Hong Kong Bar Association

Submissions to Legislative Council Bills Committee

on the Land Titles Bill

1. With reference to the letter of 20th March 2003 from the Clerk to the Bills Committee on the Land Titles Bill ("the Bill") inviting the Bar to give its views on the Bill now before the Legislative Council. In the following paragraphs, the Bar shall set out its views on each of the 5 main features of the proposed title registration system as identified in the Legislative Council Brief.

Security of Title

2. The Bar recognises that the key feature of a system of registered title must be the certainty aspect of the registered title so that any one can simply accept the registered title without any need for any further investigation or query. However, everyone would have to accept that the registered title could not be conclusive in all circumstances and there should be some power on the part of the Court or other body to rectify the title as registered. Nevertheless, in the interest of certainty, it is imperative that the circumstances where rectification is possible must be clearly defined.

3. In general, the Bar agrees with the legislative approach of giving detailed statutory guidelines for the Court to exercise its power and discretion. However, the Bar is concerned that certain of the provisions set out in Section 81 fail to achieve the right balance between the requirement of certainty of title on the one hand and the justice of a particular case on the other hand.

4. It would appear from the wordings of Clause 81(2)(a) that the Court has the power to order rectification against a registered owner in possession who has acquired his title for valuable consideration *whenever he had knowledge* of the fraud, mistake, or omission or the voidness or voidability of the instrument in consequence of which the rectification is sought. The Bar has grave doubts as to whether a "knowledge test" should be adopted as the statutory criterion in determining whether the Title Register is susceptible to the Court's power of

rectification. As the Bar pointed out in one of its previous submissions (see paragraph 8.6 of the Bar's Submissions dated 9th February 1999), the central idea of a registered title must be that there must be certainty in the title so that persons dealing with the land would be able to rely on it. In this respect, the position is not dissimilar to the rationale behind the law on negotiable instruments. The present law is that such a person who has knowledge of the voidability of a previous assignment or previous title may still acquire a good title, if the person from whom he acquires the title has a good title. Mere knowledge, as opposed to contribution or participation, to a fraud, mistake, omission or voidability should not have the effect of depriving a person's registered title. The way this Clause is drafted would seem to mean that once an owner is aware that there is fraud, mistake or omission somewhere up the chain in the title, his title is susceptible to rectification by the Court. The Bar does not see why the Bill should put a registered person's title at a greater risk than what the present law has put him.

5. The exclusion of the right of a former registered owner or former registered lessee to apply for rectification merely because he might have knowledge of the fraud at some stage is also unsatisfactory. Under Clause 81(3)(b)(i), it would appear that if the former registered owner or lessee had knowledge of the fraud, the Court would have no power to order rectification. Again we doubt if the knowledge test should be made the appropriate test for the invocation of the Court's powers in this context. Why should mere knowledge of the fraud necessarily prevent the former registered owner or lessee from seeking the Court's assistance for rectification? Absent participation or contribution, mere knowledge by a fraud victim of the fraud does not necessarily disqualify him from being a victim. For example, a fraudulent or dishonest representation may be practiced on a third party and, as a result of some action of that third party the title of a former registered owner or lessee of land is either destroyed or encumbered. Merely because the fraud was known to the former registered owner would not necessarily prevent the fraud from being committed, and the third party may not necessarily have any knowledge of the fraud. The former owner or lessee may not know the third party and may not have the means or

opportunity to apprise him of the fraud in time to prevent it from being committed. Or it may be that the former owner or lessee only acquired knowledge of the fraud after the same had already been committed. On the wordings of the present draft, once it is shown that the former owner has knowledge of the fraud at any time, any application for rectification would be out of the windows even though he has played absolutely no part in it.

6. Even if the knowledge test is the appropriate test, the important question to be asked is knowledge at what time? It is unclear from the wording of Clause 81(3)(b)(i) whether the Courts' power to order rectification would only be excluded where the former registered owner or former registered lessee *had* knowledge of the fraud *at the time of its perpetration*. This is clearly unsatisfactory and, we venture to suggest, unintended. There is no justification for barring a former registered owner or former registered lessee from seeking rectification simply because he had at some point acquired knowledge of the fraud. Indeed, he could not be expected to apply for rectification unless and until he has knowledge of the fraud. The way this Clause is drafted leaves considerable room for doubt as to *when* the former registered owner or former registered lessee has to have knowledge of the fraud before his right to apply for rectification is excluded. If the intention is to exclude rectification only where the former registered owner or former registered lessee *had* knowledge of the fraud *at the time of its perpetration*, it ought to be made clear. The Bar proposes, however, that all reference to the knowledge test should be entirely removed from Clause 81 altogether.

7. Moreover, it would appear that the word "neither" at the end of the opening words in Clause 81(3)(c) was a clerical error in the drafting. Supposedly the word "either" (rather than "neither") is intended instead. If this were not the case, then the result would be rather absurd in that rectification would be available in a case where the registered owner or registered lessee against whom rectification is sought *had neither* knowledge of the fraud *nor* caused nor substantially contributed to such fraud (Clause 81(3) (c)) but rectification would *not* be available where the registered owner or registered lessee *had* knowledge

of the fraud or caused or substantially contributed to such fraud (Clause 81(2))! Assuming that this is merely a clerical error, and leaving aside the views expressed above regarding the appropriateness of the knowledge test, it is not clear why Clause 81(3) (c) is required at all when Clause 81(2) is basically saying the same thing. It would only add confusion to the statute as Clause 81(3)(c) is, for reasons not immediately apparent, slightly different from Clause 81(2). For example, the knowledge provided for in Clause 81(3)(c) does not include knowledge of mistake or omission, nor does it include knowledge of the voidness or voidability of any instrument. Yet Clause 81(2) (a wider section) is provided to be subject to Clause 81(3)(c), which makes one wonder whether knowledge by a registered owner or lessee of anything other than fraud (things such as mistake, omission, or the voidness or voidability of an instrument) is relevant at all. The legislative intention in this respect is difficult to fathom.

Gradual Conversion

8. The Bar agrees with the recommendation that conversion should be allowed to take place as a gradual process and that automatic conversion should not be considered until after the new system of title registration has gained popular acceptance.

Indemnity Fund

9. The new system of land title registration will result in a drastic in-road into the rule of *nemo dat quod non habet*. The availability of rectification is severely restricted under Clause 81. As a result, legal protection for interests in land would be drastically reduced and save where overriding interests are concerned, a host of legal interests risk being defeated whenever they are not fully or accurately recorded on the land register. Subject to the remedy of rectification, the only remedy would then lie in the statutory provision for indemnity. However, the availability of indemnity is severely restricted under the proposed legislation.

10. Under Clause 82 (1), indemnity is only available where there is fraud, or mistake or omission on the part of the Registrar or any public officer assisting the Registrar. Fraud is only defined as including dishonesty and forgery. Subject to that express inclusion, it is not clear whether the term is confined to common law fraud (the making of a false statement of fact either knowingly, or without belief in its truth, or recklessly, without caring whether it is true or false, see **Derry v. Peek** (1889) 14 App. Cas.337), or whether it includes equitable fraud (sometimes called constructive fraud), which includes a much wider scope of situations such as undue influence, breach of confidence etc (see generally, **Snell on Equity**, 13th ed., p.610 et seq.)

