

立法會
Legislative Council

Ref : CB2/BC/2/09

LC Paper No. CB(2)461/10-11
(These minutes have been seen
by the Administration)

Bills Committee on Legal Practitioners (Amendment) Bill 2010

Minutes of meeting
held on Tuesday, 5 October 2010, at 10:45 am
in Conference Room B of the Legislative Council Building

Members present : Dr Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Hon Miriam LAU Kin-ye, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Ronny TONG Ka-wah, SC
Hon Paul TSE Wai-chun

Member absent : Hon LAU Kong-wah, JP

Public Officers attending : Item I

Department of Justice

Ms Adeline WAN
Senior Assistant Solicitor General

Ms Betty CHEUNG
Senior Assistant Law Draftsman

Mr Christopher NG
Senior Government Counsel

Mr Bernard YUE
Government Counsel

Ms Karmen KWOK
Government Counsel

Clerk in attendance : Miss Mary SO
Chief Council Secretary (2) 5

Staff in attendance : Miss Winnie LO
Assistant Legal Adviser 7

Ms Maisie LAM
Senior Council Secretary (2) 6

Action

I. Meeting with the Administration
[LC Paper No. CB(2)2328/09-10(01)]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Proposed section 7AC(3) - Effects on liabilities of partners in limited liability partnership

2. Senior Assistant Solicitor General ("SASG") said that the Administration welcomed the Law Society of Hong Kong ("LS")'s proposal made in its further submission to the Bills Committee to amend the Hong Kong Solicitors' Guide to Professional Conduct ("the Conduct Guide") to make the obligations in Commentaries 1 and 2 under Principle 5.17 mandatory for solicitor firms operating as limited liability partnerships ("LLPs"). Commentaries 1 and 2 under Principle 5.17 provided that -

- "1. A client should be told the name and the status of the person responsible for the conduct of the matter on a day-to-day basis and the partner responsible for the overall supervision of the matter.
2. If the responsibility for the conduct or the overall supervision of the whole or part of a client's matter is transferred to another person in the firm the client should be informed."

3. SASG however pointed out that as the Administration only received the further submission from LS on 29 September 2010, more time was needed to obtain the implementation details from LS, such as

- (i) how, i.e. the form of notification (e.g. whether it be in writing) and when the client would be told the name and the status of the person responsible for the conduct of the matter

Action

on a day-to-day basis, and the partner responsible for the overall supervision of the matter; and

- (ii) the consequence for not complying with Commentaries 1 and 2 under Principle 5.17, whether it be by disciplinary or any other forms of sanctions, taking into account the effect on the client affected by the breach,

before deciding whether such a proposal would provide adequate protection for the consumers if the constructive knowledge provision in the proposed section 7AC(3) was removed from the Bill. SASG further said that, at present, Commentaries 1 and 2 under Principle 5.17 only required solicitor firms to keep clients informed of the name of the person conducting their cases and the partner responsible for the overall supervision of the matter, but it was not clear whether there was a requirement to have a supervising partner for all cases. Hence, SASG expressed her initial observation that if a solicitor firm only assigned, say, a clerk or a junior solicitor, to handle cases, such as the conveyance of a small property, without assigning a partner to assume overall supervision of the cases, it would not be bound by Commentaries 1 and 2 under Principle 5.17.

4. Mr Paul TSE said that the proposal put forward by LS to amend the Conduct Guide to make the obligations in Commentaries 1 and 2 under Principle 5.17 mandatory for solicitor firms operating as LLPs was sufficient to provide adequate protection for the consumers. Mr TSE further said that all solicitor firms in Hong Kong would have a partner supervising each and every case regardless of the amount involved. Mr Albert HO expressed similar views. As to consequence of failure to notify, Mr HO suggested that partners of an LLP should bear the burden of proof that they should not be held responsible for the relevant default. Mr TSE said that he could not agree that a solicitor firm should lose its status as an LLP for failing to comply with Commentaries 1 and 2 under Principle 5.17. As all solicitor firms in Hong Kong would have a partner supervising each and every case, only the partner concerned should be held liable for failing to comply with Commentaries 1 and 2 under Principle 5.17 and/or claims made against them by the clients.

