

HPLB/LTB Paper 03/04

**Bills Committee on Land Titles Bill
Responses to Miscellaneous Issues**

Purpose

This paper addresses a number of issues raised by the Bills Committee in previous meetings.

Item 7- 12th Bills Committee (19.9.2003)
- Retention of supporting instruments

2. According to paragraph 11 of the paper on “Responses to Miscellaneous Issues” (LC Paper No. CB(1) 2464/02-03(05)), the supporting instruments for registration of the matters will be returned to the lodging parties for their disposal. The Administration was requested to consider requiring the parties concerned to keep the documents for a certain period of time. Six years was suggested as the period. The purpose was to enable examination of the original documents should the need arise. An example would be when there is a need to determine whether the documents and/or signatures are authentic or forged.

3. If the “Daylight Conversion” mechanism and the proposed changes to the court's power of rectification of registered title in the case of forgery are adopted, the Administration considers that compulsory retention of certain title documents for future reference is necessary. This will provide better protection of both the interest of an innocent former owner and the indemnity fund under the Bill. This could be achieved by requiring a current registered owner to retain certain core title documents such as assignments for an appropriate period of time and, in the case of a dealing over \$30M, to keep all title deeds and documents. A sanction for failure to keep the deeds may be an evidential presumption unfavourable to the defaulter on the issue of authenticity of document or signature, etc. in any legal proceedings or dispute on title.

4. In practice, the Law Society may also issue guidelines to conveyancing solicitors suggesting which part of the title deeds ought to be retained for some practical purposes, e.g. a deed of mutual covenants or

easements will be necessary for ready reference at any time.

5. In this connection, the Administration now proposes to impose a limitation period of 12 years for application for rectification of Title Register. We are seeking the views of the Law Society as to the types of documents to be retained and the appropriate period of retention.

Items 1 and 2 – 20th Bills Committee (9.12.2003)
- Powers of Land Registrar under Clause 32(1)

6. (a) 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:-
- (i) consider whether there is a need for the test of "wilful default" in clause 32(1);
 - (ii) give some examples to show how the test of "wilful default" would operate; and
 - (iii) highlight any equivalent provisions in other jurisdictions.
- (b) 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 his address to the Registrar. In this connection, the Administration is invited to:

- (i) give examples to illustrate what may constitute a "reasonable excuse" in clause 96(5) and (6);
- (ii) examine whether there is any conflict between "wilful default" in clause 32(1) and "without reasonable excuse" in clause 96(5); and
- (iii) 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.

7. "Wilful default" usually denotes either that someone does not do what is reasonable under the circumstances with knowledge that the omission will probably prejudice the rights of other persons or that someone intentionally does not do something which he ought to do. Usually one may not find a reasonable excuse in the situation of "wilful default"; but the converse may not be true. There could be a situation where someone acts "without reasonable excuse" but not with "wilful default". For example, a person who never addresses his mind to the issue at all cannot be said to have wilfully defaulted.

8. The Administration considers that the effectiveness of Clause 96(5) will be greatly undermined if a "wilful default" test is used. We accept that there is a risk of inconsistency in using "wilful default" in Clause 32(1) and "without reasonable excuse" in Clause 96(5). It is proposed to adopt a uniform standard of 'without reasonable excuse' in both clauses.

9. The purpose of Clauses 32(1) and 96(5) is to ensure a speedy registration process without delay or obstruction caused by unreasonable acts or omission of a party concerned. The means of delay and forms of excuse for not submitting a relevant application may be diverse and wide ranging. The use of the general term 'without reasonable excuse' is justified in such a context. The interpretation and final decision should be left to the courts on the facts of each case.

10. As far as the land registration statutes of England, Northern Ireland, and New South Wales are concerned, the land registrar or registrar-general is empowered to compel production of documents relating to a dealing of land or the title of land. The power is the same as in

Clause 6 of the Bill, and is likewise backed up by criminal sanction of a fine. In those Acts there is no provision similar to that of Clause 32(1) of the Bill in Hong Kong.