11. Neither "omission" nor "mistake" is defined in the draft legislation. Is unilateral mistake included?

12. Clause 82(2)(a) provides that no indemnity will be paid to not only a person who is himself guilty of fraud but also someone who is "negligent". Given that under the current law, a landowner's interests in land enjoy absolute protection against the fraud of third parties under the *nemo dat* rule and he is not generally under any duty of care towards third parties to prevent fraud, to the extent that he suffers a loss as a result of the new system of land title registration we fail to see any justification for excluding indemnity in cases of "negligence" as opposed to "fraud". Is it really intended that the indemnity provisions, which are designed as compensation for loss of title, be made a fault-based scheme? If so, should the extent of his "negligence" be relevant? For example, a land owner who leaves his land unattended in Hong Kong (he might have emigrated, or does not habitually live in Hong Kong, or is simply too lazy) may be a victim of fraud. It may be that if he had lived in Hong Kong and be more diligent in attending to the affairs of his landed properties he might have been able to prevent the fraud from happening (for example, if he had been more careful he might not have entrusted a power of attorney to a friend, who has fraudulently misused it causing his loss). At common law, the land owner owes no duty to any person to take care - he has no duty to take any steps to protect himself from being made a victim of fraud. Negligence simply does not come in for

consideration in determining his property rights. Yet under the proposed scheme he may be deprived of any right to obtain compensation on the ground that he has been "negligent" in not taking steps which might have protected him from the fraud. That is a major revolution on the common law principles as applied to property law. The Bar sees no good grounds for embarking on such a revolution.

13. The Bar likewise fails to see any justification for Clause 82(4)(c) which provides that no indemnity will be paid in respect of any fraud, mistake or omission which occurred *before the date of first registration* but which is only discovered after that date. In many instances, a fraud, mistake or omission which occurred before the date of first registration would not operate to defeat the interest of a landowner *but for* the first registration and there is no reason why a landowner who suffers a loss as a result of not having his interests fully or accurately recorded on the land register upon the first registration (assuming that this arises because of fraud, mistake or omission provided for in Clause 82(1)) should not be fully compensated for his loss.

14. More fundamentally, the Bar takes strong objection to the combined effect of Clauses 83(1)(a)(ii) & 83(3) which is to allow the Financial Secretary to limit the amount payable as indemnity in any manner he thinks fit. The Bar understands that determination on a case by case basis is not envisaged and that the Financial Secretary will set limits which will be applicable across the board, currently proposed to be $30 million.

15. Since indemnity is the remedy of last resort for those who do not qualify for rectification, the failure to provide a full indemnity in all cases where an owner has had his interest extinguished through no fault of his own would be wrong in principle.

16. The Bar remains unconvinced that there should be any upper limit on the indemnity. The Bar remains of the view that the reason suggested by the Administration to the effect that "individuals and companies that are able to

engage in property transactions valued at over $30 million are well able to safeguard themselves against fraud" is fallacious. As pointed out before in our Submissions dated 25th March 2002, it is unreal to expect anyone, however rich, to guard against fraud on his properties, and indeed very often fraud is perpetrated wholly without any knowledge on the part of the victim. The Bar does not feel that it is in principle right to discriminate against the rich in this connexion. The suggestion that the proposed indemnity scheme provides owners with a safeguard that they do not have at the present is likewise disingenuous. A landowner whose interests are currently protected under the *nemo dat* rule would not be exposed to any loss and hence would not require any safeguard but for the introduction of the new system of title registration.

(Please refer to Appendix II)

17. Whilst the Bar recognizes the practical consideration regarding the amount of levy and the possibility of one large claim draining the fund, the operation of the proposed legislation would amount to expropriation of private property rights, and in the case of fraud, through no fault of the owner concerned. As a matter of principle, it cannot be right for any civilized society to enact legislation having the effect of depriving a person of his property without adequate and equitable compensation. In this regard, the Bar also has strong doubts as to whether the expropriatory effects of the proposed legislation are compatible with Articles 6 and 105 of the Basic Law.

18. The procedure for claiming indemnity is governed by Clause 84. However, it is unclear as to who should be the counter-party in this kind of proceedings. Is it to be the Land Registrar or the Secretary for Justice? This ought to be made clear.

19. Clause 85 attempts to treat a claim for indemnity as a simple contract debt, i.e. subject to a limitation period of 6 years. The limitation period applicable to proceedings for recovery of land is 12 years. In many instances, the right to claim indemnity will in effect be a substitute for the right to recover the land which a landowner has lost. Hence the Bar is of the view that claims for

indemnity are akin to proceedings for the recovery of land and there is no reason for imposing a shorter limitation period.

20. Clause 85 further provides that "*the cause of action shall be deemed to arise at the time when the claimant knows or, but for his own default,* ***might have known****, of the existence of his claim*". In accordance with the provisions in the Limitation Ordinance the words "might have known" should read "should have known". There is no reason why the cause of action should be deemed to arise merely because there is a possible, however remote, means of discovering it. Clearly it would be more conducive to justice for the test to be set at the level of what *ought to* have been known, rather than what *could* have been known, to the claimant.

Overriding Interests

21. The Bar supports the proposal to subject registered titles to some well-defined categories of overriding interests.

22. The Bar repeats its comments made in paragraph 17 of our Submissions dated 25th March 2002 regarding occupiers' interests, which apparently have not been addressed in the present draft. (Please refer to Appendix II)

23. Another notable omission is the absence of any provision to cater for the possibility that easements may be acquired by prescription. Although the conventional view is that because all land in Hong Kong (with the exception of the site of St. John's Cathedral) is held on Crown leases, prescription has no application in Hong Kong, there are strong arguments in favour of allowing leaseholders to acquire rights under the doctrine of lost modern grant. In England, the matter appears to have been settled by the Court of Appeal decision in **Simmons v. Dobson** [1991] 1 W.L.R. 720 but in Hong Kong, the matter is not free from doubt. Only recently in the case of **Prosperous Tone Ltd. v. Pearl Fame Development Ltd.** (CACV 1128/2001, judgment dated 6 March 2002, unreported) the Court of Appeal had proceeded on the assumption

(albeit the matter was not argued) that in Hong Kong, a leaseholder can acquire rights of way by prescription. Given the state of the authorities, the Bar does not believe legislation can simply proceed on the assumption that prescription has no application in Hong Kong.

24. It is also important to clearly define whether the Government's right of re-entry under the terms of a Government Lease for accrued breaches of the covenants in the Government Lease should be treated as overriding interests.

Land Boundaries

25. The Bar agrees with the proposal that leaves boundary disputes to be dealt with outside the title registration system. The Bar repeats what it has stated in paragraphs 26 to 28 of our Submissions dated 25th March 2002. (Please refer to Appendix II)

Miscellaneous

26. The Bar notes that while some of the concerns which it has expressed in our previous Submissions have been addressed in the present draft, others have not. For example, in paragraphs 7.1 and 7.2 of our Submissions dated 9th February 1999, the Bar alluded to certain problems regarding consent cautions. The Bar notes that its concerns has not been addressed in the present draft and the problems remain (see Clause 70(1)). Similarly for some of the problems identified in respect of non-consent cautions (or "hostile cautions" as it is sometimes called). Without repeating verbatim these concerns again in the present Submissions, the Bar would draw attention again to the previous submissions made by the Bar. The Bar stands by those comments and does not see any justification why they are apparently ignored by the Government. A fertile ground for litigation is being created if these problems are not properly addressed and resolved in the draft legislation. (Please refer to Appendix I)

Dated the 23rd day of April 2003.

COMMENTS OF THE HONG KONG BAR ASSOCIATION
on Land Titles Bill

Overview of the Bill

1.1 The Land Titles Bill ("the Bill") proposes to replace the existing deeds-based system of land-holding in Hong Kong (supplemented by the Land Registration Ordinance, Cap. 128) by a new form of statutory title which in England has been described as "absolute". Under the proposed scheme, the present system under the Land Registration Ordinance (Cap. 128) of registering instruments affecting land will be replaced by a new system of registering the title to the land and the interests in the land subject to which the title is held (see the Explanatory Memorandum).

1.2 Upon registration, the registered owner of the Crown Lease or long-term lease (defined as a lease granted for more than 21 years at a premium) would be vested with the corresponding leasehold estate in the land, irrespective of any defect in the title of his predecessors, subject only to undisclosed Overriding Interests and the risk of Rectification being ordered against him.

