

**For discussion
on 29 April 2010**

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

**JOINT SUBCOMMITTEE ON
AMENDMENTS TO LAND TITLES ORDINANCE**

Amendments to Land Titles Ordinance

Purpose

This paper reports progress on various issues relating to the preparation of the amendments to the Land Titles Ordinance (Cap. 585) (LTO).

Background

2. When the LTO was enacted in July 2004, the Administration undertook to conduct a comprehensive review of the Ordinance before commencement. The post-enactment review of the LTO indicates that substantive amendments have to be made to the LTO before it can be commenced. A detailed report on the post-enactment review was made to the Joint Subcommittee in March 2009 (LC Paper No. CB(1)1028/08-09(01)). Key issues pertaining to the amendments to the LTO was considered at the subsequent meetings of the Joint Subcommittee. In this paper, we set out the latest position in respect of the following issues –

- (a) proposed Land Registrar's Caution Against Conversion (LRCAC) mechanism;
- (b) financial measures to cope with liabilities arising from the automatic conversion mechanism under the LTO and to back up the Land Registry Trading Fund (LRTF);
- (c) the mandatory rectification rule;
- (d) determination of land boundaries;

- (e) relationship between the LTO and other Ordinances; and
- (f) registration of managers of t'sos and t'ongs.

Proposed LRCAC Mechanism

3. As reported to the Joint Subcommittee in June 2009 (LC paper CB(1)1870/08-09(01)), there was strong public support for retaining the automatic conversion mechanism under the enacted LTO. To deal with known cases of indeterminate ownership, the Administration proposes to empower the Land Registrar (Registrar) to withhold certain land registered under the Land Registration Ordinance (Cap. 128) (LRO) from conversion to registered land under the LTO, by registering an LRCAC against the concerned properties. Consequential amendments will be made to the LRO for the purpose. When the proposal was considered by the Joint Subcommittee at its meeting on 7 December 2009 (LC Paper CB(1)538/09-10(02)), Members considered that the Administration should make the best efforts to resolve the problem of indeterminate ownership. Where possible, consideration should be given to bringing the cases to the Court to settle any title problems before the day of automatic conversion of LRO land to registered land (Conversion Day). The Joint Subcommittee also requested the Administration to –

- (a) provide further details on the measures to deal with known cases of indeterminate ownership within the 12-year incubation period before the Conversion Day;
- (b) clarify the situations under which an LRCAC would be invoked; and
- (c) consider whether a mechanism should be put in place to review the Registrar's decision of registering an LRCAC or refusing to remove an LRCAC.

Measures to deal with problematic cases before invoking LRCAC

4. We have given consideration to Members' suggestion of empowering the Registrar to initiate action to bring parties involved in a problematic case to the Court to resolve the ownership problem before assessing the need to register any LRCAC. In this regard, we note that under the existing deeds registration system of the LRO, the question of property title has always been an issue to be dealt with among the concerned parties themselves, with support from lawyers. It is possible that the buyer may proceed with a transaction for commercial reasons notwithstanding knowledge of possible title defects. Given that the Government does not claim any interest over the property concerned, and that

there are established means to resolve title problems by the concerned parties themselves, we do not consider it appropriate to empower the Registrar to proactively bring the concerned parties to the Court to resolve unclear titles.

5. We would like to reiterate that the LRCAC mechanism will only be invoked as the *last* resort after all possible efforts to resolve the indeterminate ownership problem of a particular register have been exhausted. As such, thorough investigation will be carried out within the Government to establish whether any apparent problems found in known cases of indeterminate ownership can be resolved. If our investigation fails to resolve the uncertainty, the concerned parties will be informed as soon as possible and invited to provide further evidence, if any, which they might have on hand but unknown to the Government. They will also be informed that if the indeterminate ownership problem cannot be resolved between the concerned parties, an LRCAC may be registered against their properties. Our target is to complete the investigation of all cases known to the Registrar within the first half of the 12-year incubation period.

