Views of the Hong Kong Bar Association on the Administration's paper regarding the Indemnity Provisions in the Land Titles Bill

1. By a letter dated 13th May 2003, the Bills Committee of the Legislative Council invited the Bar to submit its views on a paper prepared by the Administration regarding the indemnity provisions in the Land Titles Bill ("**the Bill**"), which paper was tabled at a meeting of the Bills Committee held on 13th May 2003. The said paper prepared by the Administration is hereinafter referred to as "**the Paper**".

2. In the Paper, the Administration sets out the background of the proposed Indemnity Scheme under the Bill, and briefly outlines the relevant provisions concerning the said Scheme. The Administration also deals with the doubts expressed, inter alia, by the Bar regarding the constitutionality of the proposed cap to the Indemnity. It is argued by the Administration that there is no constitutional problem under the Basic Law regarding the proposed indemnity provisions.

The Scheme

3. Representatives of the Administration asserted at the said Bills Committee meeting that under the present draft of the Bill, there is no limit or cap to the government's liability to pay compensation for loss caused by the fraud of public officers. We are unable to see the basis of this assertion. Under Clause 8(2)(b) of the Bill, it is expressly provided that the government shall not be liable in damages for any act done or default of any person, not acting in good faith, in the

performance of any function under the new Ordinance, save to the extent as provided by the indemnity provisions under Part 9. Clause 83(1)(a) under Part 9 of the Bill limits the amount of payment from the indemnity (as provided under Clause 81) to the amount from time to time determined by the Financial Secretary under Clause 83(3). We understand that that limit is intended to be set at HK$30 million ("**the Cap**").

4. It is thus plain that under the present draft of the Bill, where loss is caused by the fraud of a public officer, the government is not liable beyond the said limit. The assertion that the government is fully responsible for the fraud of its servants is not correct. If the intention of government is otherwise, the Bill should be amended to reflect this.

5. The Bar has already set out its views on the indemnity provisions under the present draft of the Bill in its previous Submissions (see, in particular, paras. 9 to 20 of its Submissions dated 23rd April 2003), and would not repeat the same here. Regarding para.10 of the Paper, the Bar stands by its view that there is no good reason why an owner should be prevented from obtaining compensation merely because he might have been "negligent" in failing to protect his property from being the subject of fraud. The common law does not impose on an owner any duty of care towards preventing fraud, and there is no reason why his proprietary right should be prejudiced by his failing to take care to safeguard against fraud. We see no good reason why this fundamental principle of the common law should be changed by the Bill, and no good reason has been shown by the government why there should be such a change.

Constitutionality of the Cap

6. The most important point raised by the Paper relates to the constitutionality of the Cap. The Bar has expressed doubt regarding the validity of the Cap under Articles 6 and 105 of the Basic Law. The Administration seeks to argue in the Paper that the Cap is constitutional because:

(a) the Bill does not have the effect of depriving property rights and accordingly there is no obligation to make adequate compensation for deprivation;

(b) in so far as the Bill interferes with or control ownership of property rights, it has achieved a fair balance between the general interest of the society and the property right of the individuals.

7. The Bar has examined the arguments put forward by the Administration. For reasons set out below, it cannot agree with those arguments. The Bar is of the view that the constitutionality of the Cap is highly doubtful under the Basic Law.

The Basic Law

8. Article 6 of the Basic Law provides as follows:-

> "The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law."

9. Article 105 of the Basic Law provides as follows:-

> "The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.
>
> Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.
>
> The ownership of enterprises and the investments from outside the Region shall be protected by law."

10. It can thus be seen that while imposing a general obligation on the government of the HKSAR to protect private ownership under Article 6, the Basic Law goes on to provide, under Article 105, for the specific instances and species of property rights that the government has a duty to protect. Amongst the species of rights that are expressly specified under Article 105 is the "right to compensation" for lawful deprivation of property. Article 105 further expressly provides that such compensation shall correspond to the real value of the property concerned and shall be paid without undue delay.