1.3 This new form of statutory title constitutes a radical departure from the common law concept of landholding whereby usually the assignee can not obtain a better title than that of the assignor. The obvious exceptions would be cases where the doctrine of

estoppel or section 3(2) of the Land Registration Ordinance comes into play. Where the assignor's title is defective for whatever reason, the vesting of a statutory absolute title in the new registered owner upon registration will create a major exception to the common law rule of *nemo dat quod non habet*. Except in the case of an overriding interest and subject to rectification, existing legal rights will be extinguished if not reflected in the new registration. As such, we feel that the impact of the proposed changes should be widely publicised and their implementation should only take place after informed public discussion and consultation and only with the support of the public. We are concerned that the public may think that this Bill merely introduces changes to the form of conveyancing documents and conveyancing procedure only.

Definitions

2.1 The definition of a "Charge" in Clause 2(1) of the Bill is much wider than the definition of "mortgage" and "legal charge" in the Conveyancing and Property Ordinance (Cap.219). The proposed definition would cover any transaction whereby registered land or a registered long-term lease is made security for, inter alia, "the fulfilment of a condition or obligation". It is not entirely clear, however, whether this wider definition is wide enough to make the following types of security a "Charge" with the meaning of the Bill:-

(a) an equitable mortgage by the mere deposit of title deeds;

(b) an equitable charge created by a person appropriating registered land to the discharge of some debt or other obligation (e.g. a will or a voluntary settlement which charges land with the payment of a sum of money);

(c) a vendor's lien;

(d) a purchaser's lien.

If all or any the above fall within the definition of a "Charge", presumably they can be registered pursuant to Clause 32 of the Bill and the person in whose favour they are made would become an "owner" thereof within the meaning of the definition in Clause 2(1). We suggest that the position be appropriately clarified in the Bill. Is it intended that these special kinds of securities should be Charges within the meaning of the Bill?

2.2 The definitions of "caution", "consent caution" and "non-consent caution" are unhelpful. A "consent caution" is defined as a caution with the consent referred to in Clause 66(1) and a "non-consent caution" is defined as a caution without such consent. [N.B. It is *not* defined as a caution registrable in circumstances provided in Clause 66(3). If it had been so defined, the position would perhaps be easier to understand]. It is impossible to decide what is and what is not a consent caution or a non-consent caution without knowing what exactly is a caution in the first place. And it is not helpful to go back to the definition

of "caution" because, one then finds it defined simply as meaning "a consent or non-consent caution"! That certainly does not advance the understanding of the term in any constructive way. It is to be noted that in Clause 66(1), a consent caution can only be registered in relation to a dealing in land, charge or long-term lease which is effected "in good faith and for valuable consideration", provided that there is the requisite consent. If a non-consent caution is simply a caution without that consent, does it mean that a non-consent caution would similarly be restricted to dealings in good faith and valuable consideration? Does it mean that dealings without valuable consideration are not registrable even as non-consent cautions? We do not think that that was intended to be the legislative intention. Certainly Clause 66(3) as it presently stands would otherwise have been wide enough to cover any interest acquired without valuable consideration (the words "whether contractual or otherwise" are wide) but for the rather confusing definitions in Clause 2(1).

2.3 We have also found the definition of "registered matter", which presently is in the form of a definition by way of exclusion, not terribly helpful. The definition is important because, under Clause 19(2)(b) and 19(4)(b) the absolute ownership of the person registered as owner is subject to any registered matter affecting the land.

2.4 "Dealing" is defined as including disposition and transmission but otherwise is not comprehensively defined. Again this is

liable to cause doubts and confusion. Transmission (which is defined as registration of any matter to record the passing of title by operation of law) apart, what is a dealing? Supposedly the draftsman intends that the concept of "dealing" to be wider than "disposition", but other than that it is not clear what is and what is not a dealing. There are various kinds of agreements (an agreement to transfer, to charge etc.) which are expressly excluded from the definition of "disposition". Are these agreements dealings or not? Presumably sale and purchase agreements and provisional sale and purchase agreements are "dealings" as Clause 66(2) contemplate them to be so. While it is reasonably clear from the Bill that dealing is more than just the summation of disposition and transmission, the scope of "dealings" are not clear from the Bill. We suggest an appropriate clarification be introduced to remove any doubts in this regard.

2.5 Further we consider that the definition of "disposition" should make it clear whether an assent is to be treated as a disposition.

Organisation and Administration

3.1 There is no separate definition of "Government Lease" in the Bill. Presumably the definition of Government Lease in s.3 of the Interpretation and General Clauses Ordinance applies. This includes an agreement for a Government Lease such as conditions of sale, grant or exchange. However, the Bill does not apply to Government land which is not subject to a Government

Lease (see Clause 3(1)(b)). Accordingly, rights over this kind of Government land are not registrable and not searchable. It is not impossible that privately-owned land in Hong Kong may have quasi easements in the form of rights of way over the Government land in the neighbourhood. Conversely it is also possible that in granting a lease, the Government may reserve rights over the demised land in favour of the neighbouring Government land. There is no reason why these rights and incumbrances should not be made discoverable. If the scheme of having registered title to land is meant to be comprehensive, consideration should be given to include Government land in the scheme provided for in the Bill.

3.2 We would particularly mention Clause 5(2)(a) of the Bill. Clause 5(2)(a) is couched in mandatory terms and the Registrar is under a statutory duty to keep and maintain in each land registry the Government Lease for each parcel of land. Again, it is well known that in respect of many parcels of land in Hong Kong the relevant Government leases were lost and the counterparts which should be kept by the Government were also missing. Many of them were said to have been lost during the Japanese occupation. Indeed there were quite a number of cases reported in the law reports where the cause of litigation was the missing Government Leases (see e.g. ***Gatewood Ltd. v. Silver Noble Investment Ltd.*** (1992) 1 HKC 473, ***Wong Wai Ming v. Tang Tat Chi*** (1993) 1 HKC 341, ***BMC International Ltd. v. Star Win Co. Ltd.***). We do not see how the Registrar

can possibly carry out his statutory duty where the Government Lease is in fact missing in relation to a particular parcel of land.

3.3 In this connection, we suggest that Clause 41 of the Bill should also be reviewed to tackle the problem of missing Government Leases. Very often, the loss of Government Leases (and their counterparts) is not the fault of the land-owner and even if it were his fault, we do not see any reason for punishing this fault by making the land unsaleable. Under the present law, such land with missing Government Leases is almost unsaleable (unless the vendor has expressly contracted out his duty to prove title). By reason of Clauses 5(2)(a) and (c), it would appear to us that the Government Lease would be "an instrument referred to in" the current entries in the Land Register in respect of registered land for the purpose of Clauses 41(1)(a)(i) & (ii). Thus by reason of Clause 41(a) of the Bill, such land would continue to be unsaleable because the vendor would not be able to produce any copy of the Government Lease. To make things worse for the vendor, under the scheme of registered land, he cannot even contract out his obligation under Clause 41(1)(a) because of the words "notwithstanding any stipulation to the contrary". It may not be fair to those land-owners who find themselves in such a position.

3.4 We note that under Clause 11(3) of the Bill, transitional provisions are made to make the interest under certain types of documents protected as if they had been registered as consent cautions. We note however that the list under Clause 11(3)(a) to (f) does not include the following types of documents:-

(a) powers of attorney (particularly those used in connection with the New Territories Small Houses scheme or other security arrangements);

(b) option agreements;

(c) pre-emption agreements.

These documents which are presently registered in the Land Registry should in our view be protected in the same way as the documents enumerated under (a) to (f) of Clause 11(3).

3.5 The power of the Registrar to close an old register and only transfer the information on the current ownership to a new register may impede the proper investigation of title. Care should be taken in conferring such a power to the Registrar and relying wholly on his judgment or discretion.

3.6 The provisions in Clause 18(5) is likely to give rise to serious (and probably unintended) consequence to co-owners of land. The sub-clause provides that the Registrar *shall* refuse to register *any matter relating to an undivided share* in registered land unless and until an application for the division of the land into undivided shares has been registered showing or specifying such rights to the use and occupation of the land or part thereof, as may be appurtenant to the ownership *of that share*. On these wordings, the co-owners of land holding undivided shares in the land

cannot register themselves as owners holding the land as tenants in common, unless, in relation to their co-ownership, there has been an application registered for such division of the land specifying their respective rights to the use and occupation thereof. In effect, these tenants in common would be forced to destroy their unity of possession or forced to make a deed of mutual covenants if they want to register their co-ownership. We do not see any justification for this.

