

Bills Committee on Land Titles Bill

RESPONSE TO SUBMISSIONS ON INDEMNITY

Purpose

This paper provides responses to the submissions to the Bills Committee on the paper on “Indemnity” (LC Paper No. CB(1) 1664/02-03(01)).

Background

2. The Bar Association, Law Society, Real Estate Developers Association, Consumer Council, Heung Yee Kuk and Hong Kong Institute of Surveyors have given various comments on the indemnity provisions in the Land Titles Bill to the Bills Committee.

3. The Administration has already set out its position on the constitutionality of the indemnity cap (LC Paper No. CB(1)2089/02-03(02)). We provide below our responses to the comments on other issues on indemnity raised in each of the above submissions.

Bar Association Submissions of 22.5.2003 and 30.5.2003 (LC Papers Nos. CB(1) 1724/02-03(07) and 1885/02-03(03))

4. In paragraphs 3 and 4 of its First Paper of 22 May 2003, the Bar states that there is a limit on the Government’s liability to pay compensation for loss caused by the fraud of public officers. The Administration confirms that this is the intention under Clause 83(1)(a) of the Bill. The no limit situation only applies where the loss has been caused by any mistake or omission on the part of the Government under Clause 82(1)(b).

5. In paragraph 5 of its First Paper, the Bar maintains 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 Administration wishes to point out that the law does require an owner to take some care in respect of his property. An example is Section 5(2) of the Powers of Attorney Ordinance where a person dealing with the donee of the power without knowledge of the revocation is protected. The transaction is valid if the donor has not communicated or made known his revocation of the power of attorney by some means. Furthermore,

provisions similar to those in the Land Titles Bill are contained in the U.K. Land Registration Act and New South Wales Real Property Act 1900 to the effect that indemnity is not payable if the loss is incurred as a consequence of the claimant's lack of proper care or act or omission.

6. The Administration has responded to paragraphs 6 – 32 of the Bar's First Paper on the constitutionality of the indemnity cap in paragraphs 1 – 13 of Annex B in our paper on the constitutionality of the indemnity cap (LC Paper No. CB(1) 2089/02-03(02)). We have also responded to paragraphs 6 - 8 of the Bar's Second Paper in paragraphs 14 - 19 in that annex.

Law Society Submissions of 5.6.2003, 20.6.2003 and 27.6.2003 (LC Papers Nos. CB(1) 1885/02-03(04), CB(1) 2089/02-03(03) and CB(1) 2103/02-03(03))

7. In its First Paper (LC Paper No. CB(1) 1885/02-03(04)), the Law Society objects to the Administration's proposals to exclude claims by professional indemnity insurers under Clause 82(5) of the Bill as this would result in the Hong Kong Solicitors' Indemnity Fund Ltd being the default insurer for conveyancing transactions in Hong Kong. The Administration has given a reply to this issue in its letter of 5 July 2003.

8. In its Second Paper (LC Paper No. CB(1) 2089/02-03(03)), the Law Society maintains the view that there should be no cap on the indemnity to ensure that any person suffering any loss under the proposed system will be properly compensated. The Administration has proposed a cap on the indemnity in fraud cases in order to –

- (a) limit the risk to the Indemnity Fund;
- (b) ensure that the levy rate is affordable with respect to all levels of property transactions;
- (c) maintain a stable and predictable levy scheme; and
- (d) allow for a simple system to assess levy on each property.

9. In paragraph 2 of its Third Paper of 27.6.2003 (LC Paper No. CB(1) 2103/02-03(03)), the Law Society raises concern that the Bill may facilitate the commitment of property fraud as the solicitors will not have to check the authenticity of title deeds and the vendor's signature against the one appearing in the title deeds. The Administration wishes to point out that under the title registration system, the solicitor will have to check the vendor's signature against the current assignment.

10. In paragraph 4 of its Third Paper, the Law Society argues that all claims arising as a result of fraud or negligence will be met by the Solicitors' Professional Indemnity Fund and not by the Government under the Bill. The Administration has given a reply to this in our letter of 5 July 2003.

