

BY FAX AND BY POST
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22 April 2003

Hon. Margaret Ng
Chairman of the Bills Committee,
Legislative Council Secretariat,
3/F, Citibank Tower,
3 Garden Road,
Central, Hong Kong.

Dear Ms. Ng,

Bills Committee on Land Titles Bill

We write in response to the letter dated 20 March 2003 from the Bills Committee on the Land Titles Bill and we thank the Bills Committee for inviting the Society's views on the revised Land Titles Bill (the "Bill").

The Society has expressed views on various issues at different times during the fairly long history of this legislation. While most of our concerns have now been addressed, we still have a few points to make on the revised Bill. These are explained below.

Clauses 27 and 60 – Searches and Retention of land titles records, etc

The Society has pointed out in submissions on earlier versions of the Bill that there is a need for historical records to be kept and to be accessible for searches by, for example, auditors conducting company audits. In response, the Government indicated that this would be the case. However, the provisions on searches and retention of land title records, e.g. clauses 27 and 60, seem to limit the requirement to retain records to records that relate directly to a current entry in the Title Register. At the same time, we note that the regulation-making powers, in clause 100(1)(zc), make a more general reference to the possibility of historical records being retained. We should like to seek clarification, therefore, as to the Government's intention with regard to making available records of relevant transactions and documents prior to the first registration of any given plot of land on the Title Register.

Clause 70 – Registration of cautions

Clause 70(3), amongst other things, enables a person who has presented a winding-up petition against the owner of registered land or a registered charge, or registered long-term lease, to apply to the Land Registrar for registration of a non-consent clause in respect of the petition. However, no similar arrangement seems to be provided for in the case of a person who has presented a bankruptcy petition against an owner of registered land, charge or lease. The reason for this omission is unclear. We would suggest that a person presenting a bankruptcy petition against the owner of registered land, etc. should also be able to apply to have a non-consent caution registered.

Clause 81 – Rectification by Court of First Instance

Clause 81(1) provides for the power of the Court of First Instance (“Court”) to order rectification of the Register where the Court is satisfied that the entry has been obtained, made or omitted by, e.g. fraud, mistake or omission.

Clause 81(2) provides that the Register shall not be rectified under an order of the Court so as to affect the title of the registered owner who is in possession of the land and has acquired the land for valuable consideration, unless the owner had knowledge of, e.g. the fraud, mistake or omission, or caused the fraud, mistake or omission. In relation to the registered owner having knowledge of the fraud, etc., we assume that this relates to the time at which the owner acquired ownership. This may need to be stated more explicitly.

Clause 81(3) allows the Court to order rectification of the Register to restore the title of a former registered owner in the case of fraud only, if the Court is satisfied that:

- (a) it would be unjust not to rectify the Register against the registered owner;
- (b) the former registered owner has neither:
 - (i) knowledge of the fraud; nor
 - (ii) caused such fraud or substantially contributed to it by his act, neglect or default;and
- (c) the registered owner is in possession of the land and has acquired the land for valuable consideration and has neither:
 - (i) knowledge of the fraud; nor
 - (ii) caused such fraud or substantially contributed to it by his act, neglect or default.

Clause 81(4) provides that the Court may, in exercising its discretion under clause 81(3), consider such factors as it thinks fit in all the circumstances of the case.

We find the drafting of this clause to be somewhat confusing for reasons explained further below.

Clause 81(1)

Clause 81(1) appears to provide for a general power for the Court to order rectification of the Title Register where it is satisfied that the entry has been obtained, made or omitted by fraud, mistake or omission, etc. However, this provision is subject to clauses 81(2) and 81(3) and it does not specify any particular procedures.

Clause 81(2)

Clause 81(2) provides that the title of such a registered owner shall not be affected by rectifying the Register unless the registered owner had knowledge of e.g. the fraud, mistake or omission, or was substantially responsible for the fraud, mistake, or omission, i.e. it appears to suggest that the principle of indefeasibility of title applies except where the registered owner had knowledge of e.g. the fraud, mistake or omission or was substantially responsible for it. Again it does not specify procedures for rectification and it is subject to clause 81(3).

Clause 81(3)

Although it is specified that clause 81(2) is subject to clause 81(3), the latter appears to conflict to some extent with the former by providing, as indicated above, that, where fraud has occurred, the Court may order rectification in favour of a former registered owner or lessee of a registered long-term lease, even where the current registered owner or lessee has no knowledge of the fraud. Only very general grounds are given for this apparent exception to clause 81(2), that is, that “it would be unjust not to rectify the Title Register against the registered owner or registered lessee”, and, as indicated above, under clause 81(4), the Court is empowered to consider any factors, including the acts of the parties and hardship to the parties, as it thinks fit in exercising this discretion. In addition, clause 81(3) is the only one of the relevant provisions that specifies any procedures, namely that the former registered owner or lessee is required to apply to the court for rectification of the Title Register to restore his title to the land or lease.

Given in particular the very general nature of the grounds on which the Court may exercise its discretion under clause 81(3), contrary to the apparent indefeasibility of the title of a registered owner or lessee who has acquired the land or lease for valuable consideration, without knowledge of any fraud, we believe that the present drafting of this part of the Bill could result in some uncertainty. We would suggest that if this is to be avoided, the drafting needs to be tightened up (e.g. to define the exceptions to clause 81(2) more precisely). Furthermore, the fact that, as indicated above, only the provision dealing with the Court’s power to exercise its discretion under clause 81(3) appears to specify procedures for seeking rectification of the Title Register, may add to the potential confusion.

Clause 81(3)(a)

The Society is also of the view that, in the interests of clarity, consideration should be given to amending the wording of paragraph (a) of clause 81(3) from “it would be unjust not to rectify...” to “it would be just to rectify...”. However, this would depend upon the final form of this clause after it has been reviewed as we suggest above.

We believe that our comments should be self-explanatory and should not require any elaboration in an oral representations to the Bills Committee at its meeting to be held on 12 May 2003.

If you have any questions on this submission, please feel contact to contact the undersigned at 2287 7084.

Yours sincerely,

PETER TISMAN
DEPUTY DIRECTOR
(BUSINESS & PRACTICE)

PMT/ay

c.c. Land Registrar (Attn: Mr. Kim Salkeld, fax no.: 2596 0281)