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SHL/LOL

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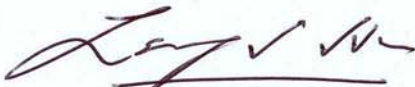
Mr. K A Salkeld, J.P.
Land Registrar
The Land Registry
28th Floor, Queensway Government Offices
66 Queensway
Hong Kong

Dear Mr. Salkeld,

Re: Consultation Papers on Amendments to Land Titles Ordinance

I enclose herewith my views on the Consultation Papers on Amendments to Land Titles Ordinance.

Yours sincerely,



S.H. Leung
Encl.

VIEWS ON CONSULTATION PAPERS ON AMENDMENTS
TO LAND TITLES ORDINANCE

1. The Development Bureau has issued consultation papers on amendments to Land Titles Ordinance. There are the following suggested amendments:-
 - (i) The proposed amendments relating to Conversion Mechanism; and
 - (ii) The proposed amendments relating to Rectification and Indemnity Provisions.
2. The object of the system of Registration of Title to Land in Hong Kong
 - (1) The object of title registration is to introduce a title that is guaranteed in place of one which has to be investigated privately upon every purchase or mortgage of the land. In other parts of the world which have the system of title registration, the title is guaranteed by the State but unfortunately the Hong Kong Government is unwilling to guarantee and the guarantee is given by the Land Registry Trading Fund. Once a title has been put on the Title Register, it is, subject to several exceptions (e.g. overriding interests and power of rectification) guaranteed by the Land Registry Trading Fund. By looking at the Land Register, a purchaser/mortgagee can quickly and easily ascertain the nature of the title he is intending to purchase or accept as security and see what limitations, incumbrances or claims affect that title. Most importantly, he can largely ignore instruments and interests not registered on the title.
 - (2) A further important facet of a system of registration of title is that title to land no longer results from the execution of a valid deed of transfer, but from the registration of that transfer. Similarly, incumbrances such as charges, charging orders and leases are effected, not by the deed or document creating the incumbrance, but by entry in the Register.
 - (3) (a) The Conversion Mechanism under the existing Ordinance – After the expiration of 12 years from the commencement of the Land Titles Ordinance, every property for which the register has been kept under the Land Registration Ordinance would become registered land except:-
 - (i) property against which a caution against conversion that had not lapsed was registered under the Land Registration Ordinance.
 - (ii) property for which instruments had been submitted for registration before the conversion date but had not yet completed registration or been withdrawn; and

- (iii) the subject matters of registers that had been kept under the Land Registration Ordinance but which do not meet the definition of land that may be registered under the Land Titles Ordinance;
- (b) The proposed amendments relating to Conversion Mechanism – The consultation paper suggests that with the exception of New Land as defined by Section 2 of the Land Titles Ordinance i.e. land granted by Government on or after the Appointed Day, all land:-
- (i) will be automatically converted from the present Land Registration Ordinance Register to the Land Titles Register in about 3 years. Transactions in the Converted Land would be the same as at present i.e. under the Conveyancing & Property Ordinance until title is upgraded.
- (ii) after the designated date (tentatively 12 years after conversion), an application can be made to the Land Registrar to upgrade the title.
- (c) Reasons for the proposed amendments to the Conversion Mechanism -
- It appears that the reasons for the amendments arise from the practical difficulties of the Land Registrar as set out in paragraph 5 of the Consultation Paper on Conversion Mechanism. It is submitted that such difficulties can be resolved and even if they cannot be resolved completely, the advantages of the present conversion mechanism as enacted outweigh such difficulties.
- The issues set out in the said paragraph 5 are:-
- (i) Indeterminate Ownership
- It is stated that cases have been found where it is not clear who the true owner is and the number of such cases that has been found is less than 500. However, it is submitted that the Land Registrar has 12 years from the Appointed Day to find out whether there are any more of those cases and during the meantime, a Land Registrar can find ways to deal with the 500 problem cases.
- (ii) Unknown Liabilities
- It is submitted that under Section 25 of the Land Titles Ordinance, the person who is registered as the owner shall hold his legal estate or equitable interest and rights subject to,

inter alia, any registered matter affecting the land, any overriding interest and that the deeming provision in Schedule 1 to the Land Titles Ordinance preserves all existing interest on conversion until the transfer. A person who claims an unregistrable interest on land can register a caveat against the land and any person who claims any title to land or a beneficial interest in any land can register a caution against conversion. The liability of the Land Registrar therefore is rather limited.

