LC Paper No. CB(2)1360/04-05(01)

HONG KONG BAR ASSOCIATION'S COMMENTS ON RECOMMENDATIONS OF JUDICAIRY'S REVIEW OF THE LANDS TRIBUNAL ORDINANCE (CAP. 17) AND THE LANDS TRIBUNAL RULES (CAP. 17A)

I. Revised Administrative Procedures.

1. The recommendation here appears to be in order, and we notice that it has in fact been implemented.

II. Amendments to LTR

Method of Service for All Types of Cases

2. The recommendation here appears to be in order.

Service of Writ for Repossession of Premises

3. The recommendation here appears to be in order.

Notice of Opposition in Application for Possession of Premises

4. In the shortness of time available for giving comments on the recommendations, we have not been able to research into why Rule 69(2) of the LTR, introduced by the Landlord and Tenant (Amendment) Ordinance 2004 (No. 16 of 2004), did not include therein non-payment of rent cases. We do not know whether the omission in 2004 was deliberate or was just a slip. If it was indeed a slip, we would be quite surprising, since "non-payment of rent cases ... constitute the overwhelming majority of possession cases" (see §16 of Paper). If the omission was deliberate, we cannot support the present recommendation without knowing the reason for such deliberate omission, made in as recently as last year.

5. Further, we do not quite see real problem here from our angle. The reason for the proposal given in the Paper is that in cases where the applicant for possession of premises rely on more than one ground for possession, one of which is forfeiture for non-payment of rent, "it will be confusing for the respondent to

consider when to file and serve the notice of opposition" (see §16 of Paper). However, if the applicant relies on a combination of grounds for possession including non-payment of rent, then since the grounds other than non-payment of rent allow the respondent only 7 days to file and serve his notice of opposition, it appears the respondent has two options:

(a) either to file a notice of opposition dealing with all the grounds of the application including non-payment of rent within 7 days ; or

(b) to file a notice of opposition dealing with all the grounds of the application other than non-payment of rent within 7 days, and to file a notice of opposition dealing with the ground of non-payment of rent alone within 14 days.

6. We have no knowledge of the actual operational aspects of this matter. So we shall respect the views of the Judiciary in this regard. However, we believe that in reality most respondents will adopt the first option instead of the second option.

7. We can think of one distinguishing factor between the "omnibus-grounds" cases and "non-payment of rent *simpliciter*" cases. For the former, by reason of, for instance, the landlord's notice of termination or notice to quit, the respondent has already had advance notice of the landlord's intention to institute take legal proceedings to repossess the premises prior to the landlord's filing his application. Hence 7 days will be sufficient for the tenant to file his notice of opposition. For "non-payment of rent *simpliciter*" cases, however, a tenant who has failed to pay the rent usually does not have the benefit of having prior advance notice, by way of a notice of termination or a notice to quit, that his landlord intends to take legal proceedings to repossess the premises. In such scenario, the landlord's notice of application may be something out of the blue for the tenant, and may cause genuine hardship for some tenants. We worry that 7 days instead of 14 days may compromise fairness in "non-payment of rent *simpliciter*" cases.

Listing for Hearing for Possession Cases

8. The recommendations here appear to be in order.

Interlocutory Procedure for All Types of Cases

9. We regret that we cannot support the recommendation here for the following reasons:

(a) The present Rules 4(3), 4(4) and 4(5) expressly provides for certain rights and obligations for the parties in Lands Tribunal proceedings. These are important rights and obligations. For instance, Rule 4(3) obligates a party to serve the other side with the interlocutory application. It is also a right of a party to be served with the interlocutory application by the party making it. Rule 4(5) confers in essence a right on a non-party to be heard on an interlocutory application.

(b) The justification given for the proposed deletion of Rules 4(3) and 4(5) is that the High Court practice can be followed, without any express rules [in the LTR] in this matter (see §21 of Paper).

