

**HPLB/LTB Paper 49/03**

**BILLS COMMITTEE ON LAND TITLES BILL**

**Powers of Land Registrar  
(Miscellaneous Issues)**

**Purpose**

This paper responds to questions raised during the 13<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> Bills Committee meetings in connection with the powers exercisable by the Land Registrar (the Registrar) under the Bill. These relate to powers exercisable under clauses 32 (power to compel registration); 70(3) (non-consent caution); 77 (restriction), and 88 (application to court for directions).

**Power to compel registration and non-consent caution [Clauses 32 and 70(3)]**

*Members' Questions*

2. At the 15<sup>th</sup> meeting, Members noted that under clause 32(1), the Registrar, if satisfied that a person had through wilful default failed to present to him an application for the registration of a matter, might, by notice in writing served on the person concerned, require the person to present the application to him within 30 days. Members asked whether the Registrar would merely refuse the application for registration of the agreement for sub-sale and purchase or take any other action if the application was not presented to him within the 30-day period.

3. Members also asked whether a purchaser in a sub-sale of a property could apply for the registration of the agreement for sub-sale and purchase as a non-consent caution under clause 70(3). In this context, the Administration was asked to consider how restrictive a non-consent caution should be, taking into account the need for certainty of ownership and the development of electronic applications.

*Application for consent caution of dealing under sub-sale agreement*

4. Where an application for registration of a *consent caution* of a sub-sale agreement is presented for registration, the sub-purchaser must

have the consent of the prior cautioner (i.e. the purchaser who sub-sells as a confirmor) or the owner of the property [clause 79(1)]. The Registrar would require the confirmor to register a consent caution on his own purchase agreement when a consent caution supporting a sub-sale has been presented but no principal sale agreement has been registered.

5. Before a consent caution for the principal agreement between the owner and the purchaser is registered, there is no ‘prior cautioner’ on the records. The sub-purchaser’s application cannot be processed.

6. If the Registrar is satisfied, upon evidence provided by the sub-purchaser, that the purchaser has failed to lodge his application for a consent caution (or for registration following completion of the purchase) through *wilful default*, the Registrar may exercise his power under clause 32(1) and serve notice to require the purchaser to make an application.

7. Any person who, without reasonable excuse, fails to comply with a requirement under clause 32(1) commits an offence under clause 96(5). This provides for a daily fine in case of a continuing offence since the sub-purchaser’s application cannot proceed in the absence of a prior cautioner on the records.

8. If the purchaser provides reasonable excuse for his failure to register the dealing of the principal agreement as consent caution, the Registrar will suspend his clause 32 notice. The Registrar will reserve his rights of action, including a prosecution under clause 96(5), if the explanation provided is later proved to be false or misleading in material facts.

#### *Application for non-consent caution by sub-purchaser*

9. If the sub-purchaser’s application for consent caution cannot be processed due to the purchaser’s non-cooperation, the sub-purchaser may consider an application for *non-consent caution*.

10. If the sub-purchaser can produce reasonable evidence to show the chain of transactions from the owner to the purchaser and then the purchaser to the sub-purchaser, the Registrar will accept an application for a non-consent caution<sup>1</sup>. The evidence required by the Registrar in this

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<sup>1</sup> As with all non-consent cautions, the applicant would be advised of the possible consequences of a wrongful caution.

particular example will likely be a statutory declaration of the facts together with a copy of the principal agreement and any other supporting documents.

11. As at present with respect to registration of instruments affecting land under section 23(1) of the Land Registration Ordinance (LRO), the Registrar's function under clause 70(3) is mainly administrative in nature. Clause 70(9) directs the Registrar to register a caution unless it is a case within clauses 70(10) or (11).

12. If a person can show, on reasonable evidence, that his claim does relate to the land affected, then subject to compliance with other requirements prescribed by the regulation as to form and particulars, he should be entitled to have a non-consent caution entered. It will not be the duty of the Registrar to decide the validity of his claim.

13. Clause 71(3) expressly declares that the registration of a non-consent caution shall not of itself affect the validity of the subject matter of the caution, nor shall it constitute a warranty or guarantee to its validity.

14. Provisions for removal of wrongful cautions and for deterrence of abuse of the system have been built in. The Bill provides two channels for removal of a wrongful caution. One is an application to the Registrar and the other is an application to the court [clauses 72(1)(b) & (4)]. To deter abuse of non-consent cautions, the Bill makes it clear that the cautioner is liable to pay damages as a result of a wrongful caution without reasonable cause [clause 73].

### **Restrictions (Clause 77)**

#### *Members' Questions*

15. At the 13<sup>th</sup> meeting, in discussing LC Paper No. CB(1)2464/02-03(06) ("Cautions, Inhibitions and Restrictions"), Members asked the Administration to -

- (a) examine whether the policy intent set out in paragraph 15 of the paper is clearly reflected in clause 77(1), and whether the drafting of clause 77(1)(c) is too broad and how it could be improved; and

- (b) define the ambit of power of the Registrar in making a restriction, including in what ways such power is limited under the Bill, and whether the ambit of the power and the limitations are clearly set out in clause 77.

### *Response*

16. Paragraph 15 of the paper referred to above seeks to explain clause 77(1). The policy intent behind clause 77(1) is that the Registrar should be empowered to impose restrictions on registrations. For further details, Members may wish to refer to the paper “Inhibitions, Restrictions and Injunctions: A comparison” issued together with this paper. The Annex to that paper provides some examples of when the power of restriction may be applied. The circumstances in which applications may be made under clause 77(1) can be very wide. The current clause 77(1)(c) that enables the Registrar to act “when he is satisfied that the powers of the owner should be restricted” is, therefore, appropriate.

