

Additional Major Issues Raised by the Review

A. Concept of registration of instruments

Under the original provisions of the LTO, a disposition (the act as opposed to the instrument) is required to be registered. The instrument providing for the disposition supports the application for registration of the disposition. The instrument itself is not registered.

2. Registration of instruments is a more simple and straight-forward approach. When a transaction is to be effected by an instrument, the transaction is not effectual until the instrument is registered. Upon registration of the instrument, the interest in the registered land to which the transaction relates is registered. For a transfer, when the instrument of transfer is registered, title to the property is vested in the transferee. Redrafting has been proposed in the working draft of the LTAB and accepted by all parties.

B. Instruments not effectual until registered

3. Section 32(1) of the LTO provides that no disposition shall be effectual unless and until the disposition is registered. Redrafting of section 32 has been proposed to stipulate that, with the exception of transmission and overriding interest, no instrument shall be effectual to affect a registered property or registered charge unless and until the instrument is registered. However, there are certificates, orders, notices and other documents under other enactments that at present are effective without being registered. The treatment of each of these documents under the title registration system is being reviewed.

C. Date of registration

4. Under the LTO, the Title Register is conclusive of all matters registered. No disposition will be effectual unless and until the disposition has been registered. That being the case, the date of registration is important and needs to be certain.

5. Section 35 of the LTO stipulates the priority of registered matters. The order of presentation of the applications to the Land Registrar is important in according priority irrespective of the dates of the instruments. That means the date of presentation determines the priority whereas the date of registration (whatever that means) confers title to the land.

6. Unless there is to be instantaneous registration, there will be a turnaround time between the date of presentation and the date of physical registration. Given the turnaround time, if the date of registration were the date of physical entry in the Title Register, that would mean an ownership vacuum during that period. There would be no certainty of title until completion of registration. Consequently we intend to propose in the LTAB that the date of registration is to be the date of presentation. There would then be certainty as to the date on which a person became a registered owner. The date will be determined directly by the interested person (through his solicitors) as it is the same date that he chooses to present his application for registration.

D. Overriding interests

7. The LTO provides that all registered property shall be subject to overriding interests referred to in section 28 of the LTO. This is irrespective of whether the interests are entered in the Title Register. Included in the list are rights under enactments relating to resumption, extinguishment of rights or creation of easements, and costs for works, and any notices, orders or certificates relating to these rights. The provisions in other enactments in relation to these rights have been examined, and conflicts have been found between them and the LTO. Examples are:-

(a) *Necessity of registration*

Some ordinances mandate registration but under the LTO overriding interests need not be registered.

(b) *Registration of statutory charge*

It is not clear how certain statutory charges are to be treated.

(c) *Discharge of statutory charge*

In some ordinances it is clear that a charge must be registered but it is not clear how the discharge of this charge is to be effected.

(d) *Re-entry or vesting*

The Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap.126), makes clear provision for registration of a memorial of re-entry. But, re-entry or vesting may be cancelled and there is no clear provision to deal with this.

8. Revisions to address these conflicts are being examined.

Prescriptive rights

9. Having regard to the case of Kong Sau Ching v Kong Pak Yan [2004]1 HKC 119, there has been a call to expand the list of overriding interests to specifically include rights acquired by prescription. It has been decided that it is unnecessary to expand the list of overriding interests at this stage. If such a claim arises, the claimant may register a non-consent caution against the property. If a prescription right are established through court proceedings, then the court order may be registered against the property.

Adverse possession

10. The Law Reform Committee has set up a sub-committee to study the law on adverse possession. A right acquired or to be acquired under the Limitation Ordinance

(Cap.347) is preserved as an overriding interest under section 28(k) of the LTO. The Land Registry will keep in close contact with the Sub-committee and consideration will be given in due course to any recommendations that may be made requiring additions to the LTO.

E. Severance of joint tenancy

11. Under section 8(1) of the Conveyancing and Property Ordinance (Cap.219), joint tenancy may be severed at law by notice served by a joint tenant on the other or an instrument. It is proposed to include provisions in the LTO to deal in a general way with severance of joint tenancy. However, the registration requirements under the LTO raise question as to when severance takes effect, whether upon the execution of the instrument of severance or its registration, or upon the service of notice or the alteration of the entry referring to the joint tenancy. Amendments to clarify the position will be made in the LTAB.