11. In our view it is plain that the right of compensation for lawful deprivation of property is a guaranteed constitutional right. Equally the amount of compensation, which must correspond to the real value of the property, is guaranteed. Accordingly, once it is shown that there has been deprivation of property in accordance with any law, the government has a constitutional duty to ensure that proper compensation is paid to the individual suffering from the deprivation.

12. For this reason it is important to consider if the proposed legislation would have the effect of depriving private property rights or ownership.

If it has that effect, any cap which seeks to reduce the amount of compensation to below the real value of the property deprived would, ipso facto, be a breach of the Basic Law.

Deprivation

13. The Administration's argument that there is no deprivation is apparently threefold, as summarised in paragraph 21 of the Paper. It is argued that:

(a) the Joint Declaration merely provides that rights concerning the ownership of property, including those relating to compensation for lawful deprivation shall ***continue*** to be protected by Law (see Section VI of Annex 1 of the Joint Declaration). It is then argued that this "theme of continuity" would mean that if certain interference with property rights did not give rise to any right of compensation before the reunification, it is unlikely that it would be within the scope of "deprivation" for which compensation is payable under Article 105 of the Basic Law;

(b) it is also argued that because the present land registration system already provides for loss of interest due to the operation of the system, the new legislation should not be considered as effecting deprivation of property for the purpose of Article 105;

(c) comparative jurisprudence of the Australian Courts and that under Article 1 of the First Protocol of the European Convention on Human Rights ("**ECHR**") shows that the kind of deprivation envisaged is expropriation by the State,

or authorized by the State for public purposes. It is argued that legislation of the kind as the Land Titles Bill is legislation which merely adjusts competing rights, and is not legislation providing for State or State authorized expropriation of property. Accordingly it is argued that there is no deprivation under Article 105 of the Basic Law.

Continuity

14. The Bar is of the view that the argument on Joint Declaration put forward by the Administration is fallacious. It is accepted that the Joint Declaration can be used as an aid to the interpretation of the Basic Law. It is also accepted that the Joint Declaration, by Section VI of Annex 1, seeks to preserve private property rights which existed before reunification. On the other hand it must be recognised that it is the Basic Law itself, not the Joint Declaration, which is the constitution of Hong Kong. The Basic Law is a national law of the PRC applicable to the HKSAR, unlike the Joint Declaration which is an international treaty between PRC and the United Kingdom.

15. It is clear that property rights which existed before reunification are preserved by the Basic Law. One of those property rights is the fundamental principle of common law as expressed by the maxim *nemo dat qui non habet* (no one gives who possesses not), and an owner will not lose his ownership of property as a result of fraud by another person. This is because the fraudster acquires no title by his fraud, and cannot pass title which he himself does not have. It has been held in **HKSAR v. Ma Wai Kwan David** [1997] HKLRD 761 that on the interpretation of the Basic Law, the common law which existed before the resumption of sovereignty continues to apply to the HKSAR after the reunification, and

there is no need for a separate act of adoption by the National People's Congress for the common law to continue to apply.

16. So it follows that the *nemo dat* principle of the common law continues to apply to the HKSAR after reunification. By the proposed legislation under the Land Titles Bill, the *nemo dat* principle is altered. Subject to the provisions of rectification, an owner will lose ownership of his property even though the registration of title by another person is the result of fraud. A fraudster would thus be able to pass title to another person at the expense of the former owner. It would seem clear that insofar as the proposed legislation seeks to remove the right of the owner to retain ownership of property from the effect of fraud, that is a deprivation of his property right – a right protected and guaranteed by the Basic Law.

