

**Clauses 6 & 7 of the Statute Law (Miscellaneous Provisions) Bill 1999
proposed amendments to the
Conveyancing and Property Ordinance (the “Ordinance”)
2nd Paper**

Issues

Paragraph 12 of the Administration’s previous paper on the captioned Bill (CB (2) 1028/99-00(02), submitted for use on 15 February 2000 indicated that the Administration would further consider the proposal from the Hong Kong Conveyancing and Property Law Association Limited (the “Association”) to extend the proposed relief in cases of untraceable mortgage to situations where no sale or exchange is involved, where the property owner only wishes to further mortgage or charge the subject property to secure fresh finance (“the Association’s proposal”).

2. Following the issue of the previous paper on 8 February 2000, the Law Society wrote to the Administration on 11 February and 2 March 2000 (copy letters also circulated to the Clerk to the Bills Committee) indicating support for the Association’s proposal and (in its final paper annexed to the second letter) made further proposals in relation to:

- (a) the provision of costs of the application;
- (b) the savings of the rights of a mortgagee over New Territories land under section 14 of the Limitation Ordinance; and
- (c) the relationship between the concept of adverse possession and operation of section 14 of the Limitation Ordinance.

Further considerations

3. Based on its experience of the practice, the Association has since been requested to indicate how often a prospective mortgagee would decline an application for a loan on account of an aged and insubstantial prior encumbrance. The Law Society was requested to comment on the proposal

from the Association.

4. The Association is unable to provide this information in the time available. However it submitted that the infrequency of the hardship would not be a basis for not amending the law to remove the hardship. Enclosed marked "A" is a copy of a letter from the Association dated 29 February 2000.

5. The Law Society has not commented on the frequency of refusal by a prospective mortgagee to grant a mortgage on account of an aged and insubstantial prior mortgage.

The Administration's response to the proposal from the Association

6. The Administration considers that there may be merit in the proposal for the following reasons: -

- (a) the basic criteria for the amendments as proposed in the Bill and as now proposed by the Association are the same, namely that a mortgagee cannot be traced and the mortgage cannot be discharged even when the owner is ready and willing to make payment;
- (b) the court will, based on the circumstances of the each individual case, decide whether it is appropriate for the order prayed for to be made and on what conditions; it is up to an applicant to satisfy the court that an order is appropriate;
- (c) there is no reason to grant relief or withhold the same because of what the owner proposes to do with the property; and
- (d) although the relief is not provided for in section 50 of the Law of Property Act, 1925, on which the proposed amendments in the Bill are based, such has been provided for in the relevant legislation of Australia and New Zealand, which were enacted more recently.

7. The Administration would be prepared to consider adopting the proposal by way of CSA and will settle its view on this matter after it has

received the comments of the Bills Committee.

The Administration's response to the proposal from the Law Society

Costs

8. The Administration would similarly be prepared to consider adopting the proposal of the Law Society in relation to provision for costs of the application by way of CSAs.

New Territories land

9. The Administration is of the view that the proposed amendments regarding New Territories land would be unnecessary and/or are outside the scope of the present clauses, for the following reasons:-

- (a) Any current owner of New Territories land who has derived title from a mortgagee in possession has done so by way of operation of law and will not be affected by the present proposed amendments. As a matter of practice, the mortgagee in possession must have either asserted and established his title upon default by the mortgagor or successfully established the same pursuant to section 14 of the Limitation Ordinance before he can pass on his title, and every party in the chain of title from the mortgagee in possession down to the current owner would have no reason for wanting to vacate the title of the mortgagee in possession.
- (b) The only parties who may want to vacate the title of the mortgagee in possession would be the original mortgagor whose title had been dispossessed by the mortgagee in possession pursuant to the operation of section 14 of the Limitation Ordinance and those who seek to claim under his interest. They would be barred from doing so by section 14.
- (c) If the mortgagee in possession is only theoretically so, and cannot in fact be found, and the statutory limitation period has not yet expired, a mortgagor who is willing to make repayment of the mortgage should be entitled to do so and falls within our proposed amendments.

