

Bills Committee on Land Titles Bill

RECTIFICATION OF TITLE REGISTER BY COURT

Purpose

This paper sets out the procedures and operation of the rectification by the Court of First Instance under Clause 81 of the Land Titles Bill. This is in response to Members' request at the 16th Bills Committee meeting.

Background

2. The basic procedures for seeking a rectification order and claiming indemnity have been set out in a flow chart annexed to the Supplementary Paper on Mistake, Rectification and Indemnity (LC No. 2305/02-03(04)).

Rectification by Court of First Instance

3. Clause 81 of the Bill provides for the rectification of the Title Register by the Court of First Instance. The Court of First Instance may rectify the Title Register by directing that an entry in or omission from the Title Register be removed, amended or entered if the entry has been made or omitted by

- (a) the fraud, mistake or omission or any person;
- (b) means of a void or voidable instrument.

The Court of First Instance may order rectification of an entry made or omitted before, on or after the date of first registration of the registered land.

4. Fraud includes forging, or altering title documents or fraudulent misrepresentation. The term “fraud” is not fully defined in the Bill but Clause 2 provides that it includes dishonesty and forgery. The full meaning of “fraud” would be determined according to case law. The term “fraud” is also not defined in the English or New South Wales system.

5. The term “mistake” is not defined in the Bill and will be determined by the case law. According to Stroud’s Judicial Dictionary of Words and Phrases, 6th Edition, “mistake” in common law means a slip made not by design, but by mischance.

6. The term “omission” will also be determined by the case law. The terms “mistake” or “omission” are also not defined in the English or New South Wales system.

7. The Court of First Instance may order rectification if an entry in or omission from the Title Register is made or omitted by means of a void or voidable instrument. An instrument will be void if the assignment it makes is illegal. An example of this would be if the owner of a Home Ownership Scheme flat sells or assigns the flat to another person without the required consent of the Housing Authority. A voidable instrument is one that has been signed under duress or undue influence.

8. Clause 81(2) provides that the Court does not have power to rectify the Title Register if the registered owner or lessee is in possession of the land (that is, in actual occupation, in receipt of rents or having the right to receive rents) and has acquired the land or lease for valuable consideration.

9. However, if the registered owner or lessee had knowledge that there was a fraud, mistake or omission or a void or voidable instrument, or if they had themselves caused or contributed to such fraud, mistake, omission, voidness or voidability, the Title Register can be rectified against him.

10. Under Clause 81(3), in the case of fraud, an innocent former registered owner or lessee can apply to the Court of First Instance for rectification if he has no knowledge of the fraud or not caused or contributed to it by his act, neglect or default.

11. In the situation where there are two innocent parties who both had no knowledge of the fraud and have not caused or contributed to the fraud, the Court has discretion to decide whether to make a rectification order. If the Court, having considered the circumstances of the case, is satisfied that it would be unjust not to rectify the Title Register against the present registered owner or lessee, it can order rectification to restore the title to the former innocent owner or lessee. While specifically mentioning the acts of the parties and the issue of hardship as matters for consideration, the Bill does not limit the factors that the Court may consider in reaching its conclusions. In order to allow for a fair balance between certainty of title and justice in the circumstances of each case, the Administration considers that the Court should be given the discretion to consider any factors in the particular case before making its decision.

12. If the Court orders rectification in favour of the former registered owner or lessee, the registered owner or lessee will lose the property but may then claim from the indemnity fund to recover his loss. If no rectification is ordered, it is the former owner or lessee who may claim from the indemnity fund.

13. Clause 81(5) provides that if the Registrar is joined as a party in any rectification case, he shall not pay costs incurred by the parties in the proceedings and damages suffered by any parties in the proceedings. These claims would have to be made by application for indemnity.

14. Clause 81(6) gives the Land Registrar the power to give effect to any rectification order made by the Court. This includes making any entry in the Title Register pursuant to the court order.

15. For better understanding of Clause 81, a flow chart is provided at the Annex.

December 2003
Housing, Planning and Lands Bureau

**Flow Chart for Seeking Rectification by Court
of First Instance (Clause 81)**