- (iii) Impracticality of pre-conversion screening - my comments on Unknown Liabilities applies to this issue.
 - (iv) Mismatch between costs, possible liabilities and financing – I submit that the fear of insufficient Trading Fund is the real concern of the Land Registrar. If from the Appointed Day, a fee for the Trading Fund shall immediately be imposed on all transactions on all land whether they are new land or not, the Land Registrar would have less worries about the insufficiency of fund to meet the possible liabilities. The public would be happy to pay more in order to have better protection.
 - (v) Conversion of Caveats – It is submitted that we can have transitional provisions to establish how the priority is to be determined among persons claiming unregistered interest instead of having the proposed conversion mechanism.
- (d) Disadvantage of the proposed Conversion Mechanism
- (i) The application for upgrading is voluntary and it is unlikely that Solicitors and their clients would be happy to apply for upgrading of title unless they are absolutely sure that the title to be upgraded is perfect. Different persons have different standards as to good holding titles. Even eminent judges from time to time hold different views whether the vendor can pass good title to the Property to be sold.
 - (ii) There is no provision for appeals if the Land Registrar has refused to upgrade the title.
 - (iii) One does not know how long it would take the Land Registrar to make a decision to upgrade the title. At present, if Solicitors for the purchaser is of the view that the vendor can pass a good title, he would complete the transaction but if

at the same time, an application is made for the title to be upgraded, Solicitors acting for the purchaser as well as his client and his mortgagee during the meantime have to bear the risk of refusal by the Land Registrar to upgrade the title.

- (iv) Until all the land shall have been applied for upgrading and such application shall have been approved, there is an indefinite period of parallel operation of the Land Registration Ordinance and Land Titles Ordinance..

The Land Titles System was first considered as early as 1988 and it took the Government over 16 years to pass the Ordinance in 2004; a system of gradual conversion had been discussed and rejected before and now suddenly the Government wants to go back to a system of gradual conversion. It is therefore submitted that the modified conversion mechanism as proposed should not be adopted..

3. Proposed Amendments relating to Rectification and Indemnity Provisions

(1) Points requiring clarification

Those points are set out in paragraphs 9 to 18 of the Consultation Paper relating to Rectification and Indemnity Provisions.

(2) Rectifications

(a) The rule of Mandatory Rectification is explained by the Land Registrar in paragraph 19 to paragraph 22 of the Consultation Paper relating to Rectification and Indemnity Provisions.

(b) The issues identified by the Land Registrar regarding rectification are set out in paragraphs 23 to 25 of the Consultation Paper relating to the Rectification and Indemnity Provisions.

(c) The Land Registrar suggests that the rectification rule be modified. His suggestions are set out in paragraphs 26 of the Consultation Paper relating to Rectification and Indemnity.

(3) Indemnity

The Land Registrar proposes change to be made to allow indemnity be given through the loss of property as set out in paragraph 29 of the Consultation Paper relating to Rectification and Indemnity.

(4) The Administration is inviting views on:-

(a) Whether all the modifications to the mandatory rectification rule proposed in paragraph 26 should be adopted?

My personal view is that subject to my criticism on the cap of amount of indemnity and the contravention of the fundamental principle of

conveyancing that the title of an assignee can be no better than that of his assignor, personally, I am inclined to agree with the proposal.

- (b) Whether only the modification to address the issues set out in paragraph 23(b) i.e. (where land has been surrendered or resumed subsequent to fraud) and 23(d) (deferred indefeasibility to be the rule for New Land) should be adopted?

My personal views are as follows:-

If the answer to question (a) is affirmative, there is no need to go into question (b).

