



11 March 2009

Your Ref: CBI/PS/4/08

Clerk to Joint Subcommittee on
Amendments to Land Titles Ordinance
Legislative Council
Legislative Council Building
8 Jackson Road
Hong Kong

Attention: Mr. Simon Cheung

Dear Mr. Cheung

**Panel on Development and
Panel on Administration of Justice and Legal Services
Joint Subcommittee on Amendments to Land Titles Ordinance
Meeting on 19 March 2009**

1. I refer to your letter of 13 February 2009.
2. In response to the December 2008 paper of the Development Bureau on the rectification and indemnity provisions of the Land Titles Ordinance ("LTO"), The Real Estate Developers Association of Hong Kong ("REDA") would like to make the following submissions to the Joint Subcommittee.

General background

3. REDA was opposed to the cap on indemnity.
4. REDA subsequently accepted the cap, but only on the basis that the innocent original owner will be entitled to have his title restored under the "*mandatory rectification*" rule which has been enshrined in section 82(3) of the LTO.
5. To put the matter in context, the mandatory rectification rule represents a compromise and, to REDA, an acceptable solution dealing with:
 - (a) the inherent unfairness of the cap on the indemnity, proposed to be fixed at a mere \$30 million; and



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- (b) the important principle that deprivation of an innocent owner of his property without full compensation is not only unfair but may also be contrary to the Basic Law.
- 6. The Administration is now proposing 3 exceptions to the mandatory rectification rule. The effect of the exceptions is to substantially abrogate the mandatory aspect of the rule and the rights of the innocent owner. REDA does not consider the proposal fair and reasonable and object to the exceptions.

Exception 1 - deferred indefeasibility

- 7. The first exception is where the registered owner is not the first person registered as owner since the fraud. This exception is very widely drawn. Practically, the only persons who do not fall within such exception would be:
 - (a) the person who purchased directly from the fraudster; or
 - (b) a person who is not a bona fide purchaser.
- 8. The practical effect of the exception is that once a property affected by fraud has changed hands by a disposition made by the person who purchased from the fraudster, the innocent original owner is no longer protected.
- 9. The problem with the proposal is that under this exception, the innocent original owner stands to lose his property and will not be compensated except to the extent covered by the cap on the indemnity, simply because the property has changed hands.
- 10. This amounts to a fundamental departure from the spirit of the mandatory rectification rule and the philosophy behind it. REDA does not consider that there is sufficient justification to effect a fundamental alteration of the innocent original owner's rights simply because the subject property has changed hands, when this is not something over which the innocent original owner has any control.
- 11. The Land Registrar has informed REDA that he has not found any other jurisdiction which has a title registration system adopting the mandatory rectification rule.
- 12. The other side of the coin is that none of the major jurisdictions (including the United Kingdom, Australia or Canada) which adopt a title registration system place a limit on the indemnity.



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Exception 2 - resumption or surrender of property to Government

13. Resumption of land should always be for a public purpose, while surrender may or may not be for a public purpose.
14. Land may be surrendered to the Government, say, for an *in situ* regrant (i.e. a land exchange) to the same owner, such that there is no obstacle to the restoration of title to the innocent original owner.
15. REDA has difficulties in understanding why an innocent original owner should stand to lose his property (at least to the extent not covered by the cap) simply because the property has been resumed or surrendered to Government.
16. Where private property rights are involved, Government should be placed in a position no better than that occupied by private citizens. Why should the position of the innocent original owner be different simply because the property has been resumed or surrendered to Government?
17. An application of this exception may result in the loss to the innocent original owner of the property or has the effect of an appropriation of the property of the innocent original owner without compensation or adequate compensation. For example, the land may be transferred to the name of an associate of the fraudster and then resumed by Government. The innocent original owner cannot have his name restored to the Title Register and he may not be able to claim an indemnity, or the indemnity may be subject to a cap.
18. This exception would appear on the face of it to be contrary to articles 6 and 105 of the Basic Law.

Exception 3 - property sold into multiple ownership

19. REDA appreciates that where the original buildings have been demolished and new buildings erected in their place and a substantial number of innocent purchasers have become owners of the units in the new building, there is a case that their interests should be protected.
20. However, it is REDA's view that:
 - (a) The protection of innocent purchasers should not be made at the expense of the innocent original owner whose remedy should not be limited by the cap.
 - (b) If this exception were to apply, certain criteria must be set and be satisfied. For example, the exception should not apply unless an appropriate



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number of bona fide purchasers are involved. It is difficult to see why the exception should apply simply because the land is developed, say, into 2 town houses one of which has been sold.

21. The Land Registrar has, in correspondence with REDA, raised the issue of what, for this purpose, would be an appropriate number of bona fide purchasers. To this REDA has responded as follows:
- (a) There is inevitably an element of arbitrariness whenever a line is drawn. For example, questions will always be asked as to whether the cap on indemnity should be set at \$30 million, \$50 million, \$100 million or some other figure.
 - (b) REDA assumes that the philosophy behind the proposal to introduce this exception is not just to protect innocent purchasers. If it had been so, there is no reason why the protection should not cover situations where there is only one single purchaser. The philosophy must be that where many innocent small purchasers are involved, the problem takes on a wider social perspective.
 - (c) At the end of the day, what constitutes an appropriate number of bona fide purchasers is a policy issue on which the public or at least all major stakeholders should be consulted.

Attendance at meeting on 19 March 2009

22. REDA would wish to make oral presentation to the Joint Subcommittee at the meeting on 19 March 2009. The reply slip is enclosed herewith.

Yours sincerely

Louis Loong
Secretary General

c.c. Mr. Kim Salkeld, JP
Land Registrar