6. To allow sufficient time for the concerned parties to resolve the ownership problem and to minimise inconvenience or hardship that might be caused to them, we propose that a Notice of Intention will only be registered against the concerned properties if the ownership problem cannot be resolved by the end of the tenth year after the commencement of the LTO. The Notice of Intention would serve as a “final reminder” to parties concerned to resolve the title problem prior to the Conversion Day, failing which an LRCAC may be registered before the end of the 12-year incubation period.

Criteria for registering LRCAC and Review Mechanism

7. To ensure that the interests and concerns of the affected parties are properly addressed, we agree that a fair and transparent mechanism for initiating the LRCAC mechanism should be put in place, including a clear set of criteria for registering an LRCAC, as well as a proper channel for aggrieved parties to object to/review the Registrar’s decision. As such, we propose that the Registrar will *only* register an LRCAC if s/he has reasons to believe that –

- (a) there are more than one register kept under the LRO in respect of more than one parcel of LRO land bearing the same lot number;
- (b) there are more than one register kept under the LRO in respect of the same parcel of LRO land. These will likely involve cases with multiple ownership claims; or

(c) the person whose name appears in the register kept under the LRO as the current owner of the LRO land may not be the true owner. These may include, for example, cases in which there are more than one chain of title to the LRO land in the same register kept under the LRO.

8. Given the potential impact of the registration of an LRCAC on the concerned properties, we agree that it would be desirable to enlist professional and non-Government input in the decision making process to ensure that the interests of concerned parties are properly addressed. We therefore propose that an interested party who is aggrieved by the Registrar's decision to register an LRCAC or to refuse to remove an LRCAC may, within 60 days after the registration of the LRCAC or upon notification by the Registrar of his/her decision to refuse to remove the LRCAC, apply to review the Registrar's decision. The application will be considered by a Review Committee to be chaired by a legally qualified person with members representing the legal profession, consumer interests and the relevant trades. The Review Committee will review the Registrar's decision and make a recommendation as to whether the LRCAC should be removed. The Registrar will, having regard to the recommendation, make a final decision confirming or reversing his/her previous decision.

9. If the Registrar's final decision is to reverse his/her own previous decision, the Registrar will register a "Removal of Notice of Intention and LRCAC". If the Registrar confirms his/her decision to register the LRCAC, the interested party may seek a Court order for removal of the Notice of Intention and the LRCAC. Until the LRCAC is removed, the property will remain governed by the LRO and will not be converted to the title registration system. The details of the Committee's establishment, terms of reference and power will be set out in the consequential amendments to the LRO.

10. The Administration has consulted stakeholders on the proposed modifications to the LRCAC mechanism made in response to the comments of the Joint Subcommittee. The stakeholders generally agree that title dispute on private properties is a matter between the parties concerned and the Administration should not be given the power to proactively take the concerned parties to the Court to settle such disputes. They also agree to the proposed criteria for registering an LRCAC as set out in paragraph 7. While stakeholders do not have strong objection to the provision of an administrative review mechanism to review the Registrar's decision to register an LRCAC, some cast doubts on its cost-effectiveness given that, regardless of the Review Committee's recommendation, only the Court will have the final say on the matter.

Financial Measures to Cope with Liabilities Arising from the Automatic Conversion Mechanism under LTO

11. While the proposed LRCAC mechanism could help reduce the financial liabilities of the LRTF in respect of *known* cases of indeterminate ownership, retaining the automatic conversion mechanism under the LTO would mean that the LRTF would nonetheless be subject to potential financial risks, as it is not feasible to carry out investigation of every LRO register prior to conversion to uncover and rectify any existing mistakes and omissions. On the other hand, operations of the Land Registry and the delivery of its services should be kept stable and not be disrupted by unanticipated liabilities arising from proven claims after automatic conversion. Fees and charges for land registration services should also be kept reasonably stable to avoid abrupt increases due to individual proven claims.

