

HPLB/LTB Paper 05/04

**The Land Title Bill
Report on Consultation on Revisions
To Conversion Mechanism and Rectification Provisions**

Purpose

This paper reports on the outcome of consultations with key parties on the proposed changes to the conversion mechanism and rectification provisions under the Land Titles Bill.

Background

2. At the 24th Bills Committee meeting on 13th February the Administration provided a position report on the major issues of the conversion mechanism and indemnity and rectification arrangements. This outlined a new approach to conversion developed by the Land Registry with the Law Society Working Party and proposed some revisions to Clause 81 (which governs rectification). The Administration advised that it needed to seek views of other stakeholders as to the acceptability of the proposed changes and undertook to report on the outcome of the consultation.

3. Apart from continuing discussions with the Law Society, the Land Registrar has sent the proposals set out in Annex A of LC Paper No.CB(1) 968/03-04(02) to the following parties:

- (a) The Bar Association
- (b) The Consumer Council
- (c) The Hong Kong Association of Banks
- (d) The Hong Kong Institute of Surveyors
- (e) Heung Yee Kuk
- (f) The Family Law Association
- (g) The Hong Kong Society of Accountants

- (h) The Real Estate Developers Association
- (i) The Federation of Women Lawyers

4. Meetings have been held with the Legal Protection Committee of the Consumer Council, the Council of Heung Yee Kuk, representatives of the Hong Kong Association of Banks and the Real Estate Developers Association (REDA), the Chairman of the Family Law Association and members of the Federation of Women Lawyers. Written submissions have been received from the Consumer Council, the Bar Association, Heung Yee Kuk, the Real Estate Developers Association and the Hong Kong Institute of Surveyors. Copies of these submissions are annexed for reference.

5. On 4th March a meeting between the Land Registrar, the Chairman and representatives of the Bar Association, the President of the Law Society and members of the Law Society Working Party was held. The comments made by the Bar Association in their preliminary submission were discussed at this meeting.

Views on the Conversion Mechanism

6. The Consumer Council supported the gradual conversion mechanism in the Bill. It has not indicated any objection in principle to the daylight mechanism but has raised a number of questions directed at the effect of the conversion on claims that may arise under unwritten equities. The Council's support for the conversion mechanism is withheld pending clarification of those questions.

7. Heung Yee Kuk previously rejected the midnight conversion scheme and has raised questions over the gradual mechanism proposed in the Bill. It now accepts the new mechanism in principle but suggests to include means to allow for interests to be protected by the courts after the conversion date.

8. The Hong Kong Institute of Surveyors does not have any adverse comments on the proposal.

9. REDA does not have any objection in principle to the proposal but has raised questions similar to those raised by the Consumer Council and suggested that rights acquired by adverse possession be treated

similarly to those arising from unwritten equities.

10. The Bar Association has given its preliminary comments. These have raised more detailed questions about the effect of the measures proposed to allow for notice of claims arising from unwritten equities to be registered. A suggestion is also made that, rather than allowing for registration of such claims, provisions similar to those under the UK legislation for rights arising from actual occupation to be treated as overriding interests should be adopted.

11. At the meeting held on 4th March the Bar Association representatives noted that the questions they had over the protection of unwritten equities were essentially general ones that affected any scheme for title registration. They felt that, ultimately, it was a policy decision as to how these should be handled. With respect to the daylight conversion mechanism itself they thought it a better approach than the first bill's midnight mechanism or the certificates of good title now required under the bill.

12. During the meeting the Land Registry clarified the intention with respect to the time in which notice can be given of claims under unwritten equities. At the date of conversion, a person who can make a claim arising from an unwritten equity will not be debarred from applying for a non-consent caution to be entered on the title register, irrespective of whether the cause arose before the conversion date. The key provision is that a purchaser for value will not be affected by such a claim unless a caveat or non-consent caution has been registered before his purchase. The operation of Clause 33(7)(a), which allows dealings that follow on from the matter of a consent caution to take their priority from the consent caution was noted. This is designed to protect a purchaser and mortgagee from intervention of new matters before completion and appears to address the concerns raised on priority.

