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## SUBMISSIONS ON LAND REGISTRATION (AMENDMENT) BILL 2000

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### **(1) Introduction**

- 1.1 The Law Society was requested to comment on the above Bill. As a result, the Law Society sent 2 representatives Mr. Henry Yip and Mr. Terry Yeung to make oral submissions to the Bills Committee on 28<sup>th</sup> March 2001.
- 1.2 During the meeting of the Bills Committee on 28<sup>th</sup> March 2001, several Committee Members considered it conducive if the Law Society's oral submissions, which were found to be quite substantive and manifold, could be reduced into writing.
- 1.3 The Property Committee of the Law Society is grateful for the time and indulgence afforded by the Bills Committee and would like to submit its comments for and on behalf of the Law Society hereinbelow.

### **(2) Copy "stopped deeds"**

- 2.1 The Committee is strongly of the view that the Land Registry ought to be under a statutory duty to make a copy of each and every document which is withheld from registration so that the public may be able to gain access to it. But the Land Registry considers that stopped deeds are not public documents as registration formalities have not been completed. On the other hand, under the Land Registration Ordinance, the priority of a document registered within time is determined according to its date rather than the date of registration. According to the current Land Registry practice, not even the Land Registry would keep copies of stopped deeds. Hence, the public is denied access to their contents. The current practice thus leaves open a loophole for a holding document to be lodged for registration and priority gained by reference to its date even though its contents may be changed extensively at a much later time. Moreover, the current practice of the Land Registry in withholding the contents of a document from public search and that of allowing the title of the document to have a place in the register are not consistent with each other. To be consistent, the title and description of the document should also be withheld from the register, otherwise the document should be made available for inspection.
- 2.2 The Committee is of the view that the Land Registration Ordinance is silent on when a document is converted into a public document. On the contrary, the purpose of the Land Registration Ordinance, as appearing on the front page of the Ordinance, is more telling. Page 1 of the Ordinance states as follows :-

To provide for the registration of deeds, conveyances, judgments and other

instruments affecting real or immovable property, the keeping of Land Registry records, and for other matters relating to land registration.

There is no justification, therefore, for the Land Registry not to keep “records” of the stopped deeds and to make available the same to the public.

- 2.3 In any event, Principle 3 of Schedule 1 to the Personal Data (Privacy) Ordinance does exonerate the Land Registry from any liability for disclosure. The reason being that the main purpose for submitting a document containing data for land registration is to make known to the public through the Land Registry the contents of the document. It is therefore recommended that if the Land Registry really considers itself not having the statutory power to make copies of the stopped deeds, legislative amendments can resolve the problem.
- 2.4 The Land Registry’s refusal and/or inability to supply owners of affected properties of a stopped deed also accounts for the huge number of “deeds pending registration”. Under the Land Registration Ordinance, the Court has the power to vacate the registration of a document. But it would appear that before the registration process is completed, the Court does not have any power to intervene. And even if it does, it would have an impossible task without access to contents of the document. Legislative measure to provide making copies of the stopped deeds is thus a corollary to the proposed Regulations 15 and 15A of the Land Registration Regulations. The proposed Regulation 15(6)(a) empowers the Land Registrar to remove as entry from the Land Registry’s record where an instrument is withheld from registration for 6 months. But before exercising such power, the Land Registry must give the person who delivered the stopped instrument and “any other person who may be affected by the exercise of that power” an opportunity to make written submissions. The Committee is of the view that the underlined phrase must include the owner of the affected property because he/she has vested interest to know what is going on with his/her property.
- 2.5 In its letter dated 30<sup>th</sup> August 2000 to the Land Registry the Law Society gave an example of a Lis pendens wrongly registered against a property not subject to the litigation. Such mistake was not discovered by the Land Registry and the document was registered at the Land Registry. As a result, the aggrieved owner managed to obtain a copy of the document for the purpose of instituting proceedings to vacate such wrongly registered document. However, had the Land Registry discovered the mistake the document would have become a “stopped deed” and the aggrieved owner would have had no means of obtaining a copy of the document; still less to institute legal proceedings against the culprit whose identity could only be available from the document!
- 2.6 The Committee therefore recommends that the Land Registry must be given express power to make copy of each and every document being withheld from registration and to make available such document for inspection before completion of registration.