- (d) If the mortgagee who is theoretically in possession deliberately stays inaccessible to the mortgagor for repayment of the mortgage, and then assigns his interest, then the scenario and the issues involved are outside the scope of the present amendment.

The relationship between the concept of adverse possession and operation of section 14 of the Limitation Ordinance

10. The decision in *Common Luck Investment Ltd. v. Cheung Kam Chuen* FACV No. 22 of 1998 pertains to the operation of the concept of adverse possession vis-à-vis section 14 of the Limitation Ordinance. The Administration is of the view that it is outside the scope of the present clauses 6 & 7 of the Bill. The Administration will consider the comments of the Law Society in greater detail and, if found appropriate, deal with the issues related thereto in another exercise.

General housekeeping matter

11. The Administration also takes this opportunity to refer members of the Committee to paragraph 7 on page 2 of CB(2)1028/99-00(02) in which it was said that section 102A of the Property Law Act 1952 (New Zealand) also provides for a situation in which a mortgagee cannot be located and that the section in fact provides for a scenario in which it was the mortgagor who cannot be traced. The reference should have been to section 87, a copy of which is attached marked "B". The Administration apologises for any confusion
_____ caused.

**THE HONGKONG CONVEYANCING AND PROPERTY LAW
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Our Ref. SHL/LOL
Your Ref. LP 3/00/7C VIII

29 February 2000

Ms. Agnes Cheung,
Senior Government Counsel,
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Legal Policy Division,
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Queensway Government Offices,
66 Queensway,
Hong Kong.

BY FAX AND BY HAND

Dear Ms. Cheung,

Re: Statute Law (Miscellaneous Provisions) Bill 1999

I thank you for your letter of 17th February 2000.

Owing to the urgency of this matter, I have not been able to obtain from my members as how often would a prospective mortgagee decline a loan on account of an aged and insubstantial prior encumbrance. However, we submit that the infrequency of the hardship would not be a basis for not amending the law to remove the hardship.

In Hong Kong, there is no title insurance and rightly or wrongly, Solicitors nowadays always demand a perfect title and they are not willing to accept a good holding title. A situation we are concerned about relates to a registered owner who may want to clear its title at the time where no agreement for sale and purchase has been entered, e.g. when such an owner wishes to surrender the land to the Government for exchange. Some of the reported cases relate to cases where the claim of the mortgagee has been statute barred but there are circumstances where it is difficult to prove such claims have been statute barred e.g. (i) the registered owner

only purchased its land a few years ago and is unable to locate his predecessors in title or unable to persuade his predecessors in title to make a statutory declaration that no demands of interest or principal has been made since the material time or (ii) there is no repayment date specified in the Mortgage.

Yours faithfully,

LEUNG SIU HON
PRESIDENT
LOL/HKCPADisk2

Annex B

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Property Law Act 1952 051

Commenced: 1 Jan 1953

VII: Mortgages

Redemption

87 Repayment when mortgagee cannot be found, etc.

87. Repayment when mortgagee cannot be found, etc. ---(1) Where any person entitled to receive or having received payment of any money secured by mortgage is out of the jurisdiction, cannot be found, or is unknown or is dead, or it is uncertain who is entitled, the Court, upon the application of the person entitled to redeem the mortgaged premises, may order the amount of the debt to be ascertained in such manner as the Court thinks fit, and direct the amount so ascertained to be paid into Court or, as the case may be, may by order declare that all money secured by the mortgage has been paid in full.

