



THE
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2 September 2013

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Legislative Council
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By E-mail
(panel_ajls@legco.gov.hk)

Dear Sir,

Solicitor Corporation Rules and consequential amendments

The Law Society ("Society") has sought the approval of the Chief Justice on the Solicitor Corporation Rules ("Rules") and consequential amendments to the Legal Practitioners Ordinance Cap. 159.

I enclose copy of a letter from the Chief Justice granting his approval in principle to the Rules and consequential amendments.

The Chief Justice has asked the Society to consult the Panel on Administration of Justice and Legal Services of the Legislative Council ("Panel") on 2 issues relating to solicitor corporations, namely, whether solicitor corporations should be required to take out top-up professional indemnity insurance and notify clients of the identity of the supervising partners.

The Society's Working Party on Solicitor Corporation Rules ("Working Party") has considered these 2 issues and the position of the Working Party is as follows:

1. On the requirement for solicitor corporations to notify clients of the identity of the overall supervising partners, Commentary 1 to Principle 5.17 of the Hong Kong Solicitors' Guide to Professional Conduct ("Guide") already prescribes that a client should be told the name and status of the person responsible for the conduct of the matter on a day-to-day basis and the partner responsible for the overall supervision of the matter. Solicitors in solicitor corporations are bound by the Guide. Principle 5.17 and the Commentaries are enclosed.

The Law Society of Hong Kong

2. On the question of top-up professional indemnity insurance, the Society submits that public protection is already sufficient. It is true that the solicitor corporation with which the client has a retainer will have limited liability in contract and in tort and the claims against the corporation for breach of contract or tort would be limited to the paid up capital of the corporation. Nevertheless, any professional negligence action instituted against the solicitor corporation would in all likelihood be made against the director/solicitor handling the matter as well and his employees for whom he is vicariously liable. Such action will thus be covered by the Professional Indemnity Scheme ("PIS") of the Society.
3. There is no statistical evidence that the present limit of indemnity of HK\$10m under the PIS is inadequate. I enclose a summary of the claims history of PIS. The Society would highlight the following:
 - (i) The claims history shows that in the past 7 indemnity years (1995/6 to 2011/2 indemnity years) including the year 1997 where the property market in the Hong Kong Special Administrative Region was severely hit by economic downturn, only 61 claimants out of the total 3,648 claims (1.67%) have sought claims of HK\$10m or more and only 16 claims (0.44%) had a payout of HK\$10m.
 - (ii) Out of the 61 claims, only 5 were made by individuals for which the Fund paid HK\$10m (including defence costs but less the indemnified's deductible).
 - (iii) In the majority of the claims (3,587 out of 3,648 claims), the claimants have made a professional negligence claim against the law firms for an amount under HK\$10m.
 - (iv) The Society has also commissioned actuaries to conduct actuarial projections on future claims against the Solicitors Indemnity Fund ("Fund") and such projections show that the Fund has adequate reserves to cover PIS claims in different economic scenarios including an economic downturn where the reinsurers of PIS fail and the Fund has to rely on its own reserves to meet claims. In the light of the projections, the Council has resolved to reduce the contributions payable in the coming indemnity year.
 - (v) As the PIS is a mandatory scheme, only the minimum level of indemnity should be prescribed in accordance with the value and the amount of claims, leaving those whose practice as solicitors or whose clients' expectations exceed the minimum the freedom of choice to purchase higher cover at their own costs, otherwise, any increase in the statutory indemnity limit of HK\$10 million per claim will inevitably lead to an increase in contributions payable by law firms i.e. insurance premium. The extra cost will in turn be passed onto the consumers who will have to pay more to get higher indemnity cover which is unnecessary based on the claims statistics.

The Law Society of Hong Kong

4. I enclose the Background brief prepared by the Legislative Council Secretariat, LC Paper No. CB(2) 247/04-05(01) and Appendix VI to that Paper. The Working Party takes the view that the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 was passed without the Legislative Council and the Administration imposing a requirement for solicitor corporations to purchase top-up indemnity insurance and since the Department of Justice had confirmed in the past there was no further policy issue to be raised, the Working Party considers it would be inappropriate to raise this issue for discussion at such a late stage which would generate no substantive gain for the public interest other than to protract the legislative amendments process.