Items 1 – 21st Bills Committee (19.12.2003)

- **Names of joint owners and chargors on the Title Register**
- **Postponement of Payment of Estate Duty**

11. In discussing the paper on "Transmissions, Receivership & Trust" (LC Paper No. CB(1)524/03-04(02)), Members noted that where one of two or more joint tenants of registered land, a registered charge or a registered long-term lease dies, upon proof of the death of the joint tenant and payment of estate duty, the Land Registrar will remove the name of the deceased joint tenant from the column "Name of Owner" in the Title Register. An appropriate note will be added in another column to highlight the transmission of ownership to the surviving joint tenant(s) under clause 62. In this connection, the Administration is requested to consider the views expressed by the Assistant Legal Adviser (ALA), as follows:

- (a) Where there are more than two joint tenants, it is necessary to add the note mentioned above twice or more. It is suggested that a column on details of the registered charge be added to the Title Register to list out the names of all the joint chargors, so that the name of the deceased would be traceable.
- (b) In relation to clause 62(2)(b), please consider whether there are any means to enable the purchaser of a property to know directly that the payment of estate duty has been postponed in accordance with the provisions of the Estate Duty Ordinance (Cap.111).

12. The Administration agrees to the proposal to list out the names of all joint chargors so that the name of the deceased would be traceable. Detail of how successive changes of joint tenancy upon death will be shown in the register is provided in the **Annex**. The death of each joint owner is shown in the 'Remarks' column. The name of the deceased will be added in the 'Nature of Dealing' column to identify whose estate duty it relates to. The names of joint chargors will appear in the 'Remarks' column corresponding to the entry of the Charge.

13. As a first charge of estate duty is an overriding interest [Clause 24(1)(g)], a mere postponement of payment may not have the legal effect of releasing the charge against the property. Even if a purchaser is aware of a mere postponement of payment, it does not remove the possible incumbrances on the property. The Administration proposes (subject to approval of the Commissioner of Estate Duty) to revise the condition precedent in Clause 62(2)(b) to the effect that it is necessary to satisfy the Land Registrar either that the estate duty has been paid or its payment has been fully secured to the satisfaction of the Commissioner of Estate Duty.

Item 3 – 21st Bills Committee (19.12.2003)
- Implied Covenants

14. In discussing the supplementary paper on "Implied Covenants" (LC Paper No. CB(1)600/03-04(02)), Members noted that the Administration will work out a mechanism to ensure that if several registrable matters are provided for in one instrument, registration of the principal matter supported by that instrument will effect the registration of other matters in that instrument which also affect the registered land, registered charge or registered long term lease. Members also note ALA's concern that such other matters could only cover those which affect the registered land, registered charge or registered long term lease and registrable under the land title registration system. The problem relating to the modification of implied covenants under Section 35 of the Conveyancing and Property Ordinance (Cap. 219) is not solved. The Administration has been asked to consider how this concern could be addressed and how details of any implied covenants could be readily discernible from the Title Register to obviate the need to refer to the relevant instrument(s). The Administration has also been asked to make reference to relevant overseas practices.

15. As mentioned in the supplementary paper on "Implied Covenants", the Administration intends that any exclusion, variation or extension of the implied covenants and any new covenants would be registered with the transfer or charge that gives rise to them. Such exclusion, variation or extension of the implied covenants provided for by Section 35(2) of the CPO would be noted in the remarks column of the transfer or the legal charge. For the details of the modified implied covenants, it is necessary to refer to the relevant instrument itself.

16. The Administration will consider to add a clause similar to that of section 75¹ and section 80(1)² of the NSW Real Property Act 1900 to link up section 35 of the CPO with the provisions of the Bill. The Administration may also make reference to section 41(1) of the NSW Real Property Act 1900³ and make amendments to clause 29(1) of the Bill in order to remove some interpretation problem due to the word "create".

Item 4 – 21st Bills Committee (19.12.2003)

- Minors

17. Members and ALA when discussing the paper on “Part 6 - Instruments (Minors)” (LC Paper No.: CB(1)600/03-04(03)), requested the Administration to follow up two points regarding Clause 61 of the Bill in connection with minors, namely:-

- (a) the need for making a provision in the Bill to cater for the situation where an owner is a minor has not been sufficiently demonstrated; and
- (b) if the present drafting of Clause 61(3) is to be retained, a mechanism should be put in place for the removal of the words “a minor” when the minor concerned attains the age of majority.

