LC Paper No. CB(1)2182/03-04(05)

HPLB/LTB Paper 10/04

Responses to Bills Committee on Outstanding Matters

Purpose

This paper sets out the Administration's responses to the list of outstanding issues attached to the Legislative Council Secretariat letter of 11 June 2004.

Item 1. Replies to parties

2. At **Annex A** are replies that the Administration has sent to various parties following their comments on the 'Report on Consultation on Revisions to Conversion Mechanism and Rectification Provisions'.

Item 2. Search by owner's name

3. The Administration has stated that it will prepare for the introduction of ownership searches in such circumstances as are in conformity with the exemptions in the Personal Data Privacy Ordinance. We are not in a position to advise on the implementation details or likely costs at this stage. A proposed mechanism will have to be developed and discussed with the Privacy Commission as a first step. To assist in the consideration of an implementation mechanism, the latest position with respect to other jurisdictions is being researched, but a general observation is that practice varies widely. In most Australian jurisdictions there have hitherto been no restrictions on access to owner's information. These are now being considered as a consequence of the introduction of privacy legislation. In England, until recently public access to any part of the register was severely restricted. Access to property based data is now similar to Hong Kong's position.

Item 3. Operation of the Restriction Mechanism

4. At **Annex B** is part 4 of the Practice Note issued by the English Land Registry on the use of notices and restrictions under the Land Registration Act 2002. This part covers the use of restrictions. It should be noted that under this recent act, two different mechanisms for protecting rights that existed under the Land Registration Act 1925 – inhibitions and restrictions - have been merged. Under the Land Titles Bill, it is intended to retain the two mechanisms. The practice note that will be prepared by the Land Registry will reflect this, setting out the different circumstances in which the mechanisms should be used.

5. The English Land Registry does not publish statistics on the number of restrictions that are applied for there. We are seeking information on this point. The costs of handling applications for restrictions made to the Registrar are covered by fixed fees under Schedule 3 of the Land Registration Fees Order 2004. The fee for an application for a standard form of restriction is £40. For a non-standard form it is £80.

6. Upon an application for the entry of a restriction under clause77(1)(a), the Land Registry will –

(a) check that the applicant is of the class of persons able to make an application. These are defined in clause 77(5). Under clause 77(5)(c), regulations similar to Rule 93 of the UK Land Registration Rules 2003 will be made to prescribe standard situations in which specified classes of persons will be regarded as being 'interested persons';

(b) consider the facts stated in the application, the nature of the restriction applied for and the persons who, from the register, may be affected by it;

(c) make any further enquiries as appear necessary;

(d) serve notice on such persons as may be affected and give them opportunity to be heard;

(e) determine whether entry of the restriction would conform with clause 77(1)(c); and

(f) make the entry or reject the application.

7. The Land Registry intends to prepare standard forms of restriction for ease of use in straightforward cases, similar to the standard forms laid down in Schedule 4 to the UK Land Registration Rules 2003.

Item 4. Forgery

8. The policy intention – agreed following concerns raised about the possible effect of the cap to diminish the position of a former owner under the original Bill - is to preserve the present position in law with respect to fraudulent transfers. The specific concern we agreed to address is the position of a former owner when a transfer is held to have been a nullity, for example due to forgery. Under current law, a former owner in such cases will recover the property unless he has done something which gives rise to an estoppel in law or has substantially contributed to the fraud. Clause 81(3) of the Bill now reinstates this position.

9. When it was first proposed to amend clause 81, the term 'forgery' was referred to. On further examination, the Administration decided that, given the policy intention, it is more appropriate to use the terms 'void instrument' and 'false entry in the register'. The term 'void instrument' is more familiar in conveyancing law and covers forged instruments as well as a false or unauthorized minute or resolution of a company. Reference to 'false entry' is also needed since, under title registration there is the possibility that an owner may have been removed from the register without there being a void instrument (e.g due to fraud by registry staff). It is not necessary, therefore, to define 'forgery' under the Bill.

10. **Annex C** and **Annex D** are copies of the decisions of *Argyle's Case* (1985) and *Hayes's Case* (1994) mentioned in LC Paper CB(1)1425/03-04(02). These are cases where the UK Courts have restored title to the former owner where a transfer has been obtained by forgery, even under title registration.

11. In *Argyle's Case* when the U.K. Court of Appeal considered how the discretion under s. 82(2) of the Land Registration Act 1925 is exercisable

against persons claiming through a registered proprietor, the Court of Appeal commented that - (at p.9, line 15 of Annex C)

> "... The court, in exercising its discretion in the present case, would no doubt also bear in mind that, if the title to the house were unregistered, there would, at least prima facie, be no question of the mortgagee's being entitled to assert any equity which, on the assumed facts[1], would prevail over the appellant's legal title. ... "

12. In *Hayes' Case* when the court dealt with the discretionary power of rectification under s. 82(2) of the Land Registration Act 1925, it said - (at p.4, line 9 of Annex D)

> "The power to order rectification is, of course, a discretionary one but, where a co-owner has forged a transfer, there is (subject to s.82(3)) usually an overwhelming case for rectification as against the transferees and their mortgagees ... "

Item 5. Daily fines

13. The policy guidelines on daily fines are that an appropriate level is between 5% and 10% of the main penalty for the offence. The administration has agreed with the Bills Committee that the level of daily fine should be consistent in all cases where it is proposed under clause 96. Consequently, CSAs have been introduced to revise the level of daily penalty under clause 96(4) and clause 96(6) to $500, or 5% of the main penalty of a fine at level 3 ($10,000), consistent with the daily penalty of $1,250 under clause 96(5) which represents 5% of a fine at level 4 ($25,000).

Item 6. Implications of recovery as civil debt as provided in Clause 99.

14. The procedures for recovery of unpaid fees, levy or expenses summarily as a civil debt within the meaning of the Magistrates Ordinance (Cap.227) are laid down in sections 67 and 68 of that Ordinance. Upon default of payment by a paying party, the receiving authority may lodge a complaint to the magistrate and apply for an order directing payment. No warrant of arrest may be issued if the defaulting party does not appear before

[1] The Argyle's Case is an appeal against the decision of a judge on a "preliminary point" raised for argument at the beginning of a trial. The assumed facts in *Argyle's Case* are (i) that the purported signature on the transfer of the house to Mr and Mrs. Hammond was a forgery, but (ii) that both the mortgagees took their charges in good faith and for value, without actual knowledge of the forgery.

the magistrate to answer such complaint, but an order may be made in his absence.

15. Failure to comply with the order for payment may lead to imprisonment. The maximum term of imprisonment which may be imposed by a magistrate ranges from 7 days (for debts of $2,000 or below) to 12 months (for any debt exceeding $50,000). However, no order may be enforced by imprisonment unless it is proved to the satisfaction of the magistrate that the defaulting party has means to pay but refused or neglected to do so.

Item 7. Prescription and Clause 24(1)(g).

16. Under the English law it is possible to acquire an easement over freehold land by a long period of use over the land if such use has been exercised without force, without secrecy and without permission.

17. The theory of prescriptive acquisition is marked by interesting presumptions. First there is a common law presumption that a long use stemmed from a valid grant if that use had continued from a time immemorial (fixed as any time before 1189 by the Statute of Westminster in 1275). There is also a common law presumption under the doctrine of 'lost modern grant' that a use over 20 years may be treated as evidence of the loss of a 'modern grant' by deed made some date after 1189.

18. The position in law may be stated in general terms that an easement under prescription may be acquired by interrupted use over servient[2] land for more than 20 years unless the common law presumption of there being a grant is rebutted or the use was based on permission or licence.

19. In England, the majority of The Law Reform Committee in their report in 1966 recommended a total abolition of the concept of prescriptive acquisition. No reform has yet occurred. Indeed, the Law Reform Commission in 1998 recommended its retention.

20. In Hong Kong, Reyes J. in *Kong Sau Ching v Kong Pak Yan* [2004] 1 HKC 119 commented that the common law doctrine of prescription from time immemorial seemed to have little practical application to Hong Kong,

[2] An easement exists over 'servient' land for the benefit of 'dominant' land.

whether or not it was part of the English common law actually received into Hong Kong in 1843 (at p.44). However, the judge concluded that, had he not found in the Plaintiffs' favour on other reasons, he would have been prepared to find for the particular Plaintiffs in respect of the acquisition of an easement by prescription over the disputed right of way (at p.50). In other words the possibility of acquisition of easement by prescription in Hong Kong is still there. **Annex E** is a copy of an extract (pp.1-3 & 28-55) from the judgment in *Kong Sau Ching's Case.*

21. The Bar Association in its letter dated 14.6.2004 suggested that the Government should consider making specific provisions to address how the doctrine of prescription is to operate in relation to registered land (assuming that prescription is possible in relation to leaseholds in Hong Kong).

22. In view of the uncertain existence of an easement by prescription under Hong Kong land law, the Administration does not intend to include an easement of prescription as an overriding interest which might be construed as a statutory recognition of the existence of such easement in Hong Kong. The exclusion means that any claimant for an easement by prescription may need to protect his claim either by a caveat under the LRO or by a non-consent caution under the LTO. A claimant might also commence an action and register a lis pendens. Before there is any court decision ruling out the possibility of an easement by prescription in Hong Kong, the Land Registrar will consider those claims as claims that may affect land for the purpose of registration.

Item 8. Position of a surviving joint tenant.

23. If a propertyis jointly owned by two persons, then, when one of the joint tenants dies, his interest will be extinguished automatically. By the operation of law the surviving joint tenant becomes solely entitled to the property.

24. Under clause 62(1) of the Bill, upon the proof to his satisfaction of the death of the joint tenant and subject to clause 62(2), the Land Registrar will remove the name of the deceased from the Title Register. Under clause 62(2), the name of the deceased will not be removed from the Title Registrar until the Land Registrar is satisfied that –

(a) estate duty is not payable under the Estate Duty Ordinance on the deceased's interest; or

(b) where estate duty is payable on such interest –

(i) such estate duty has been paid; or

(ii) the payment of such estate duty has been secured to the satisfaction of the Commissioner of Estate Duty under s.15 of the Estate Duty Ordinance.

25. Before the deceased's name has been removed from the Title Register, if an intending purchaser chooses to sign a conditional agreement for sale and purchase with the surviving joint tenant, the interest of such conditional agreement could be registered as a consent caution under the land title registration system only if such conditional agreement is lodged to the Land Registry together with the evidence to prove the death of the joint tenant under clause 62(1).

26. Under the existing registration system, such conditional agreements cannot be registered under the Land Registration Ordinance (Cap.128) ("LRO") if no proof of the death of the joint tenant is provided to the Land Registry.

Item 9. Position of a personal representative.

27. Under clause 63(1) of the Bill, where a sole owner or tenant in common of registered land dies, on the presentation to the Land Registrar of the grant concerned, his personal representative will be entitled to be registered as the owner of the land concerned.

28. Under clause 63(2) of the Bill, the Land Registrar, on the presentation to him of the grant by the personal representative of the deceased owner, and without requiring the personal representative to be registered in accordance with clause 63(1), may register, inter alia, a transfer of the land by the personal representative.

29. If an intending purchaser chooses to sign a conditional agreement for sale and purchase with an unregistered personal representative, the

position will depend on whether the personal representative is an executor or an administrator.

30. In the case of an executor, he derives title to the deceased's property under the Will. This operates from the date of death of the deceased owner. The interest of the purchaser under the conditional agreement may be acceptable for registration as a consent caution, subject to proof of the death and the production of the Will for inspection.

31. In the case of an administrator, he will obtain title to the deceased's property only upon the grant of letters of administration to him. Before that he has no title to dispose of the property. An application for registration of a non-consent caution will be rejected unless it is coupled with the letters of administration concerned.

32. A similar approach is taken in these circumstances under the deeds registration system.

Item 10. Reason for deleting Clause 82(5).

33. Clause 82(5) as set out in the Blue Bill would have barred a professional indemnity insurer from subrogating to the rights of any person against the indemnity fund. As stated in para. 11 in LC Paper No. CB(1)2207/02-03(07), the Administration has agreed that the position should be that "if a professional indemnity insurer has paid out for that part of a loss that was caused by the mistake or omission of Land Registry staff, the insurer would be entitled to recover that payment from the Land Registry." The deletion of clause 82(5) is the simplest way to achieve this. Any claim by a solicitor (or by his insurer subrogating to his rights) would then be subject to exactly the same test laid down in clause 82(1) as a claim by any other person.

Item 11. How Government Leases will be affected by clause 17 of Schedule 2.

34. The amendments proposed in the Blue Bill concern the definition of "section" which reads as follows :-

""**section**" (分段) means any portion of a lot which has been-

(a) assigned or alienated for the whole of the term created by the renewable Government lease of the lot; or

(b) declared to have been divided or severed from the remainder of the lot,

by or under an instrument which is registered ~~in the Land Registry~~ under the Land Registration Ordinance (Cap.128) or the Land Titles Ordinance (of 2002)* and any portion of a lot retained following such assignment or alienation;"

35. The amendment is simply consequential. There is no intent to change the legal effect of the definition. To reflect more clearly that under the LTO it is registration of interests rather than registration of instruments, a CSA is proposed to further revise the definition of "section" as follows:-

""**section**" (分段) means any portion of a lot which has been-

(a) assigned or alienated for the whole of the term created by the renewable Government lease of the lot; or

(b) declared to have been divided or severed from the remainder of the lot, or by or under an instrument which is registered under the Land Registration Ordinance (Cap.128), or which is registered under the Land Titles Ordinance (of 2004) or which supports a current entry in the Title Register kept under that Ordinance, and any portion of a lot retained following such assignment or alienation;"

Again, the revised CSA does not change the effect of the definition.

Housing, Planning and Lands Bureau
June 2004

BY HAND Annex A 附件A

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24 May 2004

Mr Louis LOONG
Secretary General
The Real Estate Developers' Association of Hong Kong
Room 1403 Worldwide House
19 Des Voeux road Central
Hong Kong

Dear Louis,

Land Titles Bill

Gunter's Mark-up bill V11 [20.5.04]

Further to your letter of 1 March 2004 I am writing to enclose a copy of the Land Titles Bill with all changes we propose to make marked up on it for ease of reference.

In response to points raised in your letter, I would like to draw your attention to the following :

(a) Rights under unwritten equities will not be extinguished at the end of 12 years. The crucial date is the date on which a sale to a bona fide purchaser for value takes place after the property has come under the title registration system. If the claimant has not taken action before then to secure registration of their interest (by amendment of the ownership register) or to give notice of their claim (by a caveat or non-consent caution) then they will no longer have a claim against the land. Their rights to in personam claims will remain. There will be an extensive publicity programme, locally and overseas, to prepare the public for this change.

(b) the present bill has never intended to change the law with respect to adverse possession. I have taken note of the comments of the Association and other parties on this point, however, and will be making recommendations for changes for consideration in subsequent legislation.

(c) With respect to rectification, please see the revised Clause 81. We have not used the term 'forgery' but 'void instrument' as being a more familiar term in land law. Reference to 'hardship of parties' has been removed. The discretion of the courts has been limited.

(d) Where a void instrument or a false entry in the register has been procured to effect a change of ownership, rectification must be given to an innocent former owner, irrespective of an innocent purchaser having been entered as owner on the register. In any other case, an innocent purchaser must left in possession.

(e) I note your points on the cap on indemnity payment. It remains the Administration's position that a cap is necessary. the mechanism and the level of the cap will be reviewed as experience is gained with the operation of the title registration system in Hong Kong.

The changes proposed to the Bill have been sent to the Legislative Council for consideration by the Bills Committee. They may be subject to further modification arising from discussion in committee and from our own reviews to improve the clarity and organization of the Bill. It remains our intent to try to secure enactment of the Bill within this session. In the interim I would be pleased to address any further questions or to receive any further comments that you may have.

Regards,

Kim Salkeld

(Kim Salkeld)
Land Registrar

Encl.

c.c. Secretary for Housing, Planning and Lands (Attn: Ms Olivia Nip)

"P Barnes"
<phbarnes@pacific.net.hk>

28/02/2004 15:51

To: K SALKELD/LANDREG/HKSARG@LANDREG
cc:
Subject: Re: Land Titles Bill
☐ Urgent ☐ Return Receipt

Dear Mr. Salkeld,

My apologies for the delay in getting back to you.

I have discussed the proposals with my committee. We consider that the proposals strike the right balance between the protection of unregistered interests and the need for reform of registration of title to land in Hong Kong. In particular, we welcome the simplification of the system of caveats and cautions.

We would be grateful for being kept informed of developments as they take place in committee and legislative council.

Thank you once again for taking the initiative to contact the FLA about this important reform.

Sincerely,

Peter Barnes
Barnes & Daly

K SALKELD

02/24/2004 05:35 PM

To: phbarnes@pacific.net.hk
cc:
Subject: Land Titles Bill

☐ Urgent ☐ Return Receipt

Dear Mr Barnes,

Further to our meeting it would be helpful to me to know whether the Family Law Association has any further questions or intends to make any formal comment on the proposed changes to the conversion mechanism and rectification provisions at this stage, or whether you prefer to wait until there is an actual draft of the revised legislation to consider. The Bills Committee will be considering whether to proceed with the Bill on 9th March and I will need to issue a report on the discussions I have had with various parties by the beginning of next week. If the Association does not have any specific questions or views, may I:-

a] say that you do not have any objection in principle to the changes; and/or

b] say that you would welcome the proposals for notices to be allowed under the Land Registration Ordinance in advance of the introduction of a title register; or

c] would you prefer me not to make any representation as to your views?

With regards,

Kim Salkeld.

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14 April 2004

Mrs. Pamela CHAN
Chief Executive
Consumer Council
22/F, Ka Wah Centre
191 Java Road
North Point
Hong Kong

Dear Pamela,

Land Titles Bill

Thank you for your letter of 1 March. I appreciate your preparation of such a detailed response in such a short time.

To answer your questions :

1. *After the Conversion Date, can an unwritten equity created prior to the Commencement Date be registered as a "caveat" ?*

   No. Caveats are notices of claim that will only be registered under the Land Registration Ordinance during the period between the Commencement Date and the Conversion Date. On the Conversion Date the property will be brought under the Land Titles Ordinance. No caveat may be entered after conversion, but any subsisting unwritten equity not already protected by a caveat may still be protected by registration of a non-consent caution before there is a sale to a purchaser for value after conversion.

2. *After the Conversion Date, can an unwritten equity created prior to the Commencement Date be registered as a "caution against conversion" ?*

No. While a caution against conversion may be applied for on account of an unwritten equity created before or after the Commencement Date, it would have to be registered under the Land Registration Ordinance prior to conversion. Its very purpose is to stop the land from being brought under the title registration system while action is being taken to resolve a claim. After conversion has taken place, the Land Registration Ordinance will no longer apply to the property.

3(a) *If the answer to Question 1 or 2 is "no", after the Conversion Date is there any other way by which an unwritten equity (which has been created prior to the Commencement Date) can be registered ?*

Yes. I regret the confusion caused on this point by the wording of paragraph 7 of Annex A. It should be restated as follows: "After conversion at the expiry of 12 years, all claims from unwritten equities (other than overriding interest) existing at or prior to the conversion will be null and void as against a *subsequent* registered purchaser or chargee for value unless such equities have already been protected by *registration of a caveat under the Land Registration Ordinance prior to conversion or registration of a non-consent caution under the Land Titles Ordinance after conversion.*".

In other words, an unwritten equity subsisting against a first registered owner may still be protected by registration of a non-consent caution under the Land Titles Ordinance before there is a sale to a purchaser for value after conversion.

3(b) *After the Conversion Date, can the unwritten equity (created prior to the Commencement Date) be registered as a caution under the LTO ?*

Yes, notice of such claim can be registered as a non-consent caution under the LTO. But the non-consent caution will not stand against a disposition to a purchaser for value that has already been registered (or has already been protected by

registration of a prior caution on the disposition). The priority of a non-consent caution will be governed by Clause 33 of the LTO in that any matter registered before the caution will take priority over it.

3(c) *If the answer to Q3(b) is yes, should it be a "non-consent" or a "consent" caution ?*

It should be protected by a "non-consent" caution under Clause 70(3). A "consent" caution under Clause 70(1) is for persons who intend to effect a dealing in land.

4. *Are unwritten equities created during the incubation period registrable after the Conversion Date ?*

Yes, if the unwritten equities are still subsisting at the Conversion Date. But, they must be protected by registration of a non-consent caution prior to a sale to a purchaser for value. As with 3(b), the priority of such non-consent cautions is governed by the provisions of Clause 33 of the LTO. Belated registration will be subject to any prior registered matters under the LTO.

As a general note on all the above questions, an unwritten equity by its very nature cannot be registered. A caveat under the LRO or a non-consent caution under the LTO would be a notice of a claim arising from an unwritten equity rather than registration of the unwritten equity itself. Registration of the caveat or non-consent caution preserves the priority of the claim in rem if the validity of the claim of such unwritten equity is finally established. Failure to register the claim risks loss of its effect in rem should a purchaser for value secure registration of his title. But, it does not stop the claim being pursued in personam against the previous registered owner.

Let me now turn to the concerns raised by the Council.

The <u>first concern</u> is that claimants under unwritten equities are required to register a notice of claim to protect their interest before a sale to a purchaser for value, and that this may cause family conflicts and have social consequences. I would observe that under the present system there are already family conflicts over contributions to property. A purchaser for value risks being drawn into these conflicts if it is argued that he had actual or constructive notice of the interest of another party in the property. This can have heavy consequences for the purchaser.

Unwritten equity by its nature is not capable of registration under the present system. The introduction of caveats and non-consent cautions will put claims arising from such equity on a more certain footing. Before conversion, for the family members who want to protect their unwritten interest in a property, lodging the caveat gives them certainty that they will not lose an interest in rem due to a sale. For a purchaser after conversion, if there is no non-consent caution on the title register, he is given certainty that he will not be disturbed in his enjoyment of the property by any such unwritten equity.

During the incubation period, no one is compelled to register a caveat or caution against conversion. Family members, or partners in a business, can at any time agree to change the registered ownership to reflect actual contributions or whatever other arrangement that they wish. Or they can simply leave matters as they are and settle any distribution of funds upon a sale as they wish. If there is distrust then, of course, it is advisable for the party with a claim to register a caveat or caution in order to protect it. But, it is the case at present that one must act to protect one's interests since these will be lost against a purchaser for value who cannot be proved to have had notice of your interest. The introduction of registration of caveats before conversion (or non-consent cautions after conversion) will provide a less hostile and simple way to protect a claim under an unwritten equity and put all persons dealing with the property on notice of such a claim.