13. The Hong Kong Association of Banks have not at the time of issuing this paper submitted a written response. They have indicated, however, that they do not have any objection in principle to the proposed conversion mechanism.

14. The Family Law Association has advised that it considers the revised mechanism would strike a reasonable balance and that it welcomes the proposed system of caveats and cautions against conversion.

Views on the Rectification Provisions

15. REDA and Heung Yee Kuk welcome the proposed change. REDA has asked that the definition of ‘forgery’ follows that in Part IX of the Crimes Ordinance. They also maintain their objection to reference to ‘hardship of the parties’ as a factor for the courts to consider before deciding on rectification for cases other than those involving forgery.

16. The Bar Association welcomes the proposal in respect of forgery cases but has reservations over the wide discretion given to the courts in other cases. They have also drawn attention to the evidence needed to support claims of forgery and the consequent need to maintain certain records. Their views are shared by the Law Society.

17. At the meeting with the Bar Association and Law Society on 4th March the Land Registrar noted that Clause 81 would have to be redrafted anyway to provide for the rectification to innocent former owners in forgery cases. In the course of redrafting, the concern to set clearer parameters for the court to exercise its discretion would be addressed.

18. Other parties have not made any specific comment on this matter.

Other Comments

19. The Bar Association and REDA in their submissions and the Association of Banks during discussions have repeated earlier concerns about the indemnity provisions. While the Bar Association and REDA note that the change to the rectification provision with respect to forgery is an improvement in practice, the continued employment of a cap on indemnity in cases of fraud remains objectionable to them. We understand that the Association of Banks is primarily concerned with the limitation of an indemnity to loss of ownership. They are concerned that they will lose the security for their charges in the event of rectification.

The Administration’s Position

20. The Administration is of the view that since there are no objections in principle to the general scheme of daylight conversion, CSAs can be prepared that give effect to it for consideration by the Bills Committee. The questions raised by the Consumer Council are answered by the intention, noted in paragraph 12 above, that a claimant under an

unwritten equity will not be barred from applying for a non-consent caution simply because the cause arose before the conversion day. This also addresses some of the Bar Association's concerns. Further consideration is being given to whether yet more protection should be given to persons in actual occupation through the overriding interest mechanism, but the Administration notes that most other parties have been concerned to restrict the application of overriding interests as far as possible.

21. On the rectification provisions, the Administration has already accepted the point made by the Bar Association as to the need to preserve the documents that will provide evidence if allegations of forgery arise. Requirement for retention of designated documents by owners or chargees will be added to the Bill.

22. With respect to the court's discretion in fraud cases, the Administration is considering the concerns raised. Clause 81 requires redrafting on account of the revisions in respect of forgery. We are examining how the concerns with respect to discretion in other cases can be addressed during the redrafting.

23. The Administration notes the position of the Bar Association and REDA with respect to the cap on indemnity in fraud cases but stands by the position that has been set out in our earlier submissions to the Bills Committee.

24. In respect of the concerns of the Association of Banks, subject to any further observations they may make in written submissions, the Administration is considering a CSA that would require the Land Registrar, in paying any indemnity for loss of ownership, to take account of registered charges.

Housing Planning and Lands Bureau
March 2004



HONG KONG BAR ASSOCIATION

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2 March 2004

Mr. Kim Salkeld,
The Land Registrar,
Queensway Government Offices,
28/F.,
66 Queensway,
Hong Kong.

Dear Mr. Salkeld,

Re: Land Titles Bill
Revisions to Conversion Mechanism
& Rectification Provisions

We enclose herewith the preliminary view of the Bar on
“Daylight Conversion”.

Yours truly,

Edward Chan S.C.

Encl.

