

Land Titles Ordinance – Draft Amendments to Part 12

Comments of the Hong Kong Bar Association

1. The Hong Kong Bar Association refers to the letter dated 30 March 2007 from the Land Registrar, whereby the Bar was asked to comment on the proposed amendments to Part 12 of the Ordinance which deals with indemnity.

s.84(1) – limiting right of indemnity to “loss of ownership”

2. The Bar is given to understand that the decision to restrict the scope of indemnity to loss of “ownership” was based on a deliberate “policy” to limit the Government’s potential liability. However, for the reasons set out below, the Bar does not believe such a policy is consistent with principles.
3. The Bar is unable to see the rationale for drawing a distinction between loss of “ownership” and other kinds of interests especially those of encumbrances. It is difficult to see why a Government Lessee who loses his interest as a result of the successful registration of a forged transfer should be indemnified, but say, a mortgagee who loses his security because of a successful result of a forged release, should be differently treated. As a matter of principle, any limitation on the scope of indemnity should not be arbitrary, and the Bar fails to see any rational basis for the distinction sought to be introduced here.
4. Moreover, there can be no justification for denying indemnity to someone who suffers a loss as a result of relying on an entry in the Register just because his loss is not one of “ownership”. Let us consider the case of a sub-lessee who takes a lease from a person whose name appears on the Register as the Government Lessee whose registration was in fact procured pursuant to a forged assignment. If the former registered Government Lessee were to succeed in obtaining rectification against the current registered Government Lessee, a loss would be suffered by the sub-lessee whose interest would cease to exist upon the rectification. In such a case, the sub-lessee would have taken his sub-lease by relying upon the entry in the Register which shows his landlord to be the Government Lessee at the date of the grant of his sub-lease, and his loss arising from the subsequent rectification against his landlord is precisely the sort of loss which ought to be compensated. There is no reason why he should be excluded from entitlement to indemnity simply because as a sub-lessee of a Government Lessee, his loss cannot be described as a loss of “ownership”.

s.84(4) (c) - no indemnity for fraud, etc... which occurred before date of first registration

5. This provision would appear to suggest that whereas a Government Lessee who loses his interest as a result of the successful registration of a forged transfer which purports to transfer the land *directly* to the first registered owner would be indemnified, one who loses his interest as a result of the successful registration of an instrument executed by a someone whose title was based on a forged instrument (e.g. in a confirmor sale involving 2 separate instruments where the transfer from the vendor was forged but the transfer executed by the confirmor was genuine) would not be protected. Again this seems arbitrary and difficult to justify.

s. 85 – limiting the amount of indemnity

6. If the amount of indemnity is now to be calculated by reference to the value of the interest at the date when the interest was lost as a result of the wrongful registration, then there should be provision for payment of interest before the date of the award and reasonable fees for preparing the claim in line with similar provisions in the Lands Resumption Ordinance.