- (c) The proposed clarification to various provisions set out in paragraphs 9 to 18.

Personally, I agree with the views of the Land Registrar.

Unless there are ways to solve those questions, my personal view is to adopt the suggestion of the Land Registrar that all modification as proposed in paragraph 26 should be adopted.

4. The main defects of the System of Registration of Title to Land in Hong Kong, whether or not the proposed amendments on the rectification and indemnity provisions are accepted, are as follows:-

- (1) Guarantee being given by the Trading Fund of the Land Registry instead of by the Government.

In other parts of the world which have the system of Registration of Title to Land, the State guarantees payment. In Hong Kong, guarantee is given only by the Trading Fund of the Land Registry.

- (2) Cap on the amount of indemnity
- (a) Under Section 85 of the Land Titles Ordinance, in any case where an entry has been obtained, made or omitted by or as a result of fraud by any person, the amount of indemnity may not exceed the value of the interest in the registered land immediately before the discovery of the fraud, or an amount fixed by the Financial Secretary by notice in the Gazette before the discovery of the fraud, whichever sum is the lesser. This provision, therefore, gives the Financial Secretary power to fix a ceiling to any indemnity which may become payable.
- (b) There is no definite or minimum amount laid down in the Land Titles Ordinance which the Financial Secretary may specify in the Gazette. The Land Registrar states that the intended cap amount is HK\$30 million (paragraph 7 of the Consultation Paper relating to Rectification and Indemnity).

If there is a cap on the amount of indemnity, some party, either the original owner or the subsequent purchaser for value cannot receive the damages in full.

- (3) The contravention of the fundamental principle of conveyancing that the title of an assignee can be no better than that of his assignor.
5. Possible way to solve the problem of insufficient fund to meet potential liability

If the Government shall from the commencement of the Appointed Day collect fees for the purposes of giving indemnity and the amount of fees on each case shall not be nominal, it is submitted that the problem of insufficient funds would disappear. Each of the purchasers and vendors are paying 1% on the purchase price to estate agents (while some of the purchasers and some of the valuers would bargain with the solicitors who have higher responsibility and risk for a much reduced fee), I submit that if the advantages of the Land Title System are explained to the public with a full indemnity provision by the Government with no cap on the amount of indemnity, the public could be convinced that the payment of additional fees to the Government to secure a good system in conveyancing is justified.

6. Practical problems in the Hong Kong System of Registration of Title to Land

There are the following problems:-

- (1) The problem created by existence of illegal structures.
 - (a) The problem of illegal structures has created great difficulty in conveyancing practice but it would create even greater difficulty when the Land Titles Ordinance comes into effect.
 - (b) The basic problem raised by the presence of illegal structures is two-fold:-
 - (i) is the illegal structure such as to enable the Government to re-enter and forfeit the lease (and this forfeiture would be of the whole leases: *Active Keen Industries Ltd v Fok Chi Keong* [1994] 2 HKC 67) or for the Building Authority to take action: *Incorporated Owners of Hipway Towers v Wong Chi Kit* (2000) BMAApp No LBDM 164 of 2000; and
 - (ii) is the illegal structure an encumbrance on title enabling the purchaser to avoid the contract? The answer to this question will differ where the Building Authority has registered a first charge against the title (clearly an encumbrance) than where it has not (where the answer depends on whether there is a real risk of enforcement). See *Lam Mee Hing v Keung Hing Wah* [1995] 3 HKC 247 on the registered charge, and see *AIE Co. Ltd. v Kay*

Kam Yu [1996] 1 HKC 239 where there is no registered first charge.

Even if there is no registered charge, the illegal structure may act to deny title if it is so extraordinary having regard to matters such as its nature or magnitude as to be wholly outside the contemplation of a reasonable purchaser: *Lucky Health International Enterprise Ltd v Chi Kit Co. Ltd* [2003] 3 HKC 143 (CFA).