I should be grateful if you could put this letter before the Panel for its consideration.

Yours sincerely,



Vivien Lee
Director of Standards & Development

Encls.



香港司法機構
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15 October 2012

Ms Angela Li
Assistant Director
Regulation and Guidance
The Law Society of Hong Kong
3/F., Wing On House
71 Des Voeux Road
Central, Hong Kong

Dear Ms Li,

Proposed Rules for Solicitor Corporations

I refer to the draft Solicitor Corporations Rules ("draft Rules") as set out in your letters of 23 May 2012 and 31 May 2012.

2. I write to inform you that the Chief Justice has no comments on the draft Rules and the proposed consequential amendments to the 16 pieces of subsidiary legislation at **Annex**, though the Law Society may take into account the comments of the Department of Justice as separately relayed to your organization.

3. The Chief Justice notes that there have been some recent discussions about enhanced consumer protection measures in the context of the legislative amendment exercise about the new Limited Liability Partnership (LLP) scheme advocated by the Law Society. The key issues included taking out top-up insurance and notifying clients of supervising partner(s). Given the similar nature of the solicitor corporation scheme and the LLP scheme, the Chief Justice has asked that the Law Society re-consider these two consumer protection issues for solicitor corporations.

4. Subject to this, the Law Society should consult the Legislative Council Panel on Administration of Justice and Legal Services, before seeking the Chief Justice's final approval of the draft Rules and consequential amendments. The Panel consultation can be effected by a meeting or an information note, though the above two consumer protection issues should be highlighted for the Panel (possibly together with any other issues that the Law Society considers to be appropriate).

Yours sincerely,



(Ms Wendy Cheung)
for Administrative Assistant
to the Chief Justice

c.c. Legal Policy Division, Department of Justice (Attn : Ms Adeline Wan)
Fax : 2180 9928

Annex

The Law Society's proposed consequential amendments to the following 16 Rules subsidiary under the Legal Practitioners Ordinance (Cap.159) –

Item.	Rules under LPO
1.	Solicitors' (Professional Indemnity) Amendment No. 2 Rules 2011
2.	Solicitors' Practice Rules
3.	Solicitors (Group Practice) Rules
4.	Summary Disposal of Complaints (Solicitors) Rules
5.	Notaries Public (Practice) Rules
6.	Practising Certificate (Solicitors) Rules
7.	Foreign Lawyers Registration Rules
8.	Foreign Lawyers Practice Rules
9.	Practising Certificate (Special Conditions) Rules
10.	Legal Practitioners (Risk Management Education) Rules
11.	Barristers (Qualifications) Rules
12.	Trainee Solicitors Rules
13.	Solicitors Disciplinary Tribunal Proceedings Rules
14.	Solicitors' Accounts Rules
15.	Accountant's Report Rules
16.	Admission and Registration Rules

立法會
Legislative Council

LC Paper No. CB(2)247/04-05(01)

Ref: CB2/PL/AJLS

Panel on Administration of Justice and Legal Services

Background brief prepared by Legislative Council Secretariat

Solicitor Corporations Rules

Purpose

This paper highlights the past discussions of the Panel on Administration of Justice and Legal Services (AJLS Panel) on the progress of implementation of the recommendation on the incorporation of solicitors' practices in the last legislative term.

Background

2. In 1995, the then Attorney General's Chambers published a Consultation Paper on Legal Services which made a number of proposals regarding legal services of Hong Kong. One proposal was to allow solicitors to incorporate their practices as companies. An incorporated company is in law a separate legal entity, distinct from its members. Shareholders of a company with limited liability are only liable to the extent of the unpaid nominal capital of the shares which they own. The view expressed in the Consultation Paper was that, subject to proper safeguards, solicitors should be permitted to incorporate their practices with either limited or unlimited liability.

