

(香港銀行公會用箋)

香港中區
昃臣道 8 號
立法會大樓
《土地業權條例草案》委員會
主席
吳靄儀議員

吳議員：

《土地業權條例草案》

本會已參閱隨附由香港律師會向《土地業權條例草案》委員會提交的意見書，並贊同當中載述的意見。

本會相信，該等意見會獲充分考慮，而有關方面日後亦會提出適當的委員會審議階段修正案，以糾正條例草案任何欠妥之處。本會期望在有關修正案制訂之時，有機會就修正案內容發表意見。

秘書
Rona Morgan

連附件

副本致：土地註冊處處長蘇啓龍先生

2003 年 5 月 21 日

Submission from The Law Society of Hong Kong

LAND TITLES BILL

POINTS OF PRINCIPLE

Gradual Conversion / First Registration

The Administration has failed to take on board the issues raised by the Working Party in its last submission.

We believe these need to be reiterated and explained. One of the principal advantages of a mid-night conversion to land registration is the "at a stroke" removal of prior technical defects in title. This "advantage" should not be under-estimated given the prevalence in the system of what are purely technical defects which unless removed in this way will have a consequential effect on the ability of solicitors to issue "good title" certificates.

As we know very many titles are not absolutely good but are fundamentally sound, i.e. adopting the MEPC principles there is no realistic prospect of a challenge to the title arising as a result of the apparent defect.

However without the removal of this technical defect it is difficult to see solicitors willing to provide a good title certificate in respect of them given the consequences under the Bill of their guaranteeing the title in this way.

However even mid-night conversion cannot solve the problems of current apparent defects such as the registration of Building Orders. Again whilst many purchasers and their mortgagees are willing to proceed notwithstanding the registration of such an order it does still constitute a defect in title and any title certificate must mention it. From what we understand of the position to be taken by the Land Registry this will mean that the property is not accepted for first registration. If this is the case the consequence will be that in future, purchasers will not accept these orders but will refuse to complete. This will not be an improvement to the system but a positive detraction from the benefit of its introduction.

Another problem is consistency within the profession in the issue of certificates of title. As we all appreciate whether or not an apparent defect in title is such as to warrant rejection of the title is a question of judgment. Judgment comes with experience and common sense. By proceeding in the manner suggested the Administration is reducing this process to its lowest common denominator, i.e. the solicitor with the least experience and judgment of these issues. It is for this reason that we suggested to the Administration that the Land Registry take on the task of confirming whether or not a title is suitable for first registration. It can do so by contracting out this process to the profession and in so doing it can ensure, by instructing the appropriate professionals, that standards are consistently applied. This

would also avoid a farcical situation arising where two adjoining flats in a building apply for first registration and one is accepted for registration and the other not without good reason. This is how other jurisdictions deal with first registration and for good reasons.

One of the reasons given for failing to adopt mid-night conversion is to ensure that persons are not deprived of their rights. However under the mid-night conversion as recently proposed it was intended that those rights be preserved until a bona fide purchaser for value acquires the property. This is no different than under the system proposed as, if a bona fide purchaser for value acquires the property and obtains first registration, that registration cannot be upset other than for fraud or where the instrument of transfer was absolutely void.

There are two points being made here:

- (a) The need for the mid-night conversion so as to remove the old "technical" defects so as to facilitate the issue of "good title" certificates; and
- (b) The need to ensure that the integrity of the Land Registration system is developed and maintained by ensuring that consistent standards are applied uniformly where applications for first registration are made.

Rectification

The Administration had rejected the proposal to limit the grounds on which the court can order rectification and to allow the court a general discretion to order rectification.

We believe this should be re-considered and that the court should only be given the discretion to rectify in specific limited circumstances. This would achieve greater certainty in the Register. If the Courts are given wide ranging powers to rectify indefeasibility of title is not achieved.

Indemnity

Currently the Bill only provides an indemnity for fraud or mistake by the Registrar and in respect of fraud, only which affects ownership of registered land or a registered lease. No indemnity is payable for fraud affecting a registered charge. This should be amended.

