

**For discussion
on 7 October 2009**

**LEGISLATIVE COUNCIL
PANEL ON DEVELOPMENT AND
PANEL ON ADMINISTRATION OF JUSTICE AND LEGAL SERVICES

JOINT SUBCOMMITTEE ON
AMENDMENTS TO LAND TITLES ORDINANCE**

**Implied Covenants under Section 35 of
Conveyancing and Property Ordinance**

PURPOSE

This paper examines whether the covenants implied under section 35 of the Conveyancing and Property Ordinance (Cap. 219) (CPO) shall take effect upon registration under the Land Titles Ordinance (Cap. 585) (LTO).

BACKGROUND

2. During the committee stage discussion of the then Land Titles Bill, the Assistant Legal Adviser (ALA) of the Legislative Council took the view that covenants implied under section 35 of the CPO should take effect upon registration and not when the relevant transfer or charge instrument is signed. The Administration agreed to consider the ALA's view.

IMPLIED COVENANTS UNDER CPO

3. Section 35 of the CPO is a statutory device enabling the covenants set out in the First Schedule to the CPO to be implied if the transaction falls within a case listed in paragraphs (a), (b), (c), (d) or (e) of subsection (1) of that section, unless varied, excluded or extended.

4. In the case of an assignment of the whole of the interest in land held under a Government lease, covenants concerning the payment of Government rent, and the performance and observance of the conditions in the Government lease and the deed of mutual covenant (if any) set out in Part I of the First Schedule to the CPO are implied by virtue of section 35(1)(a). In the case of

other assignments, the covenants set out in Parts II, III and IV of the First Schedule to the CPO are implied by section 35(1)(b), (c) and (d) if the appropriate capacity of the assignor is stated in the assignment. For legal charge, the covenants set out in Part V of the First Schedule to the CPO are implied by section 35(1)(e) where the person is expressed to charge as beneficial owner.

5. Section 35(2) of the CPO stipulates that all the covenants implied under section 35(1) of the CPO may be excluded, varied or extended by the parties in the assignment or legal charge.

6. Under the existing conveyancing practice, title passes upon execution of the instrument of assignment. Consequently, the covenants implied by section 35 of the CPO take effect as when the relevant assignment or legal charge is executed.

SECTION 45 OF LTO

7. Section 45(1) of the LTO provides that the LTO shall not prejudice the operation of section 35 of the CPO, and no reference to an implied covenant shall be entered in the Title Register. Where there are exclusions, variations or extensions of these covenants, sections 45(2) and (3) of the LTO provide that express reference shall be made thereto in the instrument of transfer or charge, and the registration of the transfer or charge shall effect the registration of the covenant as varied or extended.

REVIEW OUTCOME

8. We have reviewed the issue regarding when the covenants implied under section 35 of the CPO should take effect. We initially considered that, as a transfer would take effect upon registration, it would only be upon registration when title would be vested and the covenants implied by virtue of section 35 of the CPO would take effect. We thus proposed that the covenants implied under section 35 should take effect upon the date of registration of the relevant transfer (which date was at the time proposed to be the date of physical registration). This proposal was discussed in the LTO Review Committee of which the Law Society of Hong Kong (Law Society) was a member. The Law Society disagreed and suggested that the implied covenants should take effect on the date of the instrument because a purchaser might need the benefit of the covenants immediately. The Society was of the view that as the purchaser had contracted to receive the covenants on completion, the covenants should take effect immediately and should not be deferred.

9. On a separate review of the date of registration, we proposed that, under the LTO, the date of registration shall be the date of lodging of an application for registration instead of the date of physical registration, so that there would be no ownership vacuum in between. The effect of this proposal on section 35 of the CPO is that, as with the transfer, the covenants implied under section 35 of the CPO would take effect on the date of lodging of the application with the Land Registry.

10. Although our proposal on the date of registration would have the impact of bringing forward the date upon which the covenants implied under section 35 of the CPO would take effect, there will remain a time gap between the date of execution of the relevant instrument and the date upon which the covenants take effect, during which the covenants would be inoperative. Therefore, a purchaser having completed the purchase and paid over the purchase money to the vendor would not be able to enforce the implied covenants until after the instrument providing for the transfer has been lodged for registration. Similarly, a chargee having advanced the loan to the borrower would not be able to enforce the covenants implied in a charge against the chargor to protect his security until after the instrument providing for the charge is lodged for registration. The time from which the purchaser (or chargee) could take enforcement action against the vendor (or borrower) would therefore be delayed.

11. The covenants implied under section 35 of the CPO provide protection to the covenantee concerned. If the implied covenants cannot be enforced immediately on the date of the instrument but only upon the successful registration of the instrument, the benefit of the implied covenants will be severely undermined.

12. Upon further review, we recommend that, to avoid the unnecessary delay caused by the time gap between the date of execution and the date of lodging of the instrument for registration, the covenants implied under section 35 of the CPO, including any exclusion, variation or extension thereof, should take effect on the date of the instrument but not on the date when the application for registration is lodged with the Land Registry. This proposed approach will improve the safety of transactions. In handing over the purchase money on completion, a purchaser can be assured that the vendor's covenants for title are immediately enforceable on the date of the instrument providing for the transfer. A chargee who has provided the borrower with credit facilities can also take action against the borrower in matters of title immediately on the date of the instrument providing for the charge.

PROPOSED AMENDMENTS

13. We propose to add provisions in section 45 of the LTO to expressly provide that the covenants implied under section 35 of the CPO, including any exclusion, variation or extension thereof, shall take effect on the date of the instrument. We also propose that section 45(1)(b) of the LTO be expanded so that no reference to the implied covenants, as well as any exclusion, variation or extension thereof, shall be recorded in the Titles Register. Consequently, the requirement for express reference to the excluded, varied or extended covenant in the instrument of transfer or charge in section 45(2) and the provision for registration of the varied or extended covenant in section 45(3) of the LTO are no longer necessary and will be deleted.

**Development Bureau
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