17. In contrast to his administrative function under clause 71(3) (non-consent caution) (paragraph 11 above), the Registrar’s exercise of discretion under clause 77(1) is quasi-judicial in nature<sup>2</sup>. The Registrar is under a duty to act in good faith and reasonably upon such information as is available to him. This information will consist of what is entered in the register itself or filed in the registry, together with such additional information as may have been supplied to him by the applicant. Clause 77(1)(b) also allows him to obtain further information from enquiries or hearings as he thinks fit. Given this provision, the Registrar would have to show good reason as to why further enquiries or hearings were not conducted if imposition of the restriction is challenged.

### **Application to court for directions (Clause 88)**

#### *Members’ Questions*

18. At the 16<sup>th</sup> meeting, Members noted clause 88, which provides that in any case of doubt or difficulty or in any matter not

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<sup>2</sup> Reference may be made to the Privy Council decision in *Registrar of Titles, Johore, Johore Bahru vs Temenggong Securities Ltd.* [1977] AC 302 which explains the nature of powers exercisable by the Registrar of Titles under the Malaysian National Land Code, s.320 as regards a ‘private caveat’ (exercising administrative function) and a ‘registrar’s caveat’ (exercising quasi-judicial function).

provided for under the Bill, the Registrar may apply to the Court of First Instance for directions on principles of law. The Administration was asked to -

- (a) explain the policy intent and the justifications for clause 88, and define the scope of powers of the Registrar under the clause;
- (b) advise whether any other Government officials in a similar position have powers comparable to those of the Registrar under clause 88; and
- (c) as clause 88 is included in Part 10 of the Bill on appeals, clarify whether the Registrar would only exercise his power provided for in the clause in dealing with appeal cases.

#### *Response*

19. Many jurisdictions operating title registration systems have provided the registration authority with mechanisms to state a case to the court for the court's opinion. For example, under the UK *Land Registration Act 1925*, the registrar was given certain power to refer a case to the court for opinion. The New South Wales *Real Property Act 1900* also allows the Land Registrar to apply to the court for opinion. Relevant extracts of the two Acts are at the **Annex**.

20. We consider that a similar provision in the Bill is likely to prove useful, especially in the early years of operating the title registration system. Such a mechanism will allow directions to be sought on important questions of law, in turn facilitating dealings in land with certainty and in a timely manner. Our intention is that the Registrar should resort to this provision only when faced with issues of law that are of general importance to the performance of his duties, the exercise of his powers and the discharge of his responsibilities under the Bill. We do not anticipate that the power would be used frequently. The Registrar would have to justify fully to the court why he is seeking direction and not relying on his own legal advisors; otherwise the court might decline to give directions on his application. We agree that the current drafting of clause 88 does not clearly reflect this intent. We will propose suitable amendments to the clause accordingly.

21. In Hong Kong law, similar provisions may be found in

insolvency cases. Section 82(4) of the Bankruptcy Ordinance (Cap. 6) provides that, subject to the provisions of the Ordinance, a trustee in bankruptcy shall use his discretion in the management of the estate and its distribution among the creditors. Section 82(3) provides that the trustee may apply to the court *for directions in relation to any particular matter* arising under the bankruptcy. Similarly, under Section 200(3) of the Companies Ordinance (Cap. 32), a liquidator may apply to the court *for directions in relation to any particular matter* arising under the winding up.

22. The right of referral to the court for directions has been sparingly exercised by the Official Receiver & Trustee. It has proved useful, however, when he has been faced with a complex issue of law which has a general importance to his performance of public duties<sup>3</sup>.

23. Clause 88 is intended to be of general application to the whole Bill. We agree that it should be moved to a suitable place in the Bill and its heading revised.

*November 2003*

*Housing, Planning and Lands Bureau*

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<sup>3</sup> A recent example of referral by the Official Receiver & Trustee to the court for directions was a case on the interpretation of the statutory amendments of Section 30 to 30C of the Bankruptcy Ordinance which took effect in April 1998. The gist of the question for the court's advice was whether notice of objection to automatic discharge should, or could be, published against a particular class of bankrupts whose age of bankruptcy was over 8 years at the time of commencement of the new Ordinance. It was a complex issue of the combined effect of the new Sections 30, 30A, 30B and 30C.

## ANNEX

### **Provisions on Application to Court by Land Registrar in Other Jurisdictions**

*England & Wales : Land Registration Act 1925 [repealed by Land Registration Act 2002]*

#### **140. Power of registrar to state case for the court**

(1) Whenever, upon examination of the title to any interest in land, the registrar entertains a doubt as to any matter of law or fact arising upon such title, he may (whether or not the matter has been referred to a conveyancing counsel in prescribed manner), upon the application of any party interested in such land :-

- (a) refer a case for the opinion of the High Court and court may direct an issue to be tried before a jury for the purpose of determining any fact;
- (b) name the parties to such case,
- (c) give directions as to the manner in which proceedings in relation thereto are to be brought before the court.

(2) The opinion of any court to whom any case is referred by the registrar shall be conclusive on all the parties to the case, unless the court permits an appeal.

*New South Wales : Real Property Act 1900*

#### **124. Registrar-General may state case for Supreme Court**

(1) If any question arises in respect of :

- (a) land under the provisions of this Act ,or
- (b) land the subject of action under Part 4, 4A, 4B or 6A with regard to the performance of any duties or functions conferred or imposed on the Registrar-General by or under this or any other Act, the Registrar-General may state a case for the opinion of the Supreme Court.

(2) ... ..

(3) The Supreme Court's opinion on the stated case binds the Registrar-General in relation to the question.