11. In paragraph 6 of its Third Paper, the Law Society is concerned that its professional indemnity fund may not recover from the Indemnity Fund for payments made for losses caused by the Land Registry. The Administration has replied to this point in our letter of 5 July 2003. Our intention is that if a professional indemnity insurer has paid out for that part of a loss that was caused by the mistake or omission of Land Registry staff, the insurer would be entitled to recover that payment from the Land Registry. We are now considering whether and how the Bill should be amended to make this intention clear. We will consult the Law Society on this. Accordingly, there should be no infringement of the rights of the Law Society members under Article 6 of the Basic Law (paragraph 7 of the Law Society's Third Paper).

Consumer Council Submission of 19.5.2003 (LC Paper No. CB(1) 1724/02-03(03))

12. In paragraph 3 of its submission of 19.5.2003, the Consumer Council has asked whether there would be any statutory regulations governing the recovery of payment from the Land Registry Trading Fund in cases of mistake or omission of Land Registry staff where indemnity has been paid from the Indemnity Fund. Under Clause 100(1)(zh), the Secretary for Housing, Planning and Lands will be given the power to make regulations for the Indemnity Fund. The Administration intends to set out in the Indemnity Fund Regulations that the Registrar shall pay into the Indemnity Fund any amount that the Indemnity Fund already paid under Clause 82(1)(b) (that is, for mistake or omission of Land Registry staff).

13. In paragraphs 4 – 6 of its submission, the Consumer Council urges the Government to consider waiving its immunity under Clause 8(2) to enhance public confidence in the new title system. The Administration wishes to clarify that the proposed coverage of the indemnity fund is no less than the existing liability of the Government under the Land Registration Ordinance. It would not be appropriate to waive the immunity provisions under Clause 8(2).

Real Estate Developers Association of Hong Kong Submission of 19.5.2003 (LC Paper No. CB(1) 1724/02-03(04))

14. Paragraph 1 of the submission is only a general statement of the existing law. The Administration wishes to refer to paragraphs 16 and 17 of Annex A to the paper on the constitutionality of the indemnity cap (LC Paper No. CB(1) 2089/02-03(02)). Both the authors of Megary & Wade's Law of Real Property and Kerr on the Law of Fraud and Mistake are of the view that by gross negligence, an owner of legal interest will lose his interest to a subsequent purchaser or incumbrancer.

15. Paragraphs 3 – 6 concern the constitutionality of the cap on indemnity. The Administration has given a reply in Annex C of the paper on the constitutionality of the indemnity cap (LC Paper No. CB(1)2089/02-03(02)).

16. The drafting comments on the Bill will be considered.

Heung Yee Kuk Submission of 21.5.2003 (LC Paper No. CB(1) 1724/02-03(06))

17. The Heung Yee Kuk considers that it is inadvisable for the Government to bear the financial burden of providing indemnity to the owners in fraud cases. It has also asked for past statistics. The Administration has given a reply to this in paragraphs 12 to 13 of our second paper on indemnity (CB(1)1885/02-03(02)).

18. Paragraph 2 of the Heung Yee Kuk submission criticizes the inequality of the indemnity cap to owners. The Administration's reasons for the cap are given in paragraph 8 above.

Hong Kong Institute of Surveyors Submission of 20.5.2003 (LC Paper No. CB (1) 1724/02-03(05))

19. The Hong Kong Institute of Surveyors also questions the reasons for the Administration to apply different treatment of property of higher value. Again, the reasons for having a cap on the indemnity in fraud cases are set out in paragraph 8 above.

20. The Institute is also of the view that the proposed system should not deprive the existing rights of an innocent owner to recover the property because of fraud. The innocent purchasers should claim indemnity payments subject to the cap. The Administration considers that the main principle of title registration

system is to confer title on the purchaser who has been registered as the owner. Automatic restitution would defeat this main principle and is not necessarily the right course in each case. It is appropriate for the Court to decide in the circumstances of each case.

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