3.7 Clause 18(5) should also be considered in conjunction with Clause 52(1) of the Bill. That Clause clearly contemplates the right of joint tenants and tenants in common to register the instrument of transfer in their favour. If Clause 52(1) is to be read subject to Clause 18(5), then tenants in common could not be registered as owners unless they agree to destroy their unity of possession. This we believe is an unintended consequence arising from the present drafting of Clause 18(5).

Effect of Registration etc.

4.1 Clause 19(2)(d) provide:-

"*any interest –*

(i) existing immediately before the appointed day;

(ii) affecting the land;

(iii) which was not registered under the repealed Ordinance(and whether or not it was capable of registration under that Ordinance); and

(iv) which was, immediately before the appointed day, enforceable against the person who is the owner of the land immediately upon the beginning of the appointed day,

in the case, but only in the case, ***of that person****.*"

It is not clear to us what is meant by "that person" in the last sentence of Clause 19(3)(d). Does it mean to refer to the person entitled to the interest or does it mean to refer to the person who is the owner of the land immediately upon the beginning of the appointed day? This uncertainty should be clearly addressed in the Bill.

We think it is more probable that "that person" is intended to refer to the landowner as he is the only "person" mentioned in the subsection. If so, does "that person" includes the person's assigns or successors-in-title?

If "that person" includes his assigns and successors-in-title, the operation of Clauses 20(1) & (2) (relating to the position of transferees without valuable consideration) and Clauses 61 to 64 (relating to the position of various successors-in-title acquiring the land by transmission as opposed to transfer) would presumably apply. Transferees of the land-owner for valuable consideration will obviously take the land free from the unregistered interest. But those who acquire the land by

voluntary transfer and/or by transmission may not. Is that what is intended to be achieved by Clause 19(2)(d) so that the unregistered interest would indefinitely continue to burden these assigns and successors-in-title of the land-owner?

On the other hand, if "that person" in Clause 19(2)(d) refers to the person having the interest concerned, does it include his assigns and/or successor-in-title? The interest is unregistered, and in many cases, unregistrable under the Land Registration Ordinance. Is it intended that the holder of the interest can lawfully pass his interest to another person giving the latter the right to enforce it against the land-owner? Again this would have the effect of perpetuating the unregistered interest indefinitely.

4.2 In respect of Clause 19(4)(d) we would raise a similar comment as in (1) above.

4.3 Clause 20(4) is incomprehensible as it presently stands and was probably drafted under a misconception of the law on squatter title. It has been held by the House of Lords in the case of ***St. Marylebone Property Co. Ltd. v. Fairweather*** (1963) AC 510 that the squatter's extinguishment of the tenant's title would not thereby render the squatter a tenant of the landlord. Thus the mere fact that the tenant's interest has been extinguished by the squatter does not elevate the squatter to the position of the leasehold tenant vis-à-vis the landlord. In the absence of any provision in the Bill which overrules the effect of the ***Fairweather*** decision, we cannot see how the Court of First

Instance can ever make an order to the effect that a squatter "has become the owner of registered land". An owner of registered land is defined in Clause 2(1) as being either the owner or holder of a Government lease or an undivided share in the land. A squatter can never be such an owner or holder. A squatter's title is in law quite different in nature from that of a leasehold tenant against which he bars. In the situation where a squatter wants to dispose of his squatter title, special provisions would have to be made in the relevant sale and purchase agreement to expressly provide for the same. A squatter cannot sell his interest as though he was selling as a leaseholder. We therefore do not see how Clause 20(4) can ever apply. That sub-clause has to be redrafted to take into account the special nature of a squatter title.

Furthermore, to mandatorily require the Court to specify the interest subject to which the squatter holds the land would impose an almost impossible task on the Court. Our Courts presently play an adjudicatory role in our adversarial system of justice. Clause 20(4) would have the effect of enjoining the Court to take on an inquisitorial role to find out what interests may be binding on the squatter. Very often the dispute put before the Court for its decision (such as whether a squatter's occupation has been long enough to bar the leaseholder's title) would not enable the Court to go further so as to be in any position to specify the other interests (which may not even feature in the case before the Court) which are binding on the

squatter. We would suggest that the word "shall" be changed to "may, if it thinks fit", or words of similar effect.

4.4 In relation to such squatter title, we would also mention Clause 21(1)(i). The sub-clause provides as follows:-

> "*(i) any rights acquired, or* ***in the course of being acquired****, in the land where, by virtue of the operation of an enactment relating to the limitation of actions, the title of the registered owner* ***has been extinguished***".

A squatter title could only be acquired by the final and absolute extinguishment of the leaseholder's title. The squatter title is either acquired or not acquired. The leaseholder's title is either extinguished or not extinguished. If the squatter's occupation (or any previous occupations by other squatters of which he is entitled to take advantage) is one day short of the limitation period, there is no squatter title acquired. It is difficult to see how rights "in the course of being acquired" could ever be relevant when it is a requirement of this overriding interest that the title of the registered owner "has been extinguished".

4.5 Clause 22 is entitled "Entries in Land Register to constitute actual notice". We suggest that the title should be amended by removing the word "actual". While it is right to deem a person to have notice of what are registered, in consequence of which he would not be able to plead ignorance of the same, it is another thing to provide that he is deemed to have *actual* notice of every

entry in the Land Register. Actual notice of the person may have very serious implications on charges of fraud.

Dispositions

5.1 By the combination of Clauses 26(4) and (6) the doctrine of part performance is in effect wholly abolished. Under the present law, part performance may be relied upon by a party seeking specific performance but not damages. It appears that the Bill seeks in part to reverse the position – under Clause 26(4) no Court shall grant an order for specific performance of an unregistered instrument, but the right to claim *damages* on an unregistered document appears to be preserved. We note that s.3(1) of the Conveyancing and Property Ordinance is not going to be repealed but s.3(2) will be amended by providing that the same be "subject to section 26(4) of the Land Titles Ordinance". Thus an oral agreement which is evidenced by a sufficient memorandum may still be enforced, although that is subject to the prohibition regarding specific performance on an unregistered instrument. Presumably if the memorandum evidencing the oral contract has been registered there is no bar to specific performance. But where the memorandum is not registered, does s.26(4) serve to prohibit specific performance of the oral agreement? It is arguable that s.26(4) only prevents the court from granting an order for specific performance of an unregistered instrument. However, in ordering specific performance of an oral agreement, the Court is not ordering specific performance of the memorandum which evidences it at

all. It is true that the oral agreement is being evidenced by the unregistered memorandum but the fact remains that in ordering specific performance, the court is ordering specific performance of the oral contract, not the memorandum which evidences the contract. It may well be that the objective for which Clause 26(4) is designed may not be effectually achieved by its present wordings.

5.2 We note from Clause 31(5) that in order to discharge a registered Charging Order it is now necessary to have a Court Order providing for the discharge. Full payment of the judgment debt in respect of which the charging order was made is not sufficient. The judgment debtor would need to apply for an order for discharge in order to remove the relevant entry. This may be time consuming and commercially troublesome for the parties. We fail to see why an entry cannot be made to the Register recording that the judgment debt in respect of which the charging order was made has been fully satisfied with an appropriate acknowledgement by the judgment creditor. If this is done, we fail to see why this document should not be given the effect of discharging the Charging Order. Very often last minute settlement is reached between a judgment creditor and a judgment debtor at a time when the judgment debtor is anxious to sell his property and there should be no reason why the statute should place an obstacle to the title by failing to reflect timeously the effect of the settlement and the satisfaction of the judgment debt.