3. Clause 2 of the Legal Services Legislation (Miscellaneous Amendments) Bill 1996, which was enacted in June 1997, sought to add new provisions to the Legal Practitioners Ordinance (Cap. 159) to enable solicitors to incorporate their practices as solicitor corporations. These included amendments to sections 73 and 73A of the Legal Practitioners Ordinance to provide that the Council of the Law Society might make rules in respect of the establishment of solicitor corporations and fees payable to the Law Society for applications for registration as a solicitor corporation, as well as professional indemnity cover of solicitor corporations. The new provisions should take effect on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

4. The AJLS Panel held three meetings, on 19 December 2000, 27 May 2002 and 24 November 2003 respectively, to discuss the progress of implementation of the recommendation on the incorporation of solicitors' practices including the drafting of the Solicitor Corporations Rules (the draft Rules). At the Panel meeting on 24 November 2003, the Law Society briefed the Panel on specific provisions of the draft Rules, the Solicitor Corporations (Fees) Rules and the proposed consequential amendments to the Solicitors (Professional Indemnity) Rules.

Major issues discussed by the Panel

Preparation of the draft Rules

5. In answer to members' enquiries, the Law Society informed the Panel that in preparing the draft Rules, the Society had undertaken research on issues relating to incorporation of solicitors' practices in some overseas common law jurisdictions. The Society pointed out that consideration of the issues involved detailed discussion on the way in which solicitor corporations would conform to existing practice rules, including those relating to the Solicitors Professional Indemnity Scheme, compliance with rules of conduct as well as other regulatory matters. The ultimate objective was to ensure that proper safeguards would be provided to users of legal services, while allowing solicitors greater flexibility in the manner in which they ran their practice.

6. The Law Society further informed the Panel that it would continue to study whether limited liability partnerships for legal practice (i.e. partnership of solicitors as a legal entity of limited liability under certain circumstances), which were a new development in England and Wales, would be a better alternative than solicitor corporations for Hong Kong.

Top-up insurance

7. At the Panel meeting on 27 May 2002, the Administration informed members that it had studied the draft Rules issued by the Law Society in June 2001 for comments by its members and the Administration. The Administration considered that the major outstanding issue of concern was in relation to insurance of solicitor corporations for the protection of consumers.

8. The Administration had noted that there was no provision in the draft Rules requiring a solicitor corporation to have insurance coverage before it could be approved as a solicitor corporation. The Administration considered it essential that, for the protection of consumers, adequate indemnity insurance should be taken out by solicitor corporations to cover civil claims made by their clients. The Administration suggested that the Law Society should consider whether the existing minimum coverage taken out by a solicitors firm was sufficient for solicitor corporations.

9. The Law Society informed the Panel that legislative amendments would be made to include solicitor corporations in the definition of "indemnified" under the Solicitors (Professional Indemnity) Rules. In its view, the cover provided by the existing Solicitors Professional Indemnity Scheme was sufficient protection for the public. Also, in addition to the mandatory \$10 million insurance coverage for each and every claim made by clients, it was not uncommon for some larger solicitors firms to take out additional indemnity insurance.

10. A member of the Panel expressed the view that the requirement of top-up insurance would defeat the legislative intent of incorporation of solicitors firms. The member pointed out that the reason why incorporation of solicitors was contemplated was that the present system was considered to be too onerous on solicitors firms as solicitors had to pay from their own private means, if necessary, for the faults of their partners even though they had nothing to do with the negligent act.

11. The Administration had reviewed its position and advised the Panel in November 2003 that it would not insist on the requirement of top-up insurance for solicitor corporations at the present stage. Whether the need for top-up insurance should be further assessed would depend on the outcome of the Law Society's review on the existing Professional Indemnity Scheme and the practical operation of the Solicitor Corporations Rules.

12. The Law Society also explained that amendments would be made to the Solicitors (Professional Indemnity) Rules, which would put the solicitors and their staff working in a solicitor corporation in the same position as though they were practicing through the existing form of sole proprietorship or partnership. Any claims against a solicitor corporation would proceed against the Solicitors Indemnity Fund in the normal way.

Requirement in relation to member and director of a solicitor corporation

13. Under rule 3(1)(d)(i) of the draft Solicitor Corporations Rules, every member and every director of a solicitor corporation must be an individual who was a solicitor holding a current practicing certificate which was not subject to any condition other than the condition that he should comply with the Continuing Professional Development Rules and any other continuing legal education rules made under section 73 of the Legal Practitioners Ordinance. The Law Society pointed out that with the coming into force of the Practising Certificate (Special Conditions) Rules, which enabled the Society to impose conditions on the practicing certificate of a solicitor, concern had been raised as to whether the conditions imposed by the Law Society would bar the solicitor from becoming a member or director of a solicitor corporation. The Law Society advised that its Council would further consider the matter and would introduce relevant amendment to the draft Rules, if necessary.