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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Ms. Janine Cheung 張玉燕

Mr. José-Antonio Marmollet 毛樂禮

Mr. Donald Leo 劉健能

Re: Land Titles Bill

Comments on Revisions to Conversion Mechanism & Rectification Provisions

1. We refer to the letter of 9th February 2004 from the Land Registrar inviting the Bar to give its views on the proposed changes to the Conversion Mechanism and the Rectification Provisions of the Bill.

Daylight Conversion

2. The most distinctive feature of the “Daylight Conversion” mechanism is that no claim arising through “unwritten” equitable interest in land created after the commencement date of the Bill can affect purchasers for value unless notice of the claim is registered.
3. The above proposal has far-reaching consequences for the equitable doctrines of resulting and constructive trusts, as well as a variety of “personal equities”, which are indispensable devices used by the Courts to solve a host of problems which typically arise under informal family arrangements (e.g., the pious son who purchases a home for his parents and has it conveyed into the parents’ name without intending to make a gift of it, the aged parent who contributes to the purchase price of a child’s home

in return for a promise that she would be allowed to live there, the spouse who has made “contributions” towards the acquisition of the matrimonial homes, etc...). The “beneficiaries” of such “unwritten” equitable interests are typically not aware of the existence of their rights until after a dispute has arisen or alternatively, would never have contemplated that there is any need for negotiation of anything. This doctrine of unwritten equities is not limited to domestic relationship. In commercial context, there is also the problem of the right of subrogation which plays an important role in cases of refinancing. In the circumstances, we have reservations as to whether the requirement of “registration” of their claim is realistic.

4. Under the existing deeds registration system, only “instruments in writing” are required to be registered. Non-registration renders the interests created by the instrument unenforceable against subsequent purchasers for value. However, “unwritten” equitable interests are by definition incapable of registration and whether or not they can be enforced against subsequent purchasers for value would depend on the operation of the doctrine of notice.
5. In principle, we see no reason why a purchaser who has actual notice of an “unwritten” equity should not take subject to it.

6. We note that in England, “unwritten” equitable interests are protected as overriding interests to the extent they are rights of “persons in actual occupation”. This remains the case notwithstanding successive legislative reforms over the years which have progressively reduced the categories of overriding interests.

7. Whilst it may be argued that “unwritten” equitable interests feature much less prominently in the context of Hong Kong given that traditional Chinese society places far greater emphasis on the importance of the name appearing on the title deeds, major changes to the enforceability of “unwritten” equitable interests would still have wide social ramifications. We would therefore urge the Administration to give serious consideration to conferring the status of overriding interests on at least some of the “unwritten” equitable interests even though that would to some extent introduce greater uncertainties into the system of registered titles.

8. Another potential problem may arise in respect of “priorities” of registration. Under the existing deeds registration system, priority is accorded to registered instruments according to their dates of execution provided they are registered within one month. In the case of “unwritten” equitable interests, are they supposed to be accorded priority by reference to the date of their creation or the date of their registration as a claim?

9. As the law stands, where the equities are equal, the first in time prevails. This means that an equitable interest (whether by instrument or otherwise) created prior in time to the agreement for sale and purchase would bind a purchaser for value if he has notice of it before completion even if he had no notice at the date of agreement. Applying this principle, logically any claim in respect of “unwritten equities” which is registered should likewise bind a purchaser for value provided it is created before the date of the agreement. However, it is unclear whether in order for an “unwritten” equitable interest to bind a “purchaser for value”, the claim has to be registered before any specifically enforceable agreement for sale and purchase is concluded or the claim can be registered at any time before the date of the conveyance.
10. Yet a further problem may arise in respect of competing priorities between “unwritten” equitable interests which came into existence prior to the commencement date of the Bill and those interests which only came into existence after the commencement date. According to our understanding, during the 12 years interim period, the position of pre-commencement date “unwritten” equitable interests should continue to be governed by equitable principles and would remain enforceable against all except a purchaser for value without notice. An unregistered pre-commencement date “unwritten” equitable interest would enjoy priority over a registered post-commencement date “unwritten” equitable interest, irrespective of whether

the later interest is given priority in accordance with the date of creation of the interest or the date of its registration as a claim. What would happen if the pre-commencement date “unwritten” equitable interest is subsequently registered as a “caveat”? Would it retain its original priority or lose priority to a post-commencement date “unwritten” equitable interest which has been registered as a claim at an earlier point in time? The provisions of the Bill would need to make the position clear so as to leave no room for doubt.

