

**BILLS COMMITTEE ON LAND TITLES BILL**

Mistake, Rectification and Indemnity  
Supplementary Paper

**Purpose**

This paper provides additional information on mistakes, rectification and indemnity in response to questions raised by Members at the 7th meeting on 9 June 2003.

**Meaning of 'Mistake' in Clause 82(1)(b)**

2. Members requested elaboration of the coverage of the term 'mistake' and clarification as to whether it covered the following scenarios:-

- (a) registration of property without proper regard to a registered caution;
- (b) transfer of property to another name in contravention of a charging order due to erroneous interpretation; and
- (c) transfer of property to another name in contravention of a trust instrument due to erroneous interpretation.

3. A mistake in the context of Clause 82 means an error in opinion, judgement or action by the Land Registrar or an officer assisting him that leads to a wrong entry or wrong omission from the register. It does not include intentional mischief or fraud.

***Registration without regard to registered caution***

4. If a consent caution (such as with respect to a sale and purchase agreement) or a non-consent caution (such as with respect to a Court proceeding by a person claiming to have interest in land by way of contribution to the purchase price) has been registered, then, if an officer of the Land Registry were to register a new owner due to oversight of that registered caution – i.e. erroneous or mistaken belief that there was no such caution – this would be a mistake under Clause 82(1)(b). The cautioner who suffered loss as a result would have a claim for indemnity.

### ***Transfer in contravention of charging order***

5. The registration of a new owner despite the existence of a charging order may not necessarily be a mistake. It is a case concerning priority between two registered matters according to Clause 33. The Land Registrar may be obliged to register the transfer despite the charging order. The new registered owner will hold the property subject to the registered charging order.

### ***Transfer in contravention of a trust instrument***

6. One of the basic principles of title registration is that rights under trusts are matters between the trustee and the beneficiaries. If a trustee has sold a property to a third party, the rights of the beneficiary lie against the trustee and the proceeds of the sale, not against the property. Clause 69(1) of the Bill requires the Land Registrar not to enter the particulars of a trust in the title register. Clause 69(3) allows a third party to deal with a trustee as if the trustee is the owner. It follows that the Land Registrar and his staff must also treat the trustee as the owner for the purpose of dealings, unless a beneficiary has taken action to secure an inhibition or restriction against dealings by the trustee. Whether a mistake may arise in respect of such transfers turns on this point.

7. If an inhibition or restriction has been obtained (under Clauses 74 & 75 or 77 & 78 respectively) and yet the Land Registry proceeds to register a transfer in the erroneous belief that it does not contravene the terms of the inhibition or restriction then a mistake will have been made. A beneficiary who suffers loss as a consequence would be able to claim for indemnity.

8. If no inhibition or restriction has been obtained, the Land Registry cannot be held to have made a mistake in registering any transfer authorized by the trustee which is in breach of a trust. Clause 69(4) provides that no breach of terms of a trust creates any right to indemnity. Any beneficiary who has suffered loss will need to proceed against the trustee.

## **Fraudulent misrepresentation**

### ***Position under the current Deeds Registration System***

9. In general a transaction procured by fraudulent misrepresentation is voidable. The innocent party may apply to have the transaction set aside or rescinded, or he may affirm it and sue for damages only. If the innocent party wants to rescind the contract, he must act promptly when it is still possible to restore both parties substantially to their former positions. If the rights of a third

party have intervened, e.g. the property is further assigned to a bona fide purchaser for value, the remedy of rescission may be lost though damages are still available.

10. Usually such claims do not concern the Land Registrar who simply performs an administrative function to register the relevant instruments according to the Land Registration Ordinance.

*Remedies of Innocent Party under the future Title Registration System*

11. If the innocent party can act promptly before any sale to a third party, he would probably be able to obtain an order for rectification under Clause 81(1) to set aside the assignment and restore himself as the registered owner.

12. After a purchaser has been registered as the new owner, the innocent party may attempt to apply for a rectification of the title register pursuant to Clause 81(1). He has to make such an application if he wants to seek indemnity [Clause 82(1)(a)(iii)]. If the court refuses to restore the innocent party as the owner, then he may have a claim under Clause 82(1)(a) for a fraud affecting ownership. The amount would be subject to the cap specified under Clause 83. If the actual loss exceeds the cap, the innocent party may still sue the culpable party for any amount not recovered from the Indemnity Fund [Clause 86(2)].

13. There must be a fraudulent misrepresentation affecting ownership of the land and leading to an entry or omission in the Title Register before indemnity will be paid out. An example is where a former owner was fraudulently induced to execute to a relative an assignment which he genuinely believed to be a licence for occupation of the flat only.

14. However, if the fraudulent misrepresentation does not affect ownership, there will be no indemnity. An example is where a purchaser is induced to pay a higher purchase price by fraudulent misrepresentation that the land will be resumed by the Government and a resumption compensation even better than the purchaser price will be receivable. This misrepresentation affects the value of the property and not the ownership of the property. Indemnity will not be payable under Clause 82.