17. It is a fallacy for the Administration to argue that "if certain interference with property rights did not give rise to any right to compensation before the unification, it is unlikely that it would be within the scope of "deprivation" for which compensation is payable". This is the kind of "boot-strap argument" (pulling oneself up by his own boot-strap) which cannot be right. Prior to reunification, there was no such interference with this kind of property right (i.e. the right to be immuned from the effect of fraud), and of course there was no question of any right of compensation. It is only by the proposed legislation that the otherwise preserved common law right is interfered with. How could it be right to argue it backwards to say that because there was no such right of compensation before reunification, it somehow shows that there is no deprivation by the legislation now proposed? The absence of right of compensation before reunification was simply because there was no such deprivation possible at that time. Whether there is deprivation *now*

cannot be helped by considering the question whether there was a right to compensation before reunification.

Pre-existing Law

18. The reference to the limitations on the *nemo dat* rule under the pre-existing law does not help to advance the argument of the Administration either. It is of course right that under the pre-existing law, there were already limitations to the operation of the *nemo dat* rule. One example is that given in paragraph 24 of the Paper. But the Basic Law preserves the common law *subject to those limitations which already existed prior to reunification.* The mere existence of such pre-existing limitations does not give the Government the liberty to take away rights which were not otherwise limited by those pre-existing limitations. The right to retain ownership from the effects of fraud is one such right. It is preserved and protected by the Basic Law. The fact that there were other pre-existing limitations cannot be a ground for taking away this protected right. If this argument of the Government were correct, the Government would be able to rely on the existence of such pre-reunification limitations to expropriate all private properties in HKSAR without compensation at all. This cannot be right.

Australian Jurisprudence

19. The Administration claims that comparative jurisprudence in Australia and under ECHR shows that deprivation in this context is directed against State expropriation or State authorized expropriation for public purposes. The Bar doubts whether the comparison is appropriate.

20. The Bar is of the view that reference to Section 51 (xxxi) of the Australian Constitution is unhelpful. That part of the Australian Constitution provides as follows:

> "51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-
>
> (xxxi) The ***acquisition of property*** on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;"

21. It is eminently clear from the clear words of Section 51 (xxxi) of the Australian Constitution that the same deals with the power of the Parliament to make laws relating to the acquisition of property from any State or person. That part of the Australian Constitution deals with acquisition, not deprivation. It is therefore not surprising that Australian jurisprudence relating to this particular section of the Australian Constitution confines the same to acquisition of property (as pointed out in paragraph 26 of the Paper). This section of the Australian Constitution does not touch on the power of the Australian Parliament to make laws adjusting competing rights. But that is very different from Article 105 of the Basic Law which deals with deprivation of property rights.

22. State's acquisition of property by legislative compulsion, commonly known as compulsory acquisition, is of course a kind of expropriation of property. But property rights may be deprived by means other than by formal acquisition/expropriation. Section 51(xxxi) does not deal with deprivation of properties generally, unlike the Basic Law, and for that matter, Article 1 of the First Protocol of ECHR ("**Article 1**"). In this

connection, the European Court Human Rights, in considering the question of deprivation under Article 1, reminded us as follows:

> "In order to determine whether there has been a deprivation of possessions within the meaning of the second rule [of Article 1], the Court must not confine itself to examining whether there has been dispossession or formal expropriation, it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether that situation amounted to a de facto expropriation (see the Sporrong and Lvnnroth judgment cited above, pp.24-25, para.63)." (emphasise added)

see, **Carbonara v. Italy** [2000] ECHR 24638/94 at para. 60.

ECHR jurisprudence

23. Unlike Section 51(xxxi) of the Australian Constitution, Article 1 of ECHR does deal with deprivation of properties, and the ECHR jurisprudence is more relevant for the present consideration. Article 1 in terms provides as follows:

> "Article 1 Protection of Property
>
> Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

