

**Bills Committee on Land Titles Bill
Twentieth meeting on 9 December 2003**

List of follow-up actions to be taken by the Administration

Powers of the Land Registrar

1. Clause 32(1) provides that where the Land Registrar is satisfied that a person, through that person's wilful default, has failed to present to the Registrar an application for the registration of a matter, he may serve notice on the person requiring him to present the application. Members are concerned why it is necessary for the Registrar to be satisfied that there is an element of wilful default before he may require the person to present the application. In this connection, the Administration is invited to:
 - (a) consider whether there is a need for the test of "wilful default" in clause 32(1);
 - (b) give some examples to show how the test of "wilful default" would operate; and
 - (c) highlight any equivalent provisions in other jurisdictions.

2. Clause 96(5) provides that any person who, without reasonable excuse, fails to comply with a requirement under clause 32(1) commits an offence and is liable on conviction to a fine at level 4 and, in the case of a continuing offence, to a daily penalty of \$1,250. Clause 96(6) provides that any person who, without reasonable excuse, fails to comply with a requirement under clause 93 (i.e. to provide the Land Registrar with his address in Hong Kong for service) commits an offence and is liable on conviction to a fine at level 3 and, in the case of a continuing offence, to a daily penalty of \$1,000. Members are concerned that in the absence of a clear definition of "reasonable excuse", the public may be easily caught by clause 96(5) and (6) and subject to criminal sanction. Members are also concerned that these provisions are different from the existing practice where no criminal sanction is imposed on a person for his failure to present an application or to provide his address to the Registrar. In this connection, the Administration is invited to:
 - (a) give examples to illustrate what may constitute a "reasonable excuse" in clause 96(5) and (6);

- (b) examine whether there is any conflict between "wilful default" in clause 32(1) and "without reasonable excuse" in clause 96(5); and
 - (c) provide a paper on overseas practices in relation to the Land Registrar's powers under clauses 32(1) and 93, including the relevant provisions on penalty.
3. Having examined the Administration's written response (LC Paper No. CB(1)468/03-04(03)), members still consider that the scope of the power of the Land Registrar in imposing a restriction under clause 77(1) is not clear. Members also express the following points of concern:
- (a) While the Administration has pointed out that the Registrar may exercise the power only on application by a person interested in registered land and where he is satisfied that the powers of the owner of the registered land should be restricted, this is not clearly reflected in clause 77(1).
 - (b) Members are concerned how the Registrar would arrive at the conclusion that an order should be made to prohibit all dealings in the registered land (a restriction). In this connection, members note that under clause 77(1)(b) and (c), the Registrar may impose a restriction after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, and after being satisfied that the powers of the owner of the registered land should be restricted. It seems that the Registrar is empowered to perform certain quasi-judicial functions with a high degree of discretion. It appears that the Registrar may impose a restriction after considering the evidence given by a third party who has no interest in the land. The Registrar's power seems so broad that he may impose a restriction not directly consequential upon registered interests.
 - (c) It is not clear whether the term "an application" in clause 77(1)(a) refers to an application for registration of a restriction, or other types of applications, such as an application for registration of title.

Please provide a paper to set out the policy intent and the scope of power of the Registrar under clause 77(1), to give examples to illustrate how the Registrar would arrive at the conclusion that a restriction should be imposed, and to respond to the above points of concern expressed by

members. Please also examine whether the present drafting of clause 77(1) could fully reflect all these aspects and if not, please consider how the drafting could be improved.

4. To facilitate the Bills Committee's further consideration of whether indemnity should be provided for wrongful registration of restrictions by the Land Registrar, the Administration is invited to advise whether other remedies are available for a person who suffers from the wrongful registration of a restriction, in particular through fraud by a third party.
5. Members are pleased to note from the paper on "Power of Land Registrar (Miscellaneous Issues)" (LC Paper No. CB(1)468/03-04(03)) that the Administration would propose suitable amendments to clause 88 to reflect the policy intent that the Registrar would not frequently use the power under the clause to apply to the Court of First Instance for directions on principles of law, and that the Registrar would have to justify fully to the court why he is seeking direction and not relying on his own legal advisors. Members also point out that the direction should only be sought on principles of law in respect of a specific case, but not "[i]n any case of doubt or difficulty or in any matter not provided for under this Ordinance" as presently provided for in clause 88. In this connection, the Administration is invited to make reference to the relevant provisions in the Land Registration Act 1925 in England and Wales, and the Real Property Act 1900 in New South Wales (Annex to the paper). The relevant provisions in the Land Registration Act 1925 is preferable because they provide for the involvement of the affected parties.

Rectification of Title Register by Court

6. Clause 81(5) provides that in any rectification case not involving any mistake or omission on the part of any person referred to in clause 8(3), if the Land Registrar is joined as a party, the Registrar shall not pay costs incurred by the parties in the proceedings and damages suffered by any parties in the proceedings. Noting the Administration's advice that the claims for such costs and damages would have to be made by application for indemnity and that this policy intent would be set out in the relevant regulations, members are concerned that it is not clear from the relevant clauses (including clauses 83 and 84(2)(b)) that such costs could be recovered from the Indemnity Fund. Please review the drafting of the

relevant clauses to ensure that this point is clearly reflected.

7. Please provide a paper to address the following points of concern expressed by members when examining the paper on "Rectification of Title Register by Court" (LC Paper No. CB(1)524/03-04(03)):
 - (a) Members are concerned whether the original owner of a property, "A", who has lost the ownership of the property to "B" through fraud many years before, during which the property was sold to "C" and then "D", may still apply to the Court of First Instance (CFI) for rectification of the title register. While the Administration claims that the original owner may do so, members doubt whether this is provided for in clause 81. According to clause 81(1), the CFI may order rectification of the Title Register by directing that an entry therein or omitted therefrom be removed, amended or entered, as the case may be. It seems that the term "an entry" refers to the current entry only.
 - (b) Having noted the Administration's advice that the full meaning of the term "fraud" would be determined according to case law, members are concerned that the scope of the term may change from time to time. Please provide some typical examples of "fraud" that may be committed in relation to title registration.
 - (c) Clause 81(4) provides that the CFI may, in exercising its discretion on whether the Title Register should be rectified, consider such factors, including the "hardship to the parties". Members are concerned that this requirement may give rise to uncertainty. Please provide information on overseas practices in this regard.
 - (d) Referring to the Hong Kong Bar Association's concern about whether a "knowledge test" should be adopted as the statutory criterion in determining whether the Title Register is subject to the CFI's power of rectification, the Administration is invited to provide a written response on this point.