

SUBMISSIONS BY THE LAW SOCIETY'S WORKING PARTY ON LAND TITLES BILL ON THE ADMINISTRATION'S LATEST PROPOSAL ON THE REVISED LAND TITLES BILL

The Law Society's Working Party on Land Titles Bill has considered the latest proposals put forward by the Land Registry in its December 2001 paper entitled "*Preparation for the Revised Land Titles Bill*" and has the following comments:

A. *CONVERSION*

The Proposal

Under the present proposal, there will be a dual system of deeds registration and title registration. The Land Registration Ordinance will continue to apply to properties that are not brought under the Bill and conversion to the title registration system will be by way of:

- (a) an application for first registration under the title registration system of the first assignment of land on or after the Bill comes into operation; or
- (b) an application for first registration under the title registration system on the issue of a new Government Lease; or
- (c) an application for voluntary conversion to the title registration system

With the exception of case (b), a certificate of good title from a solicitor certifying that the title is in order is a prerequisite for the purpose of conversion.

Comments of the Working Party

The Working Party is disappointed with the new proposal, which has not adopted the Society's previous concerns over a dual system when the idea was raised during the last consultation in 1999. These concerns are that:

- (a) a dual system will result in properties under the 2 systems being associated with different values with converted titles having greater value than those that remain under the old system;
- (b) the increase in value resulting from the issue of a certificate of good title will place solicitors under great pressure from their clients to issue such a certificate although it may not be justified.
- (c) Affected owners may not readily understand why good title certificates cannot be issued in respect of their properties and why their properties cannot be converted to the new system;
- (d) the failure to adopt a midnight conversion system defeats one of the primary benefits of the Bill, namely, the removal of technical defects in title.

Not only does the current proposal fail to address the above concerns, it appears to be worse than the last proposal in that the idea that all unconverted land will be deemed to be converted after 15 years under the previous proposal has been abandoned.

The Working Party would like to stress that under the common law system, the concept of good title is a relative matter and requires a certain degree of judgment. Instances of properties with absolute good titles are rare if not unknown. It is envisaged that solicitors, if required to certify good title, will act very cautiously in most cases and will include a number of qualifications in the title certificates.

The current proposal has not clarified what will happen to properties with technical defects in title or otherwise for which no good title certificate can be issued. Nor has it confirmed the exact contents required of a good title certificate. It seems unlikely that such properties will be acceptable for conversion purpose. However, if this is the case, the new system will effectively deny certain properties from being converted to the title registration system and the very purpose of title registration, i.e., to clear up all technical defects in title, will be defeated. The proposal to do away with the 15-year conversion period will also mean that it will take an indefinite time before all properties in Hong Kong will have registered title.

Presumably, transactions concerning properties with qualified title certificates will continue to be registered under the old system. Otherwise, the new system will make it impossible for any affected owners to deal with their properties. However, the new proposal, in compulsorily requiring an application for registration under the new system to be made upon first assignment of land after the Bill has come into operation, will have an adverse effect on properties that remain under the old system, as the reason for these properties not being converted to the new system will be obvious.

The Working Party believes that the proposed dual system will create confusion among the public. Given that the concept of good title is not easily comprehensible and that different members of the profession will hold different views on the status of a particular title, there is potential for the public “shopping” around for any one who will agree to issue a good title certificate. This will exacerbate the possible problem of properties which have not been converted being attributed a lower value than those that have.

In the light of all the above concerns, the Working Party believes that the previously proposed midnight conversion system should be preferred against a parallel system. While the Working Party understands that the concept of a dual system was introduced to address the concerns of other consultees that interested parties might be deprived of their rights, it is noted that under the midnight conversion proposal, property rights will be “preserved” and not “taken away” by midnight conversion. Rights can only be taken away by fraud when the property is transferred to a purchaser for value and in good faith. In order to enable interested parties to have sufficient time to prepare for the change, the Working Party reiterates that a good compromise is for midnight conversion to be delayed. The Administration can in the meantime publicize the effect of the new legislation.

Having one system only will also encourage possible future moves towards electronic conveyancing.

If the Administration should nonetheless insist on the adoption of a dual system, the Working Party submits that the HKSAR Government rather than private solicitors should be responsible for approving and guaranteeing title for conversion purposes. That is the practice in other jurisdictions. To overcome the problem of insufficient manpower, the Government could subcontract the relevant work to private practitioners. In this way, the pressure that might otherwise be brought to bear on the profession by clients to issue good title certificates and thus the instances of fraud will be much reduced.

B. OVERRIDING INTERESTS (“OI”)

The Proposal

The Administration proposes that certain OIs as listed in the Bill need not be registered in order to have legal affect. The reasons being given are that it may not be practicable to register some of the OIs whilst the legal effect of others are already governed by relevant law and enactment. It is also said that OIs exist in other jurisdictions.

Comments of the Working Party

The Working Party wishes to draw attention to the proposed reform by the UK Law Commission regarding OIs in paragraphs 2.24 to 2.27 (inclusive) of the Law Com No. 271 published in July 2001 on the subject of “*Land Registration for the 21st Century: a Conveyancing Revolution.*” (“*the Report*”). The UK Law Commission regards OIs as a very significant impediment to the objective that the Register should be as complete a record of the title as it can be. Some guiding principles was also suggested in paragraph 2.25 to restrict OIs as far as possible

The Working Party submits that the UK Law Commission’s proposals regarding OIs should be adopted.

C. INDEFEASIBILITY OF TITLE OF THE PURCHASER

The Proposal

The Administration has not introduced any change to its previous proposal namely, that the court will have a general discretion to order rectification of the Land Register where it is satisfied that a failure to do so would be unjust.

Comments of the Working Party

The Working Party reiterates its previous views and submits that the grounds for rectification of the Land Register should be made specific rather than open-ended as otherwise, the court will have an absolute discretion to order rectification in all cases. This will remove the certainty that title registration is intended to create. The courts should have a discretion which is exercisable in specific and limited circumstances.

D. INDEMNITY

Comments of the Working Party

Given that under the current proposal, an innocent party other than the displaced owner may suffer as a result of the Register being rectified by a court order, the Working Party submits that indemnity should also be payable to any party who is affected by the rectification order.

E. ADVERSE POSSESSION

The Working Party notes with interest the proposal of the UK Law Commission regarding adverse possession as contained in paragraph 1.13 of the Report. Under the UK Law Commission's proposal, a squatter are entitled to apply to be registered as owner after 10 years of adverse possession but the owner has to be warned of the application and given 2 years to take action.

Comments of the Working Party

Given that the aim of title registration is to make title certain and simple, the Working Party submits that the UK proposed system on adverse possession is something to be considered as it represents a very sensible compromise between competing interests.

Regarding the other proposals in the December 2001 paper concerning "Unregistered Interests", "Title Certificate", "Land Boundaries" and "Criminal Liability", the Working Party notes the position of the Administration and has no further comment to make at present. The Working Party understands that the Administration will redraft the Land Titles Bill and reserves the right to comment on the revised bill once the same is available.

**The Working Party on Land Titles Bill
The Law Society of Hong Kong
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