Rectification in Cases of Forgery

11. We welcome the Administration’s belated recognition that an innocent former owner should not suffer a loss which is not fully compensated where a change of ownership has been procured by forgery. However, we have reservations as to the wisdom of the proposed wide discretion given to the Court for rectification in cases of fraud.

12. A right of rectification is by definition an inroad into the integrity of the register of titles. The existence of the possibility (albeit rare) of rectification in the case of fraud casts a serious doubt over the reliability of the register and this is exacerbated by the existence of the upper limit to the amount of compensation payable to the registered owner against whom

rectification is ordered. This is especially where there appears to be a wide and unguided discretion given to the Court to order rectification for fraud.

13. In the interest of certainty, we believe that the criteria for ordering rectification in non-forgery cases should be clearly defined and we repeat our previous submissions in this regard.

14. Although automatic rectification in cases of forgery will preserve the *nemo dat* rule in favour of the original rightful owner and hence the upper limit to the amount of compensation is no longer an issue as far as he is concerned, the absence of full compensation can still work injustice on the innocent registered owner against whom rectification is ordered. The absence of full compensation for the innocent registered owner may also have potentially serious impact on the liability of conveyancing solicitors. We will therefore once again urge to Administration to consider removing the upper limit on indemnity.

15. Further consideration would also need to be given to how the automatic right to seek rectification in cases of forgery will work in practice. The party seeking rectification faces a considerable evidential burden which would often be impossible in the absence of the original of the forged document. This would mean that notwithstanding the establishment of a

register of titles, a system should be put in place for preserving the instruments of transfers.

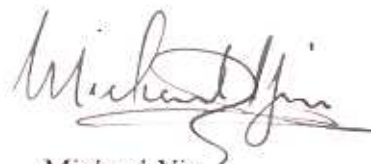
Dated the 2nd day of March, 2004.



Edward Chan, S.C.



Horace Wong



Michael Yin



新 界 鄉 議 局 HEUNG YEE KUK NEW TERRITORIES

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傳真及郵遞

檔案編號：三十三／五／〇一四〇號

日期：二〇〇四年三月二日

土地註冊處
蘇啓龍處長：

《土地業權條例草案》

感謝閣下出席本局於本年2月17日舉行的本屆第三次執行委員會會議，向本局議員介紹貴處正考慮就《土地業權條例草案》(草案)兩大方面作出的修訂，並尋求本局意見。本局了解是次貴處提出的修訂建議主要集中在設定轉制機制及土地註冊更正兩方面，有關草案的其他問題，貴處將會在日後再作研究。

有關設定轉制機制問題，草案原先建議以午夜改制方式運作，本局素來認為此機制將會引起混亂。今貴署建議將物業納入業權註冊紀錄的機制作出更改，即以白晝改制方式替代，本局原則上表示支持。

有關建議的好處是，讓業權人在條例生效的十二年時間之內，就物業業權的任何權益作出處理。但本局認為，在白晝改制的機制上，應該要提供一個彈性機制，即倘若有業權人在該十二年內，因某些特殊情況或原因，未能獲悉有關業權註冊的轉制機制，導致其失去物業權益，法例應容許該業權人可向法庭提出申請處理其權益，以避免扼殺有關人士獲得處理物業權益的機會。

