

Ref : CB1/BC/11/95/2

Bills Committee on Estate Agents Bill

Minutes of Meeting
held on Tuesday, 9 July 1996 at 4:30 p.m.
in Conference Room B of the Legislative Council Building

- Members present** : Hon Andrew CHENG Kar-foo (Chairman)
Hon Mrs Selina CHOW, OBE, JP
Hon Edward S T HO, OBE, JP
Hon Ronald ARCULLI, OBE, JP
Hon LEE Wing-tat
Hon James TO Kun-sun
Hon CHAN Yuen-han
- Members absent** : Hon Albert CHAN Wai-yip
Hon Fred LI Wah-ming
Hon CHAN Kam-lam
Dr Hon LAW Cheung-kwok
Hon NGAN Kam-chuen
- Public officers attending** : Mr William SHIU
Principal Assistant Secretary for Housing

Miss Eva TO
Assistant Secretary for Housing

Ms Sherman CHAN
Senior Assistant Law Draftsman (Atg)
- Clerk in attendance** : Mrs Vivian KAM
Chief Assistant Secretary (1)2

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Staff in attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Miss Becky YU
Senior Assistant Secretary (1)3

I. Confirmation of Minutes of Previous Meetings
(LegCo Papers No. CB(1) 1739 and 1740/95-95)

The minutes of the meetings held on 24 and 28 May 1996 were confirmed.

II. The Meeting
(LegCo Paper No. CB(1) 1622/95-96)

2. Members continued with a clause by clause examination of the Bill.

Clause 56. Offences

3. On the progress of refinement of offence provisions referred to in paragraph 25 of the information paper provided by the Administration, Mr William SHIU assured members that the Administration would examine the need for refining the clause having regard to members' views and public opinion collated, in particular on the proposed criminalization for malpractices of estate agents. Mr SHIU emphasized that the objectives of refinement would be to ensure consumer protection on the one hand and to avoid undue disruptions to the trade on the other. The introduction of the concept on "due diligence" was a step towards this direction.

4. Members enquired if similar offences, in particular with regard to the aspect of provision of information, were applicable to other trades in the service industry where a tradesman and client relationship existed. Mr SHIU undertook to provide a response but cautioned that a direct comparison might not be appropriate in view of the unique nature of the Bill.

5. Members considered the presentation of the clause too cumbersome as frequent cross referencing would have to be made, and urged the Administration to consider re-arranging the order of the sub-clauses to facilitate reference. Ms Sherman CHAN advised that it was a common approach in law drafting to specify offences and related penalties in separate clauses for the sake of clarity. To facilitate examination of the clause, the Assistant Legal Adviser (ALA) undertook to prepare a cross-referencing table on the offence and penalty provisions.

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(Post-meeting note: The cross-referencing table was circulated vide LegCo Paper CB(1) 1848/95-96.)

Sub-clause 56(1)(a)

6. In response to members, Ms CHAN explained that it would be an offence for any person who, without reasonable excuse, practised estate agency work without a licence. Such a person would be held liable on conviction upon indictment to a fine of \$500,000, or to imprisonment for two years, or to both in accordance with sub-clause 56(3)(a)(i). The penalty for summary conviction would be a fine at level six (\$100,000), or imprisonment for six months, or both under sub-clause 56(3)(a)(ii). Ms CHAN advised that the difference between conviction upon indictment and summary conviction was only a matter of proceedings. However, the level of penalty imposed upon summary conviction of such offences by a magistrate was provided for under provisions in the Magistrates Ordinance. On a related question, Ms CHAN confirmed that the Attorney General was entrusted with the role of conducting prosecutions in a magistrate's court or the High Court.

7. On the question of whether similar offence provisions were applicable to other legislation, Mr SHIU advised that it was also an offence under the Travel Agents Ordinance, the Leveraged Foreign Exchange Trading Ordinance, the Insurance Companies Ordinance and the Money Lenders Ordinance for any persons undertaking the type of work prescribed under these Ordinances without a proper licence. Offenders would be held liable to a fine ranging from \$100,000 to \$10,000,000, to imprisonment for one to seven years, or to both in accordance with the provisions under the respective ordinances. On whether estate agents awaiting renewal of licences would be regarded as undertaking estate agency work without a licence, Mr SHIU assured members that the Estate Agents Authority (EAA) would draw up guidelines to eliminate possible grey areas.