24. It can readily be seen that Article 1 does deal with deprivation of properties, as in the case of our Article 105. However, it would also be noted that our Article 105 is ***not*** the same as Article 1. There are notable differences. In particular, Article 1 expressly spells out the conditions, including public interest, subject to which a person may be deprived of his possessions. There is no reference to public interest in our Article 105. On the other hand, while our Article 105 expressly provides for compensation, and the amount thereof, Article 1 is silent on compensation. The silence on compensation has given rise to much debate under ECHR as to whether compensation is payable at all if deprivation of possessions can be justified under the second sentence of Article 1. Indeed there is a school of thought, as epitomised by the opinion of Judge Thr Vilhjimsson in the case of **James v. United Kingdom** (1986) 8 EHRR 213, who referred to the *travaux preparatoires* of the ECHR, that if deprivation is otherwise justifiable under the conditions provided under the ECHR, no compensation at all is payable. However, Judge Thr Vilhjimsson may be regarded as belonging to the minority, and majority view as shown by the ECHR jurisprudence is that despite Article 1 being silent on compensation, Article 1 should be read as "in general impliedly requiring the payment of compensation as a necessary condition for the taking of property of anyone within the jurisdiction of a Contracting State". See the **James** case, supra, at para. 54. Suffice to say that we do not have such a problem in Hong Kong, as our Article 105 is express in terms of compensation and the amount thereof in the event of deprivation. Unlike the ECHR, where the question of compensation generally features as one of the factors in the consideration of fair balance of public interests against private interests, the Hong Kong position is much more straightforward as the Government is expressly enjoined to ensure that compensation is paid which corresponds to the real value of the property deprived. In Hong Kong,

the amount of compensation does not feature in terms of "fair balance" of interests, it is simply a matter of assessing the real value of the property deprived.

25. We do not find support, on the examination of the jurisprudence of ECHR, for the Administration's contention that the deprivation provisions under Article 1 of ECHR is confined to State expropriation or State-authorized expropriation for public purposes. Examination of the relevant jurisprudence reveals the contrary.

26. As pointed out in paragraph 22 above, the European Court has emphasized that in determining whether there is deprivation, the Court should not confine itself to formal expropriation, but to look behind the appearances and investigate the practical reality to see if properties (the word "possessions" is used in Article 1 but entails little difference from our concept of properties) are being deprived. Cases are abound both in national and the ECHR jurisprudence where private disputes are held to involve or engage the deprivation provisions under Article 1. We will just give a few examples:

(a) in **Pressos Compania Naviera SA v. Belgium** [1996] 21 EHHR 301, it was held by the European Court that a Belgian law which was passed in September 1988 to retrospectively extinguish the liability for negligence of pilots navigating ships in its territorial waters was held to be a breach of Article 1. In this case, the applicants before the European Court had, prior to the passing of the 1988 legislation, brought claims against, inter alia, certain private pilot services for negligence. That was essentially a private claim in tort. As a result of the passing of the 1988 law, the

applicants' claim was retrospectively extinguished. This was held to be a clear deprivation of property rights as the tort claim constituted an asset or possession protected by Article 1;

(b) In **James v. United Kingdom** (supra), the European Court is concerned with the Leasehold Reform Act 1967 of the UK (as amended by the Housing Acts 1969, 1974 and 1980, the Leasehold Reform Act 1979 and the Housing and Building Control Act 1984). By this legislation, which is described as a legislation intending to achieve social reform, occupying tenants of "houses" let on long leases in England and Wales were granted the right to acquire the freehold of the house, or an extended lease, on certain terms and conditions. The legislation also provides for compensation terms for the freeholder. It may be noted that the effect of the Leasehold Reform legislation affected the rights inter se between the freeholders and their occupying tenants, principally by conferring a right to the tenants of long lease to obtain the freehold title from their landlords. No state expropriation in any formal sense is involved: the legislation sought to adjust the property rights between the freeholders and their tenants. In this respect the **James** case is very similar to the present situation. The European Court has no doubt at all that the applicants were "deprived of [their] possessions", within the meaning of Article 1, by virtue of the Leasehold Reform legislation (see para. 38 of the Decision of the Court). Although the Court ultimately held that the deprivation was justifiable in the particular circumstances of the case having regard to the public

interest involved, and that the compensation package provided under the legislation was just and proportionate to the deprivation and achieved a fair balance between the interests of the private parties concerned, those considerations were peculiar to the special facts of that case. What is important for present purposes is that the Court had no hesitation in holding that there was deprivation although there was no question of State expropriation in any formal sense;