有關土地註冊更正問題。政府自從十年前提出草案一直堅持，任何不知情及已付代價之物業買家無論因任何欺詐、錯誤或遺漏而買入土地物業，其物業業權經土地註冊處註冊後，即成為該物業的合法業主，而原來業權人是不能向該買家取回其物業業權，亦未有規定法庭需頒布命令將有關物業的業權歸還原本業權人。鄉議局對此建議帶來的負面影響非常關注，特別是新界不少業權人均長期身處海外，若因



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一時不察，被他人以欺詐手法導致其物業業權喪失，即使可獲得政府賠償，亦未必足以抵償原來業權人無端失去其土地業權之全部損失。

爲此，雖然社會其他團體或許對政府有關建議表示接受，但過往十多年本局仍不斷強烈要求政府及有關當局提出修訂，並建議假如因欺詐、偽造而促使物業擁有權有所變更及轉移，政府必須將物業業權歸還不知情的原來業權人，即物歸原主。經過本局近十年的努力和游說，最近終於獲得 貴處接納本局之建議。對於 貴處終能從善如流，本局表示非常欣慰。

新界鄉議局主席：劉皇發

副主席：林偉強

(秘書處代行) 新界鄉議局

秘書處

SECRETARY



HEUNG YEE KUK NEW TERRITORIES

File Reference : 31/5/0140

Date : 2 March 2004/3

By Fax and Post

Mr K Salkeld, Land Registrar

Dear Mr Salkeld,

Land Titles Bill

Thank you for attending our third Implementation Members' Committee on 17 February this year. You briefed our members about the changes your department was considering to make on two major aspects of the Bill and sought our advice on the proposed changes. We understand that the proposed changes focused on two aspects, namely the establishment of the conversion mechanism and the change to land registration. Your department will consider other issues of the Bill later.

The Bill originally proposed that the conversion mechanism be operated in the manner of gradual conversion. The Kuk has always considered that this mechanism would lead to chaos. Your department now proposes changes to the mechanism for bringing property onto the title register i.e. to be replaced by daylight conversion. This proposal is acceptable in principle to the Kuk.

The advantage of the proposal is that title owners may handle all interests in respect of title within 12 years from the commencement of the legislation. However, this Kuk considers that a flexible mechanism should be provided for the Daylight Conversion mechanism, i.e. the law should allow title owners to apply to the court to decide their interests if they have lost their interests to properties without notice of the title registration conversion mechanism due to certain special circumstances or reasons within the 12-year period so that their opportunities to decide their interests

would not be taken away.

As regards the change to land registration, the Government has been insisting since ten years ago when the Bill was introduced that any innocent purchaser for valuable would become the legal owner of the property once his title to property was registered in the Land Registry notwithstanding that he had acquired the property due to any fraud, mistakes or omissions. The original owner could not get back his title from the owner and the Court is not allowed by the law to order restoration of title to the original owner. The Kuk is very concerned about the negative effect this proposal would bring about, particularly to the many title owners of the New Territories who stay overseas for the long term. The possible compensation made by the Government might not be sufficient to fully cover the total loss of interests of original title owners which are caused by other person's fraud due to their oversight.

In this connection, though other associations may agree to the proposal of the Government, the Kuk in the past ten years has been strongly demanding the Government and the authorities concerned to make proposal for amendments. We have also proposed that the Government must restore the property to the innocent original owner where the change and transfer of ownership was procured by fraud and forgery, i.e. return something to the rightful owner. We have been making efforts and lobbying for nearly ten years and your department has finally accepted our proposal. We are very pleased that your department is willing to follow good advice.

(N.T. Heung Yee Kuk Secretary)

for Chairman of HYK : LAU Wong-fat

Vice Chairman : LAM Wai-keung



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

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1 March 2004

By fax & by mail

Mr. Kim Salkeld
Land Registrar
28/F Queensway Government Offices
66 Queensway
Hong Kong

Dear Kim,

Land Titles Bill

Thank you for your letter of 11 February 2004.

The views of REDA are as follows:

Daylight Conversion

We do not have any in principle objection to the concept of "Daylight Conversion".