5.3 Clause 46(1) resembles s.41(2) of the Conveyancing and Property Ordinance. However in s.41(2)(c) of the latter Ordinance, the wordings used are:-

> "*(2) This section applies to any covenant, whether positive or restrictive in effect –*
>
> *(a)* ……
>
> *(b)* ……
>
> *(c) which is expressed **and** intended to benefit the land of the covenantee and his successors in title or persons deriving title to that land under or through him or them.*"

In Clause 46(1) of the Bill, the words "which is expressed **or** intended to benefit" are used. The replacement of the conjunction "and" with the conjunction "or" is to be greatly welcomed. We note however that in the proposed amendments to the Conveyancing and Property Ordinance, no amendment has been included to amend s.41(2)(c) of the Conveyancing and Property Ordinance to bring it into line with Clause 46(1) of the Bill. We would strongly urge that consideration be given to amend s.41(2)(c) of the Conveyancing and Property Ordinance in this respect.

5.4 Clause 53 of the Bill provides, inter alia, as follows:-

> "*Nothing in this Ordinance shall be construed as affecting:-*
>
> *(a) a right of succession to land under Part II of the New Territories Ordinance.*"

In the case of land under Part II of the New Territories Ordinance, where there is no probate, the present position is that a successor claiming to have the right of succession would have to satisfy the Land Officer that he is entitled to such land in succession to the deceased owner (s.17 of the New Territories Ordinance refers). The Land Officer is supposed to have expert knowledge of New Territories custom. However, Clause 59(3) of the Bill provides for the registration by transmission in cases of New Territories land. That sub-clause provides in these terms:-

> "*(3) Where under section 17 of the New Territories Ordinance (Cap.97) as read with section 12 of the New Territories land (Exemption) Ordinance (cap.452) any registered land is vested in any person as a successor, that person shall, on the presentation to the Registrar of evidence which satisfies the Registrar that the land has so vested, be entitled to be registered by transmission as the owner of the land in place of the deceased person concerned.*"

How would a person present evidence to satisfy the Registrar that the land has vested in him as a successor? Is he going to obtain a certificate of some sort from the Land Officer, or is it

intended that the function of the Land Officer shall be taken over by the Registrar? Is the Registrar to be taken to have such expert knowledge, as a Land Officer is, of New Territories custom? We would suggest that the Government should also consult those bodies representing the interest of the indigenous New Territories people on this point.

Transmissions and Trusts

6.1 Clause 27 provides –

> "*Where a trustee in that capacity is registered as the owner of registered land … he shall, in dealing with the land … be deemed to be the owner of the land … and no disposition by the trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that the disposition amounted to a breach of trust.*"

6.2 On the face of it Clause 27 has the effect of conferring upon every trustee of land the power of sale. This would be a departure from the existing law, where the trustee's power of sale must be specifically provided for in the trust deed.

6.3 However, it is not clear as to whether "trustees" include trustees holding on resulting trust or constructive trust and also others in fiduciary positions. Also the effect of notice of the terms of trust is also unclear.

6.4 Clause 27 must be read in conjunction with Clause 65(4) which provides that –

> "***No person dealing with land … shall be deemed to have notice*** *of the terms of the trust to which the land … is subject and no breach of those terms shall create any right or indemnity under this Ordinance.*"

However, "no person shall be deemed to have notice" is not the same as "all persons shall be deemed not to have notice". For example, since under the existing law the power of sale must be specifically provided for in the trust deed, would it be necessary for the purchaser to show that he knew of the existence of a trust deed before he could be allowed to act on the basis that the trustee had the power to sell to him? Conversely, if he is not aware of the existence of any trust deed, should it be inferred that he must therefore be taken to know that in fact the trustee did not have any power of sale?

6.5 The position is further complicated when one takes into account of Clause 65(5) –

"A person –

> *(a) dealing with land,… shall, **in the absence of evidence to the contrary**, be entitled to assume that the exercise by the trustee concerned of the power of sale over the land, … is not a breach of the terms of the trust to which the land … is subject;*

> *(a) who suffers loss in consequence of the exercise by the trustee concerned of that power in breach of the terms of that trust shall have a remedy in damages against that trustee.*"

The words in bold seems to suggest that if the purchaser has actual notice of the breach of trust , then he cannot be protected; but under Clause 27, he is entitled to assume that the trustee is owner. Further, if a bona fide purchaser can take the property free from the trust, it would be hard to imagine how he could suffer any loss in consequence of the exercise by the trustee of the power in breach of the terms of the trust unless Clause 65(5) is not meant to protect someone with notice (most probably constructive notice) of the breach of trust.

6.6 The scope of protection given to purchasers with notice (actual or constructive) of the lack of power of sale under the terms of the trust to dispose of the land should be clearly defined. If the intention is that purchasers with notice of any breach of trust are not to be protected, the wording of Clause 27 can be changed to "no disposition ... shall be defeasible by reason <u>only</u> of the fact that the disposition amounted to a breach of trust". If the Ordinance is intended to give the power of sale to all persons in fiduciary capacity (including constructive and resulting trustees) so that even the purchaser who has constructive knowledge of the lack of power would obtain good title and the rights of the beneficiary

would simply be directed against the proceeds of sale, provided that the sale is for valuable consideration and in good faith, then it should be made clear.

6.7 Clause 58 provides –

> "*… where one of 2 or more joint tenants … dies, … the remaining joint tenants shall be subject to any interests –*
>
> *(a) subject to which the deceased joint tenant held the land … immediately prior to his death;*
>
> *(b) which are unregistered; and*
>
> *(c) which are* ***enforceable.***"

The wording should make it clear whether "enforceable" means enforceable against the deceased joint tenant or the surviving joint tenants or enforceable against the land as an incumbrance.

6.8 Clause 61 provides for the powers and duties of personal representatives. The common law position is that the personal representative may have a power of sale, yet this power is subject to Section 54(1) & (2) of the Probate and Administration Ordinance (Cap.10). Does it mean that upon the Bill coming into effect any one personal representative who is registered as the owner of the land in that capacity may validly sell and assign the land? Furthermore does Clause 61affect the requirement of an assent?

Cautions and Restraints in Dispositions

7.1 Clause 66(1) appears to provide that in the case of a second or subsequent charge, the charge would not be registrable unless the prior chargee consents to the registration. This represents a fundamental departure from the existing law, and a departure which we have grave reservation. Currently if the first charge should contain express prohibition against further charges, the further charges would still be valid as between the chargor and the further chargee although it could not affect the rights of the first chargee or persons deriving title through him. The further charges may still be presented for registration and the interest of the further chargee protected. We do not see any convincing ground for a change of the law in this respect.

7.2 Further, as presently drafted, where there are more than one prior consent cautions which affect the land, Clause 66(1)(b) would only require the consent of the cautioner of the last of such consent cautions. This is difficult to understand. When the first chargee gave his consent to the registration of the 2nd charge, he may have done so only on the basis that there would be no further charges (i.e. no 3rd charge or 4th charge etc.). Yet under the present draft, the 3rd charge may be registered with the consent of the 2nd chargee only, despite the fact that the 1st chargee might have vehemently objected to the making of the 3rd charge. We find the logic of this provision very difficult to understand.

7.3 Clause 66(5) provides as follows:-

> "*A transfer in registered land or a registered long term lease which is not for valuable consideration shall not be registered unless there is registered at the same time a non-consent caution to the effect that, in consequence of that transfer, the land or lease is or may become subject to a first charge under section 18(1) of the Estate Duty Ordinance (Cap.111).*"

This kind of compulsory non-consent caution will presumably be left on the Register forever. We do not know how, on the present scheme, such cautions may be removed. It is to be noted that this form of non- consent caution was merely a kind of warning that there may be a first charge under section 18(1) of the Estate Duty Ordinance and is not the same as a first charge under section 18(1). Hence it could not be removed under the machinery provided in Clause 68(2).

7.4 Clause 69 make provisions for wrongful cautions. Presently, where a wrongful claim is made calculated to hamper another person's interest in or his disposal of land, the legal remedy is a claim for "slander of title" or "malicious falsehood" (sometimes called "injurious falsehood"). It is a necessary ingredient for the tort to prove malice and actual damage (see ***Ratcliffe v. Evans*** (1892) 2 QB 524). The tort is not actionable per se.