(c) However, it should be noted that whilst Rules 4(3) and 4(5) confer rights on litigants in Lands Tribunal proceedings, the provision in the LTO (section 10(1)) enabling the Lands Tribunal to follow the practice and procedure of the Court of First Instance ("CFI") is a discretionary one. In other words, the Lands Tribunal in question may or may not allow a non-party's request or application to be heard on an interlocutory application made by a party. In this sense a non-party no longer has a right to be heard on such application.

(d) In any event the categories of interlocutory applications in the CFI which may allow a non-party to be heard appears to be quite limited (in the shortness of time, we can think of judicial review proceedings and applications for discovery). Therefore, whilst Rule 4(5) of the LTR confers a general right on a non-party to be heard on an interlocutory application, enabling provisions in the CFI confer such right in limited types of proceedings or limited types of interlocutory applications only.

(e) Furthermore, whilst we are aware of the general need for rationalizing and streamlining procedural law whenever possible, at the same time we are also mindful of the need for the law including procedural law to be easily and readily understood by and accessible to the users, especially litigants

acting in person. Even if there are indeed equivalent enabling provisions in the Rules of the High Court, the fact that such provisions are not expressly mentioned in the LTR means that a non-party who wants to be heard in an interlocutory application in the Lands Tribunal has to find out from another sets of statutory instruments, namely the Rules of the High Court, that he has such a right (in fact a 'discretionary right') in the first place. The chances are that a litigant in person may not have the knowledge, in such a roundabout way, to find out his rights or, for that matter, that he has such a right in the first place.

(f) As to the proposed deletion of Rules 4(4), the justification given is that this rule could delay the disposal of interlocutory applications (by a maximum of 7 days) (see §21 of Paper). From the text of the justification, we are not too sure whether Rules 4(4) is considered to be redundant and unnecessary, or a cause for delay, or both. If it is considered to be redundant and unnecessary, we repeat what we have said hereinabove. If it is considered to be a cause for delay, then we do not understand why Rule 4(4), which applies to interlocutory applications in all types of proceedings in the Lands Tribunal, should be deleted in order to achieve "the objective of disposal of business in the Lands Tribunal expeditiously" (see §21 of Paper). The Paper does not tell us whether, and if so why, Lands Tribunal proceedings other than applications for repossession of premises require the same degree of expedition as in applications for repossession of premises.

Schedule -- Forms

10. The recommendation here appears to be in order.

III. Amendments to Primary Legislation

Jurisdiction

Types of Possession Claims

11. From the text of §27 of the Paper, we are not too sure as to whether it is recommended that the Lands Tribunal be given exclusive jurisdiction over all types of possession claims regardless of their basis. Our confusion stems from

the last sentence in §27, which states that the recommendation "will provide applicants of all types of claims with an option to have their claims dealt with in the Tribunal".

12. Further, in this regard we notice that when exercising its jurisdiction under the Landlord and Tenant (Consolidation) Ordinance, the Lands Tribunal has exclusive jurisdiction under Parts I, II, IV and V thereof. However, it does not have any common law or equitable landlord and tenant jurisdiction. This jurisdiction was shared by the District Court and the Court of First Instance (see G. N. Cruden, *Land Compensation and Valuation Law in Hong Kong*, Butterworths, 2nd ed., 1999, p.29, copy at Annex hereof). The progressive amendments to section 8 do not seem to have the effect of conferring common law or equitable landlord and tenant jurisdiction on the Lands Tribunal (*ibid.*).

13. We cannot comment further here without having the above points clarified.

Award of Damages

14. We would have thought that section 8(9), which provides that "In the exercise of its jurisdiction, the Lands Tribunal shall have the same jurisdiction to grant remedies and reliefs, equitable or legal, as the Court of First Instance.", already empowers the Lands Tribunal to award damages. If that is correct, we do not see any need for the proposed amendment here. The proposed amendment will only be needed if section 8(9) does not apply to proceedings covered by section 8(8), but we do not see any basis for that interpretation.

