

**Hong Kong Bar Association's comments on  
Land Titles Ordinance – Draft Amendment Bill (16-6-06 version)**

**Introduction**

The Bar refers to the letter dated 10<sup>th</sup> July 2006 from the Land Registrar whereby the Bar was informed that a second working draft of the Land Titles Ordinance Amendment Bill ("the New Draft") has now been prepared and that apart from addressing matters that have been discussed in the Review Committee, the Law Draftsman has at the behest of the Land Registrar redrafted substantial parts of the Ordinance with a view to improving the language and structure of the Ordinance so as to make it more user-friendly. The Bar has been provided with a copy of the New Draft together with explanatory notes and it has been asked to comment on the changes.

**Preliminary Observations**

1. The Bar shares the view that the language and structure of the Ordinance as enacted in 2004 left much to be desired and the Bar welcomes the initiative taken by the Law Draftsman and the Land Registrar to make use of the time given by the review to address the concerns about the clarity of the legislation.
2. The Bar has previously submitted a number of papers covering a variety of issues prior to the enactment of the Ordinance in 2004. The Bar notes that although most of the concerns raised by the Bar have been removed by the time the Ordinance was enacted, the Bar's views have not been accepted by the Administration in their entirety. The Bar does not feel that it is its task in this paper to revisit those issues but the Bar should not be taken as having changed the position previously taken.

3. The Bar has also nominated representatives who are participating in the ongoing process of reviewing the Ordinance. It is to be envisaged that the provisions of the New Draft will be vigorously examined during future working sessions of the Review Committee where the Bar's views will be reflected by the nominated representatives. The Bar would therefore refrain from commenting on the small details such as matters of drafting and confine its comments on matters of principle.

**s13 & s19 – Priority of registered instruments and matters**

4. It is to be noted that unlike the position under the Land Registration Ordinance, there is no one month period for the registration of a registrable instrument and priority would depend entirely on the time of presentation for registration. In the case of charging order the time for presentation for registration would not just depend on the diligence of the solicitors obtaining the charging order but also on the efficiency of the court clerk in approving the formal order. Thus one should consider carefully whether one should do away with the grace period allowed for the registration of the instruments as in the case of the Land Registration Ordinance. Likewise it is also possible that declaratory orders from the court may be obtained declaring that certain land is to be subject to certain rights as from a particular date. The question that would arise is whether in such instance, the effect of such declaratory order would nevertheless be still subject to the express provision of s13(1), viz. that the interest recognised by the court order would nevertheless only have such priority as from the date of the presentation of the court order for registration. In short, the whole question of priority would merit careful reconsideration.
5. Furthermore, in view of section 19(1), it would appear that any court order registrable under this Ordinance could not take effect unless and until the same is perfected and registered. This would represent a departure from the existing law that the court order could take effect as soon as the same is pronounced by the court and that the drawing up of the order is merely a formality required

for the enforcement of the order. Section 19(1) may thus lead to some unintended consequences.

6. The effect of s 19(3) is unclear because there does not appear to be any clear provision in the Ordinance to say what interests are capable of registration under this Ordinance. Take the example of an equitable interest under a constructive or resulting trust. They are not within the definition of overriding interest in section 32. In the case of a resulting trust arising from the provision of purchase price in the acquisition of property, while it may be said that its existence is quite independent from the conveyance to the purchaser and yet the trust could only attach to the property upon the assignment of the property to the assignee. In these circumstances, is the interest of the beneficiary under the resulting trust to be considered as an interest capable of registration under the Ordinance? If not what would be the position of the beneficiary of the resulting trust under this Ordinance?

### **s.32 – Overriding interests**

7. There is no reason why easements acquired by prescription should not be made an overriding interest along with implied easements and easements of necessity. Whilst the Land Titles Ordinance is not intended to resolve the much vexed question of whether and to what extent prescription is part of Hong Kong law, special provision should still be made for easements acquired by prescription. This is because the doctrine of lost modern grant presumes that the easement was granted by a deed which has been “lost”. Under the present system, because a grant would take effect upon execution and delivery of the deed, the fact that a “lost” grant could never be registered would not prevent an easement from being acquired by prescription (although arguably any easement created by a “lost grant” would lose priority to any subsequent purchasers for value). The position would be different under the new statutory regime for registered title: inasmuch as an interest created by a deed would

take effect only from registration, it is difficult to see how the doctrine of “lost modern grant” can operate unless easements acquired by prescription are made overriding interests.