The second concern is over the need for publicity. As I said at the meeting with your members, I fully agree that extensive publicity will be needed if this new conversion mechanism is adopted. The Land Registry will undertake a major and continuing programme of publicity both locally and overseas to advise people of the changes. We have the financial resources to undertake this work.

The third concern was that some unwritten equity may go unprotected simply because of their holder's lack of funds. Caveats and non-consent cautions can be registered easily and the registration fee will not be expensive. This is sufficient to protect the priority of a claim of unwritten equity. If the registered owner does not dispute the claim, no further cost would arise. Where the registered owner does dispute the claim then other costs may be involved. But, costs would arise anyway under the present system if an owner disputes a claim. On this point, as noted at our meeting, legal aid is always available for those of limited means. There does not appear to be a situation in which anyone will be disadvantaged under the new system, as compared with the existing system, due to lack of funds.

Only a caution against conversion will require action to be taken within 12 months if it is to be sustained. The mechanism of a caution against conversion is expected to be employed in a pending dispute over the *title* to property more frequently than in a dispute over a claim arising from an *unwritten equity*, which can be more simply protected by a caveat. A caution against conversion serves the dual functions of putting the public on notice of the claim and at the same time preventing the property from being converted to the new title system while the claim is determined.

I hope that the clarification given above is helpful to your consideration and I look forward to the further views of the Council on the acceptability in principle of the daylight conversion mechanism.

Yours sincerely

(Kim Salkeld)
Land Registrar

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24 May 2004

Ms. Katie YIP
Secretary
Hong Kong Association of Banks
Room 525, Prince's Building, Central
Hong Kong

Dear Ms Yip,

Land Titles Bill

Further to your letter of 5 March 2004, I am writing to send you a revised version of the Land Titles Bill with the changes that we propose to make marked up in it for ease of reference. These set out the revised conversion mechanism and other changes.

I would like to draw the attention of the Association to two particular matters :

(a) Clause 81 has been substantially revised to remove any general discretion of the courts to rectify the register.

(b) Clause 83 has been revised to require that if ever registered charges cease to be registered due to rectification of the register and an indemnity is due to the chargor, the charge shall be settled first from the indemnity before any balance is paid to the chargor.

The proposed amendments have been sent to the Legislative Council Bills Committee and will be considered over the next few weeks. They may be further changed in light of the Bills Committee's deliberations. Given the extensive changes made to the Bill to address questions raised previously by the Bills Committee and by other parties, we may also introduce further changes to clarify the structure and intent of the legislation.

It remains our intent to try to secure passage of the Bill within the current legislative session. If the Association has any continuing concerns with the Bill I would be grateful if you could advise me before 11 June 2004.

Yours sincerely

(Kim Salkeld)
Land Registrar

Encl.

c.c. Secretary for Housing, Planning and Lands (Attn: Ms Olivia Nip)

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24 May 2004

Mrs. Pamela CHAN
Chief Executive
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22/F, Ka Wah Centre
191 Java Road
North Point
Hong Kong

Dear Pamela,

Gunter's Mark-up bill V.14 [20.5.04]

Land Titles Bill

Further to my letter of 14 April I am now writing to send you a copy of the proposed amendments to the Land Titles Bill. In light of the questions raised by your members, I would like to draw your attention in particular to Schedule 3, which sets out all amendments to the Land Registration Ordinance. This contains the provisions for caveats and for cautions against conversion. Schedule 1A, which governs the conversion of existing land to the new system, and Clauses 10A to 15A of the main bill, which cover the effects of first registration and transitional matters, are also relevant.

The aim of the drafting changes has been to ensure :

- after a property has come under the title registration system, a prospective purchaser should be able to enter into his dealing with greater surety based on the title register;

- before a property is sold to a bona fide purchaser for value under the new system, any claimant to interests in the property will not have their right to claim removed by the conversion to the new system;

- owners will have protection against vexatious claims;

- ample opportunity for giving notice of claims is provided.

Under the transitional provisions, owners will not be required to make any special applications. The land registers kept under the Land Registration Ordinance will be deemed to be the title registers under the new Ordinance.

The proposed amendments have been sent to the Legislative Council Bills Committee and will be considered over the next few weeks. They may be further changed in light of the Bills Committee's deliberations. Given the extensive changes made to the Bill to address questions raised previously by the Bills Committee and by other parties, we may also introduce further changes to clarify the structure and intent of the legislation.

It remains our intent to try to secure passage of the Bill within the current legislative session. We would then be preparing regulations, guidance notes and information programmes, on all of which we will be seeking the advice of the Council. In the interim, I would be happy to provide any further briefing that your members would like, or to receive any further questions or comments that you have.

Yours sincerely

(Kim Salkeld)
Land Registrar

Encl.

c.c. Secretary for Housing, Planning and Lands (Attn: Ms Olivia Nip)

BY HAND

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28 May 2004

Mr Edward Chan
Chairman
Hong Kong Bar Association
LG2 Floor, High Court
38 Queensway
Hong Kong

Dear Chairman,

Land Titles Bill

Further to your letter of 2 March and our meeting with representatives of the Law Society on 4 March, I am writing to present the amendments the Administration intends to make to the Land Titles Bill to implement the proposed 'daylight' conversion mechanism, as well as to respond to other issues raised in the Bills Committee.

Attached with this letter are :

(a) A copy of the Bill with the proposed amendments marked up therein; and [Legco reference to Paper # CB(1) 1849/03-04(05)]

(b) An explanatory note, cross-reference to (a), to help guide you through the amendments.

In drafting the amendments we have reflected on the comments made in your letter of 2 March and have made further changes to the treatment of caveats and cautions against conversion.

Although, as indicated in the explanatory note, there are certain clauses and aspects of organization of the Bill that are still being considered by the Administration, the amendments have been tabled in the Bills Committee. This is to allow members to consider and decide whether to proceed within the current session. If the committee decides to proceed they will need to complete their examination of the Bill by the 15th June in order for the necessary procedures to be followed to allow resumption of the second reading and third reading of the Bill at the last meeting in the current session on 9th July. I appreciate that this leaves you little time within which to make comment either to me or to the Bills Committee should they decide to proceed. I have already said to the Law Society that, given the scale of changes proposed to the Bill and the rapidity with which the drafting has been done, a post enactment review will be needed if the Bill is passed in this session. If the Bar Association has further observations on the amended Bill I would welcome them, irrespective of whether they can be made in time for me to act on them within the current session.

Yours sincerely

(Kim Salkeld)
Land Registrar

Encl.

c.c. Secretary for Housing, Planning and Lands (Attn: Ms. Olivia Nip)

The Revisions to the Land Titles Bill

Purpose

This paper provides a guide to the amendments proposed to the Land Titles Bill tabled by the Administration on 20th May 2004. Page references are to the copy of the marked up version of the Bill issued by the Legislative Council Secretariat as LC Paper No. CB(1) 1899/03-04(05).

General

2. The Administration has agreed to remove the 'gradual' conversion mechanism, contained in Clause 12 of the Bill and replace them with the 'daylight' conversion mechanism. Under this mechanism, only 'new land' will come under the Land Titles Ordinance (LTO) immediately after commencement. All other land will remain under the Land Registration Ordinance (LRO) until the end of a lead-in period, proposed to be 12 years. The new mechanism requires:

(a) Substantial amendment to the LRO to provide for 'caveats' and 'cautions against conversion' in the period before existing land is brought under the LTO. This is being done by way of a new Schedule 3 in the Bill, in which all amendments to the LRO have been placed. Amendments to the LRO related to the old 'gradual' conversion mechanism that were previously in Schedule 2 are removed;

(b) Amendments to the main Bill to provide for the new conversion mechanism. These are now contained in two places:-

(i) a new Schedule 1A, which contains the provision for the 12 year period before existing land comes under the LTO and the clause setting out when existing land will be converted and the exceptions to this;

(ii) in part 2 of the Bill, where there are clauses on transitional arrangements.

[*Note: the draftsman is reviewing the arrangement of clauses between part 2 and Schedule 1A and may propose changes to provide a clearer structure*]

(c) Amendments to the main Bill to remove references to the old conversion mechanism.

3. The Administration has also undertaken to revise the rectification provisions and indemnity scheme.

4. Rectification will now be mandated in favour of an innocent former owner whose name has been removed from the register due to a void instrument or a false entry in the register. Clause 81 has been amended accordingly and a new Clause 81A is to be added to provide for a limitation period on applications for rectification in line with the Limitation Ordinance.

5. The indemnity scheme is to be amended to require the Registrar to take account of charges and co-ownership when making indemnity payments. Clause 83 has been amended to this end.

6. Apart from these major changes, which are described in greater detail below, various other amendments have been proposed. The annex contains a note of these.

The Daylight Conversion Mechanism

7. Under the daylight conversion mechanism, after commencement of the LTO, all existing land held under a Government Lease, termed 'unregistered land', will remain under the LRO for a period of 12 years. This period is set out in Schedule 1A [Cl.2 (1); p.151].

8. The 12 year period may be varied by the Secretary for Housing Planning and Lands gazetting an amendment to Schedule 1A, which he is empowered to do under Clause 101 of the Bill. This power is subject to the approval of the Legislative Council (positive vetting).

9. Cl.2 (1) of Schedule 1A provides that, at the end of the period, all unregistered land will become registered land and all provisions of the LTO will apply to it, subject only to exceptions allowed by Cl.2(2).

The exceptions are:

(i) Any land for which instruments have been submitted for registration under the LRO and registration has not yet been completed. Cl.2(3)(a) provides that land falling into this category will become registered land as soon as the registration of the matter is completed or withdrawn under the LRO; and

(ii) Any land against which a 'caution against conversion' has been registered under the LRO. A 'caution against conversion' is a new instrument to be created under the LRO. A definition is given in Clause 1 of the new Schedule 3 [p.155] while Clause 4 of Schedule 3 inserts new sections into the LRO to govern the operation of this instrument [see 21G to 21L on

p.163 to 169]. Its purpose is to allow a claimant to title or to a beneficial interest in land to prevent conversion to the title registration system until his claim has been settled under the existing law. Once that claim has been settled or withdrawn, the land will become registered land [Cl.2(3)(b) of Schedule 1A, p.151].

10. Upon unregistered land becoming registered land, the registers kept under the LRO shall become the title register under the LTO [new Cl.15A in Bill, p.36. similar to Cl.11 of 1994 Bill].

11. The priority of interests in the title register will be determined in accordance with the provisions of the LRO [Cl.11(1), p.25]. An interest referred to as a lis pendens or charging order under the LRO will be deemed to be protected by a non-consent caution registered under the LTO [Cl.11(2), p.26] and an agreement for sale and purchase, nomination or equitable mortgage will be deemed to be protected by a consent caution registered under the LTO [cl.11(3), p.26-27]. Clause 11 has been modified only slightly as compared with the Blue Bill.

12. Clause 14 [p.31] sets out the effect of first registration. The structure of the clause has been amended for clarity and to replace references needed for 'gradual' conversion with those needed under 'daylight' conversion. The effect remains the same. The first owner of registered land remains subject to unregistered interests affecting land that were enforceable against the land immediately before first registration [Cl.14(2)(d), p.34]. Those unregistered interests will not be enforceable against the land after a subsequent sale to a purchaser for value [Cl.14(3), p.34-35].

Caveats

13. To provide a non-hostile way for anyone who has a claim to an interest that is unregistrable under the LRO to protect that claim against the effect of a subsequent sale to a bona fide purchaser after the land has been brought under the LTO, another new instrument, the 'caveat', is being introduced under the LRO by way of Schedule 3. Cl.1 (b) of Schedule 3 provides a definition of a caveat [p.155]. Cl.4 sets out new sections in the LRO [21A to 21F, p158 – 162] governing their use. A caveat can be registered in respect of an interest that is unregistrable [21A]. It gives notice of a claim [21B(1)] but does not affect the validity of the claim [21B(2)] or confer any priority [21B(3),(4)]. Whether a registered instrument is subject to an interest claimed in a caveat is determined by the law at the time of the transaction [21C] and the priority among unregistrable interests affecting the same land remains to be settled in accordance with existing rules of law and equity, irrespective of a caveat being registered [21D].

14. A caveat may be withdrawn or removed [21E]. This section mirrors Cl.72 of the Bill [p.104] dealing with the withdrawal or removal of cautions under the LTO. Similar provisions for withdrawal or removal of cautions against conversion are contained in 21K [p.167]. [*Note: arising from discussion in Bills Committee on 25.5.04, all these clauses will be modified to ensure that the Registrar will not determine an application made to him if a parallel application is being considered by the Court and to allow the Registrar*

to refer an application for removal to the Court if the Registrar considers that the matter is better determined by the Court.]

15. A caveat that is registered without reasonable cause or maintained without reasonable cause after the ground on which it was registered has ceased to exist may be liable in a suit for damages [21F, p.162]. Again this provision mirrors that in Cl.73 of the main Bill [p.107] for cautions and in 21L [p.169] for cautions against conversion.

16. Any caveat that remains registered against the land when it becomes registered land will become a non-consent caution on the title register by virtue of new Clause 11A in the main Bill [p.28]

Cautions against Conversion

17. The provisions on cautions against conversion are similar to those for caveats except that the effect of a registered caution against conversion is to prevent the land becoming registered land [21H(1), p.163] and that they lapse automatically if action is not taken to assert the claim behind the caution within a defined period [21J]. [*Note: arising from discussion in the Bills Committee on 25.5.04 it has been agreed to amend 21J to allow for circumstances where, before the end of the 12 year period, a caution against conversion may have lapsed because it was not extended under subsection (2) and the claimant wishes to ask the Court to allow an application for 'extension' of the caution on exceptional grounds.*]

Long Term Leases

18. To allow for clarity in the operation of long term leases under the LTO, it has been agreed that such leases [defined in Cl.2(1) of the Bill, p.8] which are not at present separately dealt with under the LRO, should be dealt with as a special category under the LTO. Under the old gradual conversion mechanism, application for registration of the relevant leases then existing would have had to have been made. Under the daylight conversion mechanism, 'relevant leases', defined as leases under the LRO that meet the definition of long term lease under the LTB, will automatically become long term leases once the land from which they are derived becomes registered land [new Cl.10A in main Bill, p.25]. Clause 22 [p.44] has been amended consequentially.

Other amendments relating to daylight conversion

19. The old Clauses 12 and 13 in the main Bill have been deleted and replaced by a short new Clause 12 [p.30] requiring the Registrar to open a register for new land when it is granted after commencement and allowing him to open registers in other cases.

20. The old Clause 15 on the date of first registration has been replaced by a new Clause 15 appropriate to the new mechanism [p.35].

Rectification and Indemnity

21. Clause 80 has been amended to allow the Registrar to alter the register where he is given proof that an error or omission is clerical [new subsection (1)(aa), p.114] and to remove a spent reference to a minor [new subsection (3) & (4)].

Clause 81 has been amended to:

(a) clarify that the knowledge of fraud or voidness that a title owner in possession for valuable consideration must have for his title to be open to rectification by the Court is knowledge in relation to the transaction by which he became the title owner. [81(2)(a) & (b), p.115].
(b) remove the wide discretion given to the Court under the old subsections (3) & (4), replacing them with a new subsection (3) [p.117] which requires rectification to an innocent former owner who has lost his title due to a fraud procured either by a void instrument or by a false entry in the register [(3)(b)(i)&(ii)].
(c) allow for costs and damages arising out of an action for rectification not involving a mistake or omission by the Registrar or his staff to be paid out of the indemnity fund in circumstances allowed for by regulations.
(d) make the clause subject to a new clause 81A [p.119] which limits the period within which an application may be made.

22. Clause 82 has been amended to:

(a) make clear that no indemnity may be paid in respect of unregistered land [new subsection (4)(d), p.121]; and
(b) allow for subrogation by professional indemnity insurers if they have paid out in a claim that is entitled to an indemnity payment in cases of mistake or ommission by the Land Registrar [revision to subsection (5), p.122].

23. Clause 83 has been amended to:

(a) require the Registrar to take account of any registered charges that cease to be registered due to a rectification order. When the chargor in such cases is entitled to an indemnity, the Registrar must apply the indemnity first to the charge and only pay any remaining balance to the chargor [new subsection (2), p.123]; and
(b) require the Registrar to apportion any indemnity payment between co-owners who cease to be registered due to rectification so as to reflect their respective interests in the land or lease before rectification [new subsection (2A), p.124].

ANNEX

Other amendments to LTB

Clause & Page Reference	*Brief Description*	*Annotation*
2(1) , p.1 – 14	New definitions for 'caveat', 'Land Registry', 'new land', 'registered caveat', 'relevant lease', 'unregistered land', 'unregisterable interest'. Revised definition of 'date of first registration', 'first registration', 'long term lease', 'registered land'	Needed for daylight conversion mechanism. Draftsman may move some to Schedule 1A.
2(1), p.1 – 14	Revised definitions for 'company', 'lease', 'lis pendens', 'register'.	Response to drafting comments from various parties.
3, p.15	New subsection (1A).	To provide link to Schedule 1A. May be replaced by Draftsman later.
4(c), p.17	'of a court' added	For clarity.
6A, p.21	Previously clause 88. Revised to narrow scope to questions of law.	Inappropriate location before.
10(3)(g)	'long term' deleted	Incorrect reference.
11(4)(a)	'or a building mortgage of an uncompleted building; and' deleted.	Incorrect reference.
20(5), p.39	Subsection deleted	Unnecessary.
21, p.41	Revised format	Mirrors changes to Cl.14.
24(1)(d), p.47	Replaced by new subsection (d)	For clarity.
24(1)(f) p.48	Reference to Government rights of re-entry added	For avoidance of doubt.
24(4), p.51	Recast	For clarity.
25, p.52	Replaced by new clause 25.	To make clear that any person dealing with land does so with notice of all relevant entries in the Title

		Register. Necessary because of the amendments to Cl.33 and 71 noted below.
26, p. 53	Subsection (7) revised	To cover all possibilities.
29. p.57	Revision to subsection (1) and replacement of subsection (2).	For clarity.
30, p.58	Relocated to 69A.	For clarity.
31, p.58	'matter' replaced by 'dealing'	To limit scope to important matters.
32(1), p.59	'through that person's wilful default' replaced by 'without reasonable excuse'	For consistency with other references.
33, p.60 – 63	Subsections (4), (5) &(6) deleted, subsection (7) revised. Reference to s.71(b) deleted in subsection (1).	Deleted subsections not needed now that gradual conversion replaced by daylight mechanism. Revision to subsection (7) (and s.71) is to remove potentially confusing reference to 'relating back' and acquisition of priority from cautions. It is agreed with the Law Society that a person's priority can be adequately protected by the registration of a consent caution itself.
34, p.64	Revisions made for clarity in handling successive applications for re-registration of charging orders.	Similar changes made to S.17 of the LRO by way of Cl.3 of Schedule 3, p.157.
39, p.68	'Notwithstanding section 38' deleted	Not necessary and potentially confusing.
43, p.71	New subsections (2) and (3) added	To clarify how exclusion, variation or extension of implied covenants are to be dealt with.

44, p.72 – 74	Subsection (3) deleted and other lesser changes.	To reflect daylight conversion. New subsection (1)(a)(iv) reflects need to retain originals of certain documents for evidence in claims of fraud. Regulations under Cl.100 new subsection (ob) [p.146] to provide for this.
48, p.76	Deleted	Replaced by 10A under daylight conversion mechanism.
50, p.78	Bracketed part of subsection (1) deleted	Not needed.
51(4), p.80.	Replaced	For greater clarity.
59, p.84	Subsection (1) revised and (2) replaced	For clarity.
61A, p.86	Relocated from old clause 68 and revised.	Clarifies how the Registrar is to deal with persons who have become entitled to be owners of registered land, charges or leases by operation of law, enactments or orders.
62(1), p.87	(b) and (c) deleted.	Unnecessary. 65(1)(a), 66(2)(a)(ii) 67(4)(b) and 69(3)(a) amended in similar fashion.
62(2)	Revised	For clarity.
63, p.88 - 89	Minor changes	For clarity. *Note: may be further revised. 'by transmission' may not be needed (applies to 64,66 as well).*
65(2), p.90	Deleted	Unnecessary.
69, p.95 – 97	Revision to subsection (1), new subsection (2A)	For clarity.

69A, p.98	Relocated. Was old 30.	For clarity.
70(1), p 98 –99	Proposed revision.	*Note: revised version under review by draftsman. Does not properly reflect intent that a person intending to deal a) only need take account of consent cautions that are relevant to his intended dealing; and b) only needs the consent of one person, the owner or the prior cautioner if there is such a relevant caution.*
70(2), p.99	Various small changes	Reference to 'a provisional agreement for sale and purchase' not needed here (and in various other clauses). 'Will be' and 'endorsement' added to reflect actual practice, so as to ensure that consent cautions can be registered without delay so as to protect intended dealings.
70(5), p.100	Revised to limit application to transfers by natural persons inter vivos	So as not to affect company transactions that are not subject to estate duty.
70(6), p.101	Revised	To clarify who is to make the application.
70(14), p.102	New subsection added	For avoidance of doubt that: (a) a claim arising from an unregisterable interest created before conversion can be protected by a non-consent caution after conversion if not protected by a caveat before; (b) a claim that is not protected by a non-consent caution is not enforceable against land after a sale for valuable consideration;

		(c) in personam rights or interests are not extinguished or prejudiced.
71(1), p.103	Amended to remove reference to S.33	See note on S.33 above.
71(2A), p.103	New subsection added	To clarify status of a consent caution, as is done by the existing subsection (3) for non-consent cautions.
72(5), p.107	Revision	For clarity and removal of reference to priority.
73, p.107-8	Revision	For clarity.
74(1), p.108	Revision	In line with UK Land Registration Act, to clarify purpose of action by the Court.
77, p.110 – 111	Revision	To more tightly define scope of powers for Registrar, in line with UK provision.
88, p.128	Relocated to 6A	
95, p.135	'petition or' deleted	Redundant.
96(g), p.136	Deleted	Not needed under daylight mechanism. Subsection (2) amended consequentially.
98, p140-2	Some revisions	*Note: further revision to clarify separate provisions for fees and levies may be made.*
100, p143-9	New subsections (1)(oa)-(oc), revision to (x) and replacement of (zi) by new (zi) and (zia)	To reflect changes in main bill, except (zi) where purpose is to make clear that the Registrar cannot borrow from the indemnity fund. *Note: a new clause may be added to the Bill to allow the indemnity fund to be established and to support (zia).*

BY HAND

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17 March 2004

Ms. Christine Chu
Assistant Director of Practitioners Affairs
The Law Society of Hong Kong
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71 Des Voeux Rd, Central
Hong Kong

Dear Ms Chu,

Land Titles Bill

Thank you for your letter of 8th March and the preliminary views of the Working Party as set out in the attached paper.

