

18 June 2004

By fax and hand delivery

Mr. Kim Salkeld
Land Registrar
28/F Queensway Government Offices
66 Queensway
Hong Kong

Land Titles Bill

Thank you for your letter of 17 June 2004.

Rectification under Clause 81

You have addressed our concern as to what should be the relevant time when the registered owner is to be regarded to have knowledge.

The Administration's policy is that a former owner should be placed in no worse a position than he enjoys under the current law, insofar as a forged document is concerned.

What we are objecting to is the requirement that the registered owner must satisfy the court that he did not, by his act or by lack of proper care, substantially contribute to the fraud.

You seem to be suggesting that under the current law, if a registered owner's title was purportedly transferred under a forged Assignment, he is at risk of losing his property if he had been negligent, even though he had no knowledge of and was not a party to the fraud. This is contrary to our understanding and we would appreciate your letting us know the legal authorities upon which your proposition is based.

In *Tai Hing Cotton Mill Limited v. Liu Chong Hing Bank Limited* [1987] HKLR1041 (Privy Council), a clerk of the appellant company, between 1972 and 1978, made away with some HK\$7 million by fraud and forging the signature of the company's managing director. The forged cheques accounted for some HK\$5.5 million. The trial judge summarised the clerk's defalcations in a few simple words (at page 1045) :-

"... the defalcations remained undetected for over 5 years. They involved approximately 500 cheques of which 300 were forged."

The forgery remained undetected despite the fact that the amounts of the cheques were debited to the company's account with the bank and bank statements showing payment of the forged cheques were sent monthly to the company. The company sued the bank for the return of the amounts debited to the company's account.

The Privy Council accepted that a customer owes his bank a duty in drawing a cheque to take reasonable and ordinary precautions against forgery but held that the negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn. The Privy Council rejected the contention of the bank that there was a duty either in contract or in tort on the part of the customer to exercise such precautions as a reasonable customer would take to prevent forged cheques being presented to the bank or, at the very least, to check his monthly bank statements so as to be able to notify the bank of any items which were not, or may not have been, authorised by him. The Privy Council ruled in favour of the company.

In the light of *Tai Hing Cotton Mill*, the additional requirement in clause 81(3)(c) that the applicant must satisfy the court that he did not, by his act or by lack of proper care, substantially contribute to the fraud goes well beyond what is expected of a registered owner under the current law.

Limitation under Clause 81A

Thank you for clarifying that it is for the court, rather than the Registrar, to determine whether or not a period of limitation applies. Our question remains : Why should the court be given a discretion to refuse rectification if the limitation period, whether under the Limitation Ordinance or otherwise, has not expired?

For our part, we would have no objection to a provision in the Bill to the effect that if a former registered owner's title has been extinguished under the Limitation Ordinance, he would not be entitled to seek rectification of the Land Register.

To expedite the scrutiny of the Bill, I am copying this letter to the Chairman of the Bills Committee.

Yours sincerely

Louis Loong
Secretary General

c.c. Secretary for Housing, Planning and Lands (Attn : Ms. Olivia Nip)
Hon Margaret Ng, Chairman of the Bills Committee