### **s.36 – Cancellation of title certificate**

8. It is unclear whether this provision covers severance of joint tenancies which requires special consideration. In principle, there is no reason why the old certificate issued in respect of the joint tenancy should not be cancelled and replaced by separate certificates which correspond with the severed estates. However, there should not be any requirement for surrender of the old certificate. Under section 8 of the Conveyancing and Property Ordinance, Cap. 219, a joint tenancy may be severed both at law and in equity by one of the joint tenants serving notice of severance on the other joint tenants. Consent or co-operation of the other joint tenants is not necessary. Where the certificate is held by a joint tenant who is opposed to the severance, the one who is exercising the right of severance would find it difficult to return the certificate. This situation is quite unlike those of transmission or transfer where the personal representative or transferee can reasonably be expected to be able to obtain possession of the certificate without much difficulty. If return of the certificate is insisted upon in cases of severance, the person wishing to sever his interest may be forced to sue for delivery up of the title certificate when litigation would not otherwise have been necessary.

### **s.43 – Transfer of registered property**

9. The definition of “transfer” means that the provision in section 43 will not cover cases such as an *inter vivos* release of his interest by one joint tenant in favour of the others by deed and the resignation of a one of several trustees or the appointment of additional trustees. As a matter of law, the release by one joint tenant of his interest in favour of the others does not operate as a

conveyance (see **Megarry & Wade: The Law of Real Property, 6<sup>th</sup> Ed. at 9-102**); and under the provisions of the Trustee Ordinance transfers of property are effected as a consequence of the resignation or appointment of a trustee. As a matter of principle, the effective date of the change of title in such cases should be the date of registration of the deed of release or the deed of resignation or appointment as the case may be and we can see no reason why this should not be so.

### **s50 – Easements**

10. Consideration should be given as to what is intended to be the consequence if an instrument providing for an easement does not contain all the information required under s50(1)(a) to (g), and upon the registration of an instrument purporting to contain all the information required under s50(1)(a) to (g), whether one must regard the information so given as conclusive. This problem is a real one because the question of the extent of the land to be burdened by the easement and the extent of the land to be benefited from the easement is often a difficult one. Likewise there are ways that a easement may be lost without the execution of a formal instrument releasing the easement.
  
11. Also is it intended that there should not be any Profit as a specie of interest in land in Hong KONG?

### **s.53 – Deeds of Mutual Covenant**

12. This section, and section 55, appears to envisage that any variation of the provisions in a deed of mutual covenant can only be effected by another deed of mutual covenant, but there is no legal requirement that this should be so. In principle, there is nothing to prevent all those who are bound by a deed of mutual covenant for the time being from modifying some right or obligation in the deed of mutual covenant by each entering into a bilateral agreement with

all the other owners in similar terms. Since all of the owners affected by the DMC would be bound, the combined effect of this series of bilateral agreements would effectively modify the terms of the DMC. Although there are Court of Appeal decisions which seem to suggest that these bilateral agreements would not bind subsequent owners, there is no direct authority on the point and it is very much open to doubt. In any event, even if subsequent owners are not bound, there is no reason why the “easement, covenant or right provided for or contained” in the deed of mutual covenant should not take effect amongst the immediate parties to the bilateral agreements.

#### **s.59 – Termination of certain leases**

13. This section appears to envisage that a lease can only be terminated by an instrument where it “provides for” such termination, but this is not so. An assignment or a purported grant of a sub-lease equal to or exceeding the length of remaining term to the reversioner would terminate the lease by merger although the instrument in question would not “provide for” termination of the lease. A vesting assent of a lease in favour of a specific legatee who is also the reversioner would have a similar effect. There is in principle no reason why these cases should be treated differently from cases of surrender.

#### **s.64 – Conditions relating to transfers and transmissions of divided land**

14