In view of the current proposals for rectification, particularly the wide ranging powers of the court to order that, it would seem that an indemnity should be available to any one who suffers loss as a result of dealing with the position on the register which is then affected by a subsequent rectification, providing of course he was not negligent or in some way contributed to any fraud or reasons for rectification.

It is not clear that the provisions of the Bill as drafted reflect this position.

Another issue for consideration is that as the indemnity fund is to be limited the Bill provides that a person who suffers loss in excess of the indemnity could pursue the person who caused the loss. At the same time the Land Registry could also sue that person to reclaim the amount paid out under the fund. The Bill should be amended to make it clear that in those circumstances the person who suffered the loss has a prior claim to the assets of the wrongdoer than the Registry so that in the event of a deficiency the person who suffered the loss would be preferred over the Registry.

Adverse Possession

If the aim of the bill is to bring certainty of title then the issue of adverse possession should be addressed in the Bill rather than left to be considered as a separate exercise. We would recommend that the proposals suggested in the UK Law Reform Commission Report are considered.

Land Registrar

The Land Registrar is given a number of quasi judicial functions under this Bill, but there is no requirement for the person holding the post to have any appropriate legal qualification and experience. We would recommend this be addressed in the Bill.

LAND TITLES BILL
DRAFTING COMMENTS

1. Paragraph (b) of the definition of "Charge" seems to exclude a building mortgage. This needs to be amended. A possible solution is to simply exclude a mortgage of the interest under a sale and purchase agreement or alternatively a mortgage of any interest which is protected by a caution.
2. "instrument" - What is the purpose of paragraph (b). Wills are not registerable currently in the sense they do not affect an interest in land. Is it intended to refer to the Grant of Administration to which a will might be annexed, or is this a reference to the pre 1992 ability to "register" a will at the Land Registry - although this was not for the purpose of registering an interest relating to land.

In any event (b) would appear to be redundant and should be deleted.

3. "land" - for the purposes of the Bill it is considered that a comprehensive definition of land would be appropriate.
4. In the definition of "long term lease" why is there is a need to refer to it as a "bona fide" lease. It seems these words should be deleted. They are unnecessary. In addition a "long term lease" for a term greater than 21 years should be capable of negotiation notwithstanding that at the time of first registration less than 21 years remains of the term. Otherwise for a development such as Robinson Place it would depend on when a dealing took place whether first registration could be applied for.
5. "record" - does the latter part of this definition refer to electronic records? If not, what does it mean? If it does why not say so?
6. "wording day" - the definition should refer to Section 71 of Interpretation and General Clauses Ordinance, not Section 71(2).
7. Section 2(2)(a) - should this provision be deleted in view of the provisions of Clause 4. In any event we believe the words "whether or not" should be deleted from the opening part of this Section.
8. Section 2(2)(b) - should this provision be deleted to prevent any conflict with the definition of "registered land" and Section 13 of the Bill.
9. Section 3(2) and (3) - we remain unconvinced as to why the provisions of the Land Titles Bill should be subservient to conflicting provisions in other ordinances. Should it not be the other way round. For example, under the Trustee Ordinance the appointment of a new trustee has the effect to vesting title in land from the retiring trustees to the new trustees. Surely that vesting should only take effect when the new appointment has been registered. The provisions of Part 7 of the Bill deal with the registration of transmissions by operation of law or enactment.

10. Section 4(c)(ii) - should it be a requirement that an order has to be made for the purposes of enforcing a judgment before it is capable of being registered. What about interim injunctions or "freezing" orders. Note also that there is no definition of "order" therefore the relevant sub-section should be amended to refer to an order of the court.
11. In Section 8 is it appropriate that where a loss arises as a result of the fault of a government employee the indemnity limit would still apply.
12. Section 10(3)(g) - the reference should not be to "long term lessee" but simply "lessee".
13. Section 11(3)(a), (b) and (c), Section 70(2) and any other sections where this phraseology has been used - there is no need to refer to the various types of sale and purchase agreement, a generic reference to sale and purchase agreement is sufficient.