**(3) Certified copy Instruments**

- 3.1 The Committee observes that in the “B” List enclosed with a Letter dated 28<sup>th</sup> March 2001 from the Land Registry namely, the List agreed between the Law Society and R.G. in 1991 there are “Others instruments” which, if certified by a solicitor, are acceptable for registration. This category of instruments, however does not find its way into the “A” List, namely, the Proposed List for Inclusion in Subsidiary Legislation.
- 3.2 The Land Registry proposes to issue a Land Registry Circular Memorandum to deal with the “Other Instruments” category. If the past is any guide, the Committee believes that the Land Registry should not be given a discretion to decide whether an instrument, duly certified by a solicitor, is registrable.
- 3.3 At present, the Committee from time to time receives complaints over the Land Registry’s refusal to re-register documents with amendments/rectification. Although there have been several Land Registry Circular Memoranda issued by the Land Registry to cover re-registration of amended documents, members of the Law Society and the Land Registry have different opinion over their interpretation.
- 3.4 Where a solicitor acting for a vendor issues a notice of rescission of an Agreement for Sale and Purchase, the original will be delivered to the recipient (the Purchaser). If the registrability of a certified copy of such document is disputed by the Land Registry and meanwhile withheld pending registration, such vendor will find it hard to resell his/her property.
- 3.5 The Committee therefore recommends that the “Other Instruments” appearing in the “B” List should be included in the “A” List.

**(4) Removal of stopped deeds**

- 4.1 The Committee welcomes the Land Registry’s proposal to reduce the 1 year period to 6 months. However there are certain areas the Committee would still like to comment.
- 4.2 Persons affected (Regulation 15(7)(a))
- 4.2.1 The Committee considers that an owner and the mortgagee as well as all persons having an interest in the affected property should be furnished a notice so as to make submission (if necessary).
- 4.2.2 Paragraph 7(a) should therefore be amended by adding immediately before the words “and any other person” in line 1 the words "all persons having an interest in the land and premises affected by the instrument".

#### 4.3 Application to Court (Regulation 15A(1) and 15A(6))

- 4.3.1 The word “Court” is defined in paragraph (6) in such a manner as limiting to (a) District Court and (b) the Court of First Instance. The Committee is uncertain whether this definition is intentional in the sense that an applicant should not be given the right to appeal against a decision of the District Court or the Court of First Instance. If that is the case, the Bill must contain clear provisions in order to exclude the jurisdiction of the Court of Appeal and/or Court of Final Appeal over appeal against a decision of the “Court” under Regulation 15A(6).
- 4.3.2 If the Legislative intent is not to limit such right of appeal, the Committee proposes that the word “Court” should not be defined. Otherwise, an order made by the Court of Appeal or the Court of Final Appeal cannot be treated as an order under Regulation 15A(3).
- 4.3.3 Indeed the word “Court” appears in Sections 19 and 20 of the Land Registration Ordinance, without a definition being attached it. Even if a definition of the word “Court” is desired, the Committee proposes that the definition in Order 1, Rule 4 of the Rules of the High Court ought to be adopted for the sake of consistency.

#### 4.4 Priority of documents (Regulation 15A(5))

- 4.4.1 Under Section 3(2) of the Conveyancing and Property Ordinance, Cap.219, in relation to “part performance”, it deals with “contracts” and “other dispositions” separately and under Section 2(1) of the same Ordinance “any contract for the sale or other disposition” is used. The Committee therefore proposes that, for the purpose of clarification, the words “or any contract therefor” be inserted immediately after the word “disposition” in paragraph (5).
- 4.4.2 Paragraph 5(a) uses the phrase “made in good faith and for valuable consideration”. Without clarification, the words “in good faith” may refer to either the person who makes the disposition or the person in whose favour the disposition is made. The Committee is of the view that, “good faith” must only be descriptive of a “bona fide purchaser or mortgagee” (see Section 3(2) of the Land Registration Ordinance) rather than the person who makes such disposition. In the premises, the Committee proposes that paragraph 5(a) be amended by deleting the existing paragraph 5(a) and substituting therefor :-

- (a) “made in favour of a bona fide purchaser or mortgagee and for valuable consideration; and”

#### **(5) Summary**

- 5.1 For ease of reference, the Committee hereby summarises its recommendations as follows :-
- (1) Copy “Stopped Deeds”

the Land Registry ought to be given express power to make copy of each and every document being withheld from registration and to make available such document for public inspection [see 2.6].

(2) “Other Instruments”

the “Other Instruments” appearing in the “B” List should be included in the A List namely, the Proposed List for inclusion in subsidiary legislation [see 3.5].

(3) Removal of stopped deeds

- (a) Regulation 15(7)(a) be amended by adding immediately before the words “and any other person” in line 1 “all persons having an interest in the land and premises affect by the instrument” [see 4.2.2].
- (b) the word “Court” appearing in Regulation 15A(1) and 15A(6) should not be defined [see 4.3.2] or if a definition of the word “Court” is desired, the definition adopted in Order 1, Rule 4 of the Rules of the High Court is preferred [see 4.3.3].
- (c) the words “or any contract therefor” be inserted immediately after the word “disposition” in Regulation 15A(5) [see 4.4.1].
- (d) substituting the phrase “made in favour of a bona fide purchaser or mortgagee and for valuable consideration”; for the existing draft Regulation 15A(5)(a) [see 4.4.3].

The Law Society’s Property Committee  
12th April 2001