banks involved to take the buy-back price to some 90% of the original value of the minibonds at the times of sales. If SLAS had been available, it is more likely than not that the settlement would have been secured a lot earlier and on better terms.
27. **SLAS should be extended to cover this need here and now.** There is no justification to wait for the review of OLAS to delete the exclusion of derivatives claims. Times and needs and perceptions have changed as LASC also recognized. At this stage, is it possible for an applicant qualified for OLAS to elect to go onto the SLAS scheme provided of course he accepts having to make the percentage contribution and comply with the usual SLAS conditions?

Other proposals not supported (by HAB)

- (i) ***Claims against incorporated owners of multi-storey buildings for property damages***
 28. Although insurance for property damage alone is not mandatory, in reality, it is unlikely that the public liability insurance procured by the incorporated owners would exclude property damage. In any case, the relevant building in question would be a valuable asset chargeable under normal Legal Aid procedures to answer any monetary claim.
 29. Many a time in Hong Kong, by reason of the diverse ownership of various units in multi-storey buildings, the quiet enjoyment of a co-owner and private property rights are compromised and not fully protected because of the hardship from the cost of access to justice to enforce the laws.
 30. For one reason or another, Incorporated Owners are very reluctant to take enforcement actions against the relevant person(s) who are in breach of the Deeds of Mutual Covenants or the Building Management Ordinance, Cap. 344 (BMO). The following examples are real.
 - (a) A podium at the lower floor of a residential building being converted for commercial use, for instance, as an Old Age Home causing extra demands on utilities and amenities of the building such as lifts, which are not designed to operate at such high capacity so that an owner of an upper floor unit cannot access his own property and there are fire risks.
 - (b) Residential premises being unlawfully converted for use as restaurants, hair salons and the like, posing additional risks to the other co-owners where the operator of the businesses are related to those in charge of the Incorporated Owners, who turn a blind eye to the situation.

- (c) Co-owners are not forthcoming in paying for the dues required to carry out repair work to the common parts of building, which become physical and health hazards with potential legal liabilities.
 - (d) Despite the mandatory insurance, by reason of the lack of repair, there may be difficulties in calling upon the insurer to answer a claim since the insurer may dispute liability on the ground of the failure on the part of the Incorporated Owners in carrying out necessary repair, which may be a condition precedent under the policy. The insurer may disclaim liability, thus negating the benefits of the new insurance requirement.
31. Time and again, residential properties are allowed to become ruinous and dilapidated by reason of the lack of means and knowledge on the part of the co-owners to take enforcement action against the Incorporated Owners.
32. In essence, in respect of the common parts of the building, the power to take action against another for a breach of the DMC and the BMO is vested solely in the Incorporated Owners to the extent that an individual co-owner aggrieved by the breach has no *locus standi* to bring an action. His remedy is to seek a mandatory injunction from the Lands Tribunal to compel the Incorporated Owners to take action against the party in breach.
33. Accidents causing personal injuries or property damage can be avoided by timely repair and corrective measures when this is backed by the availability of legally aided action. In this respect, mandatory insurance is not a complete answer and prevention of accident and injury is better than cure. Further, with more claims made under the policies, the premium is likely to increase to sustain the insurance cover. In the long run, all property owners will have to bear the burden.
34. Looking at the whole picture, the granting of legal aid under **SLAS is a valuable and important complement to the mandatory insurance of Incorporated Owners.** Although there may not be damage recovered or property preserved in every case, SLAS should be expanded to cover these claims. Hong Kong has a large number of old buildings which will cause problems, hence reforms by other departments. Legal Aid also has a significant part to play.

(ii) Claim arising from small marine boats accidents

35. The obduracy against funding of claims for property damage is misplaced. It appears that the Administration has allowed itself to be strait-jacketed into thinking that only claims akin to personal injury should be supported by SLAS. As said, there is a fundamental conceptual error in such line of thinking. By way of example, the claims against professionals now covered by SLAS are likely to be monetary claim (i.e. non-personal injury claims).

36. The control lies in the merits test and the means test and not in excluding this type of claim all together. An example that may readily come to mind is the collision of a sampan and a motor boat in a typhoon shelter where speeding is not an uncommon scene. The sampan may well be the tool of trade of a fisherman and represents his livelihood, **although he may not have suffered personal injury in the collision. Such claim is no less deserving than a claim for professional negligence.**

(iii) ***Claim against property developers by minority owners in respect of compulsory sales of building units***

37. There is clearly an unmet need and all the more so after the compulsory sale threshold has been lowered to 80% under the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545).

38. The risk of abuse by speculators does not justify excluding this type of case all together. Unmeritorious cases, for instance, those involving co-owners who would not act reasonably in view of a reasonable offer and speculators who sit on a recently acquired unit in the building simply to thwart re-development plan and hold the potential developer to ransom, can and should be **eliminated by proper vetting procedure.**

(iv) ***Claims in respect of trusts***

39. This type of claims is intended to cover action against executors or trustees for mismanagement or misappropriation of trust property. There is no reason not to include it under SLAS

40. For the more substantial trusts, the trustees are likely to be professionals and are insured. In the case of a modest estate, consisting of a property worth (say) \$3m with 3 named beneficiaries under a will with power vested in say 2 of them as executors, misappropriation by a non-professional executor in a family situation represents a **classic type of injustice** whereby widows and children require access to the courts.

(v) ***Claims involving disputes between limited companies and their minority shareholders***

41. **The Bar maintains that this type of claim should be included.**

42. It appears that the Administration has not taken cognisance of the fact that the Bar's recommendation is directed against misconduct of those in control of **public company listed on the Hong Kong Stock Exchange** to the detriment of minority shareholders. It is also geared towards obtaining relief for misappropriation and misapplication of valuable company assets by directors and officers of such company.

43. There are unmet needs and the repercussions are still felt after the decision of the Court of Appeal in the PCCW case. If Hong Kong is to continue to attract substantial

public listings there must be credible support for minority shareholders' rights. Otherwise "foreign registered companies" can come into Hong Kong, issue a fraudulent prospectus, float the companies, and then strip out the assets, and then leave with impunity.

(vi) ***Claims arising from sale of goods and provisions of services***

44. **The Bar maintains that these types of claim should be included.** In term of product liability, one claim may not be large but the group action will certainly be worthwhile. The Consumer Legal Action Fund is not very substantial and hence understandably jealously guarded.
45. This should be considered together with the introduction of "**class actions**".
46. There is no point in relying on the proposed amendment to the Trade Descriptions Ordinance (Cap. 362). As the Bar is given to understand, it is contemplated that there be compensatory provisions empowering the magistrate to assess and order compensation to be paid by the defendant to the victim upon conviction (akin to the mechanism available in a case of common assault, criminal damage, etc.).
47. However, such amendment to the TDO as contemplated would not be effective in assisting other persons who also suffer similar loss or damage by reason of the criminal conduct of the defendant but whose case is not selected as a representative charge for one reason or another.
48. Further, a claim for compensation predicated upon a conviction entails a higher standard of proof and may create unnecessary burden of proof on the claimants if the claims can otherwise be efficiently brought in the civil courts.

Class Action

49. This must be provided for to take advantage of the Civil Justice Reforms.

Periodical Review

50. The scope of SLAS should be kept under periodical review. The Bar recommends that an annual review be initiated by HAB inviting participating from all stakeholders.

Hong Kong Bar Association
28th March 2011