F. Consequential amendments in other legislation

12. Schedule 3 of the LTO provides for amendments to other legislation consequential upon the enactment of the LTO. During review, a number of issues have been identified where further amendments to clarify the position is needed. These include:

(a) *Interfacing with other ordinances*

Some provisions in the LTO state that the LTO would not affect or prejudice the operations of other ordinances. Whether this is appropriate in each case requires review. Other examples of interfaces that require review are where the registration of an instrument referred to in another Ordinance is mandatory but it may be an overriding interest in the LTO, which is not required to be registered; or how the effect of registration provided for in another ordinance is to be reflected in the LTO register; and, how charges

arising under other Ordinances are to be registered and discharged under the LTO. Any conflict or inconsistency should be removed.

(b) *Reference in other enactments to registered instruments*

It is common that other enactments refer to rights under an “instrument registered under the Land Registration Ordinance”. Clarity is needed as to whether such reference, in the context of the LTO, means “instrument registered under the Land Titles Ordinance” or “instrument supporting an entry in the Title Register” or both.

(c) *Creation of charges*

Different enactments adopt different approaches for creation of a charge. While some ordinances provide that a charge is created when certain events happen or upon the registration of certain instruments, there are ordinances, such as the Water Pollution Control Ordinance (Cap.358), which provides that a registered copy of a certificate itself constitutes a legal charge as defined in the Conveyancing and Property Ordinance (Cap.219). This inconsistency with the LTO should be removed.

(d) *Definitions of “Owner”*

Some ordinances contain a definition of the expression “owner”. In the context of the Land Registration Ordinance (Cap.128), an owner is still an owner even if he is not registered under that ordinance. In the context of the LTO, an owner is not an owner unless he is registered. The meaning of “owner” under each ordinance needs to be clarified.

(e) *Use of the term “registrable”*

Some Ordinances refer to an instrument as being “registrable in the Land Registry”. In the context of the Land Registration Ordinance (Cap.128), the expression can mean either an instrument that has been registered or an instrument that has not been registered but could be submitted for registration. In the context of the LTO an instrument not registered is

ineffectual. Each ordinance needs to be checked to ensure that the LTO does not have unintended consequences.

(f) *Special provisions on Priority*

There are enactments which provide for their own priority rule. For example, the Bedspace Apartments Ordinance (Cap.447) provides that a charge under that ordinance shall have priority from the commencement of the day following the date of its registration. That is not the case under the LTO. It is uncertain whether in the context of the LTO a special priority rule should apply to such charge and if so, how the special priority rule is to be dealt with as against priority under the LTO.

G. Court orders

13. To protect the integrity of the Title Register and ensure that interested parties are not caught by hidden matters, a court order should be registered before it is effectual. Revision may be needed to clarify this. Before pronouncement and registration of the court order, the claim under it can be protected by registration of a non-consent caution.

H. Transmission

14. Under the LTO, transmission does not have to be registered to be effectual. Registration only confirms the vesting of rights that are vested by court order, enactment or operation of law. However, one of the purposes of the LTO is to provide certainty of title to property, and to provide certainty as to which party a purchaser of property should deal with. If transmission takes effect without registration, there is a risk that the registered owner with whom the purchaser is dealing no longer holds the title to the property as a result of transmission. If transmission is required to be registered before it is effectual, then the position under the common law and other enactments would be disturbed. A balance has to be struck. We intend to amend the LTO to provide that, save

and except for transmission by court order, registration of transmission will only confirm the vesting. For transmission by court order, the order has to be registered before transmission is effectual.

I. Cautions

15. The LTO provides that upon the registration of the instrument providing for the disposition to which a registered consent caution relates, the priority of all instruments or matters registered after the consent caution will be postponed as against the disposition. The postponement will only take effect when the disposition is registered. During the time between the registration of the consent caution and the registration of the disposition, other instruments, such as a court order, can be registered. These instruments may affect the registrability of the disposition to which the consent caution relates. After review of provisions for the protection of dispositions in other jurisdictions, the Land Registry has concluded that no additional mechanisms are needed under Hong Kong's circumstances.

