

## **BILLS COMMITTEE ON LAND TITLES BILL**

### **Cautions, Inhibitions and Restrictions**

#### **Purpose**

1. This paper elaborates on the registration of cautions and applications for inhibitions and restrictions under the Land Titles Bill. It responds to the points raised in paragraphs 8(a), (b) and (d) of the list of follow-up actions arising from the 11<sup>th</sup> meeting.

#### **Background**

##### *Existing System*

2. Under the deeds registration system, many proprietary interests in land are created by conduct or arise by operation of law without document or evidence in writing. They are commonly referred to as "unwritten interests in land" or "unwritten equitable interests" generally and as "non-registrable interests" when used in the context of registration. Under the "doctrine of notice", unwritten interests bind all persons except a bona fide purchaser of a legal estate for value without notice of them. The following is a non-exhaustive list of examples :-

- (a) implied easements within the rule in *Wheeldon v Burrows* (1878);
- (b) equitable easements of necessity;
- (c) title acquired by adverse possession;
- (d) equitable charges by mere deposit of title deeds without any memorandum in writing.
- (e) beneficial interests arising from resulting trust or constructive trust; and
- (f) interests in land by way of proprietary estoppel.

##### *New System*

3. Under the title registration system, the non-registrable interests under para 2(a), (b) and (c) will be classified as "overriding interests" and protected without registration under Clause 24 of the Bill. Basically these unwritten interests are matters that would be apparent to a purchaser upon inspection of the property.

4. The practice of creation of security by mere deposit of title deeds (para 2(d)) will become obsolete under the title registration system because interest in registered land has to be created by registration of a disposition.

5. An unwritten equitable interest which is not an overriding interest (e.g. para 2(e) and 2(f)), will not have any standing under the title registration system. However, the Bill provides several previously unavailable ways for persons having such interests to protect them. These are “non-consent cautions” (by the applicants), “inhibitions” (by courts) or “restrictions” (by the Registrar).

### **Special features and legal effect of 'non-consent caution', 'inhibition' and 'restriction'**

#### *Non-consent Caution [Clause 70(3)]*

6. Any person who *claims an interest* in a registered property may make an application for registration of a non-consent caution. The Registrar may require production of supporting evidence [Clause 70(8)] e.g. for clarification of the interest claimed. The Registrar may refuse to register a caution which is unnecessary or which can be effected by an entry other than as a non-consent caution [Clause 70(10)].

7. A winding-up petition and a *lis pendens* (i.e. a pending action) is treated as a matter registrable as a non-consent caution [Clauses 70(3)(b) & (12)].

8. Non-consent cautions do not prohibit further dealings or making entries affecting the title [Clause 71(2)], but the new purchaser will take subject to the claim or interest protected by the non-consent caution if it is ultimately established to be a valid claim [Clause 25] .

9. The interest claimed by non-consent caution, when established and registered, will gain priority back to and take effect from the priority of the non-consent caution itself [Clause 33(7)(c)]. This is a main advantage of non-consent cautions over inhibitions or restrictions, neither of which may have priority backdated.

10. Non-consent cautions may be removed upon application by the registered owner [Clause 72(1)(b)(iii)]. A person who wrongfully and without reasonable cause present or maintain a non-consent caution is liable for loss and damage caused to a party being adversely affected [Clause 73].

#### *Inhibition of dealings by the Court [Clause 74]*

11. The Court may, upon application, make an order *inhibiting the registration of any dealing* [Clause 74(1)] and the Land Registrar shall register the order as an “inhibition” [Clause 74(2)]. The inhibition order may be:

- (a) for a specific period of time;
- (b) until the occurrence of an event, e.g. a minor attaining full age, consent given by a particular person, etc.; or

- (c) generally until a further court order [Clause 74(1)].

12. No dealing which is inconsistent with an inhibition shall be registered while the inhibition remains registered [Clause 75]. An inhibition may be removed by the Registrar in three circumstances [Clause 76]. These are:

- (a) if the specified period has expired;
- (b) if the specified event has happened (e.g. the specified age being attained, a party having received payment or given a consent); or
- (c) upon the sale by a chargee of the registered land or the registered charge, unless such sale is itself inhibited by the order.

13. Otherwise, an inhibition can only be removed by another Court order [Clause 76].

14. Registration of an inhibition does not create any backdating of the priority for the alleged claim or interest.

*Restriction on Dealings by Land Registrar [Clause 77]*

15. The Land Registrar may make an order ("the restriction") prohibiting all dealings or imposing conditions on a dealing. He may only make such an order upon application by a person proved to his satisfaction to be interested in the land and after making such enquiry and hearing such persons as he thinks fit so as to be satisfied that the *powers of the registered owner should be restricted* [Clause 77(1)]. The restriction may be:

- (a) for a specific period of time;
- (b) until the occurrence of an event, e.g. a minor attaining full age, consent of a particular person, etc.; or
- (c) generally until further order of the Land Registrar [Clause 77(2)].

16. Except with the Registrar's consent or by further court order, no dealing which is inconsistent with a restriction shall be registered while a restriction remains in force [Clause 78(2)].