The last word of the opening paragraph of Section 11(3) should not be "as" but should be "pursuant to".
14. Section 11(4)(a) - a building mortgage should not be treated in this way.
15. Section 12(1)(a)(ii) - in fact registration of government leases is carried out by government not the lessee, i.e. the government lease is first registered before it is returned to the lessee.

Section 12(1)(b) - "applications" and "owners" in the first line should be in the singular.
16. The definition of "land" in Section 12(4) should be deleted. As suggested there should be one comprehensive definition in Section 2.
17. Section 12(5) - it should be made clear that the lessee is able to apply for first registration of his long term lease.
18. Section 13(1)(b) - in the last line - the reference should not be "the first owner of the land" but should be "the owner of the land".
19. Section 14(1) - delete reference to "first owner" and replace with "owner" in the second line.
20. Section 14(2)(d)(iv) - this should say "enforceable against the owner of the land".
21. Section 14(3) - should the section be amended to refer to interests which have not been subsequently protected by registration prior to the sale to the subsequent purchaser.
22. Clause 17 - there does not seem to be any requirement that the Registrar should first contact the party affected by the removal of the entry.

23. Section 24(1)(c)(i), (ii) and (iii) - there is no need for these to be referred to separately. Rights of way and rights of water are easements.
24. Section 24(1)(d) - we do not believe the provisions of this sub-section correctly protect all "implied" easements. There appear to be 3 types of implied easements, namely easement of necessity, intended easements and continuous and apparent easements. The first two types of implied easements are capable of implication for the benefit of land retained by vendor over land sold by him as well as over the land retained in favour of the land sold. Continuous and apparent easements only arise in favour of land sold over the land retained. It might be easier rather than to seek to define when an easement is implied under the Ordinance to simply limit the operation of sub-clause (d) to easements which are implied by the law on the disposal of any land and which are not expressly granted or reserved in any instrument.
25. Section 24(4) refers to an order of the Court of First Instance. On a strict reading of this an order of any other court e.g. the Court of Appeal would not suffice. We presume this is not intended. This apparent anomaly appears in a number of other Sections of the Bill.
26. Clause 25 - does "acquisition" refer to the time of contract or time of registration. This should be amended to read "A person on becoming registered as the owner of....".
27. Section 29(2) - this Section would seem to prevent any transaction or dealing with land, which would be classified as unregistrable under the Bill, from operating as a contract. As it reads only a registrable transaction can so operate (subject to para (b) in that sub-clause).

Was it the intention to make all other agreements null and void as contracts? Or was the intention the reverse in that all contracts dealing with land could continue to have effect as contracts (remedy by common law damages if not in accordance with the terms of the Bill) but that only those contracts producing interests recognised by the Bill could culminate in registration?

If this is what Clause 29(2) seeks to achieve it does not do so.

28. Section 33(4), (5) and (6) - the word "concerned" in the opening paragraph of each sub-section should be deleted.
29. Section 33(7)(b) - do we still need these provisions now that it is possible to defer stamp duty for sale and purchase agreement. If so, should this section differentiate between agreement for sale and purchase relating to residential property and non-residential property. The references in this section to provisional sale and purchase agreement and sale and purchase agreement are superfluous they should just refer to the generic sale and purchase agreement.
30. Section 42 - this provision needs to be amended so as to cater for divisions of a new building into flats and undivided shares where land boundary plans will not be appropriate.

31. Section 44(1) - in the opening paragraph there seems to be no need to refer to "lessee or chargee". This simply confuses a sale.
32. Section 47(1) - in the second line the reference to "first lessee" should simply be "lessee". Ditto re sections 47(2)(a) and (b).
33. Section 70(5), (6) and (7) - it is not clear how this will work in practice. Sub-section (6) says the cautioner is the person who intends to effect the dealing. Does this mean the donor or the donee or either. Sub-section (7) says that the Commissioner is the cautioner.
34. Section 81(3) - this should provide for applications by the owner of a registered charge. The drafting of this Section, particularly sub-section (c) seems overly convoluted and confusing and could be simplified and improved upon to achieve the desired result.