

Bills Committee on the Land Titles Bill

**Supplementary Response to Miscellaneous Issues
(Implied Covenants)**

Purpose

This paper provides supplementary information on the relationship between section 35 of the Conveyancing and Property Ordinance (CPO) (Cap. 219) and clause 43 of the Land Titles Bill on implied covenants. It is supplemental to paragraph 9 of the paper on Response to Miscellaneous Issues [CB(1)38/03-04(05)].

Section 35 of CPO

2. As requested by Members at the 15th meeting of the Bills Committee, copies of section 35 and the First Schedule of the CPO are attached at the Annex to facilitate consideration of clause 43 of the Bill.

3. Section 35 and the First Schedule of the CPO simplify the drafting and preparation of an assignment and legal charge. Certain covenants set out in Part I to Part V of the First Schedule will be implied when a transaction falls within a case listed in sub-paragraphs (a), (b), (c), (d) or (e) of section 35(1).

4. In the case of subsection 35(1)(a) (assignment of whole interest held under Government lease), the implied covenants set out in Part 1 of the First Schedule concern the payment of Government rent and the performance and observance of the conditions in the Government lease and the Deed of Mutual Covenant (DMC) (if any).

5. The combined effect of sections 35(1A) & (1B) is to ensure that the provisions of s.41 of the CPO will apply to the covenants in the DMC etc. and that the benefit of those covenants shall run with the land and shall be enforceable by the covenantee and his successors in title.

6. Section 35(2) provides that the implied covenants may be excluded, varied or extended in the assignment or legal charge. The freedom of contract is preserved.

Clause 43 of Land Titles Bill

7. Clause 43(a) of the Land Titles Bill preserves the operation of section 35 of the CPO after the commencement of the Bill. Clause 43(b) puts it beyond doubt that the implied covenants need not be entered in the Title Register.

8. Under the existing deeds registration system, an assignment duly executed and delivered by the assignor upon completion will take immediate effect to pass the legal title to the assignee. Under the title registration system, the title to the land will only be passed to the assignee upon registration of the transfer. The covenants will be implied into the transfer unless expressly excluded by the parties. Accordingly, as the transfer takes effect upon registration, the implied covenants will also take effect on registration.

Conclusion

9. As explained above, section 35 of the CPO and clause 43 of the Bill already capture our intention regarding implied covenants. It is, therefore, unnecessary to amend them.

October 2003
Housing, Planning and Lands Bureau

CONVEYANCING AND PROPERTY ORDINANCE (CAP.219)

PART IV FORMS, COVENANTS AND CONDITIONS

35. Implied covenants

(1) There shall be implied-

(a) in any assignment of the whole of the interest in land held under a Government lease, the covenant by a person who assigns, and the covenant by a person to whom an assignment is made, mentioned in Part I of the First Schedule; (Amended 31 of 1988 s. 12; 29 of 1998 s. 105)

(b) in an assignment to a purchaser for valuable consideration, the covenants, by a person who is expressed to assign as beneficial owner, mentioned in Part II of the First Schedule;

(c) in an assignment by way of voluntary disposition, the covenant, by a person who is expressed to assign as donor, mentioned in Part III of the First Schedule;

(d) in any assignment, the covenant, by a person who is expressed to assign as trustee, confirmor, mortgagee, legal chargee, personal representative of a deceased person or under an order of court, mentioned in Part IV of the First Schedule; and

(e) in a legal charge, the covenants, by a person who is expressed to charge as beneficial owner, mentioned in Part V of the First Schedule.

(1A) The covenants implied under subsection (1)(a) shall be covenants to which section 41 applies.
(Added 31 of 1988 s. 12)

(1B) The benefit of the covenants implied under this section shall run with the land and shall be enforceable by the covenantee and his successors in title and persons deriving title under or through him or them. (Added 31 of 1988 s. 12)

(1C) In paragraphs (a) to (d) of subsection (1), "assignment" (轉讓) does not include a legal charge.
(Added 31 of 1988 s. 12)

(1D) Unless the contrary intention is expressed, the liability of joint parties to any assignment or legal charge in respect of the covenants mentioned in subsection (1) shall be joint and several. (Added 31 of 1988 s. 12)

(2) The covenants implied under this section may be excluded, varied or extended in the assignment or legal charge.

(3) This section shall not affect any assignment or legal mortgage executed before the commencement of this section.

[cf. 1925 c. 20 s. 76 U.K.]

Chapter: 219 CONVEYANCING AND PROPERTY ORDINANCE

FIRST SCHEDULE [s.35]

PART I

IMPLIED COVENANTS IN ANY ASSIGNMENT OF LAND

(Replaced 31 of 1988 s. 24)

A. BY A PERSON WHO ASSIGNS

That, in the event of the land being partitioned by assignment, the assignor shall from the date of the assignment or other date therein stated pay the balance of the Government rent on the due dates and observe and perform all the covenants (other than the covenant to pay the whole of the Government rent) agreements and conditions contained in the Government lease and any Deed of Mutual Covenant and on the part of the lessee to be observed and performed so far as the same relate to the portion of the land remaining vested in the assignor.

(Amended 31 of 1988 s. 24; 29 of 1998 s. 105)

B. BY A PERSON TO WHOM AN ASSIGNMENT IS MADE

That the assignee and any person deriving title under the assignee shall at all times from the date of the assignment or other date therein stated pay the Government rent or as the case may be the apportioned Government rent and observe and perform all the covenants (other than the covenant to pay the whole of the Government rent if the Government rent has been apportioned) agreements and conditions contained in the Government lease and any Deed of Mutual Covenant and on the part of the lessee to be observed and performed so far as the same relate to the land assigned.