(c) **Hatton v. United Kingdom** [2001] ECHR 36022/97 is a case which illustrates the wide scope of the State's positive duty to secure rights under the ECHR, to ensure that the rights guaranteed would not be interfered with even though the interference is not directly made by the State or authorised by the State. In that case the applicants complained that the aircraft noise at Heathrow Airport had interfered with their private lives in violation of Article 8 of ECHR. The European Court held that Heathrow Airport, and the aircrafts using it, were not owned or controlled by the UK government and therefore the government could not be said to have directly interfered with the rights of the applicants. However, the Court held that the government had a positive duty to take reasonable and appropriate measures to secure rights under the ECHR, and in failing to do so was liable for the violation of Article 8. The Court was emphatic in stressing the duty of the State to protect the rights guaranteed by ECHR. Our Article 105 is of a similar vein, inasmuch as it is couched expressly in terms of the Government having a duty to protect the property rights of

individuals, and "deprivation" in Article 105 must be clearly construed in that broad sense. Even if the deprivation is not caused by direct expropriation, allowing property ownership to be taken away from owners who are victims of fraud is clearly a "deprivation" of their property rights which these owners would be entitled but for the new legislation. Although **Hatton** is not an Article 1 case, in our view it illustrates the point well;

(d) the principles in **Hatton** were in line with those upheld by the European Court in **Guerra v. Italy** 4 BHRC 63. In paragraph 58 of its Decision, the Court held:

> "The court considers that Italy cannot be said to have "interfered" with the applicants' private or family life; they complained not of an act by the state but of its failure to act. However, although the object of Art 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, *it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life* (see **Airey v. Ireland** [1979] 2 EHRR 305).
>
> In the present case it need only be ascertained whether the national authorities took the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life as guaranteed by art 8 (see **Lopez Ostra v. Spain** (1994) 20 EHRR 394)."

We would add that although the **Guerra** case is an Article 8 case, the case was referred to and the above cited passage

was relied upon in a subsequent Article 1 case (**Marcic v. Thames Water Utilities Limited** [2001] 3 All ER 698, see below)

(e) In **Dennis v Ministry of Defence** [2003] EWHC 793, Buckley J dealt with a case of a claimant who brought a claim under, inter alia, Article 1 claiming that military aircrafts flying over his estate had caused such noise nuisance that his right to enjoy his property under Article 1 was being interfered with. The noise nuisance had also significantly reduced the market value of the claimant's estate. In the United Kingdom, the passing of the Human Rights Act 1998 applied the ECHR (see Sch 1 to the 1998 Act) to the United Kingdom. No expropriation of properties by the State was involved but the Court had no difficulty in holding that the claimant's right to private property was being infringed by the Ministry of Defence in allowing its aircrafts to create nuisance against the claimant's enjoyment of his property;

(f) In deciding the case of **Dennis** above, Buckley J relied on the decision of **Marcic v. Thames Water Utilities Ltd** (supra). In **Marcic**, the Defendant, which was a statutory sewage undertaker, was held liable both for common law nuisance as well as for breach of Article 1 by failing to take reasonable steps to prevent repeated floodings of the Plaintiff's property. In the first instance, Judge Harvey QC held that there was a breach of Article 1, relying inter alia on **Guerra v. Italy** (supra). He held that the failure of the Defendant to carry out works to bring to an end of the

repeated floodings was sufficient to constitute an interference with the Plaintiff's rights under the ECHR. The Court of Appeal upheld his decision, see [2002] QB 929. If allowing a private nuisance to take place was sufficient to constitute an infringement of property rights, to take away the property right from a property owner by legislation is, *a fortiori*, deprivation in the context of the Article 105. The deprivation may be lawful as it is done according to law, but it is deprivation nonetheless. Under the Basic Law, compensation is payable for lawful deprivation.