J. Caveats

16. At present, unwritten equities are not registrable. If a purchaser for value of a legal estate has made reasonable enquiries and has no notice of the unwritten interest, then he and his successors in title would not take subject to it.

17. Under Schedule 4 to the LTO, provisions for registration of caveats have been added to the Land Registration Ordinance (Cap.128) to allow an alleged interest holder to give notice of his unwritten equity. The provisions are not intended to substitute or to disturb the present law on unwritten equities so that an interest holder does not lose his interest by non-registration. A purchaser has still to make the necessary enquiries.

18. Upon conversion to title registration, the registered caveat will be deemed a non-consent caution under the LTO and all matters registered after the conversion would take subject to that interest. If no caveat was registered before conversion, then that interest would be defeated by a purchaser for value after conversion.

19. Provisions have been made in the Land Registration Ordinance (Cap.128) to determine priorities as between competing unwritten equities whilst the Land Registration Ordinance applies to the LRO land to which the unwritten equities relate. However, when the LRO land is deemed registered land on conversion, the priority as between competing unwritten equities, the caveated unwritten equities, the newly registered non-consent caution and the deemed non-consent caution remain problematic. Proposals for addressing this have been prepared but require further consideration.

K. Definitions in the LTO

20. The definitions in the LTO have been given careful scrutiny to ensure that they can be applied as intended to a particular section of the LTO.

L. Liability of Government

21. Section 11 of the LTO restricts Government's liability to those under the indemnity provisions. This may have the effect of excluding Government from other tortious claims. This is not intended and amendment may be needed to remove this limitation.

M. Filing of standard terms documents

22. Many terms of an instrument are standard such as a charge to a particular bank. A proposal has been made for banks to file a set of standard terms of frequently used documents and has been agreed by the HKAB. Provisions have been set out in the

working draft of the LTAB. Practical arrangements and possible provisions under the LRO are now being considered.

N. Restriction order

23. The LTO provides for the Land Registrar to have the power to prohibit dealings. Having concluded that such a power is not that different to that of the court if it were to make an inhibition order, it has been decided that the power of the Land Registrar to make restriction orders can be deleted. The court's decision is final whereas the decision of imposing a restriction order by the Land Registrar is not. To review the Land Registrar's exercise of the power in an application for a restriction order will add to costs unnecessarily.

O. Rectification by the Land Registrar

24. Section 81 of the LTO provides for the Land Registrar to rectify errors or omissions in the Title Register only in limited circumstances, such as where the error or omission is of a clerical nature or the error or omission would not materially affect the interest of the owner. In all other cases the interested parties would have to resolve the error or omission by court proceedings. It was recognised that there are certain errors or omissions which fall outside these two categories which justify being rectified without resorting to court proceedings. For example, when the Land Registrar is of the view that it would otherwise be unjust not to rectify. Amendments to deal with this will be put forward in the LTAB.

P. Indemnity provisions

25. Apart from addressing the issue raised in the Bills Committee report (item 19 of Annex A) the review has examined the entire operation of the indemnity provisions. The Land Registry has sought views from stakeholders on proposed revisions to clarify the operation of these provisions.

Q. Exclusion

26. Arising from the investigation of problematic land registers (paras. 13 to 16 of covering paper) it is clear that the LTO as it stands does not have provisions to enable the Registrar to handle certain cases where he cannot determine before the statutory conversion date who is the owner to be entered in the title register. These cases are where there is more than one register in respect of a single property, or more than one owner found on a single register. As well as undertaking detailed scrutiny of potential cases, the Land Registry is preparing new provisions to be added to the LTO to set out how any unresolved cases are to be handled at the time of conversion. The intention is to give the Registrar power to issue a notice that a particular register will not be converted on the statutory conversion date. The circumstances in which such a notice may be issued will be specified and the Registrar will be required to give sufficient notice for affected parties to act before the conversion date should they wish to do so. Affected parties will be able to make representations to the Registrar or to go to Court [for a declaration].

R. Practical implications

27. Practical implications of the operation of the LTO have been considered to identify whether any further amendments are needed and what needs to be covered in guidelines. Issues that have been addressed include:

- (a) *Commencement date and expiry date of Government lease term*
Section 4(2) of the LTO needs to be amended to make more provisions for all past arrangements as well as arrangements for new land.
- (b) *Historical records*
The arrangements for maintenance and access to historical records need to be set out.