This means that regardless of the nature of the claimed encumbrance, one which is totally unexpected by a reasonable purchaser can act to defeat the vendor's title. Further if the Authority has issued any type of order, such as an order for reinstatement, or order for repair of a slope, then this will constitute a "real and subsisting liability enabling a purchaser to avoid the contract: *Lam Mee Hing v Leung Hing Wah* [1995] 3 HKC 247.

The above passages are taken from pages 359 of a Student's Guide to Hong Kong Conveyancing 5th Edition by Sihombing & Wilkinson.

- (c) It is difficult for Solicitors or even architects to know whether some of the structures are illegal structures. An example can be given in *Mariner International Hotels Limited and Another v Atlas Limited and Another*, Final Appeal No.3 of 2006 when Section 2(1) of the Building Ordinance which defines "building works" and Section 41(3) of the Building Ordinance which makes provisions for exemption from the requirement of approval for the carrying out of the building work were discussed. In the Court of Appeal, her ladyship Le Pichon J A considered that the installation of concrete plinths for holding chiller plants, the installation of gondola posts and the opening in the roof slab for the passage of chilled water return pipes did not involve the structure of the building and they were in the building but the Court of Final Appeal took a different view because they involve the structure of the building and they being on the roof, were on the building and not in it.
- (d) Illegal structures are overriding interests because under Section 28(1)(g) of the Land Titles Ordinance, Statutory rights in favour of the Government includes any rights, under an enactment –
 - (i) of resumption, closure, entry, search, inspection, investigation, user, repair, alteration, removal, demolition, marking, naming, planning of buildings, or development, redevelopment or reinstatement of land;

- (ii) to extinguish rights or to create easements or other rights;
 - (iii) relating to costs, standards or specifications of any building, street or engineering works; or
 - (iv) affecting land or any interest in land,
- and any notices, orders or certificates relating to any such rights.
- (e) (i) Section 46(2) of the Land Titles Ordinance provides that:-
 - (a) on the first transfer on or after the date of first registration of land, the vendor has, or ought reasonably to have, knowledge of any unregistered overriding interest affecting the land and the vendor shall, at his own expense;
 - (b) notwithstanding any stipulation to the contrary in any agreement between the parties and whether under subsection (1)(b) or otherwise, provide the purchaser of the land with full particulars of the overriding interest;
 - (ii) Subsection (1)(b) deals with vendors in subsequent transfers of registered land and the vendor need not provide the purchaser with any overriding interest if it is stipulated in the Agreement for Sale and Purchase.
 - (iii) If there are illegal structures, the vendor has a duty to give such particulars to the purchaser.
- (f) Solicitors acting for vendor on the first transfer of registered land are in difficulty because under the Land Titles Ordinance, Solicitors on one hand, as pointed out before, would not know whether some of the structures are illegal structures and whether some of the works are exempted works and on the other hand, illegal structures are overriding interests under the heading “Statutory Rights in favour of Government” and such vendor has to give particulars of these illegal structures to the Purchaser.
 - (g) To identify what is an illegal structure inside a flat which client agrees to be sold is complicated enough but worse still, the presence of an illegal structure on the Common Parts may or may not affect the title and the vendor on the first transfer on or after the date of first registration of land has to supply to the purchaser full particulars of the overriding interest under Section 46(2) notwithstanding any stipulation to the contrary in the Agreement. One co-owner may be made to pay the total costs of remedial works in the common parts carried out by the Building Authority under the Building Ordinance (page 348 Kent on Building Management). Although whenever there is an order served

under Section 24 of the Building Ordinance, the Building Authority cannot take action against the owners of the other unit in the same building: *Active Keen Industries Ltd. v Fook Chi Keong* (1994) 2HKC 67 yet in theory, the power of the Authority to take action against the owner of the offending unit may cause loss to the other tenants in common because if the party served does not comply with the order and the Authority takes action then all tenants in common might be involved in any payment due to the Authority (page 361 A Student's Guide to Hong Kong Conveyancing 5th Edition by Sihombing and Wilkinson)..

