

Bills Committee on Land Titles Bill

**RESPONSE TO DRAFTING ISSUES
AND ISSUES RAISED BY ASSISTANT LEGAL ADVISER**

Purpose

This paper sets out the response to drafting issues raised by Members at the 8th Bills Committee meetings and issues raised by the Assistant Legal Adviser.

Background

2. At the eighth Bills Committee meeting in June 2003, Members asked the Administration -

- (a) to ensure that the Bill, in particular Clause 12(2) and the proposed new Section 23B of the Land Registration Ordinance (Cap.128) would be amended to reflect the policy that in the event that a certificate of good title could not be issued for a property, there would be no need to apply for a first registration of the property;
- (b) to report how the English version “首次轉讓” of (first assignment) in the Bill would be revised to reflect the meaning of the Chinese version;
- (c) whether the Bill reflected the policy that any disposition of registered land would without exception only have legal effect when it was registered; and
- (d) whether Clause 29(1) had to be amended to the effect that for the purpose of creating, extinguishing, transferring, varying or affecting any interest in or over registered land or a registered long term lease the disposition of which was not required to be registered under the Bill, no registration was necessary to effect such creation, extinguishment, transfer, variation or affection.

3. At the second and fifth Bills Committee meetings, the Assistant Legal Adviser raised the following issues -

- (a) whether the land title registration system had taken full account of the unique Hong Kong style of conveyancing - all leasehold, the notional undivided shares and exclusive right of use. In Hong Kong, the undivided shares in land and the exclusive right to use a particular unit in a building were joined together by a deed of mutual covenant which was itself not an interest in land and would therefore not be registrable under the new scheme. How would the proposed system deal with the two components of ownership of land in form of units in high-rise buildings in Hong Kong;
- (b) whether the proposed gradual conversion approach was practicable – labelling effect and different treatment of undivided shares in the same lot;
- (c) effect of the conversion - how effective was the alleged curative effect - mistakes in existing register - whether anything was changed at all vis-a-vis the equities, unregistered interests and overriding interests;
- (d) the operation of the new title registration system - whether adequate provisions existed to cover all categories of interests - whether proprietors of equities had ways to protect themselves;
- (e) the problem of indemnity - for whom and how much - Basic Law implications;
- (f) compatibility of the terminology of the Bill and that of Conveyancing and Property Ordinance (Cap. 219) - the problems of applying Land Registration Ordinance (Cap. 128) side by side with the Land Title Ordinance in respect of the same piece of land;
- (g) whether the ideas in the English Land Registration Act 2002 should be considered for adoption (e.g. adverse possession); and
- (h) whether the proposed system followed the title registration system in England. In particular -
 - (i) whether the proposed system should allow registration of equitable estate which was not allowed under the system in England; and

- (ii) whether the Bill intended that the power to dispose of a registered property would be available purely on a statutory basis as was the case under the system in England; and if so, whether this should be specifically provided in the Bill.

Response

4. In respect of paragraph 2(a), the Administration proposes to amend Clause 12(1) and the proposed new Section 23(1A) as follows:

- (a) In Clause 12(1) –
 - (i) by deleting “Subject to subsection (2), an” and substituting “An”.
 - (ii) in paragraph (a)(i), by adding “except where subsection (2) cannot be complied with” after “day”.
 - (iii) in paragraph (b), by adding “except where subsection (2) cannot be complied with” after “(Cap.128)”.
- (b) In item 72(b) of Schedule 2, in the proposed section 23(1A), by deleting “to which Section 12 of the Land Titles Ordinance (of 2002) applies” and substituting “mentioned in Section 12 of the Land Titles Ordinance (of 2002)”.

The amendments will ensure that in the event that a certificate of good title cannot be issued for a property, it is not necessary to apply for a first registration of the property.

5. In respect of paragraph 2(b), the Administration is of the view that the term “assignment” is clearly defined in Clause 12 in its context and will not be confused with the normal conveyancing usage of the term “first assignment”. Accordingly, it is not necessary to amend the term “first assignment” in the Bill.

6. In respect of paragraph 2(c), Clause 29 states that no disposition of registered land or a registered long term lease or interest in or over land or a registered long term lease shall be effectual to create, extinguish, transfer, vary or affect the land or lease or any interest in or over the land or lease unless and until the disposition is registered. Accordingly, all dispositions of registered land or a registered long term lease can have the above legal effect upon registration of the dispositions.