I note that the comments given in the latter and paper are those of the Working Party and are subject to confirmation of the draft legislation. I will be writing to you with the revised draft legislation as soon as it is available. In the interim I wish to :

(a) respond to points raised in the paper;
(b) seek the Law Society's views on;
  i) the question of protection of priority;
  ii) the format of the registers; and
  iii) retention of documents.

The Working Party Paper

1. *First paragraph*: agreed.

Second and third paragraphs: the LRO will be amended to allow for registration of caveats, which will give notice of a claim arising from an unwritten equitable interest. I note the view as to the handling of priority. We will need to discuss this further, for which a first draft of the legislation will be helpful. The Department of Justice are quite strongly focussed on the handling of priority. We will need to satisfy them that a proper balance of interests has been struck.

Fourth paragraph: agreed.

Fifth paragraph: the need for careful drafting is agreed.
I note the suggestion for requiring claims under caveats to be prosecuted quickly, as with cautions against conversion, but this raises a question. Why should a claimant who puts in a caveat under the LRO have to prosecute the claim expeditiously when there is no requirement for a claimant under a non-consent caution under the LTB to do so? There are provisions in the LTB (Clause 72) for an owner to have a non-consent caution removed if he so wishes. We propose to have identical provisions under the LRO in respect of caveats. There will also be sanction against caveats that are entered or maintained without reasonable cause, mirroring Clause 74 of the LTB. Is this not sufficient?
As to the question of priority, as noted in response to your second and third paragraphs, we will need to go over this carefully with the draft legislation.

Sixth paragraph: agreed.

Seventh paragraph: I am content to discuss this further. I do not think it would be accepted by other parties, however, if we dispensed with caveats altogether.

2. *First, second and third Paragraphs*: These points reflect the proposals that we have made to and are now seeking agreement for from the Department of Justice.

Fourth Paragraph: agreed.

3. We are still working with the Department of Justice on the precise detail of the rectification provision. There are certain circumstances (albeit rare) other than forgery in which the Courts may find a transaction to be void. In these, the innocent former owner should also be protected. In all other cases, a bona fide purchaser for value in possession should be protected against a former registered owner. I hope that you will find the outcome of our drafting satisfactory, but again, let us look at the draft together as soon as one is ready.

4. Noted. I have given an undertaking to the Association of Banks to address this point. We will seek your views on revised drafts.

Priority

Members of the Bills Committee have several times raised concerns about the absence of any blanket provision for relating back under the Land Titles Bill, comparable to S.5 of the Land Registration Ordinance. I have advised them that the question of protecting priority was canvassed at length during the preparation of the first Bill. Ideas for relating back and for priority search were rejected in favour of the caution mechanism acting to protect the priority of subsequent dealings. They have asked me to set out what the problems with alternative mechanisms are; to set out how priority is protected by the caution mechanism and, to confirm that the Law Society remains in support of this approach.

I have drafted two documents. The first is a note on the problems with the 'black hole' created by S.5 of the LRO and the difficulties with a priority search mechanism. The second is a description of how the LTB will operate to protect the priority of a purchaser. I would be grateful for your members' views before the next meeting of the Bills Committee on 2 April on :

(a) whether the two papers fully reflect their understanding; and
(b) whether they still agree with the approach taken in the Bill.

Format of Title Registers and Long-term Lease Registers

The Assistant Legal Advisor to the Legislative Council advising the Bills Committee has repeatedly questioned the format that we propose for the title registers. In particular he has questioned having two forms of register, one for 'ownership' and one for long term leases. He has suggested that these be merged but that then there should be three separate registers – 'property', 'proprietorship' and 'charges' – as under the English system.

It is our view that the format of the registers should change as little as possible on the conversion from deeds to title registration. Furthermore, the format we propose embodies the three parts proposed by the ALA (indeed, we think it is pedantic to say that they constitute separate registers under the English system since each is part of the overall title register).

As for merging the forms for the 'ownership' register and 'long term lease' register, we consider that this would be detrimental to anyone seeking information about transactions in respect of individual units under long term leases. The legal status of the owner and lessee is made clear in the forms, so we do not see the risk of confusion that seems to lie behind the suggestion.

Attached are samples of the forms that we propose to use. I would be grateful for the advice of the Law Society as to whether these forms are agreed in principle or whether your members see merit in the proposals by the ALA.

Retention of Title Documents

The changes to the rectification provision make it essential that certain documents are retained in order to provide evidence in case of claims of forgery. We propose that:

(1) For a dealing valued at over the amount of any cap on indemnity then prevailing, the owners or the mortgagee banks be required to retain all title documents within the root period mentioned in Section 13 of the Conveyancing and Property Ordinance.

(2) For a dealing less than the cap amount, the owners or the mortgagee banks be required to retain the title documents evidencing the dispositions or transmissions which form part of the chain of title and documents authorising execution of such title documents within the root period mentioned in Section 13 of the Conveyancing and Property Ordinance.

(3) Failure to keep the title documents may be an evidential presumption unfavorable to the defaulter.

I would be grateful for your members views on these proposals.

Yours sincerely

(Kim Salkeld)
Land Registrar

Encl.

Annex B

Justification for removing the one month relating back provision

Section 5 of the Land Registration Ordinance provides that all deeds, conveyances and other instruments in writing, including judgements, will take effect and have priority from their date of execution so long as they are registered within one month from the execution.

2. As noted in *Hong Kong Land Law* (Sarah Nield. 1996. P.51 section 3.3.4): "This back-dating mechanism is very convenient for the purchaser, mortgagee, or other person taking the benefit of the instrument. They have a month in which to submit their instrument for registration without affecting their priority."

3. As the author goes on, however : "It is less convenient for those wishing to search the register to ascertain their priority position, for it is impossible for the register to give an accurate up-to-date picture. There is always the possibility that an instrument may be submitted for registration, which can claim priority up to one month before the date of the search (see for example *Aie Company Ltd v Kay Kam Yu (1994) HCt No A48 of 1991*). This situation represents one of the major defects of the ordinance...".

4. While it is noted that the likelihood of registration of an instrument without knowledge is low due to the retention and inspection of title deeds, the defect remains.

5. In the original draft of the Land Titles Bill, Professor Willoughby proposed that there should be a system of priority searches, similar to those allowed in the English title registration system. Under this, a prospective purchaser can apply for a special search certificate from the Land Registry that will prevent registration of any other dealing for 30 days. The consent of the owner would be required, in order to prevent frivolous or malicious abuse of the procedure.

6. During deliberations on the draft bill it was noted that the stamp duty requirements – under which there has to be an agreement for sale and purchase for every residential conveyancing transaction - would present difficulties for the operation of a priority search mechanism. It was concluded that a mechanism to allow for relation back to a caution lodged in respect of the agreement for sale and purchase would provide sufficient protection. Once the caution is lodged – a simple and straightforward process – all subsequent applications for registration of a transfer or charge relating to the caution are protected, removing any need to rush for registration. It was noted that the caution mechanism could apply equally well to commercial property. The fact that a caution would not lapse unless specific action was taken to remove it was seen as an advantage over a priority search which would lapse automatically after 30 days.

Annex C

Protection of Priority Under Title Registration System

Under the title registration system, the position of a person intending to effect a dealing in registered land is protected by:-

(a) The consent caution mechanism (Clauses 70(1) & (2), 71(1)); and

(b) The priority provisions (Clause 33(1) & (7))

These clauses are set out at the back of this annex for ease of reference.

A person who intends to effect a dealing in registered land, such as a purchase, a sub-purchase or an equitable charge, may enter a consent caution in respect of his intended dealing.

The caution may only be entered with the consent of –

The owner – with respect to a purchase

The prior cautioner (purchaser) – in respect of a sub-sale

(The sub-purchaser – in respect of a sub-sub-sale, etc)

The entry of a consent caution does not prohibit the making of subsequent entries but it does have two effects:

First, the interest protected by the caution will take priority over all subsequent dealings, except for:-

any dealing which is necessary to complete the protected interest; or

any dealing to which the cautioner consents.

Thus, the interest of a purchaser protected by the entry of a consent caution will take priority over all subsequent dealings, save the transfer to the cautioner necessary to give effect to the sale and purchase agreement, or where he consents.

Second, the entry in the Register affects the priority of the subsequent related dealing by the cautioner. Clause 33(7)(a) provides that where an application is presented for the subsequent registration of a dealing which is the subject of a consent caution, the priority of the dealing, if registered, relates back to and takes effect from the priority of the consent caution as determined by the order of application for registration of the caution. This means that a transfer in favour of a purchaser will relate back to the date of his application for his consent caution and will take priority over any charging order that is registered subsequent to that application.

Illustration:

X owns land that is subject to a legal charge (mortgage) to ABC bank
X agrees to sell the land to Y
Y registers a consent caution in respect of the sale and purchase agreement.
Y applies to LMNO Bank for a mortgage
P applies for a charging order against the land
Y applies for registration of the transfer of the land to him on completion.

- Y will take the land free of P's charging order since his priority is protected by the consent caution.
- Proceeds of the sale will be used to discharge ABC bank's legal charge.
- The new LMNO's Bank legal charge is not affected by the charging order as its charged interest is the purchaser's interest in the land, the priority of which is related back to Y's consent caution.

Points to note:

After registration of the consent caution, there is, therefore, no rush to register any dependent dealings. All financial arrangements can be settled between the various parties before the application for registration of the transfer or legal charge is submitted.

The only point at which there is any rush is over registration of the consent caution itself since, if another person gets in with a prior consent caution, that will upset the purchaser's priority.

Preparation and submission of the application for registration of a consent caution is a simple matter. While it is incumbent on the purchaser to instruct a solicitor, and for the solicitor to then act promptly, similar requirements face anyone else who seeks to intervene. Samples of application forms are appended.

Clause 70(2) allows for registration of the consent caution to proceed before completion of stamping. On completion of the stamping, a second caution is registered which secures priority from the date of the first caution.

If the vendor refuses to give his consent to the caution but the purchaser still wishes to proceed despite the doubts that refusal of consent may raise, then the purchaser can register a non-consent caution. This will have the effect of protecting the priority of the purchaser's equitable interest against any person with whom the vendor subsequently deals (Clauses 70(3) & 33(7)(c)).

Full text of relevant clauses of Bill.

Clause 70(1) states:
A person who in good faith and for valuable consideration intends to effect a dealing in registered land, a registered charge or a registered long term lease may, with the consent in the specified form of –
(a) where the land, charge or lease is not affected by any prior consent caution, the owner of the land or charge or the lessee of the lease; or
(b) in any other case, the cautioner in respect of the prior consent caution which affects the land, charge or lease (or, where there is more than one such consent caution and, without prejudice to the generality of Section 33, the last such consent caution which was registered),
present to the Registrar an application for the registration of a consent caution in respect of the dealing.

Clause 70(2) states:
Where an instrument which is a provisional agreement for sale and purchase or an agreement for sale and purchase in respect of registered land or a registered long term lease has been presented for stamping under the Stamp Duty Ordinance (Cap 117), then a consent caution in respect of that dealing may be registered if, but only if, the application ...is accompanied by a statutory declaration by the purchaser under the dealing to the effect that the instrument has been so presented.

Clause 71(1) states:
Where a consent caution has been registered in respect of registered land, a registered charge or a registered long term lease –
(a) subject to section 70(1)(b) and without prejudice to the generality of section 6(2)[1], the consent caution shall not of itself prohibit the making of entries in the Title Register affecting the land, charge or lease;
(b) section 33(1) shall not operate to prevent any matter registered subsequent to the consent caution from having priority over the dealing the subject of the consent caution if, but only if –
i) that dealing is dependent on that matter having such priority; or
ii) the cautioner in respect of the consent caution consents thereto.

Clause 33(1) states:
Subject to ...section 71(1)(b), matters appearing in the Title Register shall have priority according to the order in which the applications which led to their registration were presented to the Registrar...

Clause 33(7) states:
It is hereby declared that –
(a) without prejudice to the generality of section 71(1)(b), where an application is presented to the Registrar for registration of a dealing the subject of a consent caution, the priority of the dealing, if registered, relates back to, and takes effect from the priority of the first consent caution in respect of the same dealing as determined in accordance with subsection (1) or, where applicable, that subsection as read with paragraph (b);
(b) without prejudice to the generality of section 71(1)(b), where

[1] The powers of the Registrar to register matters

i) a consent caution ("first consent caution") referred to in section 70(2) has been registered in respect of a dealing;

ii) the ... agreement ...to which the first caution relates is stamped under the Stamp Duty Ordinance; and

iii) another consent caution ("second consent caution"), accompanied by that stamped ...agreement...is registered in respect of that dealing not later than 30 days after the registration of the first consent caution,

then the priority of the second consent caution relates back to, and takes effect from the priority of the first consent caution as determined in accordance with subsection (1);

(c) ...(deals with non-consent cautions)

(d) ...paragraph (a)...shall not operate to affect the priority of a caution as determined in accordance with subsection (1).

For Land Registry use only	Application No.		Fee($)
	Presented at the Land Registry on		

Form No. .....

Application to register a Consent Caution in respect of a dealing in registered land in the Land Registry under the Land Titles Ordinance

Registered land affected including address (if any)	Undivided Shares	Lot No.		Title No.
	House No.	Street Name		
				Application Nature Code
	Block	Flat	Floor	

Supporting Instrument	Date	Supporting instrument required/ not required* by law to be stamped
	Nature	
Intended dealing	Nature	
	Consideration	

Particulars of cautioner	Name (surname first for individuals)	Identification Document No. (See Note 3)	Stamp Office No. (If applicable)
			Solicitors Code

I/We, ..., being the registered owner(s) of the registered land affected/the cautioner(s) of caution application no. .....* registered against the registered land affected
hereby consent to this caution and its registration as a Consent Caution

Signature(s) of registered owner(s)/ cautioner(s)* .....

HKID No./ Company No. .....

Date .....

Witness: .....
(signature of solicitor)

.....
(name of solicitor and firm)

.....
(date)

I/We, ..., a solicitor, hereby certify that -
(name)

(a) the instrument/instruments* attached to this application -
  (i) has/have* been prepared by me or under my direction; and
  (ii) to the best of my knowledge, information and belief-
    (A) has/have* been duly executed by the parties thereto; and
    (B) is/are* effective in law for the purposes of this application;
(b) the particulars contained in this application are correct; and
(c) this application -
  (i) has been prepared by me or under my direction; and
  (ii) has been so prepared in accordance with the provisions of the Land Titles Ordinance (of) and the subsidiary legislation made thereunder applicable to this application

.....
(signature of solicitor)

.....
(name of firm)

.....
(date)

Delete whichever is inapplicable.

P.T.O. for notes for completion of this form

Note: 1. Every box must be completed. If any box is not applicable, please put down a dash "____"

2. If space is insufficient, show particulars on a separate sheet and make a reference to this on the application form. Please staple the sheet to the application form when you lodge the application.

3. If the identification document is NOT a Hong Kong identity card, please state the type of document also.

For Land Registry use only	Application No.		Fee(S)
	Presented at the Land Registry on		

Form No. .....

Application to register a Non-Consent Caution in respect of registered land/charge* in the Land Registry under the Land Titles Ordinance

Registered land affected including address (if any)	Undivided Shares	Lot No.		Title No.
	House No.	Street Name		Application Nature Code
	Block	Flat	Floor	

Supporting Instrument	Date	Supporting instrument required/ not required* by law to be stamped
	Nature	
	Consideration	
Application No. of registered charge to which this Non-consent caution relates (if applicable)		

Particulars of owner(s) of registered land/charge* to which this Non-consent caution relates Joint tenants ( ) Tenants in common ( ) (See Note 4)	Name (surname first for individuals)	Identification Document No. (See Note 3)	Stamp Office No. (If applicable)
Particulars of cautioner(s)			Solicitors Code

I/We, ..., a solicitor, hereby certify that -
(name)

(b) the instrument/instruments* attached to this application -
  (i) has/have* been prepared by me or under my direction; and
  (ii) to the best of my knowledge, information and belief-
    (A) has/have* been duly executed by the parties thereto; and
    (B) is/are* effective in law for the purposes of this application;
(b) the particulars contained in this application are correct; and
(c) this application -
  (i) has been prepared by me or under my direction; and
  (ii) has been so prepared in accordance with the provisions of the Land Titles Ordinance (of)
  and the subsidiary legislation made thereunder applicable to this application.

....
(signature of solicitor) (name of firm) (date)

Delete whichever is inapplicable.

P.T.O. for notes for completion of this form

Note: 1. Every box must be completed. If any box is not applicable, please put down a dash "____"

2. If space is insufficient, show particulars on a separate sheet and make a reference to this on the application form. Please staple the sheet to the application form when you lodge the application.

3. If the identification document is NOT a Hong Kong identity card, please state the type of document also.

4. For more than one owner, please tick as appropriate. In case of tenancy in common, please also specify the share each owner holds against their respective names.

For Land Registry use only	Application No.		Fee(S)
	Presented at the Land Registry on		

Form No. .....

Application to register a Withdrawal of Caution in the Land Registry under the Land Titles Ordinance

Registered land affected including address (if any)	Undivided Shares	Lot No.	Title No.
	House No.	Street Name	
			Application Nature Code
	Block	Flat / Floor	
Supporting Instrument	Date		Supporting instrument required/ not required* by law to be stamped
	Nature		
Application No. of registered caution to be withdrawn			

Particulars of applicant(s) for withdrawal	Name (surname first for individuals)	Identification Document No. (See Note 3)	Stamp Office No. (If applicable)

I/We, ..., being the cautioner(s) of the above-mentioned caution hereby apply for the withdrawal of the caution

Signature of Cautioner :..... Date: .....

Witness: ....
(signature of solicitor) (name of solicitor and firm) (date)

I/We, ..., a solicitor, hereby certify that -
(name)

(c) the instrument/instruments* attached to this application -
  (i) has/have* been prepared by me or under my direction; and
  (ii) to the best of my knowledge, information and belief-
    (A) has/have* been duly executed by the parties thereto; and
    (B) is/are* effective in law for the purposes of this application;
(b) the particulars contained in this application are correct; and
(c) this application -
  (i) has been prepared by me or under my direction; and
  (ii) has been so prepared in accordance with the provisions of the Land Titles Ordinance (of) and the subsidiary legislation made thereunder applicable to this application.

....
(signature of solicitor) (name of firm) (date)

Delete whichever is inapplicable.

P.T.O. for notes for completion of this form

Note: 1. Every box must be completed. If any box is not applicable, please put down a dash "____"

2. If space is insufficient, show particulars on a separate sheet and make a reference to this on the application form. Please staple the sheet to the application form when you lodge the application.

3. If the identification document is NOT a Hong Kong identity card, please state the type of document also.

For Land Registry use only	Application No.		Fee(S)
	Presented at the Land Registry on		

Form No. .....

Application to register a Removal of Caution in the Land Registry under the Land Titles Ordinance

Registered land affected including address (if any)	Undivided Shares	Lot No.		Title No.
	House No.	Street Name		
				Application Nature Code
	Block	Flat	Floor	
Supporting Instrument (See Note 4)	Date			Supporting instrument required/ not required* by law to be stamped
	Nature			
Application No. of registered caution to be removed	Nature			

Particulars of applicant(s) for removal	Name (surname first for individuals)	Identification Document No. (See Note 3)	Stamp Office No. (If applicable)

I/We, ..., being the owner(s) of registered land/charge* affected by the above-mentioned registered caution hereby apply for the removal of the caution

Signature of owner of registered land/charge*: ..... Date :.....
(See Note 5)

Witness: ....
(signature of solicitor) (name of solicitor and firm) (date)

I/We,....., a solicitor, hereby certify that -
(name)

(d) the instrument/instruments* attached to this application -
  (i) has/have* been prepared by me or under my direction; and
  (ii) to the best of my knowledge, information and belief-
    (A) has/have* been duly executed by the parties thereto; and
    (B) is/are* effective in law for the purpose of this application;
(b) the particulars contained in this application are correct; and
(c) this application -
  (i) has been prepared by me or under my direction; and
  (ii) has been so prepared in accordance with the provisions of the Land Titles Ordinance (of) and the subsidiary legislation made thereunder applicable to this application.

....
(signature of solicitor) (name of firm) (date)

Delete whichever is inapplicable.

P.T.O. for notes for completion of this form

Note: 1. Every box must be completed. If any box is not applicable, please put down a dash "____"

2. If space is insufficient, show particulars on a separate sheet and make a reference to this on the application form. Please staple the sheet to the application form when you lodge the application.

3. If the identification document is NOT a Hong Kong identity card, please state the type of document also.

4. If the supporting instrument is a High Court order, state the order number and delete paragraphs (a)(i) and a(ii)(A) in the Verification Certificate also.