**Procedure for seeking rectification and claiming indemnity**

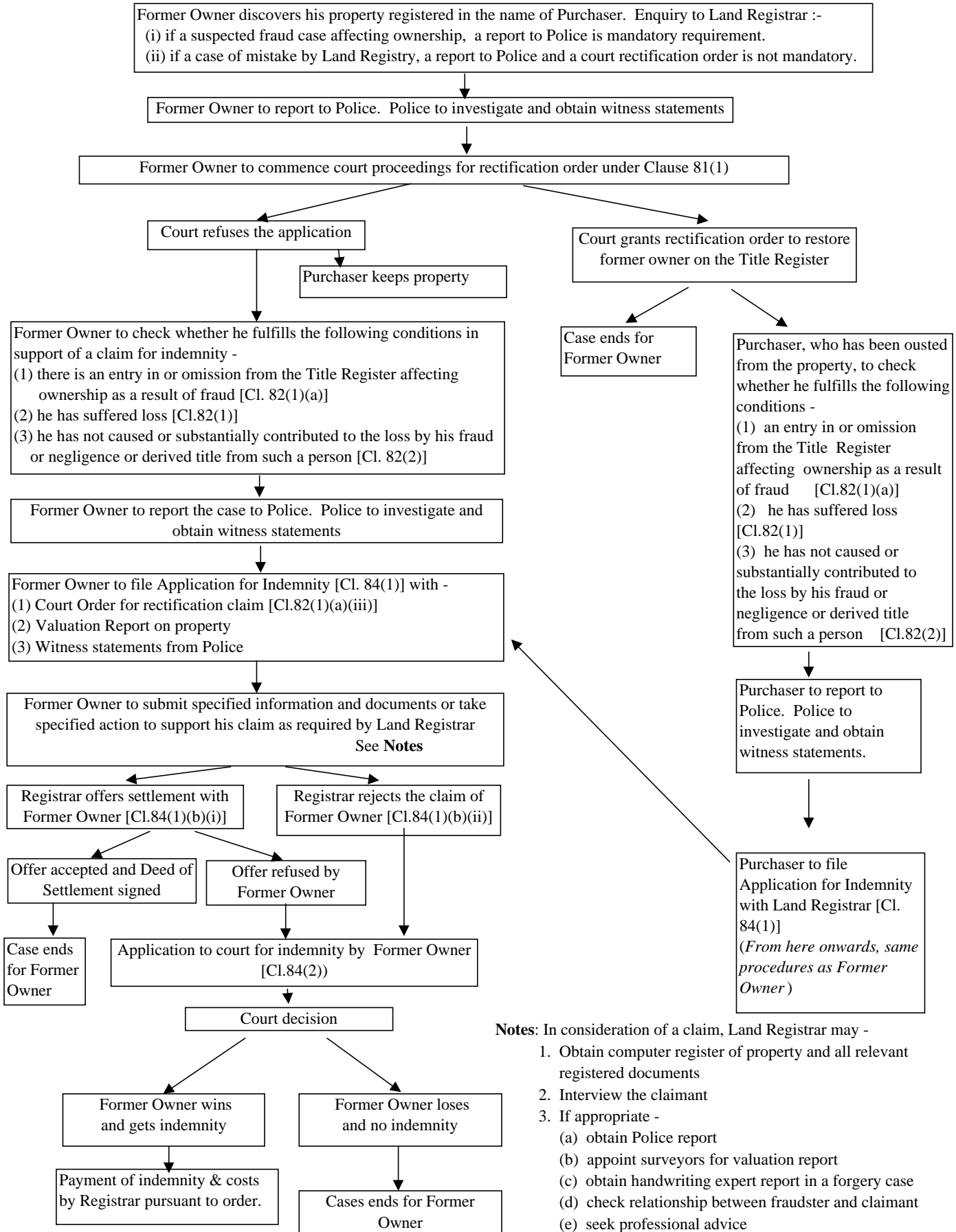
15. At the **Annex** is a flow chart showing the basic procedure for seeking a rectification order and claiming indemnity from the Indemnity Fund.

16. The procedure for a case of 'fraud' and a case of 'mistake' is basically the same. For a case of 'mistake', it is not mandatory to make a report to the Police for investigation. It is also not required to obtain an order of rectification before filing an application for indemnity.

*July 2003*  
*Housing, Planning and Lands Bureau*

# Flow Chart for Seeking Rectification and Claiming Indemnity

ANNEX



- Notes:** In consideration of a claim, Land Registrar may -
1. Obtain computer register of property and all relevant registered documents
  2. Interview the claimant
  3. If appropriate -
    - (a) obtain Police report
    - (b) appoint surveyors for valuation report
    - (c) obtain handwriting expert report in a forgery case
    - (d) check relationship between fraudster and claimant
    - (e) seek professional advice