12. To underline the Administration's commitment to the smooth implementation of the title registration system and the long-term financial stability of the LRTF, the Administration will take appropriate measures to address any liability arising out of automatic conversion, to ensure that those liabilities are met and charges on users of the registry services can be managed in an orderly manner. Any proven claims would be met by the LRTF out of its own resources including uncommitted retained earnings. Where necessary, the Administration is prepared to seek the approval of the Finance Committee of the Legislative Council for a stand-by loan facility if the resources available to the LRTF are insufficient to cover proven claims and to finance the smooth operation of the Land Registry. The terms of the loan will be determined when the need for a stand-by loan facility arises.

Mandatory Rectification

13. Under the “mandatory rectification” rule of the LTO, if an innocent former owner lost his title by or as a result of fraud, he will be restored as owner. The innocent purchaser will be protected, in accordance with the provisions in the LTO, through payment of an indemnity out of the self-financing Land Titles Indemnity Fund (Indemnity Fund), up to a cap of \$30 million. This rule was introduced in the LTO enacted in 2004 after thorough deliberation with stakeholders. It addressed the concern that the cap on indemnity in fraud cases would place an innocent former owner in a worse-off position under the new system than under common law when, subject to the Limitations Ordinance (Cap. 347), the former owner would always get back the property in case of fraud. The Heung Yee Kuk also attached great importance on this aspect of the LTO as many owners in the New Territories reside overseas and it is important that they can get back the land in case of fraud. In the 2009 public consultation,

three exceptions to the mandatory rectification rule were proposed as follows –

- (a) when the land affected had been surrendered or resumed prior to discovery of the fraud;
- (b) when the land had passed into multiple new ownership prior to discovery of the fraud; and
- (c) when the current owner was a bona fide purchaser who had not dealt with the fraudster.

14. As reported to the Joint Subcommittee in June 2009 (LC paper No. CB(1)1870/08-09(01)), respondents generally supported the need for exceptions (a) and (b) in paragraph 13 above, as it would be practically impossible to return the affected land to the original owner under those circumstances. As regards exception (c), however, almost all respondents then were in favour of retaining the rule mandating recovery of the property by an innocent former owner, irrespective of the position of the current registered owner. At that stage, the Law Society of Hong Kong (Law Society) had not formally submitted its stance. Subsequently, the Law Society indicated its opposition to the mandatory rectification rule, as they considered that the certainty of title provided by the title registration system would be compromised. The Law Society recently wrote to the Administration and the Joint Subcommittee in March 2010 reiterating its opposition to the mandatory rectification rule. Instead, the Law Society advocates “indefeasibility of title” as the appropriate arrangement under the title registration system, and further suggests that both the cap on indemnity and the bar on indemnity for pre-conversion fraud be lifted.

15. Given the importance of the mandatory rectification rule and the cap on indemnity, and the implications of reopening discussion on these fundamental subjects on the timing that the title registration system can be put into implementation, we have convened a meeting of the Land Titles Ordinance Steering Committee on 24 March 2010 to discuss with stakeholders the latest stance of the Law Society. As the Law Society’s letter touched on two key components in the enacted LTO, some stakeholders have requested for more time to provide their views on the subjects. The feedback we have managed to receive to date indicates that stakeholders’ views are diverse. We would further update Members at the Joint Subcommittee meeting. So far –

- (a) the Consumer Council considers that the issues raised by the Law Society are very fundamental and should be given serious consideration. The Council would like to know more about the Law Society’s latest stance before offering its comments;

- (b) the Heung Yee Kuk considers that any changes to the mandatory rectification rule will have serious implications on the protection of private property rights. The Kuk is adamant that the mandatory rectification rule should be retained, regardless of whether the cap on indemnity is lifted or not;
- (c) the Estate Agents Authority considers that the mandatory rectification rule and the cap on indemnity are unlikely to have any implications for estate agents and hence does not have any comments on the Law Society's position; and
- (d) the Hong Kong Association of Banks endorses the views of the Law Society. Nevertheless, if the mandatory rectification rule is to be retained, the Association considers it preferable to provide for the three exceptions as set out in paragraph 13 above.

