

**HONG KONG BAR ASSOCIATION'S
COMMENTS ON THE LAND TITLES BILL**

1. This submission on the Land Titles Bill is in response to the invitation of the Bills Committee by their letter of 22 May 2003.

2. The point of concern is paragraph 30(d) of the Administration's paper on "indemnity" where it was stated that:

"Where the scheme is insufficient to meet the full extent of the loss it does not take away the right that individuals now have to seek personal remedy against the third party fraudster ..."

3. The argument appeared to be that there would not be any deprivation of property because there is no deprivation of the right to make claims against the person who is responsible for the loss of the property, or that if there is any deprivation of property, then the SAR Government has discharged its obligation under Article 105 in having law to protect the Hong Kong people's right to compensation for lawful deprivation of their property.

4. There is no easy answer to the point raised. If one were to adopt the approach of the European Court, then one must not just confine to looking for formal expropriation but to look behind the appearances and investigate the practical reality to see if properties are being deprived.

5. Looking at the matter realistically, the change of the law to register title would change the old and well established rule of *Nemo Dat*. It is too superficial to say that whenever one loses his property but his right to take legal action against others for causing his loss of property is retained, there is no deprivation of property.

6. In our view, on the question of whether there is any deprivation of property in having the new Land Titles legislation, the answer would appear to be yes, because the new law makes it possible for one to lose his title to landed property in circumstances where before the enactment of the new legislation, he would not have lost his title to the property. This is something which had been dealt with in our earlier submission and had been explained by the Bar Chairman in the meeting of the Bills Committee on 12 May 2003 already. The deprivation would be a lawful deprivation in accordance with the new legislation, but it is still a deprivation. For this reason, the question of whether there is a sufficient protection of the right to full compensation as required by Article 105 would become in issue.

7. Even taking into account that the damages payable by the fraudulent or negligent person would be assessed at the market value of the property lost, the monetary award is quite different from the remedy under the old and existing law, viz. that the original owner would be given back his property, because:

- (1) There is always the possibility of the fraudulent or

negligent person who caused the loss not being traceable or not being able to pay up the judgment.

- (2) There is a difference in the limitation period in a claim for the return of land (being 12 years) and a claim in tort (being 6 years). Thus after 6 years from the date of the cause of action, the right to obtain damages would be lost, whilst before the right to recover the property would not have lost until after 12 years from the date of the cause of action.
- (3) In any action for the recovery of the land, the existing *nemo dat* rule would protect the original owner to the extent that even if he is negligent, he would still be entitled to recover his property. If as a result of the change of the law, his right is to be relegated to a claim in tort for a sum of money, his claim in tort would be subject to the defence of contributory negligence. Hence under the existing law, there could be the situation whereby although the original owner is somewhat negligent in protecting his own property right, he would not lose his property, yet under the new law, the same owner may lose his property and at the same time would

not be able to recover from the negligent or fraudulent person who causes his loss of the title to his property the full value of his property because of his own contributory negligence.

8. Thus the mere fact that the new legislation has not expressly abrogated the right to claim in tort against the person responsible for the loss of the title to the property, does not appear to be an answer to the requirement of full compensation under Article 105. To say the least, it appears to us that it is strongly arguable that the new legislation would not meet the requirement of Article 105 if the net result is that the property owners may be getting something less than what they would be entitled to before. Thus looking at the matter realistically, it is difficult to see how the contention in paragraph 30(d) of the Administration's paper on "indemnity" could be a complete answer to the requirement of protection of property under the Basic Law.

Dated this 30th day of May 2003.