

立法會

Legislative Council

LC Paper No. LS 22/02-03

Paper for the LegCo Panel on Planning, Lands and Works

Removal of Stopped Deeds Proposed amendments to the Land Registration Regulations

At the Panel meeting on 8 November 2002, Members noted the different opinions of the Bar Association and the Department of Justice as to whether amendments could be made to the Land Registration Regulations (Cap. 128 sub. leg.)("the Regulations") for the removal of stopped deeds in manner as proposed. Members requested the Administration to provide its correspondence with the Bar Association and the Law Society and sought the views of the Legal Service Division.

Our Views

2. The crux of the question is whether the Legislative Council has delegated the power to the Land Registrar to make such regulations. Any provision in a piece of delegated legislation would be ultra vires if it goes outside the powers conferred expressly or by implication by the principal ordinance. The general principle is that the intention of the legislature, as reflected in the principal ordinance, would be the prime guide for determining the scope of delegation.

3. We have considered the correspondence supplied by the Administration (circulated to Members under LC Paper No. CB(1) 285/02-03) and reviewed sections 3 and 28 of the Land Registration Ordinance (Cap. 128) ("the Ordinance") (see **Annex**). Subject to further views that may be presented, we would advise Members that :

- (a) removing instruments withheld from registration is part of the manner in which registration of instruments in the Land Registry is carried out or otherwise and would fall within the scope of section 28(1)(a) of the Ordinance;
- (b) providing the decision of the Land Registrar to be reviewed by the court may be considered reasonably incidental to the removal of instruments withheld from registration and may possibly fall within the scope of section 28(1)(a) of the Ordinance as part of the procedure in the registration of instruments; and

- (c) providing for the priority of the instruments if a decision of removal is subsequently overturned by the court does not seem to come within any of the matters listed in section 28(1) of the Ordinance nor is it reasonably incidental to any of those matters.

Comments on the Administration's views

4. Section 28(1) of the Ordinance sets out a list of matters for which the Land Registrar is empowered to make regulations. None of those matters expressly provide for **the court to review** a decision of the Land Registrar.

5. It is proposed under the Amendment Regulation that the Land Registrar may only remove the particulars of the stopped deeds from the register on or after the expiration of the period of 60 days during which the party aggrieved by his decision may have the decision reviewed by the court. The Administration has previously explained to the Bills Committee that the proposed application to the court for review of the Land Registrar's decision is similar to a judicial review of an administrative decision. In light of the nature of review, we consider it reasonably incidental to the power of removal of deeds withheld from registration and may be regarded as part of the manner in which registration of instruments is effected under section 28(1)(a) of the Ordinance.

6. None of the matters set out in section 28(1) of the Ordinance relate to the **priority of instruments**. Nor has the Administration specified which provision in section 28(1) empowers the making of regulations in respect of priority of instruments. Instead, the Administration has put forward two arguments, i.e. the interpretation of section 3(1) of the Ordinance and the wording of the proposed Regulation 15A(6) and (8) being contingent on the wording of the other provisions.

7. There is no contrary intention appearing either from the Interpretation and General Clauses Ordinance (Cap. 1) or from the context of the Ordinance disapplying the interpretation of the term "ordinance" in Cap. 1. The phrase "subject to this Ordinance" in section 3(1) of the Ordinance may be an evidence of intent to support the argument that priority issues may be determined by the Regulations. Section 3(1) is however clear in specifying that the only way priority of instruments may be affected by way of regulations made under the Ordinance is the determination of dates of registration under section 28(1)(b) of the Ordinance.

8. The proposed Regulation 15A(6) and (9) provides for different priority of instruments in the event of a decision of removal of the entry of the stopped deed is subsequently overturned by the court. As such proposal relates to priority rather than dates of registration, we believe that it would be ultra vires.

9. The second argument of the Administration that the wording of Regulation 15A(6) and (9) being contingent on the wording of the other provision is technical in nature and could be overcome by drafting.

Comments on the Bar Association's views

10. The Bar believes that as a matter of principle, provisions affecting substantive property rights as opposed to merely procedural matters ought not to be included in subsidiary legislation. This is a matter of policy rather than a legal principle. The rationale for the policy is that priority, being an important issue, needs certainty at law. It is unlikely a matter for delegated legislation which may take effect upon gazettal. If the Administration proposes any amendment to the Regulations in the future and such amendment comes into operation on the day it is gazetted, further amendment by the Legislative Council may cause more problems.