We have yet to receive the views of the Hong Kong Bar Association, the Real Estate Developers Association of Hong Kong and the Hong Kong Mortgage Corporation Limited. We understand that the Joint Subcommittee has invited stakeholders to attend the meeting on 29 April 2010 to offer their views on the subject.

16. We share the views of stakeholders that the issues raised by the Law Society are fundamental and have far-reaching implications on the title registration system. In considering the way forward, we believe due regard has to be given to the following –

- (a) the “mandatory rectification rule” in the enacted LTO represents the consensus reached after extensive deliberations amongst the Administration, major stakeholders and the Legislative Council. In arriving at this consensus, a fair and appropriate balance has been struck amongst a wide variety of interests in the society, with gives and takes by all parties concerned. We would not under-estimate the difficulties that may be encountered in the attempt to reach any new consensus; and
- (b) it follows that revisiting this fundamental issue would take time, which would significantly impact on the legislative timetable and the implementation of title registration.

Determination of Land Boundaries

17. Following the Bills Committee's discussion of the then Land Titles Bill in 2004, the Government has introduced a provision in the LTO to provide, for land registered under the LTO, an avenue for land owners to make a determination for the boundary of their lots. In response to Members' request, the Government would explore the possibility of extending the coverage of this provision to land registered under the LRO. We consulted the Joint Subcommittee on a proposal at its meeting on 7 October 2009, and noted Members' concerns on various legal and policy implications. We submitted a Progress Report to the Joint Subcommittee on 7 December 2009, and are substantiating our thinking after examining the complex legal and policy implications involved.

18. As provided under section 18 of the LTO, a plan referred to in the Title Register shall be treated as only indicating the approximate situation and the approximate boundaries of the registered land to which the plan relates. Furthermore, the fact that a plan is referred to in the Title Register shall not constitute a warranty, or a guarantee, as to the accuracy of the plan. An option would be to amend the Land Survey Ordinance (Cap. 473) to deal with land boundary issues, with consequential amendments to take out section 94 of the LTO.

Relationship between LTO and other Ordinances

19. During the post-enactment review of the LTO, the Administration has reviewed ordinances that contain registration requirements or references to the Land Registry to avoid conflict between the LTO and various ordinances, and generally to ensure that the LTO will be effective in operation in relation to provisions in other enactments. Where the operation of the LTO affects that of other ordinances, careful consideration has to be given to whether the provisions in other ordinances or those of the LTO shall prevail.

20. The Land Registry has consulted various bureaux/departments on the application of the concept of overriding interests to enactments under their purview and the requirement of registration of charges arising under enactments. The bureaux/departments consulted have expressed no objection to the proposals, subject to final drafting of the provisions.

21. In the post-enactment review, it was proposed that the registration requirement in section 32(1) of the LTO should be extended to apply to all instruments affecting land (other than court orders by which title passes) before they are effectual. The Land Registry has identified certain court orders, for

example, restraint orders made under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) and Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525), that must take immediate effect for preserving property regardless of whether such order was registered or not. There are also court orders which are for the purpose of abating the recurrence of fire hazard or for fire safety of buildings and should also take immediate effect. The Land Registry has to further consult the relevant bureaux/departments and give further consideration as to which provision shall prevail.

22. Under the LTO, vesting takes effect upon registration as a person as the owner upon a transfer of land. There are ordinances, for example, the Bankruptcy Ordinance (Cap. 6) and Companies Ordinance (Cap. 32), that provide certain transactions being void by operation of law. The Land Registry is having on-going discussion with the concerned bureaux/departments to address the conflict.