5. If the supporting instrument is Not a High Court order, the applicant must sign here.

擁有權註冊紀錄
OWNERSHIP REGISTER

物業資料
Property Particulars

業權編號 Title No. :	A1234
地段編號 Lot No.:	Inland Lot No.789
土地不分割份數 Undivided share in land:	—
地址/位置 Address/Location:	10 Peak Road Hong Kong

批約 Held under:	Government Lease
年期 Lease Term:	999 years
開始日期 Commencement of Lease Term:	1/1/1850
每年地稅 Rent per annum:	$10.00
物業備註 Remarks:	
首次註冊日期 Date of 1st registration:	1/10/2005

業主資料
Owners Particulars

業主姓名 Name of Owner	身分(如非唯一擁有人) Capacity (if not sole owner)	交易性質 Nature of Dealing	申請編號 Application No.	註冊日期 Date of Registration	成交價錢 Consideration	備註 Remarks
ABC Company Limited		TRANSFER	56789	1/3/2006	$10,000,000	

產權負擔
Incumbrances

申請編號 Application No.	註冊日期 Date of Registration	交易/申請性質 Nature of Dealing/Application	文書/合約/呈請/命令等性質 Nature of instrument/ Contract/Petition/Order etc.	受益方/申請人/有關各方的姓名/名稱 Name of Party in favour of/ Applicant/Relevant Parties	成交價錢 Consideration	備註 Remarks
66821	1/6/2006	Long-term lease	Long-term lease	Chan Joseph	$1,000,000	Re: Flat 1, 1/F
66825	1/6/2006	Long-term lease	Long-term lease	Yim Eric	$800,000	Re: Flat 2, 1/F
66833	1/6/2006	Charge	Charge	DE Bank	All monies	Re: Flat 1, 1/F
66845	1/6/2006	Charge	Charge	FG Bank	All monies	Re: Flat 2, 1/F
69955	1/12/2006	Consent Caution	Sale and Purchase Agreement	Chi Tina	$1,200,000	Re: Flat 1, 1/F
71234	1/1/2007	Non-Consent Caution	Lis Pendens	FG Bank and Yim Eric	—	Re: Flat 2, 1/F

申請紀錄
Applications Record
(Applications Pending Registration 等待註冊的申請)

申請編號 Application No.	呈遞日期 Date of Presentation	交易/申請性質 Nature of Dealing/Application	附連文書性質 Nature of accompanying instrument	有關各方姓名/名稱 Name of parties	成交價錢 Consideration
72233	3/2/2007	Charging Order	Charging Order	FG Bank and Eric Yim	—

FORMAT OF TITLE REGISTER 業權註冊紀錄的樣式

長期租契註冊紀錄
LONG TERM LEASE REGISTER

物業資料
Property Particulars

業權編號
Title No. :
地段編號
Lot No.:
土地不分割份數
Undivided share in land:
地址/位置
Address/Location:
長期租契資料
Particulars of long term lease:
日期
Date:
年期
Term:

批約
Held under:
年期
Lease Term:
開始日期
Commencement of Lease Term:
每年地稅
Rent per annum:
物業備註
Remarks:
首次註冊日期
Date of 1st registration:

承租人資料
Lessee Particulars

承租人姓名 Name of Lessee	身分(如非唯一擁有人) Capacity (if not sole owner)	交易性質 Nature of Dealing	申請編號 Application No.	支持文書日期 Date of Supporting Instrument	註冊日期 Date of Registration	成交價錢 Consideration	備註 Remarks

產權負擔
Incumbrances

申請編號 Application No.	文書/合約/呈請/命令等日期 Date of Instrument/Contract/ Petition/Order etc.	註冊日期 Date of Registration	交易/申請性質 Nature of Dealing/Application	文書/合約/呈請/命令等性質 Nature of instrument/ Contract/Petition/Order etc.	受益方/申請人/有關各方的姓名/名稱 Name of Party in favour of/ Applicant/Relevant Parties	成交價錢 Consideration	備註 Remarks

申請紀錄
Applications Record
(Applications Pending Registration 等待註冊的申請)

申請編號 Application No.	附連文書日期 Date of accompanying instrument	呈遞日期 Date of Presentation	交易/申請性質 Nature of Dealing/Application	附連文書性質 Nature of accompanying instrument	有關各方姓名/名稱 Name of parties	成交價錢 Consideration

Annex B

Land Registry Practice Guide 19
Mar 2003

Notices, restrictions and the protection of third party interest in the register

Land Registration Act 2002
Scope of this guide

This guide gives advice about how to apply for a notice or a restriction to protect a third party interest in a registered estate or charge. It explains the effect of existing register entries in respect of third party interests and explains what applications may be made in respect of existing entries. It is aimed at solicitors and other legal advisers and you should interpret references to 'you' accordingly. Land Registry staff will also refer to it.

You can obtain copies of this guide free from any Land Registry Office, and view or download it from our website in English and Welsh.

You can find details of Land Registry Offices, telephone numbers and opening times on our website. Telephone numbers are also listed under 'Land Registry' in the Phone Book.

www.landregistry.gov.uk

4 Restrictions

4.1 The nature and effect of restrictions

4.1.1 The general effect of restrictions

Restrictions prohibit the making of an entry in respect of a disposition or a disposition of a specified kind. The prohibition may be indefinite or for a specified period and it may be absolute or conditional on something happening (for example on the consent of a third party being obtained). A restriction makes it apparent from the register either that the powers of the relevant proprietor are limited, or that a prior condition must be met before a disposition can be registered. Once entered, a restriction will remain in the register until it is cancelled or withdrawn. Restrictions are not automatically cancelled following a disposition, although we may cancel any restriction that has clearly become superfluous.

4.1.2 Restrictions affecting a registered estate

A restriction that is entered to regulate dispositions of a registered estate will be entered in the Proprietorship Register. Such restrictions do not have any effect on existing registered charges or the powers of the registered chargee. However, a restriction entered in the Proprietorship Register may affect a charge that is registered afterwards. The date entered in brackets at the beginning of an entry shows the date of its registration. You can tell by comparing the date of a restriction and the date of a registered charge, whether the chargee' s powers may be affected.

4.1.3 Restrictions affecting an existing registered charge

A restriction that affects an existing registered charge will be entered in the Charges Register and will refer specifically to the entries relating to the affected charge. Even though a restriction entered in the Proprietorship Register may appear to restrict dispositions by "the proprietor of any registered charge" (see, for example, the form O restriction), it will not have any effect on a charge that was registered prior to the entry of the restriction. If you intend to restrict all dispositions whether by the proprietor of the registered estate or the proprietor of an existing registered charge, you must

apply for separate restrictions.

4.1.4 What entries may be prevented by a restriction?

The standard form restrictions prescribed in Schedule 4, LRR 2003 each regulate or prohibit the registration of a disposition. Registration in this context is defined as meaning the completion of a registrable disposition. None of the standard form restrictions prevent the mere entry of a notice. Note however that some restrictions entered under the LRA 1925 expressly prevented the entry of a notice. We are unlikely to accept an application for a non-standard restriction under the LRA 2002 that expressly prevents the entry of a notice.

4.2 Entry of restrictions

4.2.1 Restrictions entered at the registrar's discretion

S.42(1), LRA 2002 sets out the registrar' s general power to enter a restriction as follows: *"The registrar may enter a restriction in the register if it appears to him that it is necessary or desirable to do so for the purpose of -*
(a) preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge,
(b) securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached, or (c) protecting a right or claim in relation to a registered estate or charge." He may enter a restriction to fulfil one of these purposes whether or not an application is made for him to do so. However, the registrar will always notify the relevant proprietor when he enters a restriction without an application having been made for him to do so. See section *4.4.4 Notifiable applications* below for information about notices served when an application has been made to enter a restriction. It will usually be clear whether or not a restriction is necessary or desirable for one of the 3 permitted purposes, but this will not always be the case. Note in particular that the purpose set out in s.42(1)(c), LRA 2002 does not permit the registrar to enter a restriction in respect of any right or claim but is limited as follows: — Firstly, the registrar may not enter a restriction to protect the priority of an interest that is or could be protected by notice (s.42(2), LRA 2002). However, a restriction might still be necessary or

desirable for one of the other permitted purposes set out in s.42(1)(a) or (b), LRA 2002, for example to prevent the unlawful breach of a provision in a contract that has been protected by notice. — Secondly, a right or claim may only be protected under the third permitted purpose if it relates to a *registered* estate or charge. As only the legal estate will be registered, this does not include rights or claims that relate only to a beneficial interest in property. A charging order affecting a beneficial interest under a trust may still be protected by a restriction entered under s.42(1)(c), LRA 2002, such as form K, as this is expressly confirmed in the LRA 2002 (s.42(4), LRA 2002). However, generally a restriction can only be entered in respect of an interest under a trust for one of the other two permitted purposes. In most cases, a restriction in form A will be appropriate for the second purpose - to ensure that overreaching takes place on a disposition that gives rise to capital monies - see Practice Guide *24 Private trusts of land* for more information.

4.2.2 Where we are obliged to enter a restriction

We are obliged to enter a restriction in certain circumstances. These are where: — we enter two or more persons as joint proprietors of a registered estate in land and the survivor will not be able to give a valid receipt for capital money (s.44(1), LRA 2002); — some other statute requires the registrar to enter a restriction (s.44(2), LRA 2002); —a bankruptcy order is registered under the Land Charges Act 1972 and it appears that a registered estate or charge is affected (s.86(4), LRA 2002). Practice Guide *34 Personal Insolvency* provides further detail about the entry of a bankruptcy restriction; *and* — the court makes an order that requires the registrar to enter a restriction (s.46, LRA 2002) - see paragraph *4.6 Court orders requiring the entry of a restriction* below for more detail about restrictions required by the court. R.95, LRR 2003 specifies the forms of restriction that we are obliged to enter under various statutory provisions.

4.3 The form of a restriction

4.3.1 Standard form restrictions

The effect of a restriction must be clear from its wording and its administration must not place us under an unreasonable burden. Schedule 4, LRR 2003 prescribes a number of standard form

restrictions that are intended to cover the vast majority of applications made. These are set out in *Appendix B* of this guide. The standard form restrictions are worded in a clear manner so that we, and someone inspecting the register, will be able to determine whether a given application will be caught by its terms and if so, what action needs to be taken to allow the application to proceed. Other practice guides in this series provide information about standard form restrictions that should or may be applied for or entered in particular situations.

4.3.2 Restrictions not in a standard form

You should only apply for a restriction that is not in a standard form if none of the standard form restrictions is appropriate. Where there is no appropriate standard form available we will only approve the form that you have applied for if: — it is reasonable;
—its application would be straightforward; *and*
— its application would not place us under an unreasonable burden (s.43(3), LRA 2002).

The term 'registered' where used in any of the standard form restrictions means the completion of a registrable disposition by complying with the relevant registration requirements prescribed in Schedule 2, LRA 2002 (r.91(3), LRR 2003). If you apply to enter a restriction that is not in a standard form, we recommend that you use the term 'completed by registration' instead of the term 'registered' to make the effect of the restriction clear. Before you finalise an agreement in which the parties agree to apply for a nonstandard restriction in a specified form, please check with us that the proposed form is acceptable. It can prove difficult to renegotiate the terms of an unacceptable restriction after an agreement has been made. As we must consider the appropriateness of any restriction applied for that is not in a standard form, the application fee prescribed in the current Land Registration Fee Order is higher than that for a standard form restriction. The registrar does however have discretion to reduce the amount of the fee required where he considers it appropriate to do so.

4.4 Applying for a restriction

4.4.1 Who may apply for a restriction?

A person may only apply for the entry of a restriction if he: — is the relevant proprietor; — is entitled to be registered as the relevant proprietor (see section *3.6.2 Applications made with the co-operation of the relevant proprietor* above); — has obtained the consent of the relevant proprietor or someone entitled to be registered as such; *or* — otherwise has a sufficient interest in the making of the entry.

4.4.2 Compulsory applications

R.94, LRR 2003 prescribes certain situations where a person must apply for a restriction. In particular, where a new trust is set up or there is a change in a trust of land and as a result a sole proprietor will not be able to give a valid receipt for capital money, a proprietor must apply for a restriction in form A (Schedule 4, LRR 2003). This is the standard joint proprietorship restriction - see Practice Guide *24 Private trusts of land* for more information.

4.4.3 Applications made without the co-operation of the relevant proprietor – the need to show a sufficient interest

Where the applicant does not have the co-operation of the relevant proprietor, he may only apply for a restriction if he can satisfy us that he has a sufficient interest in the making of the entry. R.93, LRR 2003 contains a list of standard situations where a class of person will be regarded as having a sufficient interest in the making of an entry. In most cases, the rule identifies which of the standard form restrictions will be appropriate to each situation covered. The applicant must confirm how he is interested in the restriction that he is applying for or, if he claims to fall within one of the situations listed in r.93, LRR 2003 he must state which. We may request further evidence if we are not satisfied that the applicant has a sufficient interest.

4.4.4 Notifiable applications

We will notify the relevant proprietor before we complete an application for a restriction unless it is: — made by or with the consent of the relevant proprietor or someone entitled to be registered as such; — one of the compulsory applications listed in r.94, LRR 2003; *or* — applied for to reflect a limitation under a court order or an order of the registrar (or an undertaking given in place of such

an order) (s.45, LRA 2002).

The notice will give the relevant proprietor 15 business days to object to the application. If a dispute arises from an objection to an application made within that period and it cannot be resolved by agreement, it will be referred to the Adjudicator to HM Land Registry. See Practice Guide *37 Objections and disputes* for more information about the resolution of disputes by the Adjudicator.

4.5 How to apply for a restriction

4.5.1 Application form and fee

Most applications for restrictions must be made on form RX1. However, you may apply for any standard form restriction by making the application in: — the additional provisions panel of any of the following forms: TP1, TP2, TP3, TR1, TR2, TR3, TR4, TR5, AS1, AS2, AS3; — panel 7 of form CH1; —a charge where we have approved the form of the charge (including the application for the restriction) in advance. The application must be accompanied by the fixed fee prescribed under the current Land Registration Fee Order.

4.5.2 Information that must accompany the application

You must lodge the following information with your application: — full details of the restriction that you are applying for; — an address for service for any of the following: — anyone whose consent or certificate is required; — anyone on whom notice must be served; — any other person referred to by name in a standard form restriction; — where the application is made with the consent of the relevant proprietor or someone entitled to be registered as such, you must lodge either: — the consent; *or* —a certificate given by a conveyancer confirming that he holds the relevant consent; — where the application is made by or with the consent of someone entitled to be registered as the relevant proprietor, you must lodge either: — evidence of his entitlement; *or* —a certificate given by a conveyancer confirming that he is satisfied that that person is entitled to be registered and that either the conveyancer holds original documentary evidence of the entitlement or that there is a pending application to register that person as proprietor at Land Registry; —

where the application is not made by or with the consent of the relevant proprietor, you must lodge either: — details of your interest in the making of the application; *or* — identification of the class of interest specified in r.93, LRR 2003 that you claim to have. If you can easily provide evidence to support your claim to a sufficient interest, you should lodge this. In appropriate cases we will request evidence if it is not lodged.

4.6 Court orders requiring the entry of a restriction

4.6.1 The court's power to order the entry of a restriction

The court may make an order requiring the registrar to enter a restriction (s.46, LRA 2002). Forms AA to HH are the standard form restrictions that the court is most likely to order the registrar to enter, but it may also order the entry of a restriction in a different form. If you intend to apply to court for an order that will require the registrar to enter a restriction that is not in one of the standard forms, please contact us first to ensure that the proposed form will be straightforward and will not place us under an unreasonable burden.

4.6.2 Application form and fee

Although the order may be addressed directly to the Chief Land Registrar, you should make a formal application for the restriction to be entered. This will ensure that the restriction is entered against the correct titles. Your application should be made on form AP1 (not RX1) (r.92(8), LRR 2003) and should be accompanied by the fixed fee prescribed under the current Land Registration Fee Order. However, the registrar has discretion to waive the fee wholly or in part if appropriate.

4.6.3 Overriding priority

The court may direct that the terms of the restriction must take priority over that afforded by any official search with priority that is pending when we process the application for the restriction (s.46(3), LRA 2002). The restriction will then be entered immediately even if there is an unexpired priority period arising from an official search to protect the priority of a disposition that has not yet been lodged. This direction may be appropriate if there is a risk that somebody may

apply for an official search 'with priority' before the restriction can be entered so that they can register a disposition of the property without being caught by the terms of the restriction.

4.7 Cancellation and withdrawal of a restriction

4.7.1 Cancellation of restrictions

Restrictions may be cancelled from the register in the following ways: — they may be withdrawn voluntarily by the appropriate person or persons interested in the restriction (s.47, LRA 2002 and r.98, LRR 2003); — anyone may apply to cancel a restriction that is no longer required (r.97, LRR 2003); — we may cancel a restriction ourselves if it is clear that it is superfluous (paragraph 5 of Schedule 4, LRA 2002); *and* — we must cancel a restriction entered in respect of a trust of land if we are satisfied that the affected estate is no longer subject to the trust (r.99, LRR 2003). Depending on its terms, a restriction may continue to have effect despite numerous changes of proprietorship, other dispositions and the lapse of time. Someone intending to take a disposition of an estate or charge against which a restriction has been registered should therefore consider whether: — the disposition will be affected by the restriction and if so whether he can comply with its terms; *and* — the restriction may affect any later disposition that he may wish to make. In appropriate circumstances he should take steps to ensure that the restriction will be cancelled or withdrawn before committing himself to complete the disposition.

4.7.2 Applications to cancel a restriction

Cancellation is the term used in r.97, LRR 2003 to refer to an application to cancel a restriction that is no longer required. Any person may apply to cancel a restriction, the application must be made on form RX3 and no fee is payable. We will cancel the restriction if we are satisfied that the restriction is no longer required. The application must be accompanied by evidence to show that this is the case. If anyone is referred to in the restriction and if an address for service is listed for that person, we will notify him of the application and give him an opportunity to object to the application before cancelling the restriction.

4.7.3 Applications to withdraw a restriction

Withdrawal of a restriction is the term used in s.47, LRA 2002 and r.98, LRR 2003 for an application by or with the consent of all persons with the benefit of the restriction for it to be cancelled. If we are satisfied that everyone with the benefit of the restriction has consented to the application, we will cancel the entry without having to investigate whether the restriction continues to serve any purpose. The application must be made in form RX4; no fee is payable. Restrictions of the following types cannot be withdrawn (r.98(6), LRR 2003): — those entered to prevent an unlawful or invalid disposition by a proprietor whose powers are limited by statute or under the general law; — those entered by someone who was under an obligation to apply; — any that the registrar is obliged to enter; — those entered to reflect a limitation in an order of the court or the registrar or a limitation in an undertaking given in place of an order; *and* — any that the court has ordered the registrar to enter. The application must generally be made by or with the consent of everyone who appears to us to have an interest in the restriction. However, where the restriction specifies a person from whom a consent or certificate is required or to whom a notice must be sent, that person is entitled to make the application on his own and his is the only consent required. The applicant must lodge all necessary consents when applying, but we will accept a conveyancer' s certificate confirming that he holds the necessary consents. Where the application is to withdraw part of the land within an affected estate or charge from the effect of the restriction (for example in readiness for a transfer of that part) the part in question must be clearly identifiable from the application.

4.7.4 Restrictions cancelled without application

We may cancel a restriction without any application being made if it is clear that the restriction has become superfluous (paragraph 5(d) of Schedule 4, LRA 2002). The following are examples of where we might cancel a restriction automatically: — where the restriction is limited in time and the relevant period has expired; — where the restriction was entered in connection with the registration of a charge which has now been discharged; — where the restriction was entered to protect an interest that has since been overreached by the payment of capital money arising on a registrable disposition to the proprietors who have given a valid receipt (for example forms A, J or K); — where the restriction was entered in relation to a limitation on the powers of a previous proprietor; *and* — where we register a transfer under a

power of sale by the proprietor of a registered charge whose powers were not affected by the restriction.

4.8 Applications to disapply or modify a restriction

4.8.1 Disapplying a restriction

Anyone who has a sufficient interest in a restriction may apply for an order that it be disapplied to enable a particular disposition or dispositions of a specified kind to be registered.

For example, a registered estate might be subject to a restriction prohibiting the registration of any transfer without the consent of a management company. If the company has been dissolved but the applicant can show that there is no reason why the transfer should not proceed, the registrar may make an order permitting the transfer to be registered. In those circumstances it might not be appropriate to cancel the restriction completely as the company might be restored to the companies' register at a later date. If the restriction is disapplied, the transfer can be registered but the restriction would remain in the register.

4.8.2 Modifying a restriction

Anyone who has a sufficient interest in a restriction may apply for an order that its terms be modified. The modification might relate to a specific disposition or to dispositions of a specified class. For example, where a restriction requires the consent of a named individual who has transferred his responsibility to a third party, the registrar might be asked to modify the restriction so that the name of the third party is substituted for the person named in the entry.

4.8.3 The application

An application to disapply or modify a restriction must be made on form RX2. The application must be accompanied by the fixed fee prescribed under the current Land Registration Fee Order. The applicant must: — state full details of the order sought; — explain his interest and why it is sufficient to make the application; —give details of the disposition or kind of dispositions that will be affected by the order; *and* — state why the applicant considers that the registrar should make the order. The application may be made prior to or at the

same time as an application to register the disposition that is caught by the restriction. When considering whether or not to make the order, the registrar will additionally consider any available evidence to clarify what purpose the restriction still serves. He may ask for further evidence from the applicant and may serve appropriate notices.

附件 C
Annex C

49 P&CR 148, ([1985] Conv 135)

Argyle Building Society v Hammond and Others

Court of Appeal (Civil Division)

49 P&CR 148, ([1985] Conv 135)

HEARING-DATES: 25, 26 September, 18 October 1984

18 October 1984

CATCHWORDS:
Land -- **Land** registration -- Forgery -- Rectification of charges register -- Registered owner alleging transfer of registered **land** by forged deed -- Subsequent registration of transferees as joint proprietors at **Land** Registry -- Building society making loan to transferees on security of a registered legal charge on the property -- Default in making mortgage repayments -- Building society's action for possession of property -- Whether original registered owner entitled to order rectifying charges register -- **Land** Registration Act 1925 (c 21), s 82. See post, pp 156-158

HEADNOTE:
In 1964 the appellant, the third defendant to the action, became the freehold owner of property in North London and he was registered as proprietor of it with title absolute at the **Land** Registry. The appellant's evidence was that in 1976 he went to live in the United States, leaving his mother, and also his sister and her husband, who were the first and second defendants, living in the house. The appellant alleged that in 1979 his sister had visited him abroad and there induced him to sign a power of attorney that purported to empower his mother to sell, inter alia, the property on his behalf. Further he alleged that a transfer of the property took place in September 1979, by way of a forged deed in favour of the first and second defendants. He alleged that his mother's signature on the deed was forged. The first and second defendants were subsequently registered at the **Land** Registry as joint proprietors of the property. On the same date as the transfer the respondent, a building society, who it was common ground acted throughout in good faith, advanced ?5,000 to the first and second defendants on the security of a legal charge of the property. That legal charge was also registered at the **Land** Registry. The first and second defendants defaulted in making payments of the sums due to the respondent and proceedings were initiated against them in the Count Court for possession of the house. By January 1983 the respondent had obtained an order for possession of the property as against the first and second defendants and a warrant for possession on February 8, 1983, was issued for execution. On February 8 the appellant got an order from the Barnet County Court staying the warrant on terms and giving him leave to be joined as a defendant to the action. In November 1983 Judge Goldstone hearing the action in the Barnet County Court elected to deal with the issue of whether the appellant was entitled to an order rectifying the charges register as a preliminary point. That point was, during the hearing of the appeal by the Court of Appeal, formulated as follows: "on the assumptions (a) that the purported signature on the transfer of the house to [the first and second defendants] was a forgery but (b) that the mortgagees took their charges in good faith and for value, without actual knowledge of the forgery, was there in law any possibility of the appellant obtaining rectification of the charges register relating to the house against the mortgagees?" Judge Goldstone held that even assuming in the appellant's favour that the deed of transfer of the property was a forgery, he had no jurisdiction to order rectification of the charges register against the respondent and he concluded that the respondent was accordingly entitled to its order for possession of the property. On appeal against the judge's order:

Held, allowing the appeal and setting aside all orders for possession of the property against the appellant and ordering a new trial, that notwithstanding that the effect of the registration of the first and second defendants as proprietors of the property was to vest in them the legal fee simple, regardless of any forgery, by virtue of section 69(1) of the **Land** Registration Act 1925 and notwithstanding that a registered proprietor had the statutory power to create valid charges by virtue

of sections 25, 26 and 27 of that Act, there was provision made by section 82 of the Act for the discretionary rectification of the **land** register and by section 82(2) the court had the power in a proper case to rectify the charges register even as against a bona fide chargee and that on the basis of the assumed facts the court would have a discretion as to whether or not to order rectification.