We note that unwritten equities which have not been registered as a caveat or caution within 12 years from the commencement of the Land Titles Bill ("LTB") will be void. In the majority of cases, unwritten equities arise where a member of family puts up the whole or part of the purchase price for the acquisition of a property but he or she is not named as one of the owners in the Assignment. In the absence of education, many of them will be unaware that they will lose their rights even though they may be in actual possession of the property. We would like to know how the Administration proposes to educate the public that unwritten equities would need to be registered within the 12-year period.

With regard to rights acquired by adverse possession, it would appear that such rights should be given the same treatment as unwritten equities so that, unless such rights are registered as a caveat or caution within 12 years, they will be void. The public should similarly be educated on the need to register such rights within the 12-year period.



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Rectification-former innocent owner

We welcome and support the Administration's proposal that an innocent former registered owner shall always be entitled to a rectification of the Title Register and to the restoration of his name to the Register if the change of ownership is procured by forgery.

We would, however, like to be assured that "forgery" will, in the LTB, have the same meaning as the word is used in Part IX of the Crimes Ordinance.

With regard to rectification in other fraud cases not amounting to forgery, we would like to be assured that the relative hardship to the parties is not a factor which the court is to take into account in deciding whether the Title Register should be rectified. As we have repeatedly pointed out, if hardship is to be considered, a party who is financially stronger will, more likely than not, lose out. All other things being equal, it may come down to the simple question of "who can afford to lose out". This cannot be right nor can this be equitable.

Cap on indemnity

Whilst the Administration's proposal addresses our concern regarding the deprivation of the property of an innocent owner by reason of forgery, we remain concerned about the appropriateness of a cap on the indemnity.

The objective of the LTB is to increase the security and convenience with which property transactions can take place in Hong Kong and to achieve this by providing that (1) title can be established as a matter of fact by reference to the Title Register and (2) an innocent purchaser's registered title is indefeasible, or if it is defeasible, he will be properly compensated.

A cap on the indemnity means that the objective cannot be fully achieved and we would ask the Administration to consider adopting the United Kingdom model (see paragraphs 5 to 7 of Schedule to the Land Registration Act 2002) so that:

- (i) no cap is placed on the indemnity;
- (ii) no indemnity is provided if there is any fraud on the part of the claimant;



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- (iii) to the extent that the loss results from a lack of proper care of the claimant, the indemnity will be reduced to such extent as is fair having regard to the claimant's share in the responsibility;
- (iv) the amount of the indemnity will be determined by the court.

If the Administration were to insist on a cap and the Bill is otherwise acceptable, we are prepared to support the Bill provided that:

- (a) an innocent owner is always entitled to a rectification of the Land Register and restoration of his name to the Register where the change in ownership is procured by forgery;
- (b) in cases of fraud other than forgery, hardship to the parties is not a relevant consideration when the court decides whether the Register should be rectified; and
- (c) the cap is set at an appropriate level.

Yours sincerely

Louis Loong
Secretary General



1 March 2004

BY FAX & POST
#2596 0281

Mr Kim Salkeld
Land Registrar
The Land Registry
Queensway Government Offices
28/F., 66 Queensway
Hong Kong

Dear Kim,

Land Titles Bill

Thank you for your letter of 16 February 2004 informing HKIS the latest proposed changes to the Land Titles Bill.

The introduction of "Incubation" period in the proposed "Daylight" conversion is another alternative to resolve the many arguments of the "Overnight" conversion or "Conversion by Phase". HKIS does not have adverse comment on this "Daylight" conversion and other issues as outlined in your above mentioned letter.

The Institute and our members have always been following the captioned Bill in its changes and future implementation. Our previous comments on the Bill should prevail and we maintain that they should be attended to. Lastly, we are happy to receive any updates and contribute our views in future consultations.

Yours sincerely



Tony Tse
President

c.c. Mr. Gordon Ng – Secretary General, HKIS