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LTO

BY FAX (28696794) AND BY POST

President
會長

1 March 2010

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王桂壘

Dr. Hon. Margaret Ng,
Chairman of the Joint Subcommittee on
Amendments to LTO,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.

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Brian W. Gilchrist
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Dear Margaret,

CONSULTATION ON LAND TITLES (AMENDMENTS) BILL - RECTIFICATION AND INDEMNITY PROVISIONS

We are pleased to attach a copy of our letter of even date on the rectification and indemnity arrangements to the Land Registrar, contents of which are self-explanatory, for the attention of the LegCo's Joint Subcommittee on Amendments to the Land Titles Ordinance.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

Secretary General
秘書長

Encls.

Raymond C.K. Ho
何志強

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Deputy Secretary General 128443
副秘書長

Heidi K.P. Chu
朱潔冰



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Deputy Secretary General 128443
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1 March 2010

Ms. Olivia Nip,
The Land Registrar
Queensway Government Offices
28th Floor, 66 Queensway
Hong Kong.

Dear Ms. Nip,

Consultation on Land Titles (Amendment) Bill - Rectification and Indemnity Provisions

The Development Bureau issued a Consultation Paper in December 2008 to consult the views of stakeholders including The Law Society on its proposed amendments to the Land Titles Ordinance ("the LTO") to subject the so-called "Mandatory Rectification" rule ("MR rule") provided in Section 82(3) to, inter alia, the following exception:

"where the current registered owner who is in possession of the property is not the first person to have been registered as owner since the fraud. He is a bona fide purchaser for value or a person deriving title from such bona fide purchaser"

The Law Society has carefully reviewed the rectification and indemnity provisions under Part 11 of the LTO and agrees with the Administration that there are grave concerns with the existing arrangements with the MR rule being incorporated into the title registration system.

As the Administration has rightly pointed out in paragraph 8(b) of its Consultation Paper, the MR rule would have the unintended effect of "reducing confidence in the

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title register” and “reducing the effectiveness of the new scheme in improving the efficiency with which conveyancing can be conducted”. The Law Society agrees with the Administration in paragraph 8(b) of the Consultation Paper that the “opportunity should... be taken to reconsider whether the rule should be retained before the LTO is brought into operation”.

The LTO was enacted in 2004 under a very tight schedule. The Bills Committee was convened in March 2003 and completed its deliberations on the Bill in 39 meetings over a period of 15 months. The Law Society was given the understanding by the Administration then that if the 2002 Land Titles Bill did not get enacted within the 2003-4 LegCo term, it would be very unlikely that the title registration legislation would be re-introduced to LegCo given there were other legislative priorities. At the request of the Administration, weekly meetings were held between representatives of the Administration and members of our Working Party in the period between 15 April and June 2004 to try to resolve issues of concern within that LegCo term. When the Law Society was asked to endorse the bill, the then Secretary General of the Law Society wrote to the then Land Registrar on 18 June 2004 to give its support of the Bill, but expressing also its two concerns i.e. one, on the drafting of the Bill and two, given the large number of amendments to the Bill, the Law Society felt that a reasonable breathing space was needed to fully absorb the revised bill. The Administration assured the Law Society that it would continue to work with the Law Society “to address any subsisting points of concern and any issues that emerge on further consideration of the drafting of the LTO before its implementation”. It was based, inter alia, on such undertaking by the Administration to the Law Society that LegCo has passed the 2002 Bill into law on 7 July 2004. Indeed, the Administration has rightly pointed out in paragraph 8 of its Consultation Paper that the LTO was passed in July 2004 on condition that a comprehensive review was carried out before the Administration sought to bring the new system into operation and the rectification and indemnity provisions enacted in 2004 have been examined as part of that review.

The MR rule was introduced at a very late stage in 2004. This was done against a background of a rushed through deliberation process, as a political expediency and as a recognition of the fact that due to the effect of the cap on indemnity and the Court being given a wide discretion to rectify, unless rectification was made in favour of the former innocent owner who had been defrauded and lost his property, he might find himself worse off under the new system (cf. for example, the Bar’s submission dated 2nd March 2004). The Law Society understands fully the predicament the Administration was in when it introduced the MR rule.

In the end, the LTO as enacted, was a product of compromise. The Chairperson of the Bills Committee of the Legco, the Hon. Margaret Ng, when speaking on the passage of LTO, lamented that the MR rule in the LTO rendered the new system more of a "half-way house". Dissatisfaction with this product of political compromise is, therefore, not confined to the Law Society. Given the breathing space that was allowed to reflect on this compromise, the Law Society is firmly of the view that the MR rule renders unworthy the LTO to any claim of a title registration.

The *raison d'être* of a title registration system is that the title register is conclusive evidence of title so that a purchaser relying on the register will acquire a title that is warranted by the legislation to be good as against the whole world, subject to only very limited exceptions. The title registration system speaks of the title being "*indefeasible*". The advantage of title indefeasibility is that this will simplify conveyancing in the sense that a person dealing with the registered owner can safely rely on the register and be saved from the trouble and expense of going behind the register in order to investigate the history of the vendor's title, and to be satisfied of its validity.

The problem with the MR rule, as the Government rightly pointed out in paragraph 23(a) of its Consultation Paper, is that no purchaser of registered property is protected by the title register against the effect of fraud prior to the transaction in which he is involved. This would work to greatly undermine confidence in the title register and the security and ease of conveyancing that the LTO aims to achieve. A purchaser may want to go behind the title register to investigate previous transactions in order to obtain greater assurance that he will not be at risk. This would amount to a reversion to the old system of investigation of title as under the current deeds registration system.

The Law Society has to commend the Administration for bringing up this very important subject for further review after the enactment of the 2004 legislation. We submit that:

- (1) a title registration system with the MR rule is unworkable and Section 82(3) of the LTO should be deleted;
- (2) the cap on indemnity should be lifted but, were it to be retained, there should be a mechanism in the legislation to ensure that the cap would be reviewed upwards from time to time to ensure it would cover the majority (say, not less than 99%) of HK properties. To justify the need to retain the cap on indemnity, the Government should disclose information and statistics from Hong Kong

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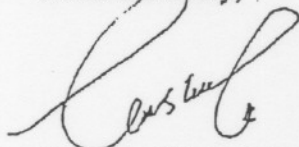
and overseas jurisdictions such as UK, Australia, New Zealand and Canada on the incidence of fraud claims on the indemnity fund under these title registration systems and/or fraud cases in property transactions generally; and

- (3) the exclusion of indemnity for pre-conversion fraud to the innocent former owner under Section 84(4)(c) of the LTO should be removed.

We, however, regret to note the Administration's indication that the majority of responses to the Consultation are in favour of retaining the MR rule. We have concern whether, with the emphasis of the Government's Consultation Paper being on the MR rule and on introducing "*deferred indefeasibility*" as an "*exception to the MR rule*", the consultation process has really brought home to the mind of the stakeholders the importance of the principle of indefeasibility of title to a title registration system and the adverse implications the MR rule would have on our new system. Indeed, rectification and MR rule are in substance exceptions rather than the rule, and this has led to confusion by creation of exceptions upon exceptions, hence losing sight of the ultimate objective of title registration.

Given the importance of this subject, we feel obliged to copy this letter for the attention of the LegCo's Joint Subcommittee on Amendments to the Land Titles Ordinance and would recommend that our proposed removal of the MR rule from the LTO should merit very serious consideration.

Yours sincerely,



Christine W. S. Chu
Assistant Director of Practitioners Affairs