INTRODUCTION:
Appeal from Judge Goldstone sitting at Barnet County Court. The appellant, Michael Derek Steed, appealed from an order of Judge Goldstone made at the trial of the action on November 18, 1983, whereby it was ordered, inter alia, that possession of the property known as 2 Arlow Road, Winchmore Hill, London N21 be delivered up to the Argyle Building Society. The grounds of appeal were (1) that the judge held that the charges register at the **Land** Registry could not or ought not to be rectified in the assumed circumstances. The judge thereby erred in that: (a) jurisdiction to rectify the register arose under section 82(1) of the **Land** Registration Act 1925 including paragraphs (a), (d), (g) and (h) thereof; (b) the jurisdiction being discretionary, it had to be exercised in relation to all the circumstances of the case. The judge exercised no discretion; (c) on the facts assumed the register could and ought to have been rectified; (2) that the county court has no or only limited jurisdiction to order rectification of the **land** register.

COUNSEL:
Andrew Walkers for the appellant; James Leckie for the respondent building society.

JUDGMENT-READ:
Cur adv vult October 18.

PANEL: Lawton and Slade LJJ and Sir David Cairns

JUDGMENTBY-1: SLADE LJ

JUDGMENT-1:
SLADE LJ: This is the judgment of the court on an appeal by the appellant, Mr Michael Derek Steed, for an order of Judge Goldstone made at the trial of two actions in the Barnet County Court on November 18, 1983. In the first action, the Argyle action, the plaintiff was Argyle Building Society, the respondent to the appeal. The three defendants were Mr David Hammons, Mrs Claire Madeleine Hammond and the appellant. By his order in the Argyle action, the judge, inter alia, made an order against the appellant for possession of a property known as 2 Arlow Road, Winchmore Hill, London N21 in favour of the respondent within a period therein specified.In the second action, the Provident action, the plaintiff was Provident Mutual Life Assurance Association ("Provident"). The three defendants were the same as the defendants in the Argyle action. By his order in the Provident action, the judge, inter alia made a possession order in respect of the house against the appellant in favour of Provident.

The appeal now before the court is an appeal by the appellant against the possession order made against him in the Argyle action. He has also appealed against the possession order made against him in the Provident action, but that appeal has not been proceeded with pending the decision of the present appeal. The relevant facts may be summarised quite shortly for present purposes. In 1964 the appellant became the freehold owner of the house and was registered as proprietor of it with title absolute at HM **Land** Registry on October 22, 1964, under Title No MX 58720. In 1976 the appellant according to his evidence went to live in America, leaving living in the house his mother, Mrs Mary Steed, and also his sister, the second defendant, who subsequently married the first defendant, Mr Hammond. Again according to the appellant's evidence, one or both of Mr and Mrs Hammond then conceived a fraudulent scheme for obtaining money. Mrs Hammond, so it is alleged, went to America and there induced the appellant to sign a power of attorney dated April 14, 1979, purporting to empower Mrs Mary Steed, inter alia, to sell the house on his behalf. Mr and Mrs Hammond, or one of them, so the appellant alleges, then arranged for the execution of what purported to be a transfer of the freehold of the house by Mrs Mary Steed dated September 4, 1979, in exercise of her power of attorney in favour of Mr and Mrs Hammond. He allges, however, that the purported signature of Mrs Mary Steed on the transfer was a forgery. Also on September 4, 1979, the respondent advanced a sum of ?5,000 to Mr and Mrs Hammond on the security of a legal charge of the house which they executed in favour of the respondent the same day. It was not suggested on behalf of the appellant that the respondent entered into this transaction with actual knowledge of the alleged forgery or otherwise than in good faith. On October 9, 1979, Mr and Mrs Hammond were registered at the **Land** Registry as joint proprietors of the house in the place of the appellant. Also on October 9, 1979, the legal charge of September 4, 1979, in favour of the respondent was registered in the Charges Register at the **Land**

Registry. By a legal charge of July 24, 1981, Mr and Mrs Hammond executed a legal charge of the house in favour of Provident to secure the repayments of an advance of ?0,000 and interest. This charge was expressed to be subject to the legal charge of September 4, 1979, in favour of the respondent. Provident was registered as second chargee in the Charges Register at the **Land** Registry on July 31, 1981.

Mr and Mrs Hammond defaulted in payment of the sums due to the respondent and to Provident under their respective legal charges. On February 1, 1982, the respondent instituted proceedings (the Argyle action) against Mr and Mrs Hammond seeking an order for possession of the house. There then followed a tangled procedural history, which we think unfortunately led to considerable confusion at the trial of the two actions. This history has been set out in some detail in an affidavit dated January 27, 1984, sworn on behalf of the appellant by Jennifer Mary Trust, the solicitor who at that date had the conduct of the matters on his behalf. For present purposes we think it will suffice to summarise it thus. By January 1983, the respondent had obtained an order for possession of the house as against Mr and Mrs Hammond, and a warrant for possession had been issued for execution on February 8, 1983. On February 8, 1983, the appellant obtained an order from the Barnet County Court staying the warrant on terms and giving him leave to be joined as a defendant to the Argyle action conditional on his filing an affidavit and satisfying the court that there was a prima facie case that he had an interest in the house. On February 21, 1983, he swore an affidavit setting out the history of the matter from his point of view. At that stage it appears that the appellant still knew no details of the transactions which had taken place. He said that the only document relating to the house which he remembered signing between the time he emigrated and the time he learned of the Argyle action was a document which Mrs Hammond produced and led him to believe required his signature so that repairs could be effected to the roof. He said he never conveyed or intended to convey the house to the Hammonds, and that, if any loans had been raised on its security, this had been done without his knowledge or consent. Finally, he expressed his wish to intervene in the Argyle action so as "to attempt to rectify whatever was done illegally or fraudulently." No allegation of forgery was made at that stage. On March 24, 1983 the appellant was added as a defendant to the Argyle action. No direction was given on that occasion, or at any of certain subsequent interlocutory hearings in the matter, for the filing by him of any pleading by way of defence. On November 11, 1983, Provident instituted the Provident action against all three defendants, claiming possession of the house and payment. On November 17, 1983, the two actions came on for hearing before Judge Goldstone. We have some sympathy with him in finding himself, as he did, faced with a procedural position of some complexity, aggravated by the fact that, beyond the appellant's affidavit, there was no written statement or pleading of the appellant's case. From the papers originally filed on this appeal, it is very difficult indeed to discern the precise course which the hearing before him took. But we have been assisted in this respect by a full account of this given by Mr Leckie, who appeared on behalf of the respondent at the trial coupled with what purports to be a note of the hearing, though the origin of this note is unknown to us and it has apparently not been approved by the judge himself. The obscurity of the course of the trial, and indeed of the precise nature of the orders and directions which he gave, is illustrated by the fact that there are with our papers several documents in different form which purport to represent copies of these orders and directions. We do not think that any of them are accepted on both sides on this appeal as accurately and fully embodying these orders and directions.

However, while Mr Walker, who now appears for the appellant, did not represent him at the hearing before Judge Goldstone, we think it is now more or less common ground that the hearing broadly took the following course. While the respondent, Provident and the appellant were each represented by separate counsel, Mr and Mrs Hammond appeared in person. On the first day of the hearing, November 17, 1983, by consent of all parties, it was agreed that both actions should be heard together and that the evidence in the one case should be evidence in the other. It was also agreed that matters should begin by Provident opening its case against the Hammonds and that, after the completion of that opening, the respondent should open its case agaisnt the appellant. On Provident's application, Mr and Mrs Hammond accepted that it had a right to a possession order against them. Particulars of the mortgage arrears were produced. The judge accordingly made a monetary order and an order for possession against Mr and Mrs Hammond in favour of Provident. Mr Leckie then proceeded to open the Argyle action against the appellant. In the absence of any pleading from the appellant, the judge by consent directed that his affidavit of February 21, 1983, and such further matters as he relied on in evidence should stand as his defence in the action. Mr Leckie indicated that he would be asking for a warrant for possession to issue against the appellant and produced an affidavit proving the debt owned by Mr and Mrs Hammond under the respondent's charge. After some submissions as to law and fact, it was accepted by the appellant's counsel that the onus fell on him to show why the warrant should not issue against the appellant and that therefore he should call his evidence first. The appellant's counsel

then proceeded to call the appellant himself and a Miss Underwood, who had purported to witness the purported signature of Mrs Mary Steed on the transfer to Mr and Mrs Hammond. By the conclusion of the evidence of these two witnesses, if not before, it had become clear that the appellant's counsel would be submitting in due course that the last-mentioned purported signature was a forgery. However, where the **land** in question is registered **land, the Land** Registration Act 1925 may operate to confer protection even on a forger and those claiming through him. For section 69(1) of that Act provides as follows:

The proprietor of **land** (whether he was registered before or after the commencement of this Act) shall be deemed to have vested in him without any conveyance, where the registered **land** is freehold, the legal estate in fee simple in possession, and where the registered **land** is leasehold the legal term created by the registered lease, but subject to the overriding interests, if any, including any mortgage term or charge by way of legal mortgage created by or under the Law of Property Act 1925, or this Act or otherwise which has priority to the registered estate.

In these circumstances, before the judge rose on November 17, 1983, Mr Leckie, on behalf of the respondent, thought it right to draw his attention to certain passages in a textbook written by two authors with wide learning and experience of registered conveyancing, that is to say Ruoff & Roper's The Law and Practice of Registered Conveyancing. We understand that the first of the passages which was drawn to his attention includes the following exposition of the effect of the "statutory magic" worked by section 69 of the 1925 Act:

It will be observed that vesting of the legal estate occurs "without any conveyance." It operates by the fact of registration alone by a kind of statutory magic entirely regardless of the facts which had led up to registration. In practice, of course, there will normally, but not necessarily, be a conveyance or other assurance in favour of the first registered proprietor, or a transfer or other dispositon in favour of anyone who is subsequently registered as a proprietor. However, there are numerous instances in which a first or a subsequent registered proprietor will acquire the legal estate through registration without any conveyance as, for example, when he claims title by adverse possession and satisfies the Chief **Land** Registrar that he has done so. He may also, for example, acquire title by fraud, including forgery, and the fact that he does so cannot possibly alter the fact that he is the registered proprietor and that, as such, the legal estate is vested in him, unless and until the register is rectified against him. Thus for example, if a forger succeeds in getting himself registered as the proprietor and thereafter executes a dispositon for value in favour of a bona fide purchaser who goes into possession of the **land,** then prima facie that purchaser cannot be ousted at the instance of the true original owner, not only because of the express statutory provisions protecting possession, but also because a registered proprietor who has been unlawfully registered can nevertheless transmit a sound title. But if, in exceptional circumstances, the purchaser is deprived of his registered estate, he is automaticaly entitled to be indemnified by the **Land** Registry. When the notorious acid bath murderer, Haigh, forged the signature of a registered proprietor, was registered in his place, and then sold to a bona fide purchaser for value, and the forgery was brought to light, the purchaser could not be disturbed. Instead, he was confirmed in his title and the personal representatives of the proprietor whose signature had been forged were compensated in full. This is an extreme example of the way in which the statutory magic works.

The "express statutory provisons protecting possession" thus referred to by the authors are those of section 82(3) of the 1925 Act, as amended. The provisons under which a purchaser may be "deprived of his registered estate" are said in a footnote to be those of section 82(3)(c). We will revert to these provisions hereafter. Mr Leckie has told us that he also drew the judge's attention to a passage in Ruoff & Roper, which contains the following two sentences and cites as authority for them Re Leighton's Conveyance [1936] 1 All ER 667, Luxmore J; [1936] 3 All ER 1033, CA.

After registration, a charge takes effect subject to the entries on the register, unless, indeed, some special statutory priority is enjoyed, and subject to overriding interests. It is noteworthy that a charge may be valid even though the transfer of the charged **land** to the borrower was void.

Mr Leckeie has also told us that he drew the judge's attention to Ruoff & Roper, which contains an expositon of the powers of the court or registrar to rectify the register and includes the following sentences:

Although rectification may be granted against the proprietor of the **land,** a charge created by the transferee in favour of a bona fide mortgagee will not be disturbed.

The sole authority cited by the authors for this proposition, and for a similar propcsition to be founc at p 798, was again Re Leighton's Conveyance.

Before the conclusion of the day's hearing on November 17, 1983, Mr Leckie had, we think, made it clear to the judge that, founding his argument on the principles appearing from these passages, he would besubmitting that, even if the signature on the transfer to Mr and Mrs Hammond had indeed been forged, there would be no question of the appellant's obtaining rectification of the Charges Register as against the respondent, which had taken its charge in good faith, or of declaring that charge invalid at the instance of the appellant.

No doubt influenced by this submission and by the passages in a textbook of high persuasive authority in this context, to which he had been referred, Judge Goldstone, at the start of the sitting on November 18, 1983, indicated that before the trial proceeded further, he was in principle prepared to hear argument on a "preliminary point" which, if decided adversely to the appellant, would leave him with no defence to his action for possession. Indeed, the judge, who had obviously taken considerable trouble to assist the parties, appears to have produced a written note to facilitate the formulation of this "prelimininary point." It is clear that, after some discussion, it was then agreed that the judge should hear argument on and decide a preliminary point. Nevertheless, regrettably as things have turned out, the preliminary point was never reduced to a final agreed form, before the argument proceeded. The result has been that in this court there has had to be a somewhat prolonged debate as to the precise point which the judge was invited to decide, and purported to decide. However, by the conclusion of the argument on this appeal, it had become common ground that in substance this point may be formulated as follows: On the assumptions (a) that the purported signature on the transfer of the house to Mr and Mrs Hammond was a forgery but (b) that both the mortgagees took their charges in good faith and for value, wihtout actual knowledge of the forgery, was there in law any possibility of the appellant obtaining rectification of the Charges Register relating to the house against the mortgagees? The judge's answer to this question was in the negative. Without hearing the rest of the evidence, he accordingly concluded that each of the mortgagees was entitled to possession of the house as against the appellant, though he directed that the warrants for possession against him should not issue for a specified period, and gave certain further directions. From this order made in the Argyle action the appellant now appeals.

Before concluding this history of the case, we should emphasise two points. First, in so far as reference has been made to the alleged forgery of the signature on the transfer of the house to Mr and Mrs Hammond, the judge and this court have been proceeding simply on the basis of a fact merely assumed for the purpose of deciding a point of law. No finding of forgery was made by the judge or will be made by this court on this present appeal. We understand that criminal proceedings have been instituted in this context, but have not yet come to trial. Secondly, it is not suggested that any decision of the judge or of this court on the preliminary point is binding on Mr and Mrs Hammond.

We now turn to the substantive issues arising on this appeal. If the title to the house were not registered and the appellant's signature on the transfer of the house to Mr and Mrs Hammond was a forgery, there would in our judgment, at least prima facie, be no possible question of the respective charges of the respondent and Provident binding the appellant. At least prima facie, the appellant could assert that the transfer was a nullity and that nothing had occurred to divest him of the freehold title to the house, unincumbered by any charge in favour of the respondent or Provident (compare Re Cooper (1882) 20 Ch 611). However, as Mr Leckie has stressed, the fact that the title to the house in the present case is registered necessitates a somewhat different approach to the legal problems. The effect of the registration of Mr and Mrs Hammond as proprietors of the freehold interest in the house must have been to vest in them the legal fee simple, whether or not the purported signature of Mrs Mary Steed on the transfer to them was forged. This is by virtue of the "statutory magic" effected by section 69(1) of the 1925 Act, to which Ruoff & Roper refer. We have already quoted that subsection, but should mention that the word "proprietor," which appears in it, is defined by section 1(XX) as meaning "the registered proprietor for the time being of an estate in **land** or a charge." The relevant provisions of the 1925 Act relating to charges are to be found in section 25 to 27. Section 25(1)(b) gives the proprietor of any registered **land** the power, inter alia, by deed to charge it in favour of a building society. Section 26(1) provides:

The charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge, and the particulars of the charge.

Section 27(1) provides that, subject to certain exceptions immaterial for present purposes, a registered charge shall take effect as a charge by way of legal mortgage.

It follows that once a person has been registered as the proprietor of freehold **land,** he has, so long as he remains so registered, the statutory power to create valid charges (through the combined effect of sections 69(1) 25, 26 and 27), even though the purported transfer of the freehold under which he himself claims is a forged instrument. Likewise, so long as he remains so registered, he has the power to transfer the freehold title itself. The 1925 Act thus contains striking exceptions to the general principle **"Nemo dat quod non habet."**

In the present case, as it happens, Mr and Mrs Hammond executed the charge in favour of Argyle before their title to the house had been registered. But Mr Leckie submitted, this makes no difference in law since the subsequent registration of Mr and Mrs Hammond as proprietors on October 9, 1979, operated to perfect the title of the respondent as mortgagee, which was itself registered on October 9, 1979, by virtue of the doctrine of what is sometimes called "feeding the estoppel." We were referred to no authority showing that the doctrine of "feeding the estoppel" can have any operation in relation to a title which is claimed on the basis of registration. Nevertheless, we shall for the time being proceed to consider the legal isues which arise in this case on the assumptions that (a) the protection afforded by the 1925 Act to the respondent as mortgagee is no less effective than it would have been if the charge in its favour had been executed after the title of Mr and Mrs Hammond as proprietors had been registered; and (b) that the protection afforded to freeholders whose title has been registered under that Act, even though it is common ground that the 1925 Act contains no explicit provisions relating to mortgagees precisely corresponding with section 69(1).

Nevertheless, it is clear that any protection enjoyed by a proprietor or mortgagee under the 1925 Act is conferred subject to the provisions for rectification of the Register contained in section 82, of which subsection (1), so far as material, reads as follows:

The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases, but subject to the provisions of this section:- (a) Subject to any express provisions of this Act to the contrary, where a court of competent jurisdiction has decided that any person is entitled to any estate right or interest in or to any registered **land** or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required and makes an order to that effect; (b) Subject to any express provision of this Act to the contrary, where the court, on the application in the prescribed manner of any person who is aggrieved by any entry made in, or by the omission of any entry from, the register, or by any default being made, or unnecessary delay taking place, in the making of any entry in the register, makes an order for the rectification of the register; (c) . . . (d) Where the court or the registrar is satisfied that any entry in the register has been obtained by fraud; (e) . . . (f). . . (g) Where a legal estate has been registered in the name of a person who if the **land** had not been registered would not have been the estate owner; and (h) In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register.

We pause to make two points in relation to this subsection. First, register of title made pursuant to the 1925 Act consist of three parts, namely the property register, the proprietorship register and the charges register. The jurisdiction to rectify under the subsection plainly extends to all or any of these parts. Secondly, on the assumed facts in the present case, the court would, in our judgment, have clear jurisdiction to rectify the proprietorship register of the house by substituting the name of the appellant for that of Mr and Mrs Hammond, since the case would fall within all or any sub-paragraphs (a), (b), (d), (g) and (h) of section 82(1). The present argument relates to the possibility or otherwise of rectification of the charges register.

Section 82(2) of the 1925 Act provides as follows:

The register may be rectified under this section, notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by any entry on the register, or otherwise.

This subsection, which reversed the position under section 95 of the **Land** Transfer Act 1875, is important in the present context. It makes it clear that the court has jurisdiction in any proper case to rectify the charges register, even though the rectification may affect a charge acquired or protected by registration.

Section 32(3), as amended by section 24 of the Administration of Justice Act 1977, contains special provisions which restrict, though they do not eliminate, the jurisdiction of the court to rectify the register "so as to effect the title of the proprietor who is in possession." They need not be quoted, since it is not suggested that they apply on the facts of the present case.

The effect of rectification of the register may on occasions be to cause loss to innocent, no less than guilty, parties. Section 83(1) of the 1925 Act accordingly provides that, subject to the provisions of the Act to the contrary, any person suffering loss by reason of any rectification of the register under the Act shall be entitled to be indemnified. In contrast, however, since the jurisdiction given to the court by section 82(1) is discretionary, there may be cases where, even though an error or omission in the register has occurred, the register is not rectified. Section 83(2) deals with such cases by providing:

Where an error or omission has occurred in the register, but the register is not rectified, any person suffering loss by reason of such error or omission, shall, subject to the provisions of this act, be entitled to be indemnified.

The only other material subsection of section 83 is subjection (4), which provides:

Subject as hereinafter provided, a proprietor of any registered **land** or charge claiming in good faith under a forged disposition shall, where the register is rectified, be deemed to have suffered loss by reason of such rectification and shall be entitled to be indemnified under this Act.

Subsection(4) shows beyond doubt that the court has jurisdiction in a proper case to rectify the register as against a proprietor of a charge claiming in good faith under a forged disposition.