The Law Society's views

11. Although the Law Society has confirmed its support for the Administration's proposal, it is not apparent from the correspondence that the Law Society has considered or commented this issue.

Conclusion

12. It seems that the power of the Land Registrar to make regulations for the removal of stopped deeds and for review of decision of the Land Registrar by the court is provided in section 28(1)(a) of the Ordinance. However, we have reservations that there is any express or implied power for the Land Registrar to make regulations providing for priority of instruments in the manner as proposed. If the proposal on priority is being consequential upon the determination of dates of registration, then it would be within the scope of section 28(1) and consistent with section 3(1) of the Ordinance.

Encl

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27 November 2002

2A. 浮動押記

(1) 達成浮動押記的文件，不論其是否特別指明任何被押記的土地，就第 2 條而言，均並非為會影響在香港的任何一幅地、物業單位或處所的契據、轉易契或其他書面形式的文書。(由 1992 年第 56 號第 4 條修訂)

(2) 達成在 1984 年 11 月 1 日當日或之前或之後設定的浮動押記的文件，於該押記在 1984 年 11 月 1 日之後具體化(由承押記人簽署或代其簽署的證明書證明)時——(由 1988 年第 31 號第 31 條修訂)

(a) 對擬受影響的土地，即變成一項固定押記；及

(b) 就第 2 條而言，是一份會影響在香港的任何一幅地、物業單位或處所的契據、轉易契或其他書面形式的文書。

(3) 為施行第 5 條，簽立第 (2) 款所述的押記的時間，即為簽署該款所述的證明書的時間。

(由 1984 年第 62 號第 57 條增補)

**3. 已註冊的文書的優先次序；
不註冊的後果**

(1) 除本條例另有規定外，所有作出、簽立或取得並依據本條例註冊的契據、轉易契及其他書面形式的文書和判決，須按照其各自註冊日期的先後而訂出彼此之間的優先次序，而該等註冊日期須按照根據本條例訂立的規例斷定。(由 1911 年第 50 號附表修訂；由 1978 年第 34 號第 2 條修訂；由 1980 年第 56 號第 4 條修訂)

(2) 凡上述的所有契據、轉易契及其他書面形式的文書和判決沒有作出註冊，對於就同一幅地、物業單位或處所付出有價值價的任何其後真誠買方或承按人，在所有用意和目的上均絕對無效；

但本款所載的任何規定，並不引伸而適用於任何租期不超過 3 年且繳付全額租金的真正租契。(由 1911 年第 50 號附表修訂)

(由 1992 年第 56 號第 15 條修訂)

4. 未註冊文書的通知不影響已註冊的文書

關於任何較先的未註冊契據、轉易契或其他書面形式的文書或判決的任何通知，不論其為實際或推定的通知，均不影響已妥為註冊的任何上述該等文書的優先次序。

(由 1911 年第 50 號附表修訂；由 1992 年第 56 號第 15 條修訂)

2A. Floating charge

(1) A document effecting a floating charge, whether or not it specifically identifies any land charged, is not, for the purposes of section 2, a deed, conveyance or other instrument in writing by which any parcel of ground, tenement or premises in Hong Kong may be affected. (Amended 56 of 1992 s. 4)

(2) A document effecting a floating charge created before, on or after 1 November 1984— (Amended 31 of 1988 s. 31)

(a) becomes a fixed charge on the land intended to be affected; and

(b) for the purposes of section 2, is a deed, conveyance or other instrument in writing by which any parcel of ground, tenement or premises in Hong Kong may be affected,

upon crystallization of that charge after 1 November 1984 as evidenced by a certificate signed by or on behalf of the chargee.

(3) For the purposes of section 5, the time of execution of a charge mentioned in subsection (2) is the time of signature of the certificate mentioned in that subsection.

(Added 62 of 1984 s. 57)

**3. Priority of registered instruments;
effect of non-registration**

(1) Subject to this Ordinance, all such deeds, conveyances, and other instruments in writing, and judgments, made, executed, or obtained, and registered in pursuance hereof, shall have priority one over the other according to the priority of their respective dates of registration, which dates shall be determined in accordance with regulations made under this Ordinance. (Amended 50 of 1911 Schedule; 34 of 1978 s. 2; 56 of 1980 s. 4)

(2) All such deeds, conveyances, and other instruments in writing, and judgments, as last aforesaid, which are not registered shall, as against any subsequent bona fide purchaser or mortgagee for valuable consideration of the same parcels of ground, tenements, or premises, be absolutely null and void to all intents and purposes:

Provided that nothing herein contained shall extend to bona fide leases at rack rent for any term not exceeding 3 years. (Amended 50 of 1911 Schedule) (Amended 56 of 1992 s. 15)

**4. Notice of unregistered instrument not
to affect registered instrument**

No notice whatsoever, either actual or constructive, of any prior unregistered deed, conveyance, or other instrument in writing, or judgment, shall affect the priority of any such instrument as aforesaid as is duly registered.