(c) *Unposted applications list*

In cases where a relevant register has not yet been created or cannot be found or exists, pending applications cannot be entered in the Title Register. It has been decided that an unposted applications list should be maintained so that such pending applications can be recorded for reference.

(d) *Power to reject/withhold applications*

The criteria and the procedures for withholding or rejecting an application are being drawn up.

(e) *Registrable instruments or matters*

The registrability of each instrument in current use is being considered so as to provide clear guidance.

(f) *Separate registration*

An easement or covenant may be created in an instrument of transfer. It may not be desirable to treat these interests as registered when the instrument of transfer is registered. The interests themselves are not referred to in the application for registration of transfer. They should be separately registered. Procedures, forms and fees for dealing with this are being drawn up.

(g) *First registration of new land*

Part 4 of the LTO deals with registration of title to new land. Applications for registration of title to new land will be presented by the Director of Lands. The procedures and timetable for doing this are being tested.

Extension areas may be granted by the Government as extension to new land. Consideration is being given to how to register extension areas and whether there are any practical difficulties to apply the provisions for registration of title to new land to extension areas.

(h) *First registration of long term lease*

Provisions need to be added to allow presentation of an application for registration of a long term lease by a person other than the first lessee.

(i) *Title certificate*

Section 29(1) provides for the issue of title certificates. Some revisions to allow applications only on or after the first transfer after conversion are being considered. Procedures for issue, cancellation and management of the certificates are being drawn up. .

(j) *Satisfaction of registered charge*

Under section 41 of the LTO, if the Land Registrar is satisfied that the charge money has been paid in full or partly paid or the conditions of the charge has been completely or partly fulfilled, he shall remove or alter the entry in the Title Register referring to the charge. In cases where mortgages are noted in the Block Government Leases and the amount of the mortgage money or the conditions of the mortgage are not available, the Land Registrar will have difficulty in the exercise of the power. Investigation as to whether the mortgage money has been paid or the conditions of the mortgage have been fulfilled is beyond the Land Registrar's administrative role. It was decided to delete section 41 and to expand section 12A of the Conveyancing and Property Ordinance (Cap.219) to the effect that in the case of registered land, the court shall have the power to declare the land to be free from a registered charge and make an order for discharge if the court is satisfied with fulfillment of part or all of the conditions to which the charge relates.

(k) *Stamping and Stamp duty charges*

Section 60(1) of the LTO provides that no instrument required by law to be stamped shall be accepted for registration unless the instrument is stamped. Consultation with the Collector of Stamp Revenue is ongoing to ensure compliance with the provision as well as to ensure that registration

is not delayed by the stamping process. Consultation is also ongoing regarding the operation of Section 102(1)(m).

(l) *Unrestricted power of sale by personal representative*

Under section 66 of the LTO, a personal representative who in that capacity is registered as the owner has the unrestricted power of sale. The Secretary for Home Affairs has advised that the power of sale should be restricted, subject to the Probate and Administration Ordinance (Cap.10). Whether amendment is needed is under examination.

(m) *Transmission on bankruptcy*

Section 67(1) of the LTO provides that a trustee in bankruptcy shall be entitled to be registered as the owner with the addition after his name of the words “as trustee of the property of a bankrupt”. The entry of the name of the trustee in the Title Register means that on each change of appointment of trustee, an application needs to be presented to the Land Registry to alter the entry. This will cause practical difficulties. A resolution is under discussion with the Official Receiver.

(n) *Address for service*

The practicality of Section 95 of the LTO, which empowers the Land Registrar to issue notice to a person as described therein to provide the Registrar with his address for service is doubtful since the Land Registrar may not have that person’s address in the first instance for issue of the notice. Also, there is no certain mechanism for keeping addresses up to date.

(o) *Conveyancing practice*

It is necessary to match the provisions of the LTO with the conveyancing practice. Mock conveyancing transactions with the assistance of solicitors’ firms in key areas such as combination and division of land, new development of land, sale and purchase and charge, are being planned.

Conveyancing forms and application forms for registration are being drawn up.

Land Registry

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