(Amended 31 of 1988 s. 24; 29 of 1998 s. 105)

PART II

**COVENANTS FOR TITLE IMPLIED IN AN ASSIGNMENT OF LAND TO A
PURCHASER FOR VALUABLE CONSIDERATION BY A PERSON WHO IS
EXPRESSED TO ASSIGN AS BENEFICIAL OWNER ("THE VENDOR")**

That the liability of the vendor in respect of a breach of any of the following covenants shall extend and

shall extend only to such a breach arising from anything made, done, executed or omitted, or knowingly suffered-

- (a) by the vendor;
- (b) by any person through whom the vendor derives title otherwise than by purchase for value;
- (c) by any person assigning by the direction of the vendor;
- (d) by any person rightfully claiming through, under or in trust for the vendor or any person assigning by his direction;
- (e) by any person rightfully claiming by, through or under any person (other than in respect of an estate or interest subject to which the assignment is expressly made) through whom the vendor derives title otherwise than by purchase for value.

1. That the Government lease is good, valid and subsisting.

2. That, so far as the same relate to the land assigned-

- (a) the premium or other money (if any) and the Government rent payable under and reserved by the Government lease have been paid; and
- (b) the covenants, terms and conditions contained in the Government lease and any Deed of Mutual Covenant have been observed and performed,

up to the date of the assignment.

(Replaced 31 of 1988 s. 25)

3. That the vendor now has good right and title to assign the land free from encumbrances save as specified in the assignment and subject to the manner in which the assignment is expressed to be made.

4. That the land may be quietly entered into and during the residue of the term of years created by the Government lease (and any renewal thereof) held and enjoyed by the person to whom the assignment is expressed to be made ("the purchaser") and any person deriving title under him without any lawful interruption or disturbance.

5. That all such lawful acts, assurances and things for further or more perfectly assuring the land and every part thereof to the purchaser and to those deriving title under the purchaser shall, from time to time and at all times at the request and cost of the purchaser or any person deriving title under him, be executed and done (subject to the manner in which the assignment is expressed to be made) as by the purchaser or any such person may be reasonably required.

(Amended 29 of 1998 s. 105)

PART III

COVENANT FOR TITLE IMPLIED IN AN ASSIGNMENT BY WAY OF VOLUNTARY DISPOSITION BY A PERSON WHO IS EXPRESSED TO ASSIGN AS DONOR

That the donor and any person assigning the land by his direction and any person deriving title under him by deed or act or operation of law in his lifetime subsequent to that assignment, or by testamentary disposition or devolution in law, on his death, shall from time to time after the date of that assignment, at the request and at the cost of the person to whom the land is expressed to be assigned or any person deriving title under such person execute and do all such lawful acts, assurances and things for further or more perfectly assuring the land and every part thereof to the person to whom the land is expressed to be assigned and to those deriving title under him (subject to the manner in which the assignment is expressed to be made) as by him or any such person may be reasonably required.

PART IV

COVENANT FOR TITLE IMPLIED IN AN ASSIGNMENT BY A PERSON WHO IS EXPRESSED TO ASSIGN AS TRUSTEE, CONFIRMOR, MORTGAGEE, LEGAL CHARGE,EE, PERSONAL REPRESENTATIVE OR UNDER AN ORDER OF COURT

That the person so assigning has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the land or any part thereof, is or may be impeached, charged, affected or incumbered in title, estate or otherwise or whereby or by means whereof the person who so conveys is in any way hindered from assigning the land or any part thereof in the manner in which it is expressed to be assigned.

PART V

COVENANTS FOR TITLE IMPLIED IN A LEGAL CHARGE BY A PERSON WHO IS EXPRESSED TO CHARGE AS BENEFICIAL OWNER ("THE BORROWER")

1. That the Government lease is good, valid and subsisting.
2. That, so far as the same relate to the land mortgaged-

(a) the premium or other money (if any) and the Government rent payable under and reserved by the Government lease have been paid; and

(b) the covenants, terms and conditions contained in the Government lease and any Deed of Mutual Covenant have been observed and performed,

up to the date of the legal charge and will continue to be paid, observed and performed during the subsistence of the legal charge.

(Replaced 31 of 1988 s. 26)

3. That the borrower now has good right and title to charge the land free from incumbrances save as specified in the legal charge and subject to the manner in which the charge is expressed to be made.

4. That, upon the lender being entitled so to do under the terms of the legal charge, the land may be quietly entered into and during the residue of the term created by the Government lease (and any renewal thereof) held and enjoyed by the lender without any lawful interruption or disturbance by the borrower, any person charging by his direction or any person rightfully claiming through, under or in trust for the borrower (other than in respect of an estate or interest subject to which the legal charge is expressly made).

5. That the borrower and any person charging the land by his direction and any person deriving title under them and any other person having or rightfully claiming any estate or interest in the land or any part thereof (other than an estate or interest subject whereto the legal charge is expressly made) shall from time to time and at all times at the request of the lender or any person deriving title under him at the cost, until sale of the land in accordance with the legal charge, of the borrower and, after such sale, at the cost of the person making the request execute and do all such lawful acts assurances and things for further or more perfectly assuring the land and every part thereof to the lender and to those deriving title under him (subject to the manner in which the legal charge is expressed to be made) as by the lender or any such person may be reasonably required.

(Amended 29 of 1998 s. 105)