8. Some members enquired whether middlemen were included in the application of the Bill. Mr SHIU advised that the Bill covered estate agents and not middlemen, and it had spelt out clearly the requirement for a licence for any work done in relation to the acquisition or disposition of properties. In reply to a related question, Mr SHIU advised that complaints against malpractices of estate agents handled by both the Consumer Council and the Independent Commission Against Corruption were related mainly to such issues as misrepresentation and overcharging of commission. There was little information on the role or work of middlemen. Members held different views on the need of licences for middlemen. While some suggested that middlemen should be exempted, others agreed with the Administration that licences were essential to ensure consumer protection. Mr SHIU emphasized the need for parity treatment for all estate agency work and cautioned that the proposed exemption would adversely affect the effectiveness of the licensing system. A member was worried that the general public might also be caught unnecessarily by the Bill for any word or deed made in relation to a property

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transaction. Mr SHIU assured members that the Administration would step up publicity to arouse public awareness of the provisions in the Bill, in particular the requirement of licences for estate agency work. A transitional period would also be provided to allow time for the trade to meet the full licensing requirements upon implementation of the Bill. Ms CHAN supplemented that in the light of previous discussions on the same subject, the Administration was considering the merits of including the phrase "in the course of business" after the word "done" in the definition of "estate agency work" under Clause 2 on Interpretation with a view to eliminating any possible grey areas. As regards the definition of the term "business", Ms CHAN advised that this would be interpreted in the context of the common law. A member considered it necessary to define explicitly the term "business" and asked ALA to follow up in this regard.

ALA

Sub-clause 56(1)(b)

9. Members sought clarification on whether middlemen would be regarded as salespersons. Ms CHAN clarified that salespersons referred to those who carried out estate agency work in the course of employment by licensed estate agents. Middlemen who were usually self-employed should not be considered as salespersons and they were therefore not covered under sub-clause 56(1)(b) although they might be covered by sub-clause 56(1)(a).

Sub-clause 56(1)(c)

10. Ms CHAN explained that it would be an offence in law for any person who, without reasonable excuse, made any false or misleading statement or furnished any false or misleading information in connection with any application for the grant or renewal of an estate agent's licence. Such a person would be held liable on conviction upon indictment to a fine at level six (\$100,000), to imprisonment for one year, or to both under sub-clause 56(3)(d)(i). The penalty for summary conviction would be a fine at level five (\$50,000), imprisonment for six months, or both under sub-clause 56(3)(d)(ii).

11. Members sought elaboration on the definition of "misleading" information and enquired about the implications if this were to be deleted from the clause. Ms CHAN appreciated members' concern on the ambiguity of the word but advised that this was commonly adopted in other legislation including the Travel Agents Ordinance. She supplemented that the proposal for deleting the word would inevitably affect the extent of control of the licensing system. On the term "misleading information", Ms CHAN quoted an example of applicants trying to conceal from the EAA the part of the truth such as revocation of certain qualifications in order to meet the eligibility criteria for the grant or renewal of licences, but the person in such a case could not be charged for providing false information as such. Members remarked that examples of similar precedents in other legislation would provide useful references.

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Sub-clause 56(1)(d)

12. Ms CHAN explained that the same penalty provisions under sub-clause 56(1)(c) would apply to salespersons who, without reasonable excuse, made any false or misleading statement or furnished any false or misleading information in connection with an application for the grant or renewal of an estate agent's licence.

13. Some members did not agree that salespersons should bear the same liabilities as estate agents as the former were under the employment of the latter, and suggested that the penalty provisions for salespersons should not follow those under sub-clause 56(1)(c). Mr SHIU considered that both estate agents and salespersons should be held equally liable as far as the provision of information was concerned and subject to the same penalties. He undertook to consider members' remarks but held the view that the penalty applicable should be similar.

Sub-clause 56(1)(e)

14. Ms CHAN explained that it would be an offence for any person who, without reasonable excuse, failed to produce to the investigator any record or document relevant to an investigation. Such a person would be held liable on conviction upon indictment to a fine of \$200,000, to imprisonment for one year, or to both under sub-clause 56(3)(b)(i). The penalty for summary conviction would be a fine at level six (\$100,000), imprisonment for six months or both under sub-clause 56(3)(b)(ii). Mr SHIU advised that similar offences under the Securities and Futures Commission Ordinance (SFCO) and the Insurance Companies Ordinance would be subject to a fine of \$1,000,000, to imprisonment for seven years, and to a fine of \$500 per day or \$100,000 respectively.

15. In reply to members, Ms CHAN confirmed that provisions similar to sub-clause 29(4)(c) could also be found in SFCO and the Leveraged Foreign Exchange Ordinance.