23. We would keep the Joint Subcommittee posted of progress on this subject.

Registration of Managers of T'sos and T'ongs

Nature of t'sos and t'ongs

24. There are lands in the New Territories that are held in the name of t'sos or t'ongs and managers are appointed to represent the t'sos or t'ongs. A t'so is created subsequent to the death of the land owner, when his son(s) or later descendant(s) decide(s) to set aside a whole or part of the deceased's land for the purpose of veneration of the deceased¹. A t'ong is usually created by the owner of land who intends that the land is to be used by his sons and their male descendants in perpetuity².

25. Section 15 of the New Territories Ordinance (Cap. 97) (NTO) provides that “[w]henever any land is held from the Government under lease or other grant, agreement or licence in the name of a clan, family or t'ong, such clan, family or t'ong shall appoint a manager to represent it. Every such appointment shall be reported at the appropriate New Territories District Office of the Home Affairs Department, and the Secretary for Home Affairs on receiving such proof as he may require of such appointment shall, if he approves thereof, register the name of the said manager who shall, after giving such notices as may be prescribed, have full power to dispose of or in any way deal with the said land as if he were sole owner thereof, subject to the consent of the

¹ *Chan Kong v Chan Li Chai Medical Factory (Hong Kong) Ltd & Others* [2006] HKEC 1156

² *Halsbury's Laws of Hong Kong*, Volume 16, para 230.0128.

Secretary for Home Affairs....”. It has been established in case law that the registration required under section 15 of the NTO is registration in the Land Registry³. While t’so is not specifically mentioned in the NTO, t’so land has been held by the court to be “clan, family and t’ong” land, and hence s.15 of the NTO applies⁴.

26. The t’so or t’ong originates from the Chinese customary law and is recognised by the NTO. The status of t’so or t’ong will *not* be affected by the commencement and application of the LTO. Section 28(1)(a) of the LTO provides that all registered land to which Part II of the NTO applies shall be subject to any Chinese custom or customary right affecting the land. Section 58 of the LTO further provides that nothing in the LTO shall be construed as affecting the operation of section 15 of the NTO.

Registration of managers of t’sos and t’ongs under LTO

27. The t’so or t’ong is the owner of the land held by the t’so or t’ong. Under section 15 of the NTO, a manager is appointed to represent the clan, family or t’ong, and is conferred with full power to dispose of or in any way deal with the land as if he were sole owner thereof subject to consent of the Secretary for Home Affairs. Under the registration system of the LTO, t’so or t’ong will be registered as the owner of the land held by it.

28. There is, however, doubt as to whether section 15 of the NTO is an empowering provision for the registration of the manager under the LTO. In this regard, the legal position of a manager of a t’so or t’ong should not be equated with that of a trustee under section 69 of the LTO. A trustee holds the title to the trust property and will be registered as owner under the LTO. In contrast, a manager does not hold the title to the land of a t’so or t’ong. To address the concern, it is proposed that provision be added to the LTO to provide for the registration of managers of t’sos and t’ongs.

29. There is also concern that since the registered owner is the t’so or t’ong, any act under the LTO to be done by the owner would have to be done by the t’so or t’ong. It is proposed that provisions be added to the LTO to recognise the power of a manager to deal with the land of t’so or t’ong.

30. The Administration has consulted Heung Yee Kuk on the issues and exchanged views on the appropriate provisions to be provided to address the concerns in paragraphs 28 and 29 above. We are making good progress. At a

³ *Tang Man Kit & Another v. Hip Hing Timber Co. Ltd.* [2001] HKEC 1039.

⁴ *Lai Chi Kok Amusement Park v. Tsang Tin Shun and Ors* [1965] HKLR 413, *Chan Choy Fong v. Secretary for Home Affairs* [1998], HKLRD 431.

meeting with the Kuk on 20 April 2010, we further discussed the need to include provisions in the LTO to enable managers of t'sos and t'ongs to continue their role under the LTO. The Kuk was receptive and requested that the wording of the provision should as far as possible follow section 15 of the NTO. We would follow up with the Kuk to finalise the wording to be adopted.

Advice Sought

31. Members are invited to comment on the contents of the paper.

**Development Bureau
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