14. The Law Society also pointed out that rule 3(2) of the draft Rules required that a solicitor corporation established by a sole practitioner must have a second member.

A member of the Panel had suggested to the Law Society that it should review the drafting of rule 3(2) in the light of the relevant statutory requirements under the Companies Ordinance to achieve consistency.

Legislative timetable

15. The Law Society informed the Panel at the meeting on 24 November 2003 that it had sought the views of its members on the draft Rules. Its members would be consulted again if the Law Society Council considered that further amendments to the draft Rules were necessary. The finalised Rules would then be submitted to the Chief Justice for approval and gazetted. The Law Society expected that this could be done by early 2004.

Relevant papers

16. The following papers are attached for members' reference –

- (a) paper provided by the Law Society for the Panel meeting on 19 December 2000 (Appendix I);
- (b) paper provided by the Administration for the Panel meeting on 27 May 2002 (Appendix II);
- (c) paper provided by the Law Society for the Panel meeting on 24 November 2003 enclosing the draft Solicitor Corporations Rules, Solicitor Corporations (Fees) Rules, and the proposed consequential amendments to the Solicitors (Professional Indemnity) Rules (Appendix III);
- (d) extract from minutes of the Panel meeting on 19 December 2000 (Appendix IV);
- (e) extract from minutes of the Panel meeting on 27 May 2002 (Appendix V); and
- (f) extract from minutes of the Panel meeting on 24 November 2003 (Appendix VI).

**Extract from minutes of meeting of Administration of Justice
and Legal Services Panel held on 24 November 2003**

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V. Solicitor Corporations

(LC Paper Nos. CB(2)390/03-04(04) - (06); 394/03-04(01))

Submission from The Law Society of Hong Kong

59. Mr Patrick MOSS introduced the paper provided by The Law Society of Hong Kong which enclosed a copy of the Solicitor Corporations Rules, Solicitor Corporations (Fees) Rules and Amendment to the Solicitors (Professional Indemnity) Rules (LC Paper No. CB(2)394/03-04(01)). In the main, the paper explained that the Legal Practitioners Ordinance (Cap. 159) was amended by the Legal Services Legislation (Miscellaneous Amendments) Ordinance in 1997 to enable solicitors to incorporate their practices as solicitor corporations. The amendments required the Council of the Law Society to make rules in respect of the establishment of solicitor corporations and fees payable to the Law Society for applications for registration as a solicitor corporation, as well as professional indemnity cover of solicitor corporations. The amendments, which were contained in Part II AA of Cap. 159, should take effect on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

60. Mr MOSS took members through the Solicitor Corporations Rules (the Rules) attached at Annex A to the Law Society's paper clause by clause.

61. Mr MOSS remarked that there had been misunderstanding as to the effect of incorporation of solicitors' practices in relation to the level of liabilities of members of such corporations arising from actions in tort. He clarified that under the general law of agency, a director as agent of a company who undertook work negligently for the company might be liable even though the tort itself was committed by the company. In the context of a solicitor corporation, a solicitor director who had direct contact with the corporation's clients and who acted negligently towards his clients might be personally liable in tort to the client, notwithstanding that the client had entered into a contract with the solicitor corporation. Regarding professional indemnity cover, the proposed amendments to the Solicitors (Professional Indemnity) Rules would in effect put the solicitors and their staff working within a solicitor corporation in the same position as though they were practising through the existing forms of sole proprietorship or partnership, and any claims against the corporation would proceed against the Professional Indemnity Fund in the normal way.

62. Mr MOSS referred members to rule 3(1)(d)(i) of the Rules, which specified that subject to subrule (2), every member and every director of a solicitor corporation must be an individual who was a solicitor holding a current practising certificate which was not subject to any condition other than the condition that he should comply with the Continuing Professional Development Rules and any other continuing legal education rules made under section 73 of Cap. 159. He said that with the coming into force of the Practising Certificate (Special Conditions) Rules, which enabled the Law Society to impose conditions on the practising certificate of a solicitor, concern had been raised as to whether the conditions imposed would bar the solicitor from becoming a member or director of a solicitor corporation. He informed members that the issue would be considered at a meeting of the Council of the Law Society on 25 November 2003. Subject to a resolution made by the Council on the matter, an amendment would be made to rule 3(1)(d)(i), if necessary.