(Amended 50 of 1911 Schedule; 56 of 1992 s. 15)

- (b) 如看來是一份載有證明書的副本、印本或摘錄，且該證明書具備土地註冊處處長或土地註冊處處長為此而授權的人的簽名或印刷簽名，核證該文件乃是一份真實副本、印本或摘錄者，（由 1995 年第 104 號第 5 條代替）

則在不抵觸《印花稅條例》(第 117 章) 下，須於刑事或民事法律程序中在法庭席前出示時，無須再作證明即可接納為證據，而直至相反證明成立，法庭須推定——

- (A) 該文件的簽名或印刷簽名及核證，是由土地註冊處處長或其為此而授權的人作出的；及。（由 1995 年第 104 號第 5 條修訂）

- (B) 該文件是一份真實及正確的副本、印本或摘錄。

(2) 如任何證據除根據本條條文外會是可接納的，則本條並不損害該證據的可接納性。

（由 1980 年第 56 號第 9 條增補。由 1993 年第 8 號第 2 及 3 條修訂）

27. 費用

(1) 行政長官會同行政會議可藉規例訂明土地註冊處收取的費用。（由 1948 年第 20 號第 4 條修訂；由 1950 年第 9 號附表修訂；由 1950 年第 37 號附表修訂；由 1999 年第 61 號第 3 條修訂）

(2) 除第 (3) 款另有規定外，真正代價必須在土地註冊處註冊的所有文件上註明。（由 1931 年第 28 號第 2 條代替）

(3) 凡擬於土地註冊處註冊的任何契據、轉讓契、按揭契或其他文書沒有述明代價金的款額或價值，或凡沒有代價金或只有象徵式的代價金根據該等契據、轉讓契、按揭契或文書而轉移，則與該契據、轉讓契、按揭契或其他文書有關的財產的價值，須由土地註冊處處長釐定，而且須按照該價值繳付費用，猶如所釐定的價值就是代價金的款額或價值一樣。（由 1931 年第 28 號第 2 條代替。由 1948 年第 20 號第 4 條修訂；由 1992 年第 56 號第 12 條修訂）

（由 1993 年第 8 號第 2 及 3 條修訂）

28. 規例

(1) 土地註冊處處長可就下述全部或任何事項訂立規例——（由 1992 年第 56 號第 13 條修訂）

- (a) 將註冊摘要、契據、轉易契及其他書面形式的文書和判決及其他文件在土地註冊處內達成記入和註冊的方式，以及將任何註冊摘要、契據、轉易契或其他書面形式的文書或判決或其他文件的註冊撤回；（由 1992 年第 56 號第 15 條修訂）

- (b) bearing a certificate, with the signature or the printed signature of the Land Registrar, or of any person authorized by him in that behalf, certifying that the document is a true copy, print or extract, (Replaced 104 of 1995 s. 5)

shall, subject to the Stamp Duty Ordinance (Cap. 117), be admissible in evidence in criminal or civil proceedings before any court on its production without further proof and, until the contrary is proved, the court shall presume that—

- (A) the signature or the printed signature and certification to the document is that of the Land Registrar or a person authorized by him in that behalf; and (Amended 104 of 1995 s. 5)

- (B) the document is a true and correct copy, print or extract.

(2) Nothing in this section shall prejudice the admissibility of any evidence which would be admissible apart from the provisions of this section.

(Added 56 of 1980 s. 9. Amended 8 of 1993 ss. 2 & 3)

27. Fees

(1) The Chief Executive in Council may by regulation prescribe the fees to be taken in the Land Registry. (Amended 20 of 1948 s. 4; 9 of 1950 Schedule; 37 of 1950 Schedule; 61 of 1999 s. 3)

(2) Subject to the provisions of subsection (3), the true consideration shall be stated in all documents registered in the Land Registry. (Replaced 28 of 1931 s. 2)

(3) Where the amount or value of the consideration money is not stated in any deed, assignment, mortgage or other instrument proposed to be registered in the Land Registry, or where no consideration money or merely nominal consideration money passes thereunder, the value of the property, to which such deed, assignment, mortgage or other instrument relates, shall be determined by the Land Registrar and the like fees shall be paid as if the value so determined were the amount or value of the consideration money. (Replaced 28 of 1931 s. 2. Amended 20 of 1948 s. 4; 56 of 1992 s. 12)