17. Notice of a restriction will be served by the Land Registrar on the owner after it is made [Clause 78(1)].

18. Both the court and the Registrar have the power, upon application by the owner or an interested party, to remove or vary a restriction where it appears to be just to do so [Clause 79]. Before the Registrar makes a decision to remove or vary a restriction, he must first give all persons affected an opportunity of being heard [Clause 79(1)(b)].

19. A restriction will not create any backdating of the priority for the alleged claim or interest.

#### Trusts

20. As with the Land Registration Ordinance now, the Bill does not require the mandatory registration of documents in trust cases. The example at the Annex illustrates how a minor's interests may be protected by various methods of registration under the title registration system. The abuse of power of sale by a trustee may be avoided by registration of a restriction or inhibition.

21. In the guidelines and in the forms for application of registration, the Land Registry may add appropriate notes or footnotes to alert the person who sets up a trust and his solicitors of the option of registration if there is any intended limitation on the trustee's power of sale. The Administration considers that a provision for mandatory registration of a restriction is not required.

#### *Appeals*

22. Clause 89(1) provides that any person aggrieved by a decision of the Registrar under the Bill (except a decision on a claim for indemnity) may appeal to the Court of First Instance by filing a *notice of appeal in the specified form* within 30 days of the decision or such extended time. A "decision" includes a direction, order, requirement, determination and refusal [Clause 89(6)]. .

23. This appeal procedure may apply to the following non-exhaustive list of decisions of the Registrar :-

- (a) a decision to register a caution under Clause 70(9);
- (b) requirement for supporting evidence for a caution under Clause 70(8);
- (c) refusal to register a caution [Clause 70(10)];
- (d) a decision to *remove a non-consent caution* under Clause 72(1)(b)(iii);
- (e) refusal to remove an *inhibition* according to Clause 76;
- (f) a decision for conditions being imposed on restriction under Clause 77(1) (e);

- (g) a decision to make or not to make a restriction order under Clause 77; and
- (h) a decision on an application for the *removal or variation of a restriction* under Clause 79(1).

24. An appeal does not affect a disposition made in good faith for valuable consideration and registered before the notice of appeal is entered as a non-consent caution [Clause 90].

25. Clause 72(4) and Clause 79(2) provide that a direct application to the Court of First Instance may be made for the removal of cautions or removal/variation of restrictions.

### Protection of Interests under Trust

The following example illustrates how a minor's interests held under trust may be protected.

2. A father ("**the Father**") who has a boy ("**the Boy**") with his estranged wife owns a flat in an old building. By a Trust Deed the Father assigned the title of his property to a nephew ("**the Trustee**") to hold it upon trust for the absolute benefit of the Boy with power to apply all rent and income for his maintenance and education during his infancy. However, no power of sale was expressly given in the trust deed. It is intended that the property will be disposed by the Boy himself after attaining the full age of 18.

#### *Under existing deeds registration system*

3. If a need arises, the Trustee may apply for a court order to convey the property with a view to the application of the capital or income thereof for the maintenance, education or benefit of an infant beneficiary pursuant to Section 54 of the Trustee Ordinance (Cap.29).

4. Once the Trustee has obtained a power of sale under the s.54 order, the purchaser is protected. Under s.19 of the Trustee Ordinance, a purchaser shall not be concerned to see that the proceeds of sale are properly applied or the money is wanted. Section 15 of the Trustee Ordinance also provides that a receipt of the Trustee shall be a sufficient discharge of the purchaser who shall be exonerated from seeing to the application of the money or answerable for any loss or misapplication.

5. A purchaser is protected if there is a Court order of sale under s.54.

#### *Under the new title registration system*

6. Clause 69 of the Bill precludes an entry of the particulars of trust in the Title Register.

#### *(a) Restriction by Registrar*

7. The Father (as a person interested) may apply for a restriction to be entered under Clause 77 at the same time as he applies for registration of the transfer to the nephew (supported by the Trust) against the relevant title. The restriction may read as "*No sale, mortgage or similar disposition by the Trustee may be registered unless there is court order under section 54 of the Trustee Ordinance or otherwise*".

8. If no restriction was applied by the Father when the trust was set up, then the Boy himself or his guardian ad litem may apply as 'a person interested' in the property for an appropriate restriction to be entered under Clause 77(1)(d) or (e).

*(b) Inhibition by Court*

9. Alternatively, the guardian ad litem of the Boy may apply for an order of inhibition to similar effect.

*(c) Proceeds of Sale*

10. Clause 30<sup>1</sup> of the Bill provides that a sale to a bond fide purchaser for value will not be defeated by a breach of trust on the part of the Trustee. Sections 15 and 19 of the Trustee Ordinance, which governs the legal position of the proceeds of sale, will similarly apply to protect the purchaser. Again the law cannot prevent the possibility of mis-application of the proceeds of sale by the Trustee. The law chooses to protect the purchaser and gives certainty to his purchase.

*Conclusion*

11. In short, under the title registration system, the risk of an abuse of power of sale by the Trustee may be avoided by registration of inhibition or restriction. As to the risk of mis-application of proceeds of sale, it is the same under both the deeds and the title registration system.

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<sup>1</sup> It is proposed that the phrase "without notice of the breach" will be deleted by a Bills Committee amendment.