18. With regard to para.17(a), the Administration considers that it is advisable for the Bill to make specific provision for situations where the registered owner is a minor. Under current case law a minor can have any disposition set aside, even if it is to a bona fide purchaser for value who did not have notice of the minority of the owner. This will undermine the

¹ **NSW Real Property Act 1900, section 75** (General covenants to be implied in instruments): "In every instrument creating or transferring any estate or interest in land under the provisions of this Act, there shall be implied a covenant by the party creating or transferring such estate or interest that the party will do such acts and execute such instruments as in accordance with the provisions of this Act may be necessary to give effect to all covenants, conditions, and purposes expressly set forth in such instrument, or by this Act declared to be implied against such party in instruments of a like nature."

² **NSW Real Property Act 1900, section 80(1)** (Implied covenants may be modified or negated): Every covenant and power to be implied in any instrument by virtue of this Act may be negated or modified by express declaration in the instrument or indorsed thereon.

³ **NSW Real Property Act 1900, section 41(1)** (Dealings not effectual until recorded in Register): "(1) No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such dealing, or by this Act declared to be implied in instruments of a like nature. "

security that it is intended to give a bona fide purchaser under the Bill. While solicitors acting for the parties to a disposition may disclose the status of the owner of the property it is not certain that they will do so. Records or notice may be lost. Clause 61(3) provides a simple mechanism to make a record of the fact of a minority in the public register so that it cannot be overlooked.

19. With regard to para. 17(b), Clause 80 provides sufficient power for the Registrar to remove the annotation on presentation of evidence that the owner has reached the age of majority.

Item1 –23rd Bills Committee (30.1.2003)

- Matrimonial Home Rights

20. The Administration is requested to provide information on the statutory requirement in the United Kingdom for spouses to register their unwritten interests in land, including the timing of registration and advise whether the relevant legislation has been successful in achieving its purpose.

Common Law Position in U.K.

21. Under the common law, a spouse has a right to occupy the matrimonial home. A spouse's right to be housed by the other spouse arises from the fact of marriage itself. Such a spousal right is not an interest in land. It is a purely personal right enforceable by a spouse against the other spouse⁴. In England & Wales there is now a matrimonial home right conferred by statute to certain classes of spouses in the regime of family law.

Matrimonial Home Rights in England & Wales

22. Under the Family Law Act 1996 a “matrimonial home right” is basically a right to a qualifying spouse ‘not to be evicted or excluded from the dwelling home by the other spouse except in pursuance of a court order⁵, or a right ‘with leave of the court to enter into and occupy the

⁴ In *National Provincial Bank Ltd. v Ainsworth* [1965] AC 1175 the U.K. House of Lord decisively rejected the idea that a wife's right of occupation in the matrimonial home was an interest in land. The immediate consequence of this House of Lord decision in the U.K. is the enactment of the Matrimonial Homes Act 1967 (now consolidated in the Family Law Act 1996) which confers a statutory right of occupation of matrimonial home on certain classes of spouse.

⁵ Family Law Act 1996, s.30(2)(a)

dwelling house'⁶.

23. This statutory matrimonial home right, if protected by entry in the register of title, become generally enforceable against any subsequent disponee of that title except as against a trustee in bankruptcy⁷. For registered land it may be protected by an entry of notice on the relevant title register. For unregistered land it is protected by registration of a Class F Land Charge under the Land Charges Act.

Hong Kong Position

24. There is no matrimonial home right in Hong Kong.

25. In the regime of bankruptcy law, section 43F of the Bankruptcy Ordinance (Cap.6) provides a continuing right of occupation of family home by a bankrupt (presumably with his family members including the spouse) for a period of 6 months with possible extension of another 6 months in exceptional circumstances.

26. The Administration is of the view that the question whether there should be a statutory matrimonial home right similar to that in England and Wales ought to be considered in the context of any reform of matrimonial law, not that of the registration system itself.

⁶ Family Law Act 1996, s.30(2)(b)

⁷ As against a trustee in bankruptcy the statutory rights can normally be effective for no more than one year after bankruptcy.