63. Regarding the proposed consequential amendments to the Solicitors (Professional Indemnity) Rules (Annex C to the Law Society's paper), Mr MOSS informed members that CJ had approved the amendments to Rule 6 of Schedule 3 to the Rules but had not yet approved the amendments to Rule 2.

Views of the Administration

64. Senior Government Counsel (Legal Policy Division) briefed members on the Administration's letter dated 17 November 2003 to the Panel (LC Paper No. CB(2)390/03-04(06)). She informed members that the Administration considered that the only outstanding issue regarding solicitor corporations was whether it was necessary for solicitor corporations to take out top-up insurance. In this connection, the Administration had agreed not to insist on a requirement for top-up insurance at this stage, after considering the circumstances put forward by the Law Society. The Administration also considered that whether the issue of top-up insurance should be further assessed would depend on the outcome of the Law Society's review on its existing professional indemnity scheme and the practical operation of the Solicitor Corporations Rules.

Issues raised by members

65. Referring to the condition in rule 3(2) of the Rules that a solicitor corporation established by a sole practitioner must have a second member in order to comply with the requirements of the Companies Ordinance, Ms Audrey EU asked whether the subrule was still required in the light of the amendments recently made to the Companies Ordinance. Mr Patrick MOSS responded that he was unaware that the amendments had been brought into effect. His personal view was that even if the amendment was passed, the safeguard in rule 3(2) might still be necessary. Ms Audrey EU pointed out that the reference to the Companies Ordinance might not be necessary. Mr MOSS agreed to follow up the issue raised.

66. Ms Audrey EU asked whether the proposed Rules on solicitor corporations had any precedents elsewhere and whether the formation of solicitor corporations would become the norm for legal practice after the Rules were passed.

67. Mr Patrick MOSS advised that there was similar legislation in some jurisdictions including Singapore. He added that he doubted many practitioners would actually incorporate their practice by establishing solicitor corporations, which, in his opinion, though suited the needs of some, were not a particularly effective way of running a legal practice. He further said that some people had supported the formation of solicitor corporations on the misunderstanding that practitioners could limit their liabilities and the problems associated with professional indemnity could be solved. However, this was not the case in reality.

68. The Chairman asked whether the Law Society had consulted its members on the Rules. Mr Patrick MOSS replied that the Law Society had sought views from its members about a year ago and minor amendments had been made to the Rules since then. He said that the members would be consulted again if the Council of the Law Society considered that further amendments were necessary.

69. In response to the Chairman, Mr Patrick MOSS said that the finalised Rules would be submitted to CJ for approval after the Council of the Law Society had resolved the relevant outstanding issues and a Chinese version of the Rules was prepared. The Rules would then be gazetted. He said that it was expected that this could be done by end of 2003/early 2004.

Way forward

70. The Chairman said that it was likely that a subcommittee would be formed to study the Rules in detail after the Rules had been tabled in LegCo. To facilitate future deliberations on the Rules, the Chairman requested the Law Society to provide a paper to explain -

- (a) the differences between legal practice in partnership and in a solicitor corporation after passage of the Rules; and
- (b) the differences between the liability of a legal practitioner in partnership and in a solicitor corporation under the existing Professional Indemnity Scheme of the Law Society.

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solicitor to do what his client wants him to do. A solicitor must not breach the principles of professional conduct in order to benefit his client.

5.15 No exploitation

A solicitor must not take advantage of the age, inexperience, want of education or business experience or ill health of his client.

Commentary

By way of example, a solicitor must not induce a client to pay a sum of money on account of costs to be incurred, which is out of all proportion to what could be justified by the work which the solicitor has been instructed to do: see principle 4.12.

5.16 Fiduciary duty

A solicitor owes a fiduciary duty to his client: see Chapter 7.

5.17 Communicate with client

A solicitor is under a duty to keep his client properly informed and to comply with reasonable requests from the client for information concerning his affairs.