It now appears that the test for a claim for maintaining or presenting a wrongful caution is one of "wrongfully and without

reasonable cause". Malice apparently is no longer required. Is there any justification for adopting a less stringent test than what is provided at common law?

7.5 We would also mention Clause 73 of the Bill. We doubt if there is any necessity for such a provision. Indeed we look at it as a attempt to create another Land Court. The section has the effect of conferring upon the Registrar a role beyond that of purely administering a land registration system. Is the Registrar to be vested with a duty to prevent fraud or improper dealings of land? It is not clear from Clause 73(1) what may constitute such "improper dealing" or "sufficient cause" so as to trigger the exercise of the power under Clause 73. We have grave reservations to this Clause and the justification therefor.

Rectification and Indemnity

8.1 Given the exception to the rule of *nemo dat quod non habet*, rectification would seem to provide an obvious answer to those who find themselves losing out as a result of their interests not being fully or accurately recorded on the land register. However, the availability of rectification is severely restricted under the proposed legislation.

8.2 The powers of the Court of First Instance to order rectification of the Land Register are set out in Clause 77 –

"*(1) … the Court of First Instance may order rectification … where it is satisfied that the entry has been obtained, made or omitted, as the case may be, by –*

*(a) the **fraud, mistake or omission**, as the case may be, of any person; or*

(b) without prejudice to the operation of section 3(4)(i), means of a void or voidable instrument,

and whether or not the entry was made, obtained or omitted, as the case may be, before, on or after the appointed day.

(2) The Land Register shall not be rectified under subsection (1)so as to affect the title of the owner of registered land or a registered charge, or the lease of a registered long term lease, who –

*(a) is in **possession** of the land and has acquired the land for **valuable consideration; or***

(b) has acquired the charge or the lease for valuable consideration, unless the owner or the lessee –

(i) had knowledge of –

(A) the fraud, mistake or omission; or

(B) the voidness or voidability of the instrument,

in consequence of which the rectification is sought; or

> *(ii) caused such fraud, mistake, omission, voidness or voidability or substantially contributed to it by his act, neglect or default.*

8.3 The concepts of "fraud, mistake or omission" require clarification. "Fraud" is said to include dishonesty and forgery in the definition section of the Bill but that definition would appear to be non-exclusive. For instance, it is not clear whether the draftsman contemplated "equitable fraud" and if so, what is the reason for not stating it clearly? The concepts of "omission" and "mistake" are not defined at all, leaving scope for arguments. For example, would it be necessary to show that the "omission" was negligent and would "unilateral mistake" be sufficient?

8.4 It would appear from the wordings of Clause 77(2) that the Courts have no power to order rectification against a registered owner *in possession* who has acquired his title for valuable consideration (Clause 77(2)(a)); and as against any other registered owner who has acquired his title for valuable consideration, the power would only be available if that registered owner has knowledge of or has caused or substantially contributed to fraud, mistake, omission, voidness or voidability (Clause 77(2)(b)).

8.5 It is unclear whether it was a clerical error in the drafting to apply the qualifying words "unless the owner or the lessee … (to the end of the Clause)" only to Clause 77(2)(b) and not to the

whole of Clause 77(2)(a) & (b). If this were not the case, then rectification would not be available except in the limited number of cases where the registered owner is a voluntary donee or where someone has purchased an interest in remainder. This is because on the current drafting of Clause 77(2)(a), no rectification may be granted against a bona fide purchaser who had furnished valuable consideration if he is in possession. We note that valuable consideration is not the same as full market consideration, and a bona fide purchaser does not mean that he could not have any notice of any interest of others or notice of any fraud or defects in title in the previous dealings in the same property. Furthermore a person who buys the property with some fraudulent misrepresentation is still one who is in possession of the land and has acquired the land for valuable consideration. It is hard to see the justification for such a severe restriction on the right to rectification.

8.6 If the words were applied to both Clause 77(2)(a) and (b), then the result is still unsatisfactory. The central idea of a registered title must be that there must be certainty in the title so that persons dealing with the land would be able to rely on it. In this respect, the position is not dissimilar to the rationale behind the law on negotiable instruments. The present law is that such a person who has knowledge of the voidability of a previous assignment or previous title may still acquire a good title, if the person from whom he acquires the title has a good title. The way this Clause is drafted would seem to mean that once an owner is aware that there is fraud, mistake or omission

somewhere up the chain in the title, then he is susceptible to rectification by Court and could not get the protection of Clause 77(2)(a).

8.7 Moreover, the Ordinance should expressly provide for the extent to which the existing equitable relief of rectification would continue to be available alongside the statutory form of rectification under Clause 77. Whilst the English position is that the Courts retain the inherent jurisdiction to order rectification (**Hynes v. Vaughan, (1985) 50 P & CR 444**), the English legislation also provides for a much wider power to order rectification.

8.8 Whatever might be the scope of rectification under the proposed legislation, the new system of land title registration will result in a drastic in-road into the *nemo dat* rule. Legal protection for interests in land would be drastically reduced and save in the limited cases where rectification is available, a host of legal interests which do not qualify as overriding interests would be defeated whenever there is a registration. The only remedy would then lie in the statutory provision for indemnity.

8.9 The combined effect of Clauses 79(1)(a)(ii) & 79(3) is that the Financial Secretary will be able to limit the amount payable as indemnity in any manner he thinks fit. It does not appear that determination on a case by case basis is envisaged; rather, the Financial Secretary will set limits which will be applicable across the board. There is no criteria laid down for the Financial Secretary's determination, nor is there any procedure for

challenging or appealing against the correctness of his determination.

8.10 Since indemnity is the remedy of last resort for those who do not qualify for rectification, the failure to provide a full indemnity in all cases where an owner has had his interest extinguished through no fault of his own would be wrong in principle. The operation of the proposed legislation would amount to expropriation of private property rights without just compensation.

8.11 The procedure for claiming indemnity is governed by Clause 80. However, it is unclear as to who should be the counter party in this kind of proceedings. Is it meant to be the Land Registrar or the Secretary for Justice? This ought to be made clear.

8.12 Clause 81 attempts to treat a claim for indemnity as a simple contract debt, i.e., subject to a limitation period of 6 years. The limitation period applicable to proceedings for recovery of land is 12 years. Claims for indemnity are akin to proceedings for the recovery of land and there is no reason for imposing a shorter limitation period.

8.13 Clause 81 further provides that "*the cause of action shall be deemed to arise at the time when the claimant knows or, but for his own default,* ***might have known****, of the existence of his claim*". In accordance with the existing provisions in the

Limitation Ordinance the words "might have known" should read "should have known".

Offences

9.1 Clause 91(2) is very alarming. The difference between Clause 91(1) & (2) is that it is an essential requirement that fraud is required in Clause 91(1). However in Clause 91(2), the offence is complete so long as the defendant has acted without lawful authority or reasonable excuse. We also believe that in this case, the intention of the Bill is to cast the onus on the defendant to show that he acted with lawful authority or reasonable excuse. Yet taking into account the sort of acts referred to in paragraphs (a) to (f) of Clause 91(1), the result would be vary alarming. We would like to point out that the acts referred to in paragraphs (a) to (c) are themselves wholly innocuous acts. For instance, the act referred to in Clause 91(a) is "issues or makes, or causes the issue or making of, any application for the registration of any matter". Thus if a solicitor honestly believing that he has the instruction of his client to complete the sale and purchase of a flat, submits an application for the registration of the transfer, he will be guilty of the offence unless the fact that he is instructed by his client is a sufficient lawful authority or reasonable excuse for him to make the application. However if he negligently thinks that he has the authority but in fact his instruction to act has been withdrawn, then he will no longer have any lawful authority or reasonable excuse for making the application for the registration of the matter. He will be guilty of an offence and

liable to be imprisoned for 3 years. Examples of this kind can be multiplied. We see absolutely no reason for criminalising mere negligent acts. However this would appear to be an area which the Law Society would be a lot more concerned with.

Dated this 9th day of February, 1999.

