

19 May 2003

Ms. Sarah Yuen
Clerk to Bills Committee
The Legislative Council
Secretariat
3/F Citibank Tower
3 Garden Road
Central
Hong Kong

Dear Ms. Yuen

Land Titles Bill

Thank you for your letter of 13 May 2003. As we mentioned at the meeting on 12 May, our concern is not so much about protecting the interests of a small number of local developers, but rather the potential adverse effect which the Bill may have over Hong Kong's ability to attract foreign investment. With this in mind, we would like to set out our views on the Administration's paper entitled "Indemnity" as follows:

1. Position under existing law

Under the existing law, an innocent owner will not be deprived of his property by reason of a fraud to which he is not a party, even where an innocent purchaser has paid valuable consideration for the property. This is acknowledged in paragraph 14 of the Administration's paper.

2. Position under the Land Titles Bill

If the Bill in its current form is passed into law, and if a fraud is perpetrated on an innocent owner e.g. if a transfer of the innocent owner's property to a purchaser is procured fraudulently, the position of the innocent owner will be completely changed, in that:

- 2.1 Under and by virtue of Clause 21(1) of the Bill, the property of the innocent owner will, upon registration of the relevant transfer, become vested in the purchaser, notwithstanding that the transfer was procured by fraud;
- 2.2 Upon such registration, the innocent owner will be deprived of his property unless he obtains an order for rectification under Clause 81(1) and/or (3);
- 2.3 Such rectification may or may not be ordered by the court. The court has a complete discretion and may consider such factors, including the hardship to the parties, as it thinks fit in all the circumstances of the case;
- 2.4 If the court does not make an order for rectification in favour of the innocent owner, then his only remedy for loss of his property will be a claim against the indemnify fund under Clause 82, which is however subject to the cap in Clause 83.

3. Article 6 and Article 105 of the Basic Law

It is our submission that:

- 3.1 The scheme proposed under the Bill, insofar as it changes the existing legal position of the innocent owner, is:-
 - (a) Contrary to Article 6 of the Basic Law, in that not only does it fail to protect the innocent owner's right of private ownership of his property, it actually operates to divest him of such ownership;
 - (b) Contrary to Article 105 of the Basic Law, in that it fails to protect the right of the innocent owner to the use of his property.
- 3.2 If and to the extent that the scheme can be upheld as a lawful deprivation, it is still contrary to Article 105 of the Basic Law in that the innocent owner's right to receive fair compensation for lawful deprivation is seriously eroded by the limit placed by Clause 83 on the amount of indemnity.

4. The Administration's position

The Administration sought to argue, in their paper, that:

4.1 The scheme of the Bill does not “deprive property” for the purpose of Article 105;

4.2 Although the scheme does interfere with or control ownership of property rights in land, such interference or control is consistent with Article 6 and Article 105, on the ground that a fair balance needs to be struck between the general interests of society and the protection of the individual’s property rights.

5. Interpreting the Basic Law: deprivation and continuity

5.1 The Administration sought to argue that, in the context of the Basic Law, “deprivation” of property is restricted to expropriations of property by the State, or authorised by the State for public purposes, whereas the issue here is not directed towards deprivation as such but is concerned with the adjustment or regulation of competing private property claims. The Administration sought to rely on the Australian Constitution and Article 1 of the First Protocol of the European Convention of Human Rights (“ECHR”) as providing support for their argument.

5.2 The Administration further argued that the theme in the Basic Law is one of continuity, so that if certain interference with property rights did not give rise to any right of compensation before the 1997 unification, it is unlikely that it would be within the scope of “deprivation” for which compensation is payable under Article 105.

5.3 We have taken legal advice on the Administration’s argument and we are advised that:

(a) In interpreting Article 105 of the Basic Law, it should not be appropriate to seek to draw any analogy from the Australian Constitution or from the ECHR, as there is nothing to suggest that the National People’s Congress intended the Basic Law to offer the same or only the same scope of protection of property rights as those offered under the Australian Constitution or the ECHR;

(b) The decision of the Hong Kong Court of Appeal in *Kowloon Poultry Laan Merchants Association v. Department of Justice* is only authority for the proposition that regulations controlling the use of land (more

specifically regulations to the effect that water birds are required to be sold at a separate location from chicken) are not a deprivation of property under Article 105. The reference made in that case by the Court of Appeal to the decision of the European Commission in *Banér v. Sweden* was made only as lending support to that view and reference to that case is *obita*;

- (c) Given that the Administration acknowledges that the intention of the Basic Law is to protect rights concerning the ownership of property and existing prior to the unification, and given the express provisions of Article 6 and Article 105, then clearly the Basic Law should not be construed in such a way which would lead to the innocent owner's right of private ownership of his property being taken away without full and fair compensation;
- (d) The issue here is not so much a case of adjustment of competing private property claims. Rather, it is a case of the Administration introducing a scheme whereby the innocent owner is divested of his property, and the title to the property is instead conferred upon a third party notwithstanding that such third party had not purchased or taken a transfer of the property from the true owner. This, in effect, amounts to expropriation of the property of an owner and granting the property to another person.