Practice and Procedure of the Tribunal

15. The justification given here is to afford the Lands Tribunal the flexibility to adopt suitable practice and procedure to deal with each case depending on its circumstances. It proposes that the Lands Tribunal should generally [*emphasis supplied*] have the same power and jurisdiction as that of the CFI on matters of practice and procedure. In our view, the proposal is not clear enough. For instance, is it proposed to empower the Lands Tribunal to grant injunctions as well, bearing in mind that the District Court in its civil jurisdiction does not generally have power to do so?

16. From our end we do not see any real problem in section 10. In our view, it is already flexible enough. We fail to see why section 10 as it is fails to give the desired flexibility.

17. As to the proposed deletion of section 10(1), we believe it will do more harm than good. Whilst it is desirable to have elegant and neat statutory language and elegant and neat statutory 'schemes', we think it should not be done at the expense of ease of understanding of the law and ease of access to the law by ordinary members of public and litigants in person. The proposed deletion of section 10(1) will have the effect of making a litigant in person having to find in a roundabout way his rights and obligations in the procedural law in the Lands Tribunal. In this regard, we would like to repeat our views at §9(e) hereof.

Costs

18. The recommendation here appears to be in order.

Transfer of Proceedings from the District Court to Lands Tribunal

19. The recommendation here appears to be in order.

21st April 2005
Hong Kong Bar Association

Annex

Land Compensation and Valuation Law in Hong Kong

Second Edition

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advisers whose advice has to be disclosed to the parties before the Tribunal delivers judgment. The resulting cumbersome procedural position led to this power of appointment falling into disuse. The present practice is to appoint chartered surveyors, accountants, architects, engineers and other experts, sitting on a part-time basis, also as members, under section 4(4). In 1996 the establishment of the Tribunal was increased with creation of a second position for a full-time valuer member.

These major changes created differences and brought jurisdictional problems. The Lands Tribunal, when exercising its original jurisdiction under the Lands Resumption Ordinance and other compensation ordinances, has not only exclusive but when dealing with quantum, unlimited jurisdiction. When exercising jurisdiction under the Landlord and Tenant (Consolidation) Ordinance it has exclusive jurisdiction under Parts I, II, IV and V. However, it did not have any common law or equitable landlord and tenant jurisdiction. This jurisdiction was shared by the High and District Courts. District Court proceedings were considerably restricted by the quantum limitations imposed by sections 36 and 37 of the District Court Ordinance (Cap 336).

The majority of those jurisdictional problems were resolved by progressive amendments to section 8 of the Lands Tribunal Ordinance. Section 8A also gave the Lands Tribunal power to transfer to the Court of First Instance or to the District Court, applications for which it has no jurisdiction or which it considered should, in the interests of justice, be transferred to one of those courts. A later significant jurisdictional change occurred in 1993, when Section 8(9) was amended to provide:

> In the exercise of its jurisdiction, the Tribunal shall have the same jurisdiction to grant remedies and reliefs, legal and equitable, as the High Court.

The amendment was in part prompted by the Tribunal, in 1993, being given jurisdiction under the Building Management Ordinance (Cap 344). The majority of proceedings under the Ordinance, often involving deed of mutual covenant disputes, had earlier been heard by the High Court. However, the section 8(7) amendment applied to all proceedings before the Tribunal. These High Court relief and remedies powers complement the Lands Tribunal's unlimited quantum jurisdiction, the reinforcement of its own rules by the Rules of the High Court and the Tribunal's practice to award High Court costs where compensation, rent or the value of the property exceeds District Court limitations.[41]

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41 Where an Ordinance does not clearly give the Lands Tribunal exclusive jurisdiction the question may arise whether the courts have concurrent jurisdiction. Where there is concurrent jurisdiction and an issue first comes before the courts, they have a discretion whether to exercise jurisdiction. It was common practice, at least in earlier years, for parties to compensation claims first to seek declarations in the High Court on disputed interpretations of Government lease covenants. This practice has become less frequent and the Tribunal commonly determines these issues. However,

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