5. SASG responded that the suggestion made by Mr TSE would not provide incentive for partners to notify their clients the name and the status of the person responsible for handling their cases on a day-to-day basis and the partner responsible for the overall supervision of the matter.

Action

As regards Mr HO's suggestion, it would not be fair to the innocent claimants as they would be dragged into the legal proceedings and thereby incurring costly legal fees whilst the partners sought to prove their innocence to the court that they were not responsible for the negligence. SASG further said that if the constructive knowledge provision was to be removed from the Bill, one consideration would be to spell out in the Bill that all partners in an LLP would be held liable for failing to comply with Commentaries 1 and 2 under Principle 5.17.

6. The Chairman said that actual knowledge was preferable to constructive knowledge in providing protection to consumers, as this would obviate the need for the consumers to identify the responsible partner to claim damages for negligence. The Chairman then invited discussions on two possible options for an LLP failing to give notice to clients, namely (a) losing LLP protection, or (b) imposing the burden of proof on "innocent" partners to prove their innocence. While Mr Paul TSE and Mr Albert HO expressed their preference for the later option (i.e. imposing the burden of proof on "innocent" partners to prove their innocence), SASG expressed her concern that the later option did not provide meaningful incentive for LLPs to ensure that notice would be provided. In addition, SASG indicated her preference to specify the consequence of not providing the notice in the Bill. The Chairman expressed her view that there were two levels of notices to consider. First, a general notice to all clients of a firm's LLP status. Second, an individual case notice on each individual matter handled by the LLP to its clients. On the general notice, the Chairman suggested that LS should provide mandatory professional guidelines to its members to inform clients of their LLP status, and for the Bill to specify what the consequence would be for a failure to comply with those guidelines by LS. On the individual case notice, the Chairman expressed her view that it would be best to spell out in the Bill that LLPs must comply with Commentaries 1 and 2 under Principle 5.17. However, she considered that making all partners collectively liable for negligence caused by an employee of the LLP would be disproportionate to the liabilities faced by innocent partners if the failure to notify the clients, say, the transfer of a case to another person in the firm, was made by an employee without the knowledge of his/her supervising partner.

7. SASG responded that the Administration would further discuss with LS on how best to protect innocent partners of an LLP against personal liability for the default of other members of the firm on the one hand and protecting consumer interests on the other.

Proposed section 7AI - Provisions regulating distribution of partnership property

8. SASG said that the Administration disagreed with the views of LS that the proposed section 7AI was redundant and served no useful purpose. SASG pointed out that the main purpose of the proposed section 7AI was to prevent dissipation of partnership assets by partners. The Administration also disagreed with the views of LS that solicitors were left to their own judgement in figuring out when an obligation was to be included or excluded in the computation of partnership obligation for the purpose of the proposed section 7AI as the meaning of "contingent", referred to in the proposed section 7AI(4), was not defined. In the Administration's view, "contingent" was a basic legal concept which should be clearly understood by legal practitioners. The reason for not defining contingent obligation in the Bill was that whether something constituted a contingent obligation or not depended on the particular facts of each case.

9. SASG further said that the proposed section 7AI would not prohibit partners of an LLP from distributing their partnership property in the event of an occurrence of an actual or contingent obligation as understood by LS. SASG referred members to the proposed section 7AI(1) which simply provided that, if the dual liquidity-solvency test in subsections (a) or (b) could not be met after an LLP distributed its property to a partner or an assignee, the partner or assignee would be liable to return the amount of money received by the partner or the amount necessary to discharge the partnership obligation at the time of the distribution, whichever was the lesser. SASG also pointed out that some overseas jurisdictions in fact prohibited the distribution of partnership property by partners regardless of whether an obligation was an actual or a contingent one, unlike the proposed section 7AI which allowed partners to decide whether it was appropriate to distribute its partnership property. Also, unlike the proposed section 7AI, some overseas jurisdictions required each partner to return not only the amount of partnership property received by himself at time of the distribution, but also to pay back amounts he authorised to be distributed to other partners as well.

10. At the request of Mr Paul TSE, SASG undertook to provide information setting out the relevant LLP statutes from relevant overseas jurisdictions which prohibit distribution of partnership property under

Action

similar circumstances. At the request of the Chairman, SASG also undertook to provide a paper setting out the policy intent of the proposed section 7AI as explained in the meeting and how it would apply in practice.