(Amended 8 of 1993 ss. 2 & 3)

28. Regulations

(1) The Land Registrar may make regulations for all or any of the following matters— (Amended 56 of 1992 s. 13)

- (a) the manner in which entry and registration of memorials, deeds, conveyances, and other instruments in writing, and judgments, and other documents in the Land Registry shall be effected, and the withdrawal of any memorial, deed, conveyance, or other instrument in writing, or judgment, or other document from registration; (Amended 56 of 1992 s. 15)

- (b) 決定已註冊的文書的註冊日期和有關的證明；
 - (c) 為註冊的目的而須提交的詳情及文件；
 - (d) 記錄註冊摘要、契據、轉易契及其他書面形式的文書和判決及其他文件的方法及形式，以及保存該等註冊摘要、契據、轉易契、書面形式的文書、判決及文件的方式；（由 1992 年第 56 號第 15 條修訂）
 - (e) 任何註冊摘要或其他文件的更正及修訂；
 - (f) 土地註冊處索引、登記冊及其他紀錄的備存；
 - (g) 使用微縮軟片、影像處理或任何其他材料或方法，以記錄註冊摘要、契據、轉易契及其他書面形式的文書和判決及其他文件（包括土地註冊處紀錄）；（由 1992 年第 56 號第 15 條修訂；由 1995 年第 104 號第 6 條修訂）
 - (ga) 使用影像處理方法以記錄微縮軟片紀錄；（由 1995 年第 104 號第 6 條增補）
 - (h) 將記錄在微縮軟片或其他材料的註冊摘要及其他文件，或將藉影像處理方法記錄的註冊摘要及其他文件，包括土地註冊處紀錄，予以毀滅或處理；（由 1995 年第 104 號第 6 條修訂）
 - (i) 訂定土地註冊處或其任何部分開放予公眾的時間，並賦權土地註冊處長更改該等時間；
 - (j) 對進入土地註冊處或其任何部分和公眾人士使用其內的任何設備、設施或材料，作出規管；
 - (k) 規管土地註冊處內的人的行為；
 - (l) 賦權拒絕任何人進入土地註冊處，以及賦權將任何人移離土地註冊處；
 - (m) 訂明根據本條例須予訂明或准予訂明的任何事情。
- (2) 根據本條訂立的規例，可規定違反任何該等規例的任何指明條文，即屬犯罪，並可為此而訂定不超過 \$10,000 罰款及監禁 2 年的罰則。
（由 1980 年第 56 號第 10 條增補。由 1993 年第 8 號第 2 及 3 條修訂）

- (b) determining the date of registration of registered instruments and the proof thereof;
- (c) particulars and documents to be furnished for the purposes of registration;
- (d) the method by which and the form in which memorials, deeds, conveyances, and other instruments in writing, and judgments, and other documents are to be recorded and the manner in which they are to be maintained; (*Amended 56 of 1992 s. 15*)
- (e) the correction and amendment of any memorial or other document;
- (f) the keeping of indexes, registers and other records of the Land Registry;
- (g) the use of microfilm, imaging or any other material or method for the recording of memorials, deeds, conveyances, and other instruments in writing, and judgments, and other documents, including records of the Land Registry; (*Amended 56 of 1992 s. 15; 104 of 1995 s. 6*)
- (ga) the use of the imaging method for the recording of microfilm records; (*Added 104 of 1995 s. 6*)
- (h) the destruction or disposal of memorials and other documents, including records of the Land Registry, recorded on microfilm or on other material or by the imaging method; (*Amended 104 of 1995 s. 6*)
- (i) fixing the hours during which the Land Registry or any part thereof shall be open to the public and empowering the Land Registrar to vary such hours;
- (j) regulating admission to the Land Registry or any part thereof and the use of any equipment, facilities or material therein by members of the public;
- (k) regulating the conduct of persons in the Land Registry;
- (l) enabling any person to be refused entry to the Land Registry and the removal from the Land Registry of any person;
- (m) prescribing anything that is required or permitted to be prescribed under this Ordinance.

(2) Regulations made under this section may provide that a contravention of any specified provision of any such regulation shall be an offence and may provide penalties therefor not exceeding a fine of \$10,000 and imprisonment for 2 years.

(*Added 56 of 1980 s. 10. Amended 8 of 1993 ss. 2 & 3*)