- (h) Further complications would arise when illegal structures have been found after the first transaction of the Registered Land under the Land Titles Ordinance. The property might have passed many hands and it is difficult to know who erected the illegal structures. The vendors after the first transfer would be entitled to provide expressly in the sale and purchase agreement that the vendors need not provide the purchaser with the particulars of any overriding interest affecting the land of which he has or ought reasonably to have knowledge (he is entitled to do so under Section 46(1)) and that the purchaser accepts the title of the vendor. Probably the vendors on the first transfer and Solicitors acting for such vendor would be subject to enquiries from future purchasers. In the above example, who is liable under the system of Land Titles Ordinance? Under the system of the Land Titles Ordinance, the title is supposed to be guaranteed.
- (i) As regards the problem created by illegal structures in Hong Kong, I remembered that when the system of Registration of Title to Land was first considered many many years ago, it did not appear to us that there were many litigations regarding incumbrance on title resulting from illegal structures but nowadays a lot of litigations arise from existence of illegal structures. Illegal structures can be incumbrance and in the extreme case may enable the Government to re-enter the land and the registered owner may lose his registered land..
- (j) It does not appear that an illegal structure is an overriding interest under English legislation. Furthermore, the statutory right in favour of the Government is too wide.
- (k) The problem of illegal structures on Registered Land can be resolved if statutory rights in favour of the Government (or at least those concerning illegal structures) would be removed from the list of

overriding interest and Government must protect its right by registering the incumbrances or by entering inhibitions restriction or non-consent cautions against the land.

(2) The classification of Chinese custom and customary rights as an overriding interest affecting land under Part II of the New Territories Ordinance (Section 28(i)(a) of the Land Titles Ordinance).

(a) Chinese custom or customary rights are classified as an overriding interest – The Land Titles Ordinance has protected these customary rights by designating them as overriding interest so that they do not have to be registered to remain enforceable. However, it is suggested that the Government should inform the public what are the Chinese custom or customary rights. The elders in the New Territories and the experts in Chinese custom or customary rights and Government officials who have experiences in these matters are getting old and their numbers are dwindling. On the other hand, vendors on the first transfer on or after the first registration of land are under duty to provide particulars of overriding interests to the purchasers notwithstanding any stipulation to the contrary in the Agreement for Sale and Purchase.

(b) It is submitted that the above problem may be resolved in one of the following ways:-

(a) such rights are removed from the list of overriding interests and those claiming such rights should protect themselves by entering inhibitions restrictions or non-consent cautions against the land.

(b) Government would inform the public what are the Chinese custom and customary rights?

(3) Possible increase of Solicitors' liability under the system of Land Titles Ordinance:-

(a) Requirement to give particulars of overriding interest to purchasers by the vendors on the first transfer on or after the date of first registration of land.

(b) Increase of liability in the example given above relating to illegal structures.

7. Further suggestions

It is further suggested that:-

(1) The revisions of the Land Titles Ordinance should be proceeded as soon as possible after Government has decided whether to adopt the proposed amendments to the Land Titles Ordinance as set out in the Consultation

Papers. I understand that due to the change of the draftsman, the terminology used in the amendments to the Land Titles Ordinance is quite different from the original Ordinance.

- (2) The Statutory forms under the LTO should be completed as soon as possible because some of the forms might require amendments;
- (3) Based on the present Ordinance and the present draft statutory forms, mock transactions should be conducted as soon as possible. It may be more convenient to deal with the mock transactions in the New Land first. Through those mock transactions, one would be able to find out whether the present Land Titles Ordinance would need any further amendments. The more mock transactions, the better.

However, I must express my thanks to the Land Registrar and those assisting him and the other members of the Working Party to the Land Titles Ordinance and its proposed amendments for their unfailing and consistent efforts in coping with such a difficult and unique subject. I said unique because although other countries have the system of Registration of Title to Land, the Hong Kong system of co-ownership of multi-storey building is not found in any other part of the world.

Dated this 25th day of March 2009



S.H. Leung

Former member of the Registrar General's Working Party on Titles Registration
Former member of the Working Party of the Law Society's Land Titles Ordinances
Former President of the Hong Kong Conveyancing & Property Law Association Limited