7. In respect of paragraph 2(d), as it is intended that the creation, extinguishment, transfer or variation of all interests in or over registered land or a registered long term lease are to be registered by disposition under the Bill and can only have such legal effect upon registration as stated in Cl.29(1), there are no other interests the disposition of which are not required to be registered under the Bill. Clause 29(1) need not be amended.

8. In respect of paragraph 3(a),

(a) the leasehold nature, notional undivided shares and exclusive right of use have been reflected in the following ways -

(i) the Bill applies to land held under a Government lease (Clause 3(1));

(ii) the definition of land in Clause 2 to include an undivided share in land and such an interest vested in a person by virtue of section 14(1), 21(1) or 22(1);

(iii) the vesting of the legal estate or equitable interest in the land held under the Government leases and the undivided shares in the land held under the Government leases upon the registered owner under first registration (Clause 14 (1)) and registration of transfer or transmission (Clause 21(1));

(iv) the exclusive right to use individual units in a multi-storey building is vested on the registered owner as all rights attaching to the land which may be exercised by virtue of the legal estate or equitable interest of the undivided shares in the land (Clause 14(1) and Clause 21(1)); and

(v) in high-rise buildings, all the owners are the co-owners of the whole of the land and the building erected on the land, which they hold as tenants in common in undivided shares with the exclusive possession to the individual units. The exclusive possession is achieved by an agreement, the Deed of Mutual Covenant, binding on each co-owner granting individual owners the right to exclusive occupation of their units. The developer will sign the Deed of Mutual Covenant with the first purchaser. Then, the developer will assign the undivided shares in land with exclusive right to use a particular unit in the building by assignments to the individual owners. Transfers supported by these assignments can be registered under the Bill (Clause 41). The Deed of Mutual Covenants which governs the exclusive possession, mutual rights, grants or reservations

of the easements and covenants among the owners of the Building are registrable under Clause 51 of the Bill.

9. In respect of paragraph 3(b), the Administration is of the view that properties having title defects are subject to different treatment under the existing system already. Either the sale price will be reduced or transactions will be refused until the defect has been dealt with. Any labelling effect arising from the proposed system of conversion is unlikely to be significant.

10. In respect of paragraph 3(c), the Administration has already replied in paragraph 26 of the Paper on the Conversion Mechanism (LC Paper No. CB(1) 1464/02-03(04)).

11. In respect of paragraph 3(d), the proprietors of equities can register their interests by way of non-consent cautions (Clause 70(3)), inhibitions (Clause 74) and restrictions (Clause 77).

12. In respect of paragraph 3(e), the indemnity scheme has been explained in the Paper on Indemnity (LC Paper No. CB(1) 1664/02-03 (01)). The Basic Law implications have been discussed in the Paper on the Constitutionality of the Indemnity Cap. (LC Paper No. CB(1) 2089/02-03(02)).

13. In respect of paragraph 3(f), items 87 – 99 of Schedule 2 are the consequential amendments to the Conveyancing and Property Ordinance. The compatibility of the terminology of the Bill and that of the Conveyancing and Property Ordinance have been reviewed. Item 87 provides in the proposed Section 2(2) that an assignment includes a transfer and a legal charge includes a charge.

14. In respect of paragraph 3(g), the Administration is of the view that the law on adverse possession is wider than the issue of land registration as such. Any reform of Hong Kong's law on this point would require full deliberation in this wider context.

15. In respect of paragraph 3(h), some of the provisions in the Bill are modelled on English statutes. However, some provisions are particularly adapted to the Hong Kong situation as the Hong Kong conveyancing system is unique.

- (a) The proposed system would allow registration of equitable estate as the interest under some agreements for Government lease and interests under sale and purchase agreements of uncompleted buildings are equitable estates. Other equitable estates can also be registrable to provide details of all interests affecting the land on the Title Register.

- (b) In England, the principal dispositions an owner can make are those expressly authorized by the Land Registration Act, which when completed by substantive registration, pass or confer legal estate or interest on the transferee or grantee. The owner also has powers to make dispositions by virtue of the general law but these dispositions would create only minor interests taking effect in equity and being capable of being overridden by the registered dispositions for value unless protected on the register.

The Administration is of the view that the English system is too complex and different from the existing Hong Kong conveyancing system. Accordingly, it is more feasible for the power of disposition of the registered owner to dispose of a registered property to be determined according to the common law and equity. There will be no specific provisions on the owner of disposition of the registered owner in the Bill.

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