In the light of the very wide discretion given to the court by the 1925 Act, we found it at first sight surprising that the judge should have concluded that on the assumed facts and as a matter of law, there was no possibility of the appellant's obtaining rectification of the charges register against the mortgagee. For this, as we read it, was the undoubted effect of his decision. If he had reached this conclusion on the basis that under the 1925 Act there was no jurisdiction to rectify as against the mortgagee, the conclusion would, in our judgment, have been manifestly erroneous, having regard to sections 82(1), 82(2) and 83(4). However, whether or not he was referred to the last mentioned subsection, the attention of the judge was certainly directed to section 82. We cannot believe that he did not fully appreciate that, on the assumed facts, the court would have at least a theoretical discretion under the wording of the statute to rectify the charges register against the mortgagees, in addition to rectifying the proprietorship register against Mr and Mrs Hammond. However, if we have properly understood the effect of his decision from the notes of his judgment which are before us, the gist of it was that, in view of the authorities, the court would have no alternative but to refuse to exercise its discretion to rectify the charges register in favour of the appellant. And in reaching this conclusion he relied heavily, not only on the statements of law in Ruoff & Roper, but on the decision in Re Leighton's Conveyance. [1936] 1 All ER 667.

The facts of the latter case, as summarised in the headnote to the report 667, were as follows:

A daughter without her mother's knowledge arranged for the sale of certain registered **land** from the mother to herself. Without explaining the true nature of the document, the daughter secured the execution of the necessary transfer by her mother and her own registration as owner with an absolute title. The daughter subsequently created charges upon the property, the chargees being ignorant of the fraud upon the mother, and giving full consideration for their charges.

The mother sought both rectification of the proprietorship register with regard to the house, and rectification of the charges register, by removing the registered charges. Though a plea that the transfer was forged was not proceeded with, she asserted that the deed which purported to convey the property to her daughter was not her deed upon the basis of the doctrine known as "non est factum." Though Luxmoore J had no doubt that the daughter had adopted a course of conduct which was "wholly improper", he considered it important to determine whether or not this was in truth a case where the doctrine applied. For, as he pointed out at p 672:

If a party who executes a document can read but does not do so, it is good even if contrary to their mind. But if it is read falsely or its contents falsely declared and then signed, the deed is not his deed.

Luxmoore J however conlcuded that the relevant deed was the deed of the mother. As he said at p 672:

There is little doubt that she had no understanding of the nature of the documents, but I am equally satisfied that she knew she was doing something, and if she had made inquiries she would have found out that it had to do with No 167 Camden Road. She made no such inquiries . . .

On the basis of these facts, the conclusion which Luxmoore J reached was that the proprietorship register should be rectified by substituting the name of the mother for that of the daughter, but that there were no grounds for interfering with the charges by rectifying the charges register. He put the matter thus at p 673:

It follows with regard to the chargees who have acted on the faith of the document executed by Mrs Wardman that she cannot against them aver that the deed was not hers, or that a misrepresentation was made which brought about its execution. I am satisfied that there are no grounds on which I can say that these charges are bad, but with regard to the equity of redemption I am satisfied on the evidence that what Mrs Wardman did was at the request of and in reliance on her daughter, and under her influence. The daughter is now dead and her estate is being administered in bankruptcy. It follows that the conveyance to Mrs Bergin can have no effect as against Mrs Wardman, and she is still entitled to the equity of redemption in the property. The proper order in the circumstances is to direct rectification of the register by striking out the name of Mrs Ethel Bergin and inserting as owner with an absolute title the name of Mrs Wardman. With regard to the charges register, there is no ground for interfering with it and directing any rectification. They are good charges and remain enforceable against the property.

The decision of Luxmoore J went to appeal on a question relating to costs. Lord Wright MR, [1936] 1 All ER 667, Luxmoore J; [1936] 3 All ER 1036, CA referred to his decision on the rectification issue with apparent approval, but we think that for present purposes nothing turns on what was said in the Court of Appeal.

Reverting to the decision at first instance in the Leighton case, the report of the argument shows that the provisions of section 82(1) and (2) of the 1925 Act were drawn to the attention of Luxmoore J. We feel no doubt that he would have appreciated that, even in the absence of a successful plea of forgery or non est factum, the section would in terms have conferred a discretion on the court to rectify the charges register, even as against the innocent chargees. Nevertheless, it is readily intelligible that Luxmoore J should have considered that, when the discretion fell to be exercised, the equities were all on one side -- that is to say in favour of the chargees, who had acted on the faith of a document of transfer which the mother had herself executed after having failed to make inquiries which would have revealed that the document related to the property. If the title to the **land** had not been registered, the title of the daughter would, at worst, have been voidable, not void; and under general principles of equity, mortgagees from the daughter in good faith and for value, without notice of the facts giving rise to the voidability, would have acquired a good title to their mortgages. We can see no reason why the court in the Leighton case should have regarded the equities as being any different, as between the mother and the chargees, merely because the **land** happened to be registered **land.**

The judge, as we read the notes of his judgment in the present case, considered that Luxmoore J in the Leighton case had laid down a general principle that "a fraud which entitles someone to rectify under section 82(1)(d) does not poison later charges which are bona fide and for value." He considered that a distinction sought to be drawn by the appellant's counsel between fraud and forgery did not exist. He rejected a further or alternative argument put forward on his behalf to the effect that the charges could not be binding as against the appellant on the grounds that the mortgagee had constructive notice of the forgery. In answer to the preliminary point put to him, he therefore concluded, as appears from the notes of his judgment, that, even if the appellant was entitled to rectification of the proprietorship register, the respondent was entitled to possession of the property. The premise on which he reached this conclusion, as we understand his judgment, was that in view of the principles of law exemplified in the Leighton decision, there could be no possible question of the appellant obtaining rectification of the charges register as against the mortgagees, who had taken their charges bona fide and for value, without actual notice, and, as he decided, without constructive notice, of the assumed forgery. With respect to the judge, this premise was, in our judgment, erroneous in law. For the reasons already given, there is no doubt whatever that in the present case, on the basis of the assumed facts, the court would have jurisdiction, in the proper exercise of its discretion, to rectify the charges register as against the chargees. The wording of section 82(1), which issues the permissive word "may," and reported

decisions to which we have been referred such as Claridge v Tingey [1967] 1 WLR 134, 141 and Epps v Esso Petroleum Co Ltd, [1973] 1 WLR 1071; 25 P & CR 402 leave no doubt that the jurisdiction to rectify in a case falling within one or more of the sub-paragraphs of the subsection, is of a discretionary nature. And section 82(2) makes it clear that the jurisdiction is exercisable against persons claiming through a registered proprietor. The decision in the Leighton case, in our judgment, affords little useful guidance, certainly no conclusive guidance, as to the manner in which the court's discretion would fall to be exercised in the instant case, since in at least one crucial respect it is clearly distinguishable from the present case on its facts. In a case such as the present, on its assumed facts, where the registered proprietor has been deprived of his freehold estate as a result of a forged transfer followed by a new registration of the freehold title at the **Land** Registry, quite different considerations may fall to applied when the court comes to exercise its discretion. For, unlike the plaintiff in the Leighton case, the person seeking rectification will be able to assert that the written instrument which most directly led to such deprivation was not his own deed or instrument in any sense, but was a complete nullity. The passage already cited from the judgment of Luxmoore J in the Leighton case makes it clear that he regarded it as highly material that the relevant deed was the deed of the misguided plaintiff. The court, in exercising its discretion in the present case, would no doubt also bear in mind that, if the title to the house were unregistered, there would, at least prima facie, be no question of the mortgagees' being entitled to assert any equity which, on the assumed facts, would prevail over the appellant's legal title. It would also have in mind that section 83(4) of the 1925 Act would give the mortgagees, as persons claiming in good faith under a forged disposition, an express right to an indemnity.

We draw attention to these various points, not meaning to suggest that, on the assumed facts, an application by the appellant for rectification of the charges register would be bound to succeed; the court still would have to exercise its discretion, having regard to all the relevant evidence before it. We do so merely for the purpose of indicating why, in our judgment, the judge erred in his conclusion on the preliminary point that on, the assumed facts, there was in law no possibility of the appellant's obtaining rectification of the charges register relating to the house against the mortgagees. We accept Mr Leckie's submission that on any application for such rectification, the court's discretion would have to be exercised judicially, but are quite unable to accept his submission that a rejection of the application would inevitably ensue.

As must appear, we are of the opinion that, with great respect to them, the authors of Ruoff & Roper's The Law and Practice of Registered Conveyancing have stated rather too broad a proposition in saying that:

although rectification may be granted against the proprietor of the **land,** a charge created by the transferee in favour of a bona fide mortgagee will not be disturbed,

and that there are other similar passages in that work which could benefit from slight qualification. The Leighton case relied on by them is not in our judgment authority for such an unqualified proposition. In this context two important points, among others, have to be borne in mind. First, in a case where one or more of the conditions of section 82(1) are fulfilled, the court always has at least theoretical discretion to rectify any part of the register, even as against innocent third parties, subject only to the limiting provisions of section 82(3) (which Mr Leckie told us applied in the Haigh case referred to in Ruoff & Roper). Secondly, when the court comes to exercise its discretion, different considerations may well apply in a case where the party seeking rectification has been deprived of his title as the result of a forged document which he did not execute from those which would apply where he has been deprived as a result of a document which he himself executed, albeit under a mistake induced by fraud or other sharp practice -- though in the present case, as Mr Leckie pointed out, the fact that the appellant did at least sign the power of attorney given to his mother may perhaps be one further relevant matter which falls to be taken into account.

We do not find it necessary to refer to the judge's conclusions in relation to the alleged constructive notice of the mortgagees, save to say that, with all respect to him, this was not, in our judgment, a suitable matter to be dealt with on assumed facts, though we fully understand why he thought it would assist the parties if he attempted to do so. Nor do we think it necessary on this appeal to express any further views on the precise legal effect under the 1925 Act of the mere registration of a charge or on Mr Leckie's submissions as to "feeding the estoppel." All these points will fall to be dealt with, so far as necessary, by the judge who hears the case on a retrial.

for the reasons which we have given, we allow this appeal and set aside the judge's order of November 18, 1983, as against the appellant. In view of the obscurity of the procedural events which occurred

before November 17, 1983, we also accede to the invitation of Mr Walker on his behalf that this court should in general terms set aside such previous orders for possession of the house, if any, as may have been made against the appellant. It seems to us that he must inevitably be entitled to this relief, at least for the time being, if, as we have concluded, the preliminary point should not have been decided against him. We see no grounds for setting aside the order for possession which has been made agianst Mr and Mrs Hammond, who have not appealed from this order, though this order may be of little practical use to the mortgagees, since we have been told that Mr and Mrs Hammond are no longer occupying the house, but that it is occupied by the appellant and members of his family. Argyle's case against the appellant is clearly going to require to be wholly reheard. The issues foreshadowed in his affidavit and amplified in the evidence called on his behalf are essentially issues by way of defence and counterclaim. These issues give rise to questions of law and the exercise of the court's discretion which may not in all respects be easy to determine; in as much as forgery is alleged, they also involve important questions of fact. In our judgment, the Chancery Division of the High Court will be the most appropriate forum for the determination of these issues. Mr Leckie suggested that section 37(1) of the Administration of Justice Act 1970, which gave the county court exclusive jurisdiction in certain mortgage actions (before it was repealed by section 148(3) and Schedule 4 to the County Courts Act 1984), might preclude the High Court from assuming jurisdiction to hear the respondent's claim for possession against the appellant. But we cannot see that on any footing this subsection is relevant, since it is only expressed to apply where "no part of the **land** is situated in Greater London," and it is common ground that the house is situated in Greater London. Accordingly, we make an order transferring the whole of the Argyle action as against the appellant to the Chancery Divsion. Though we were invited to make ancillary directions to accompany such a transfer, we think that such directions will best be made by a Chancery master, to whom the action should be referred for this purpose at the earliest convenient opportunity. The directions which he gives will, of course, have to include (inter alia) directions in regard to pleadings on both sides.

Finally, we would emphasise that when, at a new trial, the judge who hears the case comes to exercise his discretion on any application by the appellant to rectify the register, he will be free to do so in accordance with the provisions of the 1925 Act, and on the basis of all the evidence before him, without regarding himself as in any way bound by our decision on this appeal to exercise it in a particular manner.

DISPOSITION:
Appeal allowed. Orders for possession as against appellant set aside. Case to be transferred to the Chancery Division of the High Court.

SOLICITORS:
Colin Bishop & Co; Warrens.

附件 D
Annex D

(Transcript)

Hayes v **Nwajiaku** and others

CHANCERY DIVISION

(Transcript)

HEARING-DATES: 10 June, 1994

10 June, 1994

INTRODUCTION:
This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made (RSC Ord 59, r9(1)(f), Ord 68, r1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

COUNSEL:
No details in original source

PANEL: J CHERRYMAN QC (Sitting as a Deputy Judge of the High Court)

JUDGMENTBY-1: J CHERRYMAN QC (Sitting as a Deputy Judge of the High Court)

JUDGMENT-1:
J CHERRYMAN QC (Sitting as a Deputy Judge of the High Court): In this case it has been necessary to explore what legal consequences ensue when one of two joint proprietors of registered land forges the signature of the other for the purposes of selling the property and the purchasers then create mortgages in favour of innocent mortgagees.

The basic facts were not seriously disputed. I heard only one witness namely the Plaintiff. Mr Jackson for the Fourth and Fifth Defendants called no witnesses but very properly cross-examined the Plaintiff with a view to attempting to show that his evidence was unreliable and that, although there were forgeries, he knew very well what was going on and either consented or acquiesced or, putting the matter at the very lowest, prevaricated for a long time before taking any positive action. Although the Plaintiff's witness statement gave a rather different account of the matter than that in a statement made to the police in 1989, I accept his oral evidence as the truth and find that at no time did he consent or knowingly approve of the forgery and fraud perpetrated by his wife in the circumstances which I shall now relate.

The Plaintiff is an Airline Captain employed by Nigerian Airways Limited. He claims to have married the Third Defendant in about 1972. In 1976 44 Sidmouth Road, Willesden, NW2. was purchased and registered in the joint names of the Plaintiff and the Third Defendant. By 1984 the marriage had broken down and the Plaintiff was not a very frequent visitor to this country.

On 3 June 1985 a Notice of Deposit of the Land Certificate with Punjab National Bank was entered in the Charges Register of the title to the property. The Plaintiff knew nothing about this and there has been no evidence about what loan if any was ever secured by this deposit.

On 1 July 1985 a Power of Attorney in favour of a Mr Igboji was purportedly executed by the Plaintiff and the Third Defendant.

On 18 March 1986 the following transactions took place:

(1)The Notice of Deposit to the Punjab Bank was withdrawn.

(2) Someone (it may have been Mr Igboji) purporting to act as Attorney for the Plaintiff and the Third Defendant purported to sign and exchange contracts for the sale of the property to the First and Second Defendants for #255,000, with a deposit of #98,237 being acknowledged as having been paid.

By a Transfer made the same day and purportedly executed by the Plaintiff and the Third Defendant the property was transferred to the First and Second Defendants.

(4) The First and Second Defendants created a first charge in favour of Chemical Bank and a second charge in favour of the Fifth Defendant Scottish Life Assurance Company Limited.

On 17 April 1986 the First and Second Defendants were registered as proprietors of the property and Chemical Bank's, and the Fifth Defendants' Charges were registered. Subsequently, Chemical Bank transferred the First Charge to the Fourth Defendant BNP Mortgages Limited and ultimately the Fourth Defendant was registered as proprietor of that Charge.

Having read the evidence of handwriting experts and heard all the oral evidence of the Plaintiff, I find as facts:

(1) that what purport to be his signatures on the Power of Attorney and the Transfer of 18 March 1986 were forgeries; and

(2) that he had no knowledge of and certainly did not consent to or approve of:

(a) the deposit of the Land Certificate with Punjab Bank;

(b) the creation of the Power of Attorney;

(c) the sale of the house to the First and Second Defendants; or

(d) the mortgages of the property created by the First and Second Defendants.

On 14 December 1987 the Fourth Defendant obtained a possession order against the First and Second Defendants due to mortgage arrears.

These proceedings were commenced in 1988. The First, Second and Third Defendants were debarred from defending by Orders made in 1992 as a result of their having failed to comply with orders for discovery. They did not attempt to take any part in the trial.

On 25 March 1993, the Fourth Defendant executed the possession order it had obtained against the First and Second Defendants in 1987. The Fourth Defendant then took active steps to sell the property as mortgagee in possession but, when a purchaser was found, a caution which the Plaintiff had registered prevented the sale from going ahead. The Plaintiff eventually removed the caution to allow the sale to proceed on the basis of:

(1) a Deed dated 24 August 1993 made between (i) the Plaintiff and (ii) the Fourth Defendant, whereby half of the net proceeds of sale were to be placed on deposit pending the result of this action; and

(2) undertakings dated 13 August 1993 given by the Chief Land Registrar to the Fourth Defendant and the Plaintiff to the effect that, for the purposes of considering claims by either of them for an indemnity under s 83 of the Land Registration Act 1925, he would treat them as if the sale by the Fourth Defendant had not taken place.

The property was in due course sold by the Fourth Defendant and the sum placed on deposit pursuant to the Deed dated 24 August 1993 was #111,721.79. Mr Jackson, who appeared for the Fourth and Fifth Defendants accepted that the amount still owing to the Fourth Defendant would swallow up the sum on deposit if the Plaintiff's claim fails, so that the Fifth Defendant has no beneficial interest in the result of this action.

In the above circumstances, the principal issue I have to decide is whether, but 1for the recent sale, the register of the Title comprising 44 Sidmouth Road would have been rectified in the Plaintiff's favour so as to show the Plaintiff and the Third Defendant as still remaining the registered proprietors and so as to delete the registration of the Charges in favour of the Fourth and Fifth Defendants.

The starting point is to consider the effect of a forged document of title for conveyancing purposes. In

unregistered conveyancing a purported Conveyance by two joint owners on which one of the signatures as been forged severs any beneficial joint tenancy but is wholly ineffective to pass any estate or interest of the person whose signature has been forged and any disposition by the grantee is ineffective so far as that estate or interest is concerned. In registered conveyancing the position is different. By force of statute a person who becomes registered as the proprietor of land or a charge over land is, subject to the power of the Court or the Registrar to rectify the register, the legal owner of it even if he or his predecessor in title has derived title under a forged transfer (see Argyle Building Society v Hammond (1984) 49 P & CR 148, 152-3).

Rectification of the register is provided for by s 82 of the Land Registration Act 1925 which (as amended by the Administration of Justice Act 1925) is in the following terms:

"82.-(1) The register may be rectified pursuant to an order of the court or by the registrar, subject to an appeal to the court, in any of the following cases, but subject to the provisions of this section:-

(a) Subject to any express provisions of this Act to the contrary, where a court of competent jurisdiction has decided that any person is entitled to any estate right or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification of the register is required, and makes an order to that effect;

(b) Subject to any express provision of this Act to the contrary, where the court, on the application in the prescribed manner of any person who is aggrieved by any entry made in, or by the omission of any entry from, the register, or by any default being made, or unnecessary delay taking place, in the making of any entry in the register, makes an order for the rectification of the register;

(c) In any case and at any time with the consent of all persons interested;

(d) Where the court or the registrar is satisfied that any entry in the register has been obtained by fraud;

(e) Where two or more persons are, by mistake, registered as proprietors of the same registered estate or of the same charge;

(f) Where a mortgagee has been registered as proprietor of the land instead of as proprietor of a charge and a right of redemption is subsisting;

(g) Where a legal estate has been registered in the name of a person who if the land had not been registered would not have been the estate owner; and

(h) In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register.

(2) The register may be rectified under this section, notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by any entry on the register, or otherwise.

(3) The register shall not be rectified, except for the purpose of giving effect to an overriding interest [or an order of the court], so as to affect the title of the proprietor who is in possession-

(a)[unless the proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care; or]

(b) [...]

(c) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him.

(4) Where a person is in possession of registered land in right of a minor interest, he shall, for the purposes of this section, be deemed to be in possession as agent for the proprietor.

(5) The registrar shall obey the order of any competent court in relation to any registered land on being

served with the order or an official copy thereof.

(6) On every rectification of the register the land certificate and any charge certificate which may be affected shall be produced to the registrar unless an order to the contrary is made by him."

The present case (looked at immediately before the recent sale) falls squarely within paragraph (g) of s 82(1). If the land had been unregistered, neither the First and Second Defendants nor the Fourth and Fifth Defendants would have obtained a legal estate. They would have taken equitable interests in the Third Defendant's beneficial half share, but the legal estate would have remained vested in the Plaintiff and the Third Defendant and the Plaintiff's half share would still belong to him unincumbered (compare Norwich and Peterborough Building Society v Steed [1993] Ch. 116, 132, [1993] 1 All ER 330).

The power to order rectification is, of course, a discretionary one but, where a co-owner has forged a transfer, there is (subject to s 82(3)) usually an overwhelming case for rectification as against the transferees and their mortgagees (see Steed at pages 125 and 132).

In essence s 82(3) provides that rectification shall not be granted "so as to effect the title of the proprietor who is in possession" unless he has been at fault (paragraph (a)) or it would for some other reason be unjust not to rectify against him (paragraph (c)).

For the Fourth Defendant, Mr Jackson raised a novel point. He submitted that s 82(3) applied in the present case immediately before the recent sale because, he contended, the words "the proprietor who is in possession" are apt to describe not only the proprietor of the land who is in possession, but also the proprietor of a registered charge who is in possession as the Fourth Defendant undoubtedly was. In support of his submission, Mr Jackson pointed out that s 3 (xx) of the Act defines proprietor" as "the registered proprietor for the time being of an estate in land or of a charge." He further contended that the sub-section made perfect sense if "the proprietor" is read as "the proprietor of that which is to be rectified."

I cannot accept this ingenious submission. In my judgment the presence of the definite article before the word "proprietor" makes it clear that the proprietor is the proprietor of the registered land of which he is in possession. The Fourth and Fifth Defendants therefore cannot pray subsection (3) in aid. In case I am wrong on this point, I should add that even if sub-section (3) were applicable, in my judgment this case would fall within paragraph (c). The reason is that, if the sale had not occurred and rectification had been ordered, the Fourth and Fifth Defendants would have had a much stronger case for indemnity under s 83 than the Plaintiff would have had if no rectification had been ordered. This is because the Fourth and Fifth Defendants would have the benefit of sub-section (4) of s 83 under which they would be deemed to have suffered loss (cf. Steed at page 138). In my judgment therefore this would still have been a case for rectification against the chargees even if s 82(3) were applicable.