HONG KONG BAR ASSOCIATION

Comments on the Revised Land Titles Bill

Introduction

1. The Bar refers to the letter of the Land Registrar to the Bar Chairman dated 24th December 2001 by which the Bar was informed that changes were being made to the Land Titles Bill ("**the Bill**") and enclosing a paper ("**the Paper**") which explained the major changes. It has been asked to give its comments on these changes.

2. The Bar has been told that drafting of the Revised Bill is now proceeding but the process is complex and likely to take sometime. Until the Bar has the opportunity to see the actual draft of the Revised Bill, it will not be able to give its specific comments to the proposed legislation. At this stage, its comments can only be general and they are made in relation to the changes outlined in the Paper.

3. The Bar has previously submitted its comments on the previous draft of the Bill by a report dated 9th February 1999 ("**1st Report**"). On 24th November 1999, it made its further comments on 7 issues of concerns raised by the Land Registrar ("**2nd Report**").

4. The Bar would repeat paragraph 1.3 of the 1st Report in which it expressed the view that the impact of the Bill was significant and it was important that the proposed changes should be widely publicized and their implementation should only take place after informed public discussion and consultation. The public must not be misled into believing that the proposed changes are merely procedural in nature, or that the same are merely designed to simplify conveyancing documents and procedures. The proposed legislation is a substantive reform of land titles in Hong Kong.

5. In the following paragraphs, the Bar shall set out its views on the proposed revision of the original Bill.

Application of the Bill

6. The Bar notes that the previous proposal of effecting an overnight conversion of the land registration system has now been dropped. Instead there will be a gradual conversion from deeds to title registration so that a dual system will exist in parallel after the enactment of the Bill into legislation. It believes this is a step in the right direction. It has had grave reservation to the original proposal for overnight conversion and it is pleased that its reservation has been addressed. It agrees that automatic

conversion should only be considered at a later stage after the public has become familiar with the new system. It believes that the previous proposal of overnight conversion, involving as it is a very drastic change to land titles in Hong Kong, is a recipe for disaster. The dropping of that proposal is very much welcomed.

7. The Bar's concern about the dual system now proposed is a practical one. Will the Land Registry computer and information facilities be able to handle such a dual system working in parallel? It notes that in the Paper, it is said that the Land Registry system will be able to handle the complexities of parallel running. However, previously the Government had given the impression that the Land Registry would not be able to cope with a dual system (c.f. para. F2 of The Law Society's Submissions on the Land Titles Bill (14th draft)). It assumes that the Land Registry information system will be extended and upgraded to cope with the task but it would suggest that a system audit be carried out of the relevant information system to ensure that it is indeed able to handle the workload involved.

Conversion

8. There was previously a proposal of a 15 year limit for gradual conversion. In the Bar's 2nd Report, it expressed its reservation regarding a 15 year limit. As the Paper no longer mentions such a limit, it assumes that the limit is now dropped. It welcomes this as we do not think that such a limit is either necessary or appropriate. Obviously,

the idea of an automatic conversion may be considered at the later stage once the new system proves to be working well and public confidence on it is established.

9. The Bar is however not too sure about the "voluntary conversion" mentioned in para.10(c) of the Paper. It appears from para.11 of the Paper that upon voluntary conversion, unregistered interest will continue to affect the property until the owner subsequently sells the property. The question is, what benefit will accrue to an owner applying for voluntary conversion? The answer to that question is not clear from the Paper. If no advantage is to be obtained, then it is unlikely that any land owner will want to incur expenses in engaging a solicitor to examine the title and provide a certificate of good title for the purpose of the voluntary application. There will be no incentive for him to do so. His property will be brought into the new system when he sells his property anyway. It believes that if the government's intention is to encourage land owners to switch to the new system as soon as possible, then it must be made clear to the public what advantage will be gained by applying for voluntary conversion.

10. From paragraph 9 and 10(b) of the Paper, it appears to us that the intention behind the legislation is that there will be an automatic application for registration of title whenever there is a genuine sale and assignment of the property and presumably a mortgage

whether legal or equitable would not automatically bring the property into the new system. However, while it is now not possible to have a legal mortgage by way of assignment, it continues to be possible that an assignment may be held to be an equitable mortgage if in essence the assignment is by way of security. It is not unknown that an assignment with a right of re-purchase under certain conditions could amount to an equitable mortgage. It is therefore necessary for assignment to be clearly defined.

11. In principle the Bar has no objection to the requirement of a certificate of good title in the case of an application for first registration by first assignment or by voluntary application. There is however little justification that such certificate may only be issued by solicitors. There is no reason why a certificate by a barrister should not suffice. It further notes that because of this requirement of a certificate of good title, many of the title problems faced by conveyancers at the moment (such as the problem arising from loss of Government or Crown lease, obsolete offensive trade clause in the Crown lease, uncertainty of boundary especially in the old schedule lots under a Block Crown Lease or cases of missing lots under a Block Crown Lease), would remain unresolved by this proposed legislation. As certificates for good title cannot be issued for properties affected by these

problems, conversion by way of voluntary application would not be possible for these properties.

Unregistered interests

12. As pointed out in para.11 of the Paper, unregistered interests will continue to affect properties brought under the title registration system through an application for voluntary conversion. After the conversion however once the owner has sold the property, the unregistered interests will no longer affect the property if the new purchaser had given value for the purchase. The Bar takes this to mean that after voluntary conversion, transactions other than transfer for valuable consideration will continue to be affected by unregistered interests. So, for example, if the property is assigned by way of gift, or if there is a transmission of title upon death, bankruptcy or liquidation, the property will still be affected by unregistered interests. Perhaps this point should be confirmed and clarified with the Government.

13. Although the position is not entirely clear from the Paper, the Bar takes it that under paragraph 10(b) of the Paper, a voluntary assignment by way of gift will still operate to make the transferee's title a registered title. If this is so, there would also be the problem arising in cases where the property is assigned for less than its market value. Bearing in mind that a purchaser for value

would obtain a "perfect" registered title whilst it would appear that a volunteer would have to take the title subject to unregistered interests, disputes may frequently arise as to whether the consideration paid is the market value or is otherwise adequate.

14. It appears that there is no provision making any transmission by operation of law, such as by succession or bankruptcy, a triggering point for registered title. If an assignment by way of gift will make the title a registered title although the registered owner will still have to take the property subject to unregistered interests, there is little basis for saying that a transmission by operation of law should not have the same result.

15. The Bar repeats para.4.1 of its 1st Report where it dealt with the ambiguity arising from the previous draft relating the unregistered interests. It hopes that the confusion mentioned in its 1st Report will be clarified when the Revised Bill is redrafted.

Overriding interests

16. The Bar supports the government's view that some well-defined categories of overriding interests to which registered titles would be subject should be retained in the proposed legislation. It agrees that interests such

as those arising from short term tenancies, stamp duty first charge, squatter rights etc. should continue to qualify as overriding interests and it is either impractical and indeed sometimes impossible to require registration of these interests. It is not cost effective to require short term tenancies to be made in writing and then registered, and it is not practical to expect registration of squatter rights. The same would apply to interests such as public rights (rights to repair highways, public drainage etc.). Such provisions for overriding interests are commonly found in corresponding legislation in other jurisdictions (see as an example, the English Land Registration Act 1925, section 70) and it does not see any problem so long as these overriding interests are well-defined. However it is of the view that other rights of the Government such as rates and property tax should not qualify as overriding interest.