(2) A certificate by the Registrar that such payment as aforesaid was directed and has been made or a sealed copy of the order of the Court declaring that all money secured by the mortgage has been paid in full shall, in favour of a purchaser of the land, upon registration, operate as a discharge of the land from the mortgage debt and as a deed of reconveyance in the same manner as a memorandum of discharge operates under subsection (4) of section 79 of this Act:

Provided that as between the mortgagor and the person so entitled to receive payment as aforesaid any amount which is eventually shown by the person entitled to the mortgage debt to have been in fact due or payable over and above the amount so paid shall continue to be a debt due under the mortgage of the nature of a liability under a deed.

(3) The Court shall order the amount so paid into Court to be paid to the person entitled, upon the application of that person, and on proof that the deed or instrument of mortgage, and all the title deeds which were delivered by the mortgagor to the mortgagee on executing the same, or in connection therewith, have been delivered up to the person by whom the amount was so paid into Court, or his executors, administrators, or assigns, or have been otherwise satisfactorily accounted for.

(4) In the case of a mortgage under the Land Transfer Act 1952, upon production to the District Land Registrar of the certificate of the Registrar of the [High Court] as hereinbefore mentioned or of a sealed copy of the order of the Court declaring that all money secured by the mortgage has been paid in full ---

(a) He shall on payment of the prescribed fee make an entry in the register book discharging the mortgage, stating the day and hour on which the entry is made:

(b) The entry shall be a discharge of the land from the mortgage: Provided that as between the mortgagor and the person so entitled to receive payment as aforesaid, any amount which is eventually shown by the person entitled to the mortgage debt to have been in fact due and payable over and above the amount so paid shall continue to be a debt due under the mortgage of the nature of a liability under a deed:

- (c) The District Land Registrar shall endorse on the relevant certificate of title or other document of title, and also on the memorandum of mortgage, whenever those instruments are brought to him for the purpose, particulars of the entry.

(5) In any case in which subsection (1) of this section applies, the person entitled to redeem the mortgaged premises, instead of applying to the Court, may tender to the Public Trustee the amount of the mortgage debt, or, as the case may be, proof that all money secured by the mortgage has been paid in full, and the Public Trustee, on proof to his satisfaction that the amount tendered is the whole amount due under the mortgage, may receive the amount in trust for the mortgagee or other person entitled thereto, and in any such case or on proof to his satisfaction that all money secured by the mortgage has been paid in full, the Public Trustee shall sign a memorandum of discharge of the mortgage debt in the form numbered (1) in the Fifth Schedule to this Act, and every such memorandum of discharge shall operate as if it had been signed by the mortgagee himself:

Provided that as between the mortgagor and the person entitled to receive payment any amount which is eventually shown by the person entitled to the mortgage debt to have been in fact due or payable over and above the amount (if any) so paid shall continue to be a debt due under the mortgage of the nature of a liability under a deed.

(6) Every such memorandum of discharge when registered shall, for the protection of any person dealing with the mortgagor in good faith and for value, be conclusive proof of the happening of all conditions necessary to entitle the Public Trustee to receive the mortgage debt (if any) and to sign the memorandum.

(7) The production of the Public Trustee's receipt for the mortgage debt, or, as the case may be, the production of his certificate that all money secured by the mortgage has been paid in full, shall be sufficient authority to the person in possession of the instruments of title to the mortgaged property to deliver them to the mortgagor.

(8) The Court may order any person in possession of the instruments of title to the mortgaged property to deliver them to the mortgagor on production of the Public Trustee's receipt for the mortgage debt, or, as the case may be, on production of his certificate that all money secured by the mortgage has been paid in full, and on payment of all proper charges (if any).

[(9) In any case where the Public Trustee discharges a mortgage under the powers conferred on him by this section, he shall incur no liability in respect of any loss incurred in respect of his so doing so long as he acts reasonably and in good faith. The onus of proving that the Public Trustee has not acted reasonably and in good faith shall be upon any person alleging it.]

Cf. 1908, No. 152, s.75

Subs. (9) was added by s. 3 (1) of the Property Law Amendment Act 1957.

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