Commentary

1. A client should be told the name and the status of the person responsible for the conduct of the matter on a day-to-day basis and the partner responsible for the overall supervision of the matter.
2. If the responsibility for the conduct or the overall supervision of the whole or part of a client's matter is transferred to another person in the firm the client should be informed.
3. A solicitor should advise his client when it is appropriate to instruct a barrister and obtain the client's authority before doing so. Whenever a client is to attend a hearing at which he is to be represented, he should be told the name of the solicitor or barrister who it is intended will represent him.
4. This duty extends to keeping a client informed about recent changes of the law where those changes affect the subject matter of his retainer.

5. The extent and frequency of the information supplied and the degree of consultation will depend on the circumstances and on the type and urgency of the matter and of the experience or otherwise of the client in that type of matter.
6. There may be exceptional circumstances in which a solicitor would be justified in withholding information from a client. See for example, principle 8.03, commentary 4.

5.18 Honest and candid advice

A solicitor must be both honest and candid when advising a client.

Commentary

1. A solicitor's duty to a client who seeks legal advice is to give the client a competent opinion based on sufficient knowledge of the relevant facts, and adequate consideration of the applicable law and the solicitor's own experience and expertise. The advice must be open and undisguised, clearly disclosing what the solicitor honestly thinks about the merits and probable results.
2. A solicitor should explain as well as advise, so that his client is informed of the true position and fairly advised about the real issues or questions involved.
3. A solicitor should clearly indicate the facts, circumstances and assumptions upon which his opinion is based, particularly where the circumstances do not justify an exhaustive investigation with resultant expense to the client. However, unless a client instructs otherwise, a solicitor should investigate the matter in sufficient detail to be able to express an opinion rather than merely make comments with many qualifications.
4. A solicitor should be wary of bold and confident assurances to a client.
5. In addition to advice on legal questions, a solicitor may be asked for or expected to give advice on non-legal matters such as the business, policy or social implications involved in a question, or the course a client should choose. In many instances the solicitor's experience will be such that his views on non-legal matters will be of real benefit to the client. A solicitor who advises on such matters should, where and to the extent necessary, point out his lack of experience or other qualification in the particular field and should clearly distinguish legal advice from such other advice.

**Claims Statistics with respect to Hong Kong Solicitors Professional Indemnity Fund
up to the 2011//2012 Indemnity Year**

Professional indemnity cover

(i) Since the indemnity year 1998/99, the average claim size has ranged from HK\$0.4 million to HK\$2.7 million, well below the statutory indemnity limit of HK\$10 million per claim.

(ii) From the 1995/96 indemnity year to 2011/12 indemnity year (both inclusive), there have been 3,648 claims on the Hong Kong Solicitors Indemnity Fund ("Fund") (including notifications), out of which, only 61 claimants, i.e. 1.67 %, have sought claims of HK\$10 million or more.

(iii) Of these 61 claims:

(a) Payout of HK\$10 million

There are 16 claims (0.44%) in which the Fund paid HK\$10 million (including defence costs but less the indemnified's deductible).

Of these 16 claims, 11 (69%) were brought by companies and 5 (31%) by individuals.

(b) Payout between HK\$8 million and HK\$10 million

There are 19 claims in which the actual or expected payment by the Fund (including defence costs) is or will be more than HK\$8 million but less than HK\$10 million.

Of these 19 claims, 13 (68.42%) were brought by companies and 6 (31.58%) by individuals.

(c) Payout of less than HK\$8 million

There are 21 claims in which the claimants sought HK\$10 million or more, but which were settled for less than HK\$8 million (including defence costs).

Of these 21 claims, 17 (80.95%) were brought by companies and 4 (19.05%) by individuals.

(d) Open claims with payout which may reach HK\$10 million

There are 7 open claims in which it is anticipated that the claim payments (including defence costs) will reach HK\$10 million.

4 of these claims were brought by companies, 2 by individuals, and 1 claim by a company and an individual jointly.

- (e) Open claims with payout which may be less than HK\$8 million

There are 2 open claims in which the claimants are seeking HK\$10 million or more but it is anticipated that the claims will settle for less than HK\$8 million (including defence costs).

1 claim was brought by a company and an individual jointly and the other by an individual.

The Law Society of Hong Kong
19 August 2013