11. Mr Paul TSE and Mr Albert HO shared the views of LS that the term "contingent" should be defined in the Bill to address uncertainty in the application of the proposed section 7AI.

Admin

12. Assistant Legal Adviser 7 advised that the drafting of the proposed section 7AI could be further improved to make it more clear and comprehensive for LLPs to follow.

Admin

13. The Chairman urged the Administration to, first, clarify under what circumstances partners might safely distribute partnership property without fear of clawback under the proposed section 7AI and, second, to consider how best the proposed section 7AI should be drafted to reflect the policy.

14. Mr Albert HO asked whether, under the Administration's proposal, each partner of an LLP would be required to contribute up to a certain amount to the LLP. SASG said the Administration's proposal did not contain such a requirement. Mr HO urged the Administration to take note of the fact that some law firms, even big firms, were run on overdraft, and an LLP law firm might exploit the lack of a requirement for each partner to contribute up to a certain amount to the partnership by not keeping any reserve in the partnership, having regard to the fact that the claim amount would first be settled under the Professional Indemnity Scheme, then by the partnership property if the amount should exceed HK\$10 million, and lastly by the partner in default whose liability would be unlimited.

Others

15. The Chairman said that LS had previously conveyed to the Panel on Administration of Justice and Legal Services that it would conduct a publicity campaign jointly with the Consumer Council to educate the public on the business nature of LLPs and the differences with traditional partnerships. In the light of this, the Chairman requested the Administration to revert to members on what publicity documents in general LS would prepare to notify the public of the business nature of LLPs. SASG agreed.

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Action

II. Any other business

Admin 16. Members agreed to hold the next meeting on a date to be fixed after the meeting. At the request of the Chairman, the Administration agreed to provide responses in writing to the further submission from LS to the Bills Committee before the next meeting.

17. There being no other business, the meeting ended at 12:20 pm.

Council Business Division 2
Legislative Council Secretariat
3 December 2010

**Proceedings of the meeting of the
Bills Committee on Legal Practitioners (Amendment) Bill 2010
on Tuesday, 5 October 2010, at 10:45 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000134	Chairman	Opening remarks	
000135 - 003104	Chairman Admin Mr Paul TSE Mr Albert HO	<p>The Administration's preliminary responses to the further submission from the Law Society of Hong Kong ("LS") (LC Paper No. CB(2)2328/09-10(01)) concerning the proposed section 7AC(3)</p> <p>The Administration was requested to revert to the Bills Committee how the publicity campaign would be jointly conducted by LS and the Consumer Council to raise public awareness on the business nature of limited liability partnerships ("LLPs") and the differences with traditional partnerships. The Administration was also requested to revert to members on what publicity documents in general LS would prepare to notify the public of the business nature of LLPs</p>	Admin (para. 15 of minutes refers)
003105 - 012135	Chairman Mr Paul TSE Mr Albert HO Admin	<p>The Administration explained the policy intent and provided preliminary responses to the further submission from LS concerning the proposed section 7AI</p> <p>The Administration was requested to provide a paper setting out -</p> <p>(a) the relevant LLP statutes from relevant overseas jurisdictions which prohibit distribution of partnership property in similar circumstances as described in the proposed section 7AI; and</p> <p>(b) the policy intent of the proposed section 7AI and how it would apply in practice</p>	Admin (para. 10 of minutes refers)

Time marker	Speaker	Subject	Action required
012136 - 012347	Chairman Admin Mr Albert HO	The Chairman urged the Administration to first, clarify under what circumstances partners might safely distribute partnership property without fear of clawback under the proposed section 7AI and, second, to consider how best the proposed section 7AI should be drafted to reflect the policy	Admin (para. 13 of minutes refers
012348 - 012618	Chairman ALA7	ALA7's view that the proposed section 7AI could be further improved to make it more clear and comprehensive for LLPs to follow	Admin (para. 12 of minutes refers
012619 - 012850	Chairman Admin	Date of next meeting The Administration undertook to provide responses in writing to the further submission from LS before the next meeting	Admin (para. 16 of minutes refers

Council Business Division 2
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3 December 2010