In the result my decision is that, if the recent sale by the Fourth Defendant had not taken place, the Court would have rectified the register in the Plaintiff's favour so as to delete the charges of which the Fourth and Fifth Defendants are proprietors and to delete the First and Second Defendants as registered proprietors of the land and to reinstate the Plaintiff and the Third Defendant as registered proprietors. I grant relief accordingly and, after I have heard further from Counsel as to precisely the form the relief should take I shall direct Counsel to sign and lodge an appropriate Minute of Order.

DISPOSITION:
Judgment accordingly

SOLICITORS:
No details in original source

附件 E
Annex E

HCA 13429/1997

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 13429 OF 1997

BETWEEN

KONG SAU CHING suing on behalf of himself and KONG YUEN HING, KONG HOI SUN, KONG HOI YUEN, TIN LI LING, KONG FONG, YIP YAM SAM, all being villagers of Hang Tau Village, Sheung Shui, New Territories and TRADE ADVISERS COMPANY LIMITED, being the owner of property in Hang Tau Village	Plaintiffs

and

KONG PAK YAN	1st Defendant
KONG SIK YAU	2nd Defendant
KONG WING TAK	3rd Defendant

AND

HCMP 4363/1997

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 4363 OF 1997

BETWEEN

KONG SIK YAU	1st Plaintiff
KONG PAK YAN	2nd Plaintiff

KONG WING TAK	3rd Plaintiff
and	
WONG CHAU MING	1st Defendant
TRADE ADVISERS COMPANY LIMITED	2nd Defendant
LEE TIN FUK	3rd Defendant
LI KA SHING	4th Defendant
LEE SIU FAI	5th Defendant
LI KWAI	6th Defendant

(Consolidated pursuant to the Order made by Registrar Betts of the High Court on 24 July 1998)

Before: Hon Reyes J in Court

Dates of Hearing: 7, 8, 9, 10 and 12 October 2003

Date of Judgment: 3 November 2003

JUDGMENT

I. Background

A. Preliminary

1. There is a road ("the Hang Tau Road"), west of Sheung Shui, that runs south from Castle Peak Road to the village of Hang Tau in Demarcation District ("DD") 94. As the Hang Tau Road enters DD 94 and the northern end of Hang Tau, it becomes a way ("the Way") formed from the aggregation of parts of various lots in DD 94. Moving from the northern edge of Hang Tau southwards, the Way passes through Lots 399B, 399C, 399D, 399F, 399RP, 399G, 399E; runs along Lot 395 RP; passes through a part of Lots 361A RP and Lot 394B ss. 5; and then reaches Lot 364A. At Lot 364A the Way forks. One fork heads east through Lot 364

RP towards Lots 362A, 362B, 362C and 362 RP, before looping around towards the southwest in the direction of Lots 370 and 371. The other fork proceeds south through parts of other lots in the direction of Lots 369, 370 and 371.

2. Part of the Way ("the Disputed Way") consists of an L-shaped portion situated on land belonging to the owners of Lot 364A and House 99 on that lot. The Plaintiffs in HCA No. 1342 of 1997 and the Defendants in HCMP No. 4363 of 1997 (collectively, "the Plaintiffs") claim that they have a right to drive vehicles through the Disputed Way. On the other hand, the Defendants in HCA No. 1342 of 1997 and the Plaintiffs in HCMP No. 4363 of 1997 (collectively, "the Defendants") contend that the Plaintiffs only have a right to pass over the Disputed Way on foot. The Defendants deny that the Plaintiffs are entitled to drive their vehicles through the Disputed Way without the Defendants' permission.

3. In Section II.F of this Judgment I identify where in Hang Tau the Plaintiffs and Defendants live or have lived. In essence, at about the time when the 2 actions comprising these proceedings were commenced, the Plaintiffs mostly lived in lots situated to the south or southeast of the Disputed Way, while the Defendants were co-owners of Lot 364A. In this Judgment, for convenience, I shall refer collectively to the Defendants and their predecessors in title on Lot 364A as "the owners of Lot 364A".

4. Annexed to this Judgment is a copy of a Lot Index Plan ("the Plan") dated 16 August 2003 (produced as Exhibit P1 at trial) which gives a general idea of the course of Hang Tau Road and at least some of the Way which I have just described. The Plan also shows the location of the various lots and houses comprising Hang Tau village. The Plan is

as a matter of law to have consented to a dedication. Nor should my conclusion be understood as necessarily accepting the applicability in Hong Kong of the English common law rule that a leaseholder cannot of his own make a public dedication (whether in perpetuity or for a term). It is unnecessary to deal with those matters in light of my finding of Government consent.

C. Easement

67. By way of fall-back position, Mr Graham argued that the Plaintiffs had individually acquired rights of vehicular passage over the Disputed Way by prescription. Given my conclusion on dedication, it is strictly also unnecessary for me to go into the issue of easement, which in the Hong Kong context involves difficult questions of law. But, in deference to both counsel who addressed argument to me on the nature of easements in Hong Kong, I propose to consider the law of easement in Hong Kong and sketch out how I would have dealt with the evidence in light of my observations.

68. Mr Graham acknowledged that his major difficulty was the English rule that a leaseholder cannot obtain an easement of prescription over land occupied by another leaseholder. I shall refer to the rule as "the English restriction".

69. Megarry & Wade, p. 1122 (§18-128) describes the English restriction as follows:-

> "The user [said to give rise to prescriptive rights] must be by or on behalf of a fee simple owner against a fee simple owner. 'The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with anyone except an owner in fee.' [*Wheaton v. Maple & Co.* [1893] 3 Ch 48, at 63,

> per Lindley LJ] An easement or profit for life or for years, for example, may be expressly granted but cannot be acquired by prescription, for the theory of prescription presumes that a permanent right has been duly created at some unspecified time in the past. A claim by prescription must therefore fail if user can be proved only during a time when the servient land was occupied by a tenant for life or for years, for then the fee simple owner may never have been in a position to contest the user. But if it can be shown that user as of right began against the fee simple owner, it will not be less effective because the land was later settled or let; and user against the fee simple will be presumed, unless the servient owner can show the contrary.
>
> It will be seen, accordingly, that the theory of prescription does not deal properly with cases where the servient land is in the hands of a limited owner. It seems irrational to allow prescription against land if occupied by an owner in fee simple but not if occupied under a 999-year lease, for example. The law in Ireland, where prescription against limited owners is allowed, seems more satisfactory."

70. Two Hong Kong cases (*Foo Kam Shing* and *Tang Tim Fat*) appear at first impression to have decided that the English restriction applies to Hong Kong. Two other cases (*Pang Kwan Lung* and *Chung Yeung Hung*), have held that it is arguable that the English restriction does not apply to Hong Kong.

71. *Foo Kam Shing and others v. The Local Printing Press Ltd* (1953) 37 HKLR 201 involved 2 plots of land on Duddell Street. Both were subject to Crown Leases for 999 years. The plaintiffs had erected a building (No. 4 Queen's Road Central ("No. 4")) in 1921, the defendants another building (No. 1 Duddell Street ("No. 1")) in 1900. The defendants wanted to replace No. 1 with a new structure. The plaintiffs said that the new building would interfere with a right to light (in relation to No. 4) acquired by prescription since 1921.

72. Counsel for the plaintiffs conceded that the a right to light could not be acquired against the Crown under the Prescription Act 1832

("the 1832 Act"). But, they contended that, since the Crown's reversionary interest in the defendants' land would not fall into possession for some 900 years, "it could not be said that the easement acquired by the Prescription Act materially affected the Crown" (p. 206). The Full Court (Howe CJ and Reece J) rejected this argument (at p. 207):-

> "We see no merit in the argument that because we are dealing with estates of over 900 years' duration, they should be deemed freehold estates. It appears to us to be immaterial what the length of the term may be, for an estate for a term of years can never, no matter how long it is to last, be a freehold interest and the easement of light, when established, is an absolute and indefeasible right and cannot be acquired for a term of years by prescription."

73. In 1966 the Application of English Law Ordinance (No. 2 of 1966) ("AELO") (later Cap. 88[2]) was passed. AELO s. 3 provided as follows:-

> "The common law and the rules of equity shall be in force in Hong Kong, so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject to such modifications thereto as such circumstances may require, save to the extent that such common law or any such rule of equity may from time to time be modified or excluded by:-
>
> (a) any Order in Council which applies to Hong Kong;
>
> (b) any Act which applies to Hong Kong, whether by express provision or by necessary implication; or
>
> (c) any Ordinance."

AELO s. 4 stipulated that specified English Acts (including the 1832 Act[3]) shall be in force in Hong Kong "subject to such modifications thereto as the circumstances of Hong Kong may require" and "subject to such amendment as may have been or may hereafter be made thereto by: (a)

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[2] The AELO was subsequently amended after enactment. In this Judgment I refer to the AELO's original 1966 text.

[3] It would be more accurate to say that, by s.4 (1) and item 60 of its Schedule, the AELO made ss.1 to 8 of the Prescription Act 1832 as amended by Statute Law Revision Act 1888 (No. 2) applicable to Hong Kong.

Order in Council which applies to Hong Kong; or (b) any Act which applies to Hong Kong; or (c) any Ordinance."

74. In 1989 Godfrey J in *Pang Kwan Lung* (an application for an interlocutory injunction) thought that it was arguable that the English restriction did not apply to Hong Kong. However, he did not have to decide the issue in advance of trial.

75. *Tang Tim Fat* in 1992 involved the trial of a claim in trespass against defendants purporting to exercise a right of vehicular passage over the plaintiffs' Yuen Long land. A pedestrian right of access over the land was conceded. Deputy Judge Chan there considered the Irish case law on easements by prescription. He concluded (at 380 (l.45)-381 (l.32)):-

> "However, upon a careful examination of those irish cases, I am not convinced of the reasons nor the necessity for the divergence. The importance of restricting the operation of the presumption as between owners of fee simple only as expounded by Lindley, LJ in *Wheaton v. Maples & Co.*, *supra*, must be upheld. The mere fact that as a matter of history only one piece of land in Hong Kong was granted by the Crown in fee simple is not sufficient to justify such a drastic departure from the common law under the disguise of modification permissible by s. 3(1)(b) of the [AELO]. In any event, I do nto see the necessity to rewrite the English common law to enable the Prescription Act to apply between leaseholders in Hong Kong. It is always open to leaseholders in Hong Kong to take advantage of the rule in *Wheeldon v. Burrows* (1879) 12 Ch D 31. It laid down that upon the grant of part of a tenement, there would pass to the grantee as easements all quasi-easements over the land retained which (i) were continuous and apparent, or (ii) were necessary to the reasonable enjoyment of the land granted; and (in either case) (iii) had been and were at the time of the grant, used by the grantor for the benefit of the part granted. This rule for an implied grant applies also to cases where the grantor, instead of retaining any land himself, makes simultaneous grants to two or more lessees. Each lessee obtains the same easement over the land of the other as he would have obtained if the grantor had retained it... All leaseholders in Hong Kong held their tenement from one common landlord, the Crown, under Crown leases. In the New Territories, all land is declared to be vested in the Crown as from 23rd July 1900 by virtue of s. 8

> of the [NTO]. The tenements granted to leaseholders in the New Territories are subject to express provisions as to user. As the New territories modernize with the passage of time, temporary permits or waivers are issued by the Crown, on payment of premiums, relaxing the restriction over the user. All such Crown leases, which expired on 30th June 1973, were automatically renewed at the same time by the New Territories (Renewable Crown Leases) Ordinance *Cap.* 152[4]. Thus on 1st July 1973, there was a simultaneous grant of a new demise for all land in the New Territories by virtue of Cap. 152. It is thus arguable that any new easement or right of way granted expressly or impliedly to any dominant tenement by virtue of any temporary waiver/ permit issued prior to that time would bind the servient tenement by operation of the doctrine of an implied grant. However, this doctrine cannot come to the assistance of the defendants in the present case as they have via their counsel expressly abandoned any reliance on any right stemming from the fact of a common landlord."

76. In June 1997 the Court of Appeal (Mortimer and Godfrey JJA, Keith J) in *Chung Yeung Hung v. Law Man Nga* [1997] HKLRD 1022 held that it was "at least arguable" that under Hong Kong law there may be prescription by one tenant against another tenant of the same landlord. *Chung Yeung Hung* concerned a claim by the plaintiffs that they had acquired a right to use an access road running over the defendants' Ku Tung land. The Court of Appeal thought that the overwhelming predominance of leasehold land in Hong Kong meant that, if prescription here only applied between fee simple owners, the concept of prescription would be to all intents and purposes meaningless. This outcome would run counter to the AELO which stipulated that the 1832 Act was to be in force in Hong Kong. There must have been a reason for such provision in the AELO. *Foo Kam Shing* was distinguished on the ground that the AELO had not been enacted at the time of the Full Court's decision. The Court of Appeal referred to *Tang Tim Fat* but noted that, being a decision at first

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[4] This was the name by which the NTRGLO was known prior to 1998. For simplicity, I shall also refer to the pre-1998 ordinance as NTRGLO.

instance, *Tang Tim Fat* was not binding on it.

77. The decision in *Chung Yeung Hung* was premised on the need to give effect to the AELO. Following the return of Hong Kong to the Mainland on 1 July 1997 the AELO ceased to be law, having been repealed as being in contravention of the Basic Law by Annex 1 of the "Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law" (adopted on 23 February 1997).

78. What then is the present state of the law on the acquisition of easements of prescription in Hong Kong? I propose to deal with the question by considering the following topics:-

(1) The ratio of *Foo Kam Shing*.

(2) The ratio of *Tang Tim Fat*.

(3) The validity of *Chung Yeung Hung* following repeal of the AELO on 1 July 1997.

(4) The reception of common law prescription in Hong Kong.

(5) The applicability of the English restriction in Hong Kong.

C.1 Foo Kam Shing

79. I doubt that the way in which the Court of Appeal in *Chung Yeung Hung* distinguished the Full Court's decision in *Foo Kam Shing* was valid.

80. While it is true that the AELO had not been enacted at the time of *Foo Kam Shing*, a provision similar to AELO s. 3 was in force. The Supreme Court Ordinance ("SCO") then provided as follows:-

> "5. Such of the laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants, and except so far as they have been modified by laws passed by the said legislature."

AELO s. 7(1) repealed SCO s. 5 and so AELO s. 3 in effect replaced SCO s. 5. Accordingly, at the time of *Foo Kam Shing*, except to the extent rendered inappropriate by local circumstances or modified by local statute, the 1832 Act applied in Hong Kong as part of the law in force in England on 5 April 1843[5].

81. A reading of *Foo Kam Shing* confirms this. The Full Court appears to have taken it for granted that the 1832 Act formed part of Hong Kong law. As far as the Full Court seems to have been concerned, the only question on prescription was whether a holder for a term years could claim a right to light under the 1832 Act. However, the Full Court failed to assess whether circumstances in Hong Kong, in particular the predominance of leasehold interests here, justified the application of the English restriction in Hong Kong. Nowhere in its judgment does the Full Court engage in the exercise required by SCO s. 5 of considering the extent to which a facet of a relevant English law has been modified by local circumstances[6].

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[5] Presumably, the 1832 Act as it stood in 1843 applied.

[6] Williams J at first instance ((1952) 36 HKLR 192) does not seem to have engaged in the requisite exercise either.

82. Given this omission, I do not think that the Full Court's decision can be read as putting forward any definitive view on the general applicability of the English restriction in Hong Kong. *Foo Kam Sing* should probably be read narrowly as confined to its facts. At most, the case would be authority for the proposition that, in the urban area (as opposed to the New Territories or Hong Kong generally), a limited owner cannot obtain a right to light (as opposed to other types of easement) by prescription against another limited owner.

C.2 Tang Tim Fat

83. In contrast to the Full Court, Deputy Judge Chan considered (as required by AELO s. 3) whether it was appropriate to modify the English restriction in Hong Kong. He thought that modification of the English rule was unwarranted. But he so concluded on the ground that the rule in *Wheeldon v. Burrows* rendered it unnecessary to modify the English restriction. In my view, this conclusion raises difficulties.

84. First, it is doubtful that mere consideration of the rule in *Wheeldon v. Burrows* (an institution of English land law) constitutes sufficient examination of whether Hong Kong (as opposed to English) circumstances call for modification of the English restriction. A wider array of relevant local factors would need to be canvassed as part of the requisite exercise.

85. Second, prima facie, the rule in *Wheeldon v. Burrows* (whereby quasi-easements enjoyed by an owner of land are transformed into full-blown easements when parcels of that land are conveyed to others) covers different ground from the law of prescription. It is unclear to me

how the existence of *Wheeldon v. Burrows* renders a law of prescription superfluous in Hong Kong.

86. Judge Chan suggests (obiter) in *Tang Tim Fat* that, upon the deemed renewal of leases on 1 July 1973 under the NTRGLO, all quasi-easements enjoyed by the Government (as reversioner) during the notional brief moment between the falling into possession and deemed re-grant of New Territories land on 1 July 1973, would have been elevated into easements by operation of *Wheeldon v. Burrows*. But I doubt that the suggested mechanism works. It seems to me that it can only work if fiction is added to fiction, the very sin that Judge Chan decries in *Tang Tim Fat*. The proposal assumes that in the split-second between termination and renewal of a lease at midnight on 30 June 1973 the Government engaged in a "continuous and apparent user" of all quasi-rights of way (however identified) which might reasonably be thought necessary for the enjoyment of New Territories land. If a right of way was already established on 30 June 1973 it would be unnecessary to rely on *Wheeldon v. Burrows*. NTRGLO s. 4(4)(c) expressly preserves such right. If an alleged right of way had not yet crystallised on 30 June 1973, I do not see how the combined application of *Wheeldon v. Burrows* and the NTRGLO can convert the alleged right into a full-blown easement on 1 July 1973.

87. Third, assume that the combination of the NTRGLO and *Wheeldon v. Burrows* does provide a practical alternative to prescription in the Hong Kong context. The NTRGLO was enacted in 1969. What would have been the situation before 1969? I have already suggested that *Wheeldon v. Burrows* by itself could not have obviated recourse to prescription in Hong Kong. Before 1969, would local circumstances have justified modification of the strict English restriction in Hong Kong?

88. If the answer to the question is yes, it would be strange if the enactment of the NTRGLO had the tacit effect of rendering modification of the English restriction unnecessary and altering pre-1969 Hong Kong law on prescription. Nothing in the NTRGLO suggests that the legislature had such a drastic change in mind. One would have expected an important change in the law to have been expressly flagged in a statute, rather than left to subtle inference.

89. If the answer to the question is no, one must articulate the reasons why modification of the English restriction is unwarranted. It would be those reasons, and not the NTRGLO, which would equally render modification of the English restriction unnecessary at the time of the decision in *Tang Tim Fat* and thereafter.

90. In other words, I do not think that it is correct to determine whether the English restriction has been modified in its application to Hong Kong by reference to the NTRGLO, which was enacted after AELO s. 3 or (if relevant) SCO s. 5 (the predecessor to AELO s. 3). The starting point for assessing the effect of local circumstances on English law must be a date (such as (say) 5 April 1843 insofar as SCO s. 5 is concerned) from which reception of English law is reckoned. One cannot look at an event X occurring in 1969 and reason that, because of X, some English rule could not have been received (whether in modified or unmodified form) into Hong Kong law at a reception date before 1969. X may have the effect of amending or repealing an English rule as incorporated into Hong Kong law on a relevant reception date such as 5 April 1843. But evaluating the effect of the happening of X in 1969 on a received English rule is a different exercise from ascertaining whether an English rule was received into Hong Kong law on an earlier date in the first place.

91. Given the problem identified above, I believe that Judge Chan's analysis of the effect of local circumstances on the English restriction might have gone further. Had it done so, fuller argument would likely have shown that *Wheeldon v. Burrows* did not offer the ready alternative to prescription in Hong Kong which Judge Chan thought it could. Had the question of prescription and the application of the English restriction in Hong Kong arisen in a later case, it is possible then that Judge Chan would have been persuaded that there was a case for saying that local circumstances in the New Territories had modified the English restriction.

92. A consequence of the foregoing discussion is that I do not think that *Foo Kam Shing* or *Tang Tim Fat* constrain a 1st instance judge from holding that under local circumstances a limited owner in Hong Kong may acquire a right of way by prescription against another limited owner.

C.3 Chung Yeung Hung and the repeal of the AELO

93. The AELO is no longer part of Hong Kong law. But the Court of Appeal in *Chung Yeung Hung* relied heavily on the enactment of the AELO in deciding that it was arguable that the English restriction did not extend to Hong Kong. What effect does the repeal of the AELO have on the decision in *Chung Yeung Hung*? Can *Chung Yeung Hung* now be ignored on the ground that the AELO's repeal has fatally undermined the Court of Appeal's logic so it is now unarguable that a limited owner can acquire prescriptive rights here? Unfortunately, the answers to these questions are not straightforward.

94. First, Article 8 of the Basic Law provides:-

> "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and

> customary law shall be maintained, except for any that contravenes this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

95. In England prescriptive rights can be acquired at common law as well as under the 1832 Act. The English restriction is itself an English common law rule that judges applied when construing the parameters of the 1832 Act. If the common law doctrines of prescription by lost modern grant and prescription from time immemorial were part of Hong Kong common law before 1 July 1997 (see further below), such doctrines would still apply after 1 July 1997 by Article 8. Repeal of the AELO (which only concerned prescription under the 1832 Act) would not by itself render otiose the debate over the reception and application of the English restriction in Hong Kong at least as far as any received common law prescription doctrines were concerned.

96. Second, on the application of the 1832 Act in post-handover Hong Kong, the question may be tackled by analysing the effect of the repeal on 2 categories of claims straddling either side of 1 July 1997:-

(1) prescriptive claims which were capable of enforcement under the 1832 Act before 1 July 1997, but which are only brought in the High Court after 1 July 1997; and,

(2) post 1 July 1997 prescriptive claims which would not have been enforceable under the 1832 Act before 1 July 1997, but would have become so if the Act had continued in force beyond 1 July 1997.

The 1st category of straddle claim is pertinent here. The 2nd is not. I therefore focus on the 1st category.

