

24 June 2004

By fax and hand

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Land Titles Bill

Thank you for your letter of 23 June.

Limitation Period

The intention of clause 81A is that an owner's position, as it presently stands under the Limitation Ordinance, is not to be affected.

We still have reservations on the latest drafting of clause 81A. Would it not be better if the clause were to simply state that no rectification of the Title Register may be made under clause 81 if the former registered owner or former registered lessee has been barred from maintaining a claim for recovery of the property under the Limitation Ordinance?

Rectification under Clause 81

We agree with the Administration's policy that a former owner should be placed in no worse and, similarly no better, a position than he enjoys under the current law.

We accept that, on the authority of *Tai Hing Cotton Mill*, the court, in hearing an application for rectification under clause 81, should have regard to the conduct of the applicant, ***but only if the conduct relates to the transaction itself, that is, in the manner in which the allegedly void instrument was made.***

Clause 81(3)(c) goes beyond conduct which is in relation to the transaction itself. It extends to negligence (lack of proper care) which substantially contributes to the fraud. Such a general duty to prevent fraud was rejected by the Privy Council in *Tai Hing Cotton Mill*.

You have cited *Li Tse Hi (Administrator) v. Pong Tsoi Ching* [1934] HKLR 4. That is a case where an adopted son of the plaintiff (a widow) caused someone to impersonate his late adopted father (the former registered owner) who had died 5

years ago to assign the property to the adopted son. The trial judge found that the plaintiff had contemporaneous knowledge of the impersonation (at page 14). On appeal to the Full Court, the Chief Justice confirmed the judgment of the trial judge and proceeded on the basis that the plaintiff knew and consented to the forged assignment (at page 14). It is apparent from the judgment that the scheme was adopted with the object of evading estate duty.

The *Li Tse Hi* case is one where the plaintiff had knowledge of and acquiesced in and can even be said to be a party to the fraud. It is certainly not an authority for the proposition that a registered owner can lose his title by mere negligence, even if the negligence substantially contributed to the fraud.

Our concern would be met if clause 81(3) is amended to reflect the position of the law under *Tai Hing Cotton Mill*.

Way Forward

It seems to us that the Administration is not disagreeing with our position. The only question is whether the drafting of clauses 81A and 81 accurately reflects and achieves the agreed position.

We understand that the Administration will give an undertaking to the effect that (1) the intention is that clauses 81A and 81 will not place a former owner in a worse position than he enjoys under the current law, (2) if clauses 81A and 81 are passed into law without amendment due to the pressure of time, the Administration will review these clauses to address legitimate concerns as to whether the legislative intent for them has been achieved and (3) if the intention is not achieved, the Administration will take steps, before the Bill comes into operation, to amend clauses 81A and 81 to achieve the legislative intent. On the basis that the undertaking will be given and implemented by the Administration, we are content for the Bill to proceed.

Yours sincerely

Louis Loong
Secretary General

c.c. Secretary for Housing, Planning and Lands (Attn : Ms. Olivia Nip)
Clerks to Bills Committee on Land Titles Bill (Attn: Miss Salumi Chan)