27. We note that in paragraph 27 of the Paper, the Administration referred to the cases of **Bramelid v. Sweden** [1982] 5 EHRR 249 and the decision of the High Court in **Family Housing Association v. Donnellan** [2002] 1 P& CR 34 in support of its argument that deprivation is confined to expropriations by State (or authorized by State for public purposes). **Bramelid v. Sweden** is not a decision of the European Court. It is an admissibility decision of the European Commission, which was the former body (before the coming into force of Protocol No.11 on 1-11-1998) in charge of filtering out unarguable cases from the European Court. In the adjudication system under the ECHR, it is the European Court which performs the function of making final and binding adjudications. The decisions of the European Commission were on admissibility only. While it is true that in **Bramelid**, the European Commission did, in its admissibility decision used words which would seem to suggest that the word "deprivation" in Article 1 relates to acts "by which the state seizes or gives another the right to seize a specific asset to be used for the realization of a goal in the public interest", we are of the view that such words are what English lawyers would call obiter (not necessary for the decision itself); but in any event that was a

relatively old admissibility decision from the Commission, and not from the European Court. Even it is not obiter, we would think that the decision cannot possibly stand in the light of the modern decisions of the European Court, which clearly shows that the word "deprivation" is not to be so narrowly construed under Article 1.

28. The first instance judgment of **Family Housing Association v. Donnellan** (by Park J) must be read with caution for a number of reasons:

(a) Insofar as Park J relied on **Bramelid v. Sweden**, as pointed out above, we do not think that the admissibility decision can now stand in the light of the subsequent authorities. The danger of relying on admissibility decisions by the European Commission, as opposed to decision of the European Court, is further illustrated by Park J.'s reference to the admissibility decision of the European Commission in the case of **James v. United Kingdom** [1984] 6 EHRR 455. As has been noted above, the **James** case in fact went to the European Court subsequently (see [1986] 8 EHRR 213), and the European Court held that there was a clear deprivation of the possessions of the applicants within the meaning of Article 1. In fact, by that time the point had become so clear that the UK Government conceded the point.

(b) It is also clear from Park J's judgment that his decision was very much affected by the Court of Appeal decision in **JA Pye (Oxford) Ltd. Graham** [2001] Ch 804. Quite apart from the fact that the Court of Appeal's decision itself in the **JA Pye** case was subsequently overruled by the House of Lords [2002] 3 WLR 221 (but not on the point of EHRR, which was not

pursued in the House of Lords), it is clear that the ECHR point was left open and was regarded by the House of Lords as well as the Court of Appeal in the **Donnellan** case as a question which is "not an easy one" (see the judgment of Lord Hope in the **JA Pye** Case at p.245A). The fact that the ECHR point was not eventually pursued in the House of Lords was not because the point itself was not otherwise without merits. It was merely because it was conceded that the Human Rights Act 1988 (which brought into effect the ECHR) only applied to decisions of a court or tribunal made before 2nd October 2000, and that the Act did not apply retrospectively. In the House of Lords, Lord Bingham (at page 225A) indicated a view suggesting that compensation should be paid to some one who loses a title to squatter through the system of registered title. Indeed when the **Donnellan** case itself was before Aldous LJ sitting in the Court of Appeal for leave to appeal, the Court decided to grant leave to appeal although he felt that he was bound by the Court of Appeal's decision in JA Pye and so he would dismiss the appeal (see paragraphs 7 and 10 of his decision). Aldous LJ held that he did not believe it would be right to deprive the Housing Association of the opportunity of seeking to argue their case before the House of Lords;

