

**Paper for the Meeting of the Bills Committee on Land Titles Bill  
on 20 April 2004**

**Comparison of Provisions Governing Priorities  
under the existing registration of documents system of the Land Registration Ordinance (Cap. 128)  
and under the proposed title registration system of the Land Titles Bill**

No	Topics	Land Titles Bill	Land Registration Ordinance (Cap. 128)	Remarks
1.	General Principles	Matters shall have priority according to the order in which the applications which lead to their registration were presented to the Registrar (clause 33(1)).	<p>a) All deeds etc. shall have priority one over the other according to the priority of their respective dates of registration (section 3(1)).</p> <p>b) All deeds etc., which are duly registered within one month after the time of execution thereof, shall be entitled to priority according to the date thereof only as if the Ordinance has not been passed (section 5).</p>	The dates of instruments would be irrelevant under the title registration system in determining priority.

<p>2.</p>	<p>Consent Cautions</p>	<p>a) Only registrable with consent of owner if the land is not affected by any prior consent caution (clause 70(1)(a));</p> <p>b) Only registrable with the consent of the prior cautioner if a prior consent caution has been registered (clause 70(1)(b));</p> <p>c) No subsequent interest can obtain priority without the cautioner's express consent (caluse71(1)(b));</p>	<p>a) No such provision;</p> <p>b) No such provision;</p> <p>c) Similar effect under section 3(1);</p>	<p>(The summary presented here has omitted the more detailed provisions of the Bill regarding provisional sale and purchase agreements. Those provisions do not affect the basic rules stated or the arguments developed below.)</p> <p>Both b) and d) are not absolutely necessary to preserve the priority of an interest registered by a consent caution as the doctrine of notice still applies.</p> <p>b) This requirement would be a <b><i>restriction on an owner's power of disposition</i></b> of his own land. An example would be where a consent caution has been registered by a mortgagee bank, a subsequent purchaser would need the bank's consent before he can register a caution of the sale and purchase agreement. By the same logic, a subsequent mortgagee would also require the consent of the cautioner before he can register a consent caution to preserve his priority.</p> <p>Since <b><i>no provision has been made for the effect of a consent caution to be spent</i></b> after the dealing to which it relates has been completed or "superseded", it could happen that the consent of a prior mortgagee cautioner is still required after the related mortgage has been discharged.</p>
-----------	-------------------------	--	--	--

		<p>d) Where a dealing, which is the subject of a consent caution, is registered, the priority of the dealing <b>relates back</b> to and takes effect from the priority of the first consent caution in respect of the same dealing (clause 33(7)(a)).</p>	<p>d) No such effect except as between a subsequent assignment and a registered sale and purchase agreement. However, this is effected by operation of law and not by any express statutory provision.</p>	<p>d) Determining priority according to the date of presentation of application would be sufficient. In fact, that would mean continuation of the present priority system. Relating back would <i>change the law</i> and could have <i>unintended effects</i>. Once a consent caution has been registered, any <i>subsequent charging order would be ineffective</i>. To that extent, the law would be changed. Under the present law, where an owner has entered into a sale and purchaser agreement and a charging order is registered prior to the execution of the assignment of the land, the charging order would attach to the proceeds of sale (<i>Ho King-yim v Lau King-mo</i> [1980] HKLR 42). Under the provisions of the Bill, the transfer will relate back to the date of the entry of the consent caution and the charging order will affect neither the land nor the proceeds of sale (Willoughby &amp; Wilkinson, <i>Registration of Titles in Hong Kong</i>, 1995, 103). Hence, it would not be too difficult for a debtor to register a consent caution for a bogus sale and purchase agreement to defeat any attempt of his creditors to charge his property. In certain circumstances, unintended consequences could result. If a sub-sale agreement is registered by consent caution before that of an equitable mortgage, the sub-purchaser could take free of the mortgage.</p>
--	--	---	--	--

				The purchaser vendor could therefore skip redeeming the mortgage. Similarly, if an owner has agreed to sell his property with completion to take place a year later and seeks to refinance his mortgage, the new mortgagee would be postponed to the purchaser.
3.	Non-consent caution	<p>a) Any person claiming any interest, contractual or otherwise or having presented a winding-up petition could register a non-consent caution (clause 70(3));</p> <p>b) A transfer of registered land not for valuable consideration is not to be registered unless at the same time a non-consent caution of a first charge under section 18(1) of the Estate Duty Ordinance (Cap. 111) (clause 70(5));</p>	<p>a) Only instruments affecting interest in land may be registered (section 2(1));</p> <p>b) No such provision;</p>	<p>a) It has not been demonstrated that such means of preserving priority is necessary or desirable.</p> <p>b) There is nothing to suggest that <i>Estate Duty</i> has become irrecoverable as a result of the Commissioner not enjoying such priority. Since this provision would apply to all, it means that any intra-group transfer of properties by any listed company would also need to register such a non-consent caution. If an interest protected by a non-consent caution would have priority over all subsequent dealings in the land, <b><i>financial institutions would not be willing to accept the property as security for a loan</i></b> unless the non-consent caution has been removed.</p>

		<p>c) Where an interest, which is the subject of a non-consent caution, is registered, the priority of the interest <b>relates back</b> to, and takes effect from, the priority of the non-consent caution (clause 33(7)(c)).</p>	<p>c) No similar provision.</p>	<p>c) The <i>relating back</i> is not absolutely necessary. There is nothing to suggest that determining priority by reference to the date of application would cause any problem.</p> <p>The relating back gives an incumbrancer a right that <i>does not exist under the present registration of documents system</i> and has no equivalent under the English system. It could be abused by any person who wants to spoil any deals that an owner may be negotiating.</p> <p>Similar to the consent caution, the non-consent caution would have the same <i>unlimited effect</i>. There is no requirement that the cautioner must take any action within a specified time. So long as the statutory limitation period is not exceeded, the non-consent cautioner could sit on his caution. The owner would be quite helpless if the cautioner disappears after registering the caution. No one can afford to ignore a non-consent caution however bogus the claim that it seeks to protect may appear at the date of any subsequent dealing, because if the claim becomes established, it would take effect and have priority from the date of registration of the non-consent caution.</p>
--	--	---	---------------------------------	---

Prepared by  
The Legal Service Division  
Legislative Council Secretariat  
15 April 2004