

BILLS COMMITTEE ON LAND TITLES BILL

Wrongful Registration of Cautions

Purpose

This paper responds to Members' questions about wrongful registration of cautions under Clause 73 of the Bill.

Background

2. At the 13th Bills Committee held on 29 September 2003, Members asked the Administration to -

- (a) set out the practice regarding wrongful registration under the existing deeds registration system;
- (b) advise whether a policy change was involved under the new land title registration system;
- (c) set out the threshold test for "wrongfully and without reasonable cause" adopted by other jurisdictions, illustrating with relevant cases.

Clause on Wrongful Cautions

3. Clause 73 of the Bill provides that a wrongful registration of cautions without reasonable cause will attract liability for damages. This provision has been made in response to concerns that non-consent cautions could be exploited by third parties to cause difficulties for owners by raising spurious claims. It seeks to address the concern that the existing law, which is silent as to whether damages can be claimed in such circumstances, may not offer sufficient deterrence to such behaviour. The provision is similar to those found in a number of other recent title registration laws elsewhere.

Existing System

4. Section 19 of Land Registration Ordinance (LRO) provides power to the court to order vacation of lis pendens, but is silent on the point whether the court may award damages against a person for his wrongful registration of a lis pendens. The section reads -

"The court or judge ... may on the determination of the lis pendens, or during the pendency thereof, where the court or judge is satisfied that the litigation is not

prosecuted bona fide, or for other good cause shown, *make an order for the vacating of the registration in the Land Registry of such lis pendens without the consent of the party who registered it, and may direct the party on whose behalf the registration was made to pay all the costs and expenses occasioned by the registration or the vacation thereof, including the costs of the application to vacate, or may make such other order as to such costs or any of them as to the court or judge may seem just.* "

5. Judicial statements on whether damages may be awarded for wrongful registration may be found in the Court of Appeal decision in *Fung Kan Wai v Leung Shui Fat* (1999) 4 HKC 70, as described below.

6. In dismissing the defendant's counterclaim for damages for wrongful registration of the lis pendens, the judge of the Court of First Instance said this :-

" Lastly, I turn to deal with the Defendants' claim for damages due to the wrongful registration of the lis pendens. Having found the Plaintiffs to be in breach of the Agreement, it appears at first blush that the Defendants must be entitled to damages for wrongful registration of the lis pendens by the Plaintiffs.

However, on further reflection of the matter, ... I am of the view that there has been no wrongful registration of the lis pendens. Accordingly, the Defendants' counterclaim in this respect fails."

So it appears that the judge was prepared to award damages if a wrongful registration was proved.

7. The Court of Appeal was more conservative in this regard, but it did not actually decide the point. In dealing with the claim for damages for wrongful registration, the Court of Appeal had this to say :-

" There remains the defendants' claim for a declaration that they are entitled to recover from the plaintiffs damages for which they may be held liable to the subsequent purchasers in respect of the wrongful registration of the lis pendens and for an order that such damages be assessed.

Mr Mak, for the defendants, has not referred us to any provisions of law or any authority that points to this court having power to award damages for wrongful registration. In particular s 19 of the Land Registration Ordinance (Cap.128), which confers power on the court to order vacation of the lis pendens, only confers powers to direct the party on whose behalf the registration was made to "pay all the costs and expenses occasioned by the registration or the vacating thereof." The implication of that omission, coupled with the references in some of the authorities cited to statutory provisions in other jurisdictions enabling such damages to be awarded, occasions us some concern. Moreover, no claim in tort and no special damages for wrongful registration of lis pendens were ever pleaded. ... We are not persuaded that a cause of action exists on the pleadings and that these facts do entitle the defendant to damages for wrongful registration. Accordingly, we allow the appeal only to the extent of declaring the registration of the lis pendens as wrongful, reserving the matter of damages for determination in the other proceedings. ... "

In this instance, the Court of Appeal only granted a declaration of wrongful registration and left the defendants to pursue the matter for damages in separate proceedings. This appears to support the view that the court has no power to award damages for wrongful registration under the LRO. A claim for damages for wrongful registration must be pleaded specially and established as a separate cause of action.

8. The author of Volume 16 (Land) of *Halsbury's Laws of Hong Kong* is also supportive of the view of a possible cause of action for damages for wrongful registration. At Para 230.0394 of Vol.16 she states:

"Where there is any doubt where a written claim is registrable, it is prudent (for the Land Registrar) to register the instrument to preserve any possible priority. There is no statutory penalty for wrongful registration although the owner of the land may be able to take action where he has suffered loss as a result of that registration." [Words in bracket are added]

9. In equitable jurisdiction there is a maxim of equity that "Equity will not suffer a wrong without a remedy." (quoted from p.132 of *Osborn's Concise Law Dictionary, 8th Edition*).

10. In conclusion, it is more probable than not that, under the existing system although not under the provisions of the LRO, damages may be awarded for a wrongful registration of *lis pendens* if the facts are properly pleaded to establish a separate cause of action.

Title Registration System

11. Under the Bill, a *lis pendens* will be entered as a non-consent caution. Clause 73 puts it beyond doubt that a wrongful registration without reasonable cause will attract liability for damages. Insofar as it is possible to claim damages for wrongful registration under the existing system, the rationale underlying the clause is not an entirely new policy.

12. Provisions for liability arising out of wrongful registration of caution caveat are not uncommon. In Singapore, s.128 of the Land Titles Act (Cap.157) provides that a person, who wrongfully, vexatiously or without reasonable cause lodges a caveat or (being a caveator) refuses to withdraw such caveat upon request, shall be liable to pay compensation to any person who sustains pecuniary loss. In Northern Ireland, s.66(5) of the Land Registration Act (Northern Ireland) 1970 provides that a person who applied for a caution without reasonable cause shall be liable to pay compensation to any person who suffers damages as a result thereof.

13. The *Fung Kan Wai's Case* quoted above is an example of wrongful registration. The plaintiffs asserted a claim for a *lien* in respect of the deposits for purchase price and registered the writ as a *lis pendens*. Subsequently the plaintiffs abandoned the claim for *lien* and were ordered by the court to vacate the *lis pendens*. The registration was ruled to be wrongful for two reasons : (1) a claim for *lien* in

respect of the deposits was not a claim to a proprietary interest in land and so not a *lis pendens* affecting land, and (2) there were no grounds for a lien on the facts of the case.

14. The following judicial statements quoted from the English Court of Appeal decision in *The Mogul Steamship Co. Ltd. v McGregor Gow & Co* (1889) 23 QBD 598 may illustrate how the terms "wrongful" and "without reasonable cause" are understood and applied by the courts.

(1) [p.612] " ... The terms "maliciously," "wrongfully," and "injure" are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. ... The term "wrongful" imports in its turn the infringement of some right. ... "

(2) [p.613] " ... All personal wrong means the infringement of some personal right. 'It is essential to an action in tort,' say the Privy Council in *Rogers v Rajendro Dutt*¹, 'that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests, is not enough.' ... But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage. ... "

(3) [p.619] "... Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, Was it done with or without "just cause or excuse"? If it was bona fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable: ... But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell. ... "

It appears that each case will have to be decided on its own facts.

Conclusion

15. The Administration is of the view that Clause 73 should remove any doubt about the court's jurisdiction to award damages in appropriate cases. The scope of liability has been confined to a case of wrongful registration without reasonable cause. The meaning of the terms "wrongful" and "without reasonable cause" has been dealt with by case law and the concepts should be familiar to legal professionals.

¹ 13 Moore, P.C. 209