(c) Finally, it is important to remember that Park J was dealing with a case of adverse possession, which is very different from the present situation. As pointed out by Mummery LJ in the **JA Pye** case, the Limitation Act did not deprive a person of his property as such, but merely deprive him of his right of access to the courts for the purpose of recovering property if he has delayed the institution of his legal proceedings for more than

the limitation period. Also as pointed out by Keane LJ, the European Court itself has acknowledged such limitation periods as not being incompatible with the ECHR (see, **Stubbings v. United Kingdom** [1996] 23 EHRR 213), and the ECHR itself expressly recognised such time limits for the commencement of legal proceedings. That sort of situation is light-years away from the present case, as the present case involves the deprivation of property rights not because of any delay or fault of the owner, but simply because he unfortunately finds himself to be a victim of fraud. It is not his access to courts that is barred, it is his legal ownership that is being taken away.

29. The Administration also refers to the case of **Kowloon Poultry Laan Merchants Association v. Director of Agriculture Fisheries and Conservation** [2002] 4 HKC 277. Again the Bar is of the view that the case does not support the argument of the Administration. In that case the applicants' complaint was that following the "bird flu" virus scare, the Government required the poultry wholesalers to sell chicken separately from the water birds. There is no question of any deprivation of property rights at all. As pointed out by the Court of Appeal, the applicants had not been deprived of the use of the land rented to them by the Government at the Cheung Sha Wan Temporary Poultry Market. They continued to occupy the rented premises and were still doing business there by selling chicken. What they could not do was to sell chicken and waterbirds together, and the Government had provided them with an alternative location from which to sell water birds. In these circumstances the Court of Appeal held that there was not even an arguable case that the applicants had been deprived of any property. The Government was merely regulating the use of the Poultry Market. Those

are special facts of the **Kowloon Poutry** case and we have not found the case to be of any assistance at all.

Fair Balance

30. In the context of Article 1 of the ECHR, fair balance of public and private interests and the proportionality of interference is of paramount importance in determining the question whether there is a breach of the second sentence of Article 1, which expressly provides for deprivation to be permitted subject to certain conditions, including public interests. As pointed out in paragraph 24 above, Article 1 is silent on compensation and the question of compensation usually features in the ECHR jurisprudence in the form of the consideration of proportionality and balance of interests. In the present case, the Bar has no difficulty in accepting that inasmuch as the proposed legislation would result in deprivation of property rights, such may be justified by public interests and the benefits to the society as a whole, for example, in simplifying conveyancing, achieving certainty of titles etc. The virtues of a system of registered title must have been carefully considered long before drafting of the Land Titles Bill, and some of those virtues are set out in paragraph 30 of the Paper. But that is not the point. The point is, proceeding on the basis that such deprivation is well justified, and otherwise lawful, the Basic Law requires that proper compensation be paid for such lawful deprivation. The Cap, which arbitrarily limits the compensation to HK$ 30 million, is not the compensation required by the Basic Law. In the context of the Basic Law, fair balance does not come into the equation at all once deprivation is shown. The Basic Law leaves no room for argument that the amount of compensation shall depend on the public interests involved, or that it shall be reduced if there is some general interests other than the real value of the property deprived.

31. Article 105 clearly recognises that properties may be deprived in accordance with the law, but requires the Government to pay full compensation according to the real value. Clearly, the rationale behind Article 105 is that, as emphasized by Buckley J in the case of **Dennis v. Ministry of Defence** (supra), while deprivation may be justified on grounds of public interests, it is generally wrong for the individuals concerned to be forced to bear the cost of the public benefit. That must be the reason why our Basic Law expressly provides for compensation to be paid according to real value. We see no room for any argument that the amount of compensation may be cut down to below the real value once it is shown that there is deprivation, even though such deprivation may be fully justified by public interests and otherwise in accordance with the law. The point of fair balance is thus a red herring.

Conclusion

32. For reasons above, the Bar has very grave reservations as to the constitutionality of the Cap, and it is unable to accept the arguments given by the Administration in support of its constitutionality.

Dated the 22nd day of May 2003.