17. One notable omission in the previous draft of the Bill is the absence of a counterpart of s.70(1)(g) of the Land Registration Act 1925 in relation to occupiers' interest. In England, the rights of a person in actual occupation of land or in receipt of rents and profits thereof has been preserved by statute as an overriding interest, save where enquiry is made of such person and the rights (which often take the form of rights under a resulting trust) are not disclosed. The retention of such interests as a kind of overriding interest for the purpose of title registration has given rise to cases in England such as

Williams & Glyn's Bank v. Boland [1981] AC 487. In Hong Kong, the famous decision of **Wong Chim Ying v. Cheng Kam Wing** [1991] 2 HKLR 253 has confirmed the validity of such interests as being equally applicable in the context of deeds registration (see also **Wong Lai Suk Chun v. Wong Chiu Ming** [1993] 1 HKC 522). Is it intended that the new legislation would statutorily repeal the **Boland** case, or is it intended that such occupiers' interests be dealt with under the relevant provisions dealing with trusts? If the intention is the former, one would want to see a good justification for purposely taking away by the stroke of a pen the interests of such persons. If the intention is the latter, it would repeat the comments made by us in paragraphs 6.1 and 6.6 of its 1st Report and its comments regarding the trust provisions of the previous draft of the Bill, particularly regarding its query on the effect of notice as raised in paragraph 6.3 of our 1st Report.

18. It is also important to clearly define whether the Government's right of re-entry under the terms of the Government Lease for accrued breaches of the covenants in the Government Lease should be treated as overriding interests.

Title Certificate

19. The Bar is not too sure about the purpose of the title certificate mentioned in paragraph 13 of the Paper. Apparently it is now the owners' free choice as to whether or not to apply for a title certificate. It is however not clear what advantage would he get by paying a fee to obtain such a certificate if the same is not mandatory or required for proof of title. The Bar does not understand the statement that "Once issued, the title certificate will be a *title document*". In what way would the title certificate be a title document if the title register remains the conclusive evidence of the title to registered land? Presumably the production of a title certificate would *prima facie* prove the state of the up-to-date entries on the title register as at the date of the certificate. Is it intended that the purchaser be entitled to rely on the certificate as accurately recording the relevant entries on the register so that no further searches would be necessary in respect of those entries? If not, and separate proof of title is still necessary, why would anyone want to pay a fee for a certificate which is of little use? (The incentive would be even less if it is made mandatory, once the certificate is issued, that the same be produced and surrendered to the Land Registry on the sale of a property. If an owner has applied and obtained such a certificate but somehow lost it, he might find himself in great trouble when he subsequently sells his property − he has caused an unnecessary title document to be created and then is unable to produce it.) If yes, and the certificate turns out to be either incorrect or incomplete, is it intended that recourse could

be made to the indemnity fund for any loss suffered as a result? The Bar believes that the revised Bill should make this clear so that there would not be any room for doubt.

Indefeasibility of title of the purchaser

20. The Bar repeats its comments made in paragraph 5 of our 2nd Report. It maintains the view that the fact that the register can be rectified represents an exception to the certainty which a title registration system is aimed to achieve. It accepts that this is an unavoidable exception but such exception should not be left at large. To give the Court the wide power of ordering rectification whenever it is satisfied that a failure to do so would be unjust is to introduce a large amount of uncertainty into the system. While it supports the proposal to widen the scope of rectification as provided in the original draft of the Bill, the Bar strongly disagrees with the idea of simply leaving everything to be decided by the Court. There should be clear statutory guidelines and limitations imposed on the Court's power of rectification. It believes that it is not conducive to establishing an efficient and certain system of land titles if "justice" is to be employed as a sole criterion in determining the exercise of the power of rectification. Concepts of "hardship" and "justice" are necessarily relative between the parties involved, but in commercial dealings certainty and speed is sometimes more important than the relative justice in an individual case. The whole point of

having a title registration system is to establish a system of land titles under which professional advisers and parties alike would be able to say with confidence and with minimum trouble whether the title of a property is good or not. Even in difficult cases where recourse to the Courts is required, it would be desirable that legal advisers would be able to tell their clients the statutory criteria that would be adopted by the Court in the exercise of its power. It would offer little comfort to parties who unfortunately have to find themselves involved in such litigation that the validity of the title hinges on the Court's view of what is just and what is not just. The parties are entitled to expect that the Court would deal with matters of land title according to some well-defined guidelines. Rectification of land titles is not the kind of matter which should be left to the unfettered and absolute discretion of the Court, and judged only by reference to the relative justice of the individual case.

21. The Bar would urge the administration to reconsider this matter and be cautious in unnecessarily diluting the certainty of title registration which is after all the primary objective of the whole system.

Indemnity

22. The Bar remains unconvinced that there should be an upper limit on the indemnity. It takes the view that the reason suggested to the effect that "individuals and companies that are able to engage in property transactions valued at over $30 million are well able to safeguard themselves against fraud" is fallacious. It is unreal to expect anyone, however rich, to guard against fraud on his properties, and indeed very often fraud is perpetuated wholly without any knowledge on the part of the victim. It does not feel that it is in principle right to discriminate against the rich in this connection.

23. Th Bar recognizes the practical consideration regarding the amount of levy and the possibility of one large claim draining the fund. On the other hand, the effect of the proposed legislation is that property rights are being expropriated, and in cases of fraud, through no fault of the owner concerned. As a matter of principle, it is not right for any civilized society to enact legislation having the effect of depriving a person of his property without adequate and equitable compensation. In this connection, it would remind the Government of its obligations under Articles 6 and 105 of the Basic Law under which the HKSAR has the duty of protecting private ownership of property in accordance with law. Where properties are deprived in accordance with law, there is a right to compensation for which the HKSAR has the duty to protect. Such compensation shall, in accordance with Article 105, "correspond to the real value of the

property concerned at the time and shall be freely convertible and paid without delay". Whether the proposed upper limit might infringe this part of the Basic Law needs to be carefully examined by the administration.

24. Another issue that required to be addressed in connection with the question of indemnity is the class of persons who are qualified to make claims. On the wordings of the previous draft, and it appears from paragraph 5 (a) of the Paper, that the indemnity is only available to owners who has suffered loss as a result of fraud of any person or the mistake of the Land Registry staff. However it must not be forgotten that it is not only the owners who can suffer loss. Incumbrancers (e.g. a mortgagee whose mortgage is fraudulently discharged), like the owners, can be the victims of fraud. If indemnity is made available only to those who "suffered loss of ownership" (as paragraph 5 (a) seems to suggest), incumbrancers who have been cheated out of their securities might be left without any remedies at all.

25. As regards mistake of the Land Registry staff, the Bar does not know if it is intended that mistakes that are being "carried over" from the present register to the title register would be covered by the indemnity. Certainly it is well known that the present register is not necessarily accurate, but the present register would form the basis of the future title register.

However, under the previous draft of the Bill, the Land Registry staff whose mistakes may give rise to claim for indemnity are only those persons referred to in Clause 8 (3) of the Bill, and it is not clear that those persons would include the staff working in the Land Registry before the coming into effect of the new legislation. That being the case, mistakes that are being carried over from the old register may well be exempted from the protection of the indemnity provisions and it does not see any justification for it.

Land Boundaries

26. Certainly the owners who would be keen to obtain a registration of land boundary plans are those who presently have a dispute with neighboring owners over the lot boundaries of their properties, or who have reasons to believe that such disputes are likely to arise in the future. The Bar is of the view that it may not be just to the neighbouring owners for an owner, knowing that he has a dispute with his neighbours or that a dispute is likely to arise, to secure registration of a lot boundary plan behind the back of his neighbours. This is particularly so in those cases where the relevant plan is prepared by land surveryors appointed by him as described in paragraph 16 (e) of the Paper. The Bar therefore suggests that a requirement be made as a condition for any application for registration of boundary plans that proper notice be given to neighbouring owners and a way be provided for these neighbouring owners to make any

objection or submission to the Land Registrar within a specified period of time.

27. It is also not clear what legal effect would follow from the registration of the boundary plans. As pointed out in the Paper, the indemnity provisions would not apply to boundaries description. Would registration of boundary plans serve as either conclusive or prima facie evidence of the boundaries of the lot as identified in the registered plans? If not, what advantage will be gained by registering such lot boundaries plans?

28. Finally, the Bar would like to point out that the question of boundary and the question of title to any property are intertwined. If the boundary of the land is such that certain part of the land is occupied by a neighbour, then under the existing law, the title to the land could not be said to be a good title.

Criminal Liability

29. The Bar agrees with the proposed revision to the provisions of criminal liability.

Dated this 25th day of March 2002