97. Megarry & Wade, pp. 1128-30 (§§18-140 to 18-143) describes the 1832 Act as follows:-

> "The Act of 1832 is notorious as 'one of the worst drafted Acts on the Statute Book'. It is perhaps best explained by giving a summary of the effects of he principal sections and annotating the sections in groups. The elements of the Act are as follows.
>
> **1. Easements (other than) light and profits**
>
> *(a) The statutory periods*
>
> SECTIONS 1 AND 2:
>
> (i) An easement enjoyed for 20 years as of right and without interruption cannot be defeated by proof that user began after 1189.
>
> (ii) An easement enjoyed for 40 years as of right and without interruption is deemed 'absolute and indefeasible' unless enjoyed by written consent.
>
> (iii) The same rules apply to profits, except that the periods are 30 and 60 years respectively.
>
> SECTION 3: This section, which lays down special rules for the easement of light, is dealt with below.
>
> SECTION 4:
>
> (i) All periods of enjoyment under the Act are those periods next before some suit or action in which the claim is brought into question.
>
> (ii) No act is to be deemed an interruption until it has been submitted or acquiesced in for one year after the party interrupted had notice both of the interruption and of the person making it.
>
> *(b) Shorter and longer periods.* The shorter periods (20 and 30 years for easements and profits respectively) operate negatively, i.e. they assist prescription at common law by prohibiting one kind of defence. The longer periods operate positively, for then the Act declares the right to be 'absolute and indefeasible'. This important distinction is further discussed below, in light of the other provisions of the Act.
>
> *(c) "Next before some suit or action".* The Act does not say that an easement or profit comes into existence after 20, 30, 40 or 60 years' user in the abstract; all periods under the Act are those next before some action in which the right is

> questioned. Thus until some action is brought, there is no right to any easement or profit under the Act, however long the user. It is sometimes said that the right remains merely inchoate until action is brought. The important point is that the fruits of the Act can be reaped only by a litigant. Any person who wishes to consolidate an inchoate right under the Act can issue a writ against the servient owner claiming a declaration that he is entitled to an easement or profit. He need not wait for some interference with it by the servient owner.
>
> Even if there has been user for longer than the statutory periods, the vital period remains the period next before action. Thus if user commenced 50 years ago but ceased five years ago, a claim to an easement will fail if the action is commenced today, for during the 20 or 40 years next before the action, there has not been continuous user. Similarly a claim under the Act will fail if there has been unity of possession for a substantial time during the period before the action, for then there has not been user as an *easement* during the whole of the period."

98. Articles 6, 105 and 120 of the Basic Law provide as follows:-

> "6. The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law."
>
> "105. The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.
>
> Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay. ..."
>
> "120. All leases of land granted, decided upon or renewed before the establishment of the Hong Kong Special Administrative Region which extend beyond 30 June 1997, and all rights in relation to such leases, shall continue to be recognised and protected under the law of the Region."

99. Assume that it was possible for a limited owner in Hong Kong to acquire rights by prescription against another limited owner under the 1832 Act as extended by the AELO. It would appear contrary to the spirit

of Articles 6, 105 and 120 if repeal of the AELO meant that an inchoate right of easement which a person could have enforced by way of an action for a declaration brought on or before 30 June 1997, suddenly disappeared on 1 July 1997 simply because the person had not in fact brought an action by that date. The more probable effect of the AELO's repeal on 1 July 1997 was that an inchoate right which could have been enforced under the 1832 Act by an action brought as at 30 June 1997, was preserved by Articles 6, 105 and 120 of the Basic Law. The result is that such inchoate right would continue even after 1 July 1997 and repeal of the AELO. The 1832 Act remains a relevant factor for the Court to consider even after 1 July 1997.

100. I appreciate that there can be many variations to the simple situation considered in the previous paragraph. For example, what is the position where an inchoate right under the 1832 Act accrues before 1 July 1997, but before suit is brought in the post-1 July 1997 period there is a long interruption of user? The many permutations of possible events are best left to be considered as and when they actually arise.

101. The present proceedings are more akin to the situation discussed in §99 above. Until Kong Sik Yau attempted to block passage through the Disputed Way in November 1997, the villagers of Hang Tau (including most of the Plaintiffs) freely enjoyed rights of passage over the Disputed Way. As soon as Kong Sik Yau closed the Disputed Way to vehicle access, the Plaintiffs took out the 1st Action in December 1997. In such situation it is difficult to see how, given Articles 6, 105 and 120 of the Basic Law and given that the Plaintiffs or one or more of them had an inchoate property right under the 1832 Act capable of enforcement by

action on 30 June 1997, such inchoate right should be lost a few months later.

102. Accordingly, in the present case before me, I cannot ignore the implications of the 1832 Act as applied by the AELO in considering whether the English restriction was received in Hong Kong. The decision in *Chung Yeung Hung* remains pertinent to my deliberations. I note that before me, with characteristic fairness, Mr Graham did not push a case based on the 1832 Act. Nonetheless, I believe there is something in the case.

103. By way of completeness, I briefly comment on the 2nd category of straddle claim which I have identified above. The person who is only able to show (say) 18 years of user of a neighbour's footpath as at 30 June 1997 may not be able to point to an inchoate property right which attracts protection under the 1832 Act and the Basic Law. In the post-handover period, that person may conceivably be limited to reliance on common law prescription insofar as possible in Hong Kong. But it might be argued to the contrary that the repeal of the AELO had the effect of reviving the law in force in Hong Kong prior to enactment of the AELO. I do not rule out the possibility of other arguments. It is unnecessary on the facts of this case for me to go further. I merely signal that, to me at least, the answer to the question whether, despite the AELO's repeal, the 1832 Act may still apply to the 2nd category of straddle claim is not self-evident.

C.4 Common law prescription in Hong Kong

104. To what extent do the common law doctrines of prescription since time immemorial and prescription by lost modern grant apply to Hong Kong today?

105. As far as time immemorial was concerned, Judge Chan had no doubt. He said in *Tang Tim Fat* at 377 (ll.32-43):-

> "At common law such a grant would only be presumed if the user as of right had continued from time immemorial, i.e. 'from time whereof the memory of men runneth not to the contrary' (see *Littleton* p. 1031). The year 1189 has been fixed as the limit of legal memory (see *Bryant v. Foot* (1867) LR 2 QB 161 per Cockburn LJ at pp. 180-81). As it is clearly impossible in most cases to establish continuous user as of right since 1189, a period of 20 years' user has been accepted by the courts as sufficient to give rise to a presumption of such user since 1189 (see *Darling v. Clue* (1864) 4 F&F 329, at p. 334). However, if it can be demonstrated that the user could not have existed in 1189, e.g. when a building was only erected after 1189, the easement cannot be claimed. In the premises, there is no question that prescription by user since time immemorial can ever apply to lands in Hong Kong in view of the history of the territory, and also the fact that British rule only commenced less than 100 years ago."

106. I agree with Judge Chan that, for the reasons given by him, the doctrine of time immemorial would seem to have little practical application in Hong Kong, whether or not it was part of the English common law actually received here in 1843. Mr Graham frankly conceded that in the Hong Kong context it was "impossible to apply the concept of user as of right since time immemorial".

107. On prescription by lost modern grant, Judge Chan was equally robust. He said in *Tang Tim Fat* at 381 (l.33)-382 (l.9):-

> "I am not convinced that it would be appropriate to modify the English common law to allow the presumption of a lost modern grant to arise between lessees of a common landlord. Such an

> extended presumption violates the very foundation of the doctrine itself, i.e. the fiction of a servient owner making a grant to a dominant owner. As between lessees of a common grantor, the rule in *Wheeldon v. Burrows* of an implied reservation/grant is capable of providing a ready solution to a situation where such a right of way is necessary for the enjoyment of the land. There is no logical need to add fiction to fiction. In reality it is difficult to see how such a matter can ever become a real problem. All Crown leases in the New Territories are for agricultural use and can only be used profitably for other uses with the special permission from the Crown. Thus, it is difficult to see how a 'servient lessee' would not be readily agreeable to consent to a modification of the right of way for agricultural use over his land to that of more profitable uses if he himself is seeking special waiver from the Crown for similar profitable uses of his own land. In any event, the Crown also has ultimate weapon of a right of re-enter under the Crown Land resumption Ordinance (*Cap.* 124). I am not satisfied that the circumstances justify a modification of the well-established English common law in manner urged upon me by the defendants. The justice of the situation does not warrant such a drastic departure from the well-founded basis for the presumption. I hold that the presumption of a lost modern grant can only be claimed by one owner of fee simple against another, and cannot be made available to a lessee of a term unless he claims it also on behalf of his grantor who holds the fee simple. And, as a result of historical fact, such presumption has no de facto application in Hong Kong."

108. I think that the difficulties which I identified in the course of analysing *Tang Tim Fat* above apply equally to Judge Chan's comments on the application of the doctrine of lost modern grant to Hong Kong. I will not repeat the observations which I have made. I simply add that I do not follow Judge Chan's reasoning based on New Territories leases being for agricultural purposes and on the Crown Land Resumption Ordinance (first enacted in November 1900). Nor am I clear as to what "historical fact" Judge Chan alludes.

109. Again my difficulties with *Tang Tim Fat* lead me to think that Judge Chan's consideration of local circumstances in determining the extent (if at all) to which the common law doctrine of lost modern grant

was received in Hong Kong did not go as far as it might have. At first impression, clumsy though the doctrine of lost grant may be as a fiction, it was part of the common law in force in England in 1843 and would have been received in Hong Kong at that time, possibly in modified form as circumstances warranted. The question whether the English restriction applies in Hong Kong to limit prescription by lost modern grant here to fee simple holders is a different question to that of reception of the lost grant doctrine in the first place.

110. I accordingly agree with Mr Graham's argument that the doctrine of lost modern grant formed part of the common law received by Hong Kong in 1843 and such doctrine has been preserved post-1 July 1997 by Article 8 of the Basic Law.

C.5 The English restriction and Hong Kong circumstances

111. I now face the stark question whether the English restriction constrains the acquisition of prescriptive rights in Hong Kong. Perhaps wisely, neither counsel thought it necessary to take me through the Irish line of cases in which the English restriction has been held not to apply to Ireland (for example, *Timmons v. Heuitt* (1888) 12 Ir CLR 627, *Hanna v. Pollock* [1900] 2 IR 664, *Dawson v. McGroggan* [1903] 1 IR 98, *Macnaghten v. Baird* [1903] 2 IR 734, *Flynn v. Harte* [1913] 2 IR 322 and *Tallon v. Envis* [1937] IR 549).

112. Mr Graham was content to urge me to follow through on the Court of Appeal's approach in *Chung Yeung Hung*. He submitted that, if the English restriction applied in Hong Kong, that would effectively mean that there is no (and never has been any) practical prospect of acquiring a

prescriptive easement in Hong Kong. Mr Graham argued that "this would leave a gaping lacuna in the Land Law of Hong Kong". Such a result would run counter to ordinary expectation. Although the debate is couched in the language of land law whereby it seems dry and technical, Mr Graham was at pains to impress on me that the consequences of a decision one way or the other would have a significant effect on the daily lives of numerous villagers in the New Territories. For historical reasons, many roads used by the public in the New Territories commonly run through plots of land held under Government lease. Typically these roads are the only means of access to village houses. If the English restriction applied in Hong Kong, then however long previous user by a villager for motor transport, his vehicular passage along a road could be denied at any time by the owner of the land over which the road passed. See also Judge Chan's remarks in *Tang Tim Fat* at 375 (1.4)-376 (1.2).

113. Mr Chan, on the other hand, argued that the AELO's repeal rendered the decision in *Chung Yeung Hung* irrelevant and pressed me to follow Judge Chan in *Tang Tim Fat*.

114. In an ideal world, I would have preferred to have heard argument on the Irish cases in order to understand the rationale for rejecting the English restriction there. For instance, do the reasons or circumstances for rejecting the English restriction in Ireland also exist in Hong Kong? Given the ready availability of cases from other countries on the internet, I would also have welcomed a brief survey of other common law jurisdictions to see whether, Ireland apart, any other country has modified the English restriction and (if so) why.

115. On the basis of the material made available to me by both counsel, I agree with Mr Graham. Where from the start of British government in Hong Kong it was envisaged that Hong Kong land would predominantly be held on a leasehold basis, it would be odd if prescription of rights of way under the doctrine of lost modern grant or under the provisions of the 1832 Act had been received here subject to the English restriction. It would have been more commensurate with ordinary expectation for a law of prescription capable of practical application to have been received in Hong Kong generally.

116. Further, given (as discussed above) that *Chung Yeung Hung* and the 1832 Act as enacted by the AELO remain relevant to the present proceedings, *Chung Yeung Hung* compels a conclusion that in Hong Kong a limited owner can obtain a right of way by prescription against another limited owner. The Court of Appeal must have felt there that it was more than arguable that the English restriction did not apply to Hong Kong. Otherwise, there was little point in holding that the plaintiff's case was "arguable" in the face of Judge Chan's first instance decision (reached after trial and examination of case authority) to the contrary. Since property rights were concerned, the Court of Appeal would have carefully considered the consequences to New Territories landowners of re-opening the question of the application of the English restriction before delivering any judgment.

C.6 Application of the law to the facts

117. On the basis of the evidence mentioned in Section II.B above, I am of the view that such of the Plaintiffs as hold leasehold interests in land (that is, dominant tenements) lying to the south and southeast of Lot 364A

would have a right of easement over the Disputed Way. I identify the particular Plaintiffs ("the particular Plaintiffs") whom I have in mind in §128 of this Judgment.

118. There is ample evidence that, for more than 20 years (at least) prior to the commencement of these proceedings and indeed more than 20 years (at least) prior to 30 June 1997, the particular Plaintiffs and their predecessors-in-title enjoyed rights of vehicular passage over the Disputed Way. I do not agree with Mr Chan that over the relevant period vehicle use of the Disputed Way was only intermittent or sporadic until the early 1990s. There is no evidence that the passage was obtained by force or engaged in secretly. Kong Sik Yau (for example) was fully aware of the regular user of the Disputed Way by motor vehicles. The owners of Lot 364A acquiesced in the passage as evidenced by their building a fence and (later) a wall which demarcated the boundaries between their dwelling area and the Disputed Way within Lot 364A. Before November 1997, there is no evidence of there ever having been a drop bar or other impediment to the free passage of vehicles over the Disputed Way. I reject Kong Sik Yau's evidence that permission was routinely required or sought from the owners of Lot 364A.

119. The easements would have arisen by reason of the common law doctrine of lost modern grant and through operation of the 1832 Act as applied to Hong Kong by the AELO. Insofar as the 1832 Act is concerned, notwithstanding repeal of the AELO on 1 July 1997, the particular Plaintiffs' inchoate rights would have been preserved by reference to Articles 6, 105 and 120 of the Basic Law.

C.7 Conclusion on easement

120. Had I not found in the Plaintiffs' favour on public dedication, I would have been prepared to find for the particular Plaintiffs in respect of the acquisition of an easement by prescription over the Disputed Way.

D. Estoppel

121. Mr Graham suggested estoppel as a basis for the Plaintiffs' claim in the course of his opening. He did not pursue estoppel vigorously in his closing. I therefore do not deal with this ground at any length. I merely state that I would not have found in Mr Graham's favour on estoppel.

122. Proprietary estoppel essentially requires evidence of a representation by the Defendants, reliance on the representation by the Plaintiffs and (possibly) detriment as a result of such reliance. Assume that allowing individuals to pass over the Disputed Way by motor vehicle without hindrance constituted a representation by the Defendants that the particular Plaintiffs had a right of vehicular passage. It is not clear to me from the evidence adduced how individual Plaintiffs claim to have relied on such representation such that it would now be inequitable to allow the Defendants to resile from their representation. Nor is it clear precisely what detriment (if any) each of the Plaintiffs says he suffered as a result of reliance on the Defendants' representation.

E. Trespass

123. Having a right to pass over the Disputed Way in a vehicle, does not mean that one can pave the Disputed Way without the owners' permission. In the 2nd Action the Defendants claim against Wong Chau

Ming and Trade Advisers in trespass for concreting the Disputed Way in July 1997.

124. There is no evidence that Wong Chau Ming actually went on the Disputed Way in the course of the paving work done by Trade Advisers on 22 July 1997. Nothing to this effect was put to Wong Chau Ming in the course of his cross-examination. Accordingly, I reject the Defendants' claim against Wong Chau Ming.

125. I also reject the claim in trespass against Trade Advisers. Although Trade Advisers may have paved the Disputed Way after the heavy rains of June and July 1997 at the request of Kong Sau Ching and other villagers, Trade Advisers acting through Liu Tai Chuen had promised Kong Pak Yan that it would repair any damage caused to the Disputed Way by its lorries and other vehicles. In paving the Disputed Way, Trade Advisers was simply making good on Liu Tai Chuen's promise to Kong Pak Yan. Kong Pak Yan had by implication given Trade Advisers permission to carry out the repair on the Disputed Way. The fact that Trade Advisers had also been requested by Hang Tau villagers to repair the Disputed Way does not transform what Trade Advisers did into an act of trespass.

F. Locus

126. Mr Graham and Mr Chan both suggested that various of the Plaintiffs and Defendants had no locus to make a claim in these proceedings. I briefly consider the standing of each of the parties to this action.

127. The Plaintiffs own property in Hang Tau as follows:-

(1) Kong Sau Ching lives in House 88 on Lot 370. He is also the administrator of the estate of his father, Kong Sang (who is also known as Kong Chap Leung and appears to have traded as Wing Wo Company). Part of Kong Sang's estate consists of the leasehold title to Lots 366, 367, 369 and 370.

(2) Kong Yuen Hing lives in House 97A on Lot 366. No evidence was adduced as to ownership of property in Hang Tau.

(3) Kong Hoi Sun, Kong Sau Ching's elder son, lives with his wife in House 88 on Lot 370. No evidence was adduced as to his ownership of property in Hang Tau.

(4) Kong Hoi Yuen lives in House 88B on Lot 367. No evidence was adduced as to ownership of property in Hang Tau.

(5) Tin Li Ling lives in House 40 on Lot 388J ss. 1. No evidence was adduced as to ownership of property in Hang Tau.

(6) Kong Fong lives in House 95 part of which is on Lot 365A and part on 365B RP. Kong Fong is the registered owner of both lots.

(7) Yip Yum Sang lives in House 41 on Lot 388C RP. Yip Yum Sang is the owner of Lot 388C RP.

(8) Trade Advisers is the owner of Lot 362 RP.

(9) Of the parties sued in the 2nd action, Wong Chau Ming does not appear to live or own land in Hang Tau. Lee Tin Fuk, Li Ka Shing, Lee Shu Fai and Li Kwai owned property in Hang Tau as stated in §6 above. They sold their interests to various purchasers in 1998.

128. As members of the public previously or currently associated with Hang Tau, all of the Plaintiffs seem to me to have locus to claim a public dedication of the Disputed Way. Insofar as easement is concerned, on the evidence adduced at trial, Kong Sau Ching, Kong Fong, Yip Yum Sang and Trade Advisers would have been entitled to claim a right of easement by prescription. Contrary to Mr Chan's submission, that Trade Advisers' Lot may still be agricultural land does not affect matters. Trade Advisers would still be entitled to access by motor vehicle to Lot 362 RP. Mr Chan argued that Lee Tin Fuk, Li Ka Shing, Lee Shu Fai and Li Kwai, having sold their Hang Tau properties in 1998, are not entitled to seek a declaration. But I think that Lee Tin Fuk, Li Ka Shing, Lee Shu Fai and Li Kwai have locus to seek a declaration that, when they held their respective properties, they enjoyed rights of easement over the Disputed Way, even if they no longer do so now.

129. The Defendants were registered as co-owners of Lot 364A in January 1967. By a Deed of Partition dated 29 January 2002, Kong Wing Tak (also known as Kong Ha Tsai) became the owner of Lot 364A. It follows that at the time the 2nd Action was brought all of the Defendants had locus to bring the 2nd Action. Although Kong Sik Yau and Kong Pak Yan ceased to have any interest in Lot 364A in 2002, they would still have locus to seek a declaration that in 1997, when the 2nd Action was commenced, they had a right to block vehicle access over the Disputed Way.

130. Accordingly, I do not dismiss any party's claim by reason only of a lack of locus.

G Miscellaneous

131. Mr Chan submitted that usage of the Disputed Way had become so excessive as to constitute a nuisance to the owners of Lot 364A. He said that this was the result of Kong Sau Ching allowing cars to park around Lots 366, 367, 369 and 370 on payment of a fee. That meant (Mr Chan contended) that I should hold against the Plaintiffs. It seems to me that whether or not there is or has been nuisance caused since 2000 by Kong Sau Ching allowing cars to park on his land is outside the scope of the present proceedings. Such specific allegation has not been pleaded by the Defendants at all. I do not make any finding on the matter.

III. Conclusion

132. The claim in the 1st Action and the counterclaims in the 2nd Action succeed.

133. I make a Declaration that the public have a right of pedestrian and vehicular passage along the Disputed Way at all times and for all purposes.

134. In light of that Declaration, I make an Order restraining Kong Wing Tak (the present owner of Lot 364A), whether acting by himself, his servants or agents (including Kong Pak Yan and Kong Sik Yau) or howsoever otherwise, from obstructing or blocking vehicular traffic along the Disputed Way.

135. I dismiss the claim of Kong Sik Yau, Kong Pak Yan and Kong Wing Tak in the 2nd Action and their counterclaim in the 1st Action.

136. The parties have liberty to apply in relation to the wording of the above declaration and injunction.

137. I make an Order Nisi that the Plaintiffs in the 1st Action are to have their costs of that action against Kong Pak Yan, Kong Sik Yau and Kong Wing Tak, such costs to be taxed if not agreed.

138. I make an Order Nisi that Wong Chau Ming, Trade Advisers, Lee Tin Fuk, Li Ka Shing, Lee Siu Fai and Li Kwai are to have their costs of the claim and counterclaim in the 2nd Action against Kong Pak Yan, Kong Sik Yau and Kong Wing Tak, such costs to be taxed if not agreed.

(A T Reyes)
Judge of the Court of First Instance
High Court

Mr Peter Graham, instructed by Messrs Weir & Associates, for the Plaintiffs in HCA 13429/1997 and the Defendants in HCMP 4363/1997.

Mr Kenny Chan, instructed by Messrs T K Cheng & Co., for the Defendants in HCA 13429/1997 and the Plaintiffs in HCMP 4363/1997.