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The Doctrine of Notice and the Land Titles Bill

At the meeting of the Bills Committee on Land Titles Bill held on 19 June 2003, Hon Audrey Eu queried whether the doctrine of notice would apply under the new title registration system and asked the Legal Service Division to look into the issue. The Chairman of the Bills Committee instructed the Division to articulate the issues and give its view on them in written form to facilitate the response on the part of the Administration. This paper seeks to carry out the aforesaid instructions.

The Doctrine of Notice

2. The doctrine of notice is a doctrine that relates primarily and traditionally to the priority of competing property rights. A classical statement of the operation of the doctrine may be found in the judgement of Lord Browne-Wilkinson in *Barclays Bank plc v. O'Brien* [1993] 1 AC 180, 195-196: "The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it if he had taken proper steps (constructive notice). In particular, if the party asserting that he is taking free of the earlier right of the other knows of certain facts which put him on inquiry of the possible existence of that right of the other and he fails to make such inquiry or take such steps as are reasonable to verify whether such earlier right does or does not exist, he would have constructive notice of the earlier right and take subject to it."

3. What is not expressly mentioned in the statement of Lord Browne-Wilkinson is the more fundamental rule that a purchaser in good faith of a legal estate for value without notice is an absolute, unqualified, unanswerable defence against the claims of any prior equitable owner or incumbrancer. The doctrine of notice is only intelligible against this fundamental rule.

In the Context of Hong Kong Conveyancing

4. Both the doctrine of notice and the fundamental rule abovestated apply in Hong Kong as part of the Common Law system. In the context of Hong Kong conveyancing, the application of the doctrine of notice has been modified by the Land Registration Ordinance (Cap. 128) (LRO). Section 3(2) of LRO provides that all deed, conveyance and other instruments and judgements which are not registered shall as against subsequent bona fide purchaser or mortgagee for value of the same parcels of ground, tenements or premises, be absolutely void and of no effect to all intents and purposes. Hence, under the current registration of deeds system, any unregistered instrument or judgement affecting land will not affect a subsequent purchaser or mortgagee in good faith and for value who has registered his assignment or mortgage even if he has notice of such unregistered instrument or judgement.

5. The apparent abrogation of the doctrine of notice does not apply to unregistrable equitable interest or rights. This is exemplarily illustrated by *Wong Chim-ying's* case ([1990] 2 HKLR 111). Wong purchased a flat from a woman who was shown to be the purchaser on the last deed of assignment registered in the Land Registry in respect of that flat. In reality, the flat was purchased wholly with the money of the woman's husband, who had paid the down payment as well as the monthly mortgage instalments. Wong's daughter who had visited the flat was aware that persons other than the woman were also occupying the flat. Wong did not inquire about the interests of the other occupants in the flat. After completion of the purchase, the woman absconded and her husband refused to give possession of the flat to Wong. Wong then commenced proceedings for procession. The court held that since the husband has an unregistrable equitable interest in the flat and Wong had constructive notice of his interest, Wong must take the flat subject to the husband's rights. Wong was held to have constructive notice because she should have taken reasonable steps to enquire about the interests of the other occupants of the flat but did not do so.

Under the Land Titles Bill

6. At the meeting of the Bills Committee on 19 June 2003, the Administration expressed the view that if the same facts occur under the title registration system, the purchaser would not be subject to the husband's rights. The husband's equitable interest is not registered, so the subsequent purchaser for value takes free of it. Two difficulties arise. First, as Hon Audrey EU has

pointed out, it is not the fact of purchaser for value but whether such purchaser has notice that has decided whether he is bound. Secondly, the Administration has at the same meeting also acknowledged that although trust could not be registered, trust could still be created albeit outside the title registration system. It is not entirely clear whether the doctrine of notice would apply in relation to registered land vis-à-vis equitable interests created outside the title registration system.

7. Part of the difficulties in knowing exactly what would happen under the title registration system arises from the fact that the Bill has not stated clearly what effect the entries on the title register other than the name of the owner and cautions would have. Clause 25 seems to suggest that such entries would deem every subsequent owner to have notice and therefore knowledge. Moreover, clause 30 expressly provides that no disposition that amounts to a breach of trust by the trustee to a bona fide purchaser for valuable consideration without notice of the breach shall be defeasible by reason of the fact of that breach. Both seem to suggest that the doctrine of notice would still be highly relevant.

8. If we are right in saying that the doctrine of notice would apply under the title registration system, then the result could be quite startling. Take the situation in *Wong Chim-ying's* case described in paragraph 5 above as an example. The wife selling the flat is in fact in the position of a trustee. A purchaser who has not made due enquiries of the interests of the other occupants in the flat would have constructive notice of the husband's beneficial interest. Unless the husband has been asked and he has agreed to the sale, the purchaser would have constructive notice of a breach of trust by the wife. Applying clause 30, the same set of facts would lead to the same result under the title registration system. The purchaser would not be helped.

9. If the position of the Administration is that the doctrine of notice is abrogated in relation to registered land except as provided in clauses 25 and 30, it has not been made clear in the Bill.

10. Since the doctrine of notice is a necessary part of the fundamental rule of purchaser for value without notice, it is inconceivable that the Administration would intend to abolish it entirely in relation to registered land. If paragraph 9 represents the true intention of the Administration, then the

abrogation of the doctrine must be limited to dispositions that could only be effected by registration under the title registration system. Further, it may be necessary to consider including provisions facilitating entries to be made to effect notice in reliance upon clause 25.

11. If the doctrine of notice is wholly abrogated by the Bill in respect of registered land, it would mean the de facto abolition of the fundamental rule of purchaser for value without notice which governs competing property rights in relation to such land. The date of presentation of the application for registration would become the sole criterion for determining the priority of competing rights (clause 33(1)). The title registration system under the Bill only governs the priority of interests registered under it. Any interest merely claimed by a non-consent caution would seem not to have any effect on any subsequent transactions unless the interest is itself subsequently registered or is the subject of a court order. This suggests that all persons whose "mere equities" or equitable interests could not be registered under the title registration system would be affected.

Prepared by

Legal Service Division
Legislative Council Secretariat
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