Sub-clause 56(1)(f)

16. Ms CHAN said that it would be an offence for any person who, without reasonable excuse, accepted or purported to act pursuant to an appointment as a manager of an estate agency office without an estate agent's licence: Such a person would be held liable on conviction upon indictment to a fine of \$150,000, to imprisonment for six months, or to both under sub-clause 56(3)(c)(i). The penalty for summary conviction would be a fine at level five (\$50,000), imprisonment for three months, or both under sub-clause 56(3)(c)(ii). In reply to members, Ms CHAN confirmed that a person such as a purported manager could be held liable for offences under both sub-clauses 56(1)(a) and (f) for practising without a licence. She agreed with members that licences might not be required under sub-clause 56(1)(a) for managers undertaking only administrative duties in estate agency offices.

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Admin 17. Members considered a need to standardize the level of penalties for offences, in particular the period of imprisonment. Mr SHIU undertook to find out the rationale behind the imposition of different levels of penalties and revert to the Bills Committee in due course.

Sub-clause 56(1)(g)

18. Ms CHAN explained that it would be an offence for any person who, without reasonable excuse, made any false or misleading statement or furnished any false or misleading information in purported compliance with a provision of the Ordinance or any regulation thereunder which required the supply of information. Such a person would be held liable on conviction upon indictment to a fine of \$200,000, to imprisonment for one year or both under sub-clause 56(3)(b)(i). The penalty for summary conviction would be a fine at level six (\$100,000), imprisonment for six months, or both under sub-clause 56(3)(b)(ii).

19. Members questioned the rationale for setting different levels of fine for sub-clauses 56(1)(c), (d) and (g) taking into consideration their similarity in nature. Ms CHAN advised that the Administration was considering the merits of refining this clause and a decision had yet to be made.

Sub-clause 56(1)(h)

20. Ms CHAN explained that it would be an offence for any person who, without reasonable excuse, failed to attend as a witness, produce a document or answer any question put to him under any other provision of this Ordinance or any regulation thereunder. Such a person would be held liable on conviction upon indictment to a fine of \$200,000, to imprisonment for one year or both under sub-clause 56(3)(b)(i). The penalty for summary conviction would be a fine at level six (\$100,000), imprisonment for six months, or both under sub-clause 56(3)(b)(ii).

21. Members sought clarification on whether the phrase "under any other provision of this Ordinance" referred to provisions apart from sub-clause 29(4). Mr SHIU advised that the objective was to ensure the applicability of sub-clause 56(1)(h) on future amendments to the Bill. Ms CHAN took note of members' views and undertook to consider defining the phrase in question more explicitly.

Sub-clauses 56(1)(i) and (j)

22. No particular comments were made on these sub-clauses.

Sub-clause 56(2)(a)

23. Ms CHAN explained that it would be an offence for a licensed estate agent or a licensed salesperson who, without reasonable excuse, failed to comply with any of the conditions, including those prescribed under Clause 57, attached to his

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licence. On conviction upon indictment, a licensed estate agent would be held liable to a fine of \$500,000, to imprisonment for two years, or to both under sub-clause 56(4)(a)(i). The penalty for summary conviction would be a fine at level six (\$100,000), imprisonment for six months, or both under sub-clause 56(4)(a)(ii). On the part of a licensed salesperson, he would be held liable on conviction upon indictment to a fine of \$200,000, to imprisonment for one year, or to both under sub-clause 56(5)(a)(i). For summary conviction, the penalty would be a fine at level six (\$100,000), imprisonment for six months, or both under sub-clause 56(5)(a)(ii).

24. In reply to members, Mr SHIU explained that the conditions referred to those to be prescribed by the EAA in accordance with Clauses 17 and 57. Ms CHAN supplemented that other licensing authorities also had similar powers to prescribe additional conditions. The important point was to enable EAA to prescribe additional conditions for circumstances not covered by subsidiary legislation. Members considered a need for the additional conditions to be prescribed first to be followed by the offences rather than the other way round. Mr SHIU responded that in doing so, the effectiveness and efficiency of EAA in dealing with unforeseen situations or circumstances outside those prescribed in the Bill would be greatly hampered.

Sub-clause 56(2)(b)

25. No particular comments were made on this sub-clause.

III. Any Other Business

26. The Chairman reminded members of the next two meetings scheduled for Friday, 19 July 1996, after the meeting of the Finance Committee; and Monday, 29 July 1996, at 2:30 pm.

(Post-meeting note: The meeting on 19 July 1996 was re-scheduled to 23 July 1996 and the meeting on 29 July 1996 was subsequently cancelled.)

27. There being no other business, the meeting closed at 6:30 pm.