Annex

TITLE REGISTER (showing transmission of interest upon the successive death of more than one joint owners)

A . Before death of joint tenant Lee Lai Ling

Owners Particulars

Name of Owner	Capacity (if not sole owner)	Nature of dealing	Application No.	Date of Registration	Consideration	Remarks
SZETO Man Lung, Lee Lai Ling & Szeto Wan Ngai	Joint Tenants	Assignment dated 23.11.1990	A0000000	00.00.0000	\$0,000.000.00	

Incumbrances

Application No.	Date of Registration	Nature of Dealing / Application	Nature of instrument/ Contract /Petition/ Order etc.	Name of Party in favour of Applicant/ Relevant Parties	Consideration	Remarks
B0000000	00.00.0000	Deed of Mutual Covenants	Deed of Mutual Covenants dated 00.00.0000	As per instrument	As per instrument	
B0000000	00.00.2022	Charge	Legal Charge dated 10.12.2000	Chargee: FGH Bank	All monies	Joint Chargors: SZETO Man Lung, Lee Lai Ling and Szeto Wan Ngai

B. After death of joint tenant Lee Lai Ling on 10.9.2021

Owners Particulars

Name of Owner	Capacity (if not sole owner)	Nature of dealing	Application No.	Date of Registration	Consideration	Remarks
SZETO Man Lung & Szeto Wan Ngai	Surviving Joint Tenants	Transmission on death of joint tenant under s.62 of LTB	D00000000	20.10.2022	-Not applicable-	Date of death of joint tenant Lee Lai Ling: 10.9.2021

Incumbrances

Application No.	Date of Registration	Nature of Dealing / Application	Nature of instrument /Contract/Petition/Order etc.	Name of Party in favour of / Applicant/ Relevant Parties	Consideration	Remarks
B0000000	00.00.0000	Deed of Mutual Covenant	Deed of Mutual Covenants dated 00.00.0000 ["DMC"]	As per instrument	As per instrument	
C0000000	00.00.0000	Charge	Legal Charge dated 10.12.2000	Chargee: FGH Bank	All monies	Joint Chargors: SZETO Man Lung, Lee Lai Ling, & Szeto Wan Ngai
C0000000	00.00.0000	First charge for estate duty re Lee Lai Ling	Application dated 00.00.0000 and signed by The Commissioner of Estate Duty pursuant to Section 18(2) of the Estate Duty Ordinance (Cap.111)	The Commissioner of Estate Duty	-Not applicable-	

C. After death of joint tenant SZETO Man Lung on 10.10.2023

Owners Particulars

Name of Owner	Capacity (if not sole owner)	Nature of dealing	Application No.	Date of Registration	Consideration	Remarks
Szeto Wan Ngai	Sole Surviving Joint Tenant	Transmission on death of joint tenant under s.62 of LTB	D00000000	20.10.2022	-Not applicable-	Date of death of joint tenant Lee Lai Ling: 10.9.2021 Date of death of joint tenant: SZETO Man Lung on 10.10.2023

Incumbrances

Application No.	Date of Registration	Nature of Dealing / Application	Nature of instrument /Contract /Petition /Order etc.	Name of Party in favour of / Applicant/Relevant Parties	Consideration	Remarks
B0000000	00.00.0000	Deed of Mutual Covenant	Deed of Mutual Covenants dated 00.00.0000 ["DMC"]	As per instrument	As per instrument	
C0000000	00.00.0000	Charge	Legal Charge dated 10.12.2000	Chargee: FGH Bank	All monies	Joint Chargors: SZETO Man Lung, Lee Lai Ling and Szeto Wan Ngai
C0000000	00.00.0000	First charge for estate duty re Lee Lai Ling (deceased)	Application dated 00.00.0000 and signed by The Commissioner of Estate Duty pursuant to Section 18(2) of the Estate Duty Ordinance (Cap.111)	The Commissioner of Estate Duty	-Not applicable-	
C0000000	00.00.0000	First charge for estate duty re SZETO Man Lung (deceased)	Application dated 00.00.0000 and signed by The Commissioner of Estate Duty pursuant to Section 18(2) of the Estate Duty Ordinance (Cap.111)	The Commissioner of Estate Duty	-Not applicable-	