6. Fair Balance

6.1 For the reasons given in the above, we do not consider that the Administration's argument on fair balance can stand. We re-iterate our view that the current scheme of the Bill is contrary to Article 6 and Article 105 of the Basic Law.

6.2 However, if the need to strike a fair balance were to be a relevant consideration, then it is our submission that it is neither fair nor just to take away the property rights of an innocent owner who owns a property with a value in excess of the proposed cap of HK\$30 million without full compensation corresponding to the real value of the property, when he has done nothing wrong, or where all other things being equal, it is considered that less hardship will be caused to him by awarding the property to the purported purchaser who, in almost every case, would have either by himself or through

agents or lawyers appointed by him, dealt with the person who perpetrated the fraud.

Finally, we wish to mention that we also have a concern over the existing drafting of the Bill, in that we have noted quite a few ambiguity and uncertainty/contradiction in the drafting. In this relation, we enclose a short paper setting forth our drafting comments for consideration by the Bills Committee.

Yours sincerely

Louis Loong
Secretary General

c.c. Mr. Kim Salkeld, Land Registrar

Land Titles Bill: Drafting Comments

A. General Comments

1. Simply reading the Bill, it is difficult to visualize the manner of making an application or the manner of registration. It will not be possible for any view to be formulated as to whether the provisions work unless and until the detailed regulations and the prescribed forms are also made available for review.
2. For example, the Bill envisages that the following can be registered: cautions (consent and non-consent), incumbrances, charging orders, overriding interests, leases, easements and covenants. For a matter to be registered, does an applicant first have to determine the specific compartment into which the matter falls and then make a specific application under that compartment? After registration, does the matter show up under a specific heading in the Title Register or in the Title Certificate? Alternatively, will the Title Register/Title Certificate be in the same format as the present register under the Land Registration Ordinance?
3. There could be considerable uncertainties as to the correct label under which a particular matter will fall. Section 51 stipulates that a DMC shall be registered as an incumbrance. However, a DMC is equally an instrument creating easements/covenants. Sections 49 and 50 provide for the registration of an easement and a covenant respectively, but easements/covenants are also overriding interests under Section 24 of the Bill. Section 46 provides for the registration of leases, but is a lease an incumbrance? Section 34 refers to registration of charging orders and *lis pendens*. Presumably a charging order is to be registered as an incumbrance. However, it appears from Section 70(12) that *However* a *lis pendens* is to be registered as a non-consent caution.
4. The approach under the Land Registration Ordinance is to provide for registration of instruments affecting land. The approach under the Land Titles Bill is that, to be registrable, the registration of the matter should be provided for either in the Bill or in another enactment. There could be a risk that a matter cannot be registered simply because it does not fall under one of the labels created by the Bill. To add to the complication, there is a whole range of other Ordinances which require the registration of various matters pursuant thereto. In some instances, e.g. orders made by the Buildings Department under the Buildings Ordinance, they are slotted in the category of overriding interests, but there are probably other instances when you cannot find a convenient classification for the matter which requires registration under another enactment. For example, the Land (Compulsory Sale for

- Redevelopment) Ordinance requires the registration of an order for sale made by the Lands Tribunal under that Ordinance. Is such order to be registered as an overriding interest or as a lis pendens?
5. A whole range of other Ordinances will be affected by the passing of the Land Titles Bill. At the moment, consequential amendments to these Ordinances are dealt with under Section 102 and Schedule 2 of the Bill. In scrutinizing the Land Titles Bill, these other Ordinances must also be carefully scrutinized in order to evaluate the impact of the passing of the Land Titles Bill on these other Ordinances. This we have not yet undertaken, in the time which is available to us.
 6. To ensure that land title registration will work properly in the way it is intended, it would be preferable for a mock-up model to be set up and to put that model through a series of trial run.

B. Specific Drafting Comments

1. Section 2: Interpretation

- 1.1 It would be preferable to have a definition for “incumbrance”.
- 1.2 In the definition for “charge”, what is the rationale for specifically excluding a mortgage of an equitable interest? How do you protect a charge given by a purchaser of his interest under a sale and purchase agreement?
- 1.3 The expression “lis pendens” as defined include a bankruptcy petition. Why does it not include a winding up petition?
- 1.4 The definition of “long term lease” should be expanded to include a relevant lease (as defined in Section 48) which is deemed by Section 48(4) to be a long term lease.

2. Section 11: Transitional provisions in respect of Title Register

- 2.1 Section 11(1) stipulates that, subject to sub-section (2), where a register has been kept and maintained under the Land Registration Ordinance, then on the opening of a Title Register in relation to the land to which the register relates, the priority of all interests in the Title Register existing immediately before the date of first registration and in respect of which a memorial has been registered under the Land

- Registration Ordinance shall be determined in accordance with the provisions of the Land Registration Ordinance.
- 2.2 Should Section 11(1) be subject to both sub-sections (2) and (3), as opposed to only sub-section (2)?
- 2.3 It is not clear how the interest referred to in Section 11(1) will come to be registered or noted in the Title Register, bearing in mind that, according to Section 10(3), the Title Register shall only contain particulars of instruments which support a current entry in the Title Register. If the interest is a lis pendens or a charging order, then according to sub-section (2), that interest will be deemed protected as if it had been registered as a non-consent caution. If that interest is a sale and purchase agreement, then according to sub-section (3), that interest shall be deemed protected as if it were a registered consent caution. In both instances, the protection is conferred by a deeming provision, as opposed to actually registering the interest in the Title Register.
- 2.4 If lis pendens/charging orders are covered by Section 11(2) and sale and purchase agreement are covered by Section 11(3), then what other interests would be covered by Section 11(1)?
- 2.5 Why does Section 11(3) extend to an equitable mortgage but not a legal mortgage?
- 2.6 The drafting of Section 11(1) may be defective since, by virtue of Section 102(1) and paragraphs 71 of the Second Schedule of the Bill, the Land Registration Ordinance shall not apply to land registered under the Land Titles Ordinance.
3. Section 12: Application for first registration
- 3.1 The meaning and effect of the definition of “land” in Section 12 (4) is not clear. If, by definition, “land” does not include any part of a lot which has been sub-divided into undivided shares, then how would it be possible for an owner of an undivided share to apply for first registration?
- 3.2 Section 12(1)(a)(ii) stipulates that an application for first registration shall be made by the Government lessee upon the issue of the Government lease on or after the commencement day. What is the position where a Government lease is deemed to have been issued under Section 14 of the Conveyancing and Property Ordinance e.g. upon issuance of a certificate of compliance? It should be noted that such

deemed issuance of Government lease is referred to in Section 14 of the Bill, but not in Section 12.

- 3.3 Under Section 12(1)(a)(ii), the application for first registration shall be made by the Government lessee. If, in respect of a lot, undivided shares were assigned to purchasers following the grant of consent to assign, and a certificate of compliance is subsequently issued so that a Government lease is deemed to be issued, should the application for first registration be made by the original Government lessee (who may no longer have any interest in the lot) or by the owners for the time being of the lot?
- 3.4 What is the effect of non-compliance with Section 12(1)(a)? Other than a power for the Registrar to compel registration under Section 32, there does not seem to be any other sanction. If the Government lessee of a Government lease issued after the commencement day fails to apply for registration, can he nevertheless assign or dispose of his interest in the lot?

4. Section 20: Combinations and Division

- 4.1 Section 20(2) stipulates that where any new building is to be situated on any land consisting of two or more lots, then the Registrar shall refuse to proceed with the registration of any matter relating to an undivided share with an exclusive right to use and occupy a part of the building, unless and until an application for the combination of those lots has been registered.
- 4.2 This Section could create problems for certain existing buildings in Hong Kong. For example, there is a separate title for Phase I and for Phase II of Pacific Place.

5. Section 22: Effect of Registration of Long Term Lease

- 5.1 No distinction has been made, in Section 22(2), between an interest affecting the reversion and an interest affecting the lessee under the long term lease.
- 5.2 The operation of Section 22(3) should be confined to non-enforceability of unregistered interest affecting the leasehold interest under the long term lease, after the sale of such leasehold interest to a purchaser for value.

6. Section 24: Overriding interest

- 6.1 The aim of a title registration system is to achieve certainty of title and to limit inquiries by a prospective purchaser to the minimum. Unregistered interests should not normally be allowed to bind subsequent purchasers.
- 6.2 Under Section 24(1)(c)(ii), (iii) and (iv), rights of way, rights of water and covenants which run with the land and existing at the date of first registration of the land are overriding interests notwithstanding that they have never been registered under the Land Registration Ordinance.
- 6.3 Should the existence of such rights and covenants as overriding interests not be conditional on the same being continuous and apparent and are necessary for the reasonable enjoyment of the land benefited, as in the case of easements under Section 24(1)(d)?
- 6.4 Further, should easements registered under the Land Registration Ordinance referred to in Section 24(1)(c)(i) not also be subject to the requirements that they are continuous and apparent and are necessary for the reasonable enjoyment of the land benefited thereby?
- 6.5 Possessory title acquired by adverse possession is an overriding interest which is not required to be registered. This is unsatisfactory. Whereas the ownership of unregistered land is ultimately based on possession, the ownership of registered land is based on registration.
- 6.6 In the UK, the Land Registration Act 2002 introduces provisions requiring a person claiming to have a possessory title by adverse possession to register his interest, subject to certain transitional provisions. This strikes a fair balance between the rights of the registered owner as against those of the squatter. The Administration should consider changes similar to those introduced by the UK Land Registration Act 2002.

7. Section 26: Title Certificates

- 7.1 Under Section 26(1), the Registrar may, on application by the owner of registered land, issue a title certificate showing or referring to all current entries in the Title Register affecting the land.

7.2 What is the treatment for non-consent cautions deemed to be registered under Section 11(2) or consent cautions deemed to be registered under Section 11(3) of the Bill?

7.3 In Section 26(8), why is a title certificate subject to any subsequent entry in the Title Register affecting the registered land to which the certificate relates?

8. Section 30: Protection of persons dealing in registered land

8.1 Section 30 provides that 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 that amounts to a breach of trust by the trustee to a bona fide purchaser for valuable consideration without notice shall be defeasible by reason of that breach.

8.2 In the light of Section 30, in what way can a beneficiary protect himself against unauthorised dealing with the trust property? Can he apply to register a non-consent caution or is he precluded by Section 69 from doing so?

9. Section 33: Priority of registered matters

9.1 Section 33(4) provides that the priority of an instrument dated before the date of a first assignment effecting a first registration of land in the title register and submitted for registration after the submission of the first assignment shall be determined in accordance with the provisions of the Land Registration Ordinance. This drafting is defective for the following reasons:-

(a) The Land Registration Ordinance only governs the priority of documents registered in pursuance of that Ordinance;

(b) By virtue of Section 102 (1) and paragraph 71 of the Second Schedule, the Land Registration Ordinance shall not apply to land registered under the Land Titles Ordinance.

9.2 Similar comments apply to Section 33(5) and (6).

10. Section 44: Provisions as between vendor and purchaser

10.1 On a sale and purchase of registered land, is the purchaser only entitled to require from the vendor the production of the items listed in Section 44(1) as proof of title,

- bearing mind that (by virtue of paragraph 88 of the Second Schedule to the Bill), Section 13 of the Conveyancing and Property Ordinance shall have no application to registered land.
- 10.2 What is the thinking behind Section 44(1)(c)? Consider the fact a sale by a receiver, liquidator or trustee?
- 10.3 Under Section 44(2), particulars of overriding interest are to be included in the application for first registering under Section 12(1)(a)(i). Under Section 44(3), particulars of overriding interests are to be included in the application for first registration under Section 12(1)(b). However, if the application for first registration is made under Section 12(1)(a)(ii), then there is no similar requirement. What is the reason for the difference in treatment?
11. Section 47: Long term leases and Section 48: Special provisions applicable to certain leases granted before date of first registration
- 11.1 Under Section 47, application for registration of a long term lease by the first lessee of a long term lease granted on or after the first registration of the land is mandatory, but does not have to be accompanied by a certificate of good title. Under Section 48, application for registration of a lease which, but for the fact that it was granted before the date of first registration of the land, would be a long term lease is optional but shall be accompanied by a certificate of good title. What is the reason for the difference in treatment?
12. Section 70: Registration of cautions
- 12.1 Under Section 70(1), an application for registration of a consent caution in respect of a dealing is to be made, where the land is not affected by any prior consent caution, with the consent of the owner of the land or, in any other case, with the consent of the cautioner in respect of the prior consent caution which affects the land.
- 12.2 In the case where the land is affected by a prior consent caution, should the application for registration of a consent caution be made with the consent of both the owner of the land as well as the cautioner in respect of the prior consent caution?
- 12.3 What is the position if the land is affected by a prior non-consent caution?

12.4 Is there any reason why a lis pendens (which is defined to include a bankruptcy petition) cannot be dealt with under Section 70(3) as a non-consent caution, but has to be dealt with separately in Section 70(12)?

13. Section 71: Effect of cautions

13.1 Section 71 itself does not say what the effect of a registered caution is. It will be more helpful if, in section 71, a cross-reference is made to Section 33(7).

13.2 The meaning of Section 71(1)(b)(i) is unclear. It appears that the draftsman intends to deal with the position where a sale and purchase agreement is protected by a consent caution, and is then followed by a transfer of the land from the vendor to the purchaser. In the context of Section 71(1)(b)(i), the transfer would be the matter registered subsequent to the consent caution, while the agreement for sale and purchase would be the dealing which is the subject of the consent caution. It is unclear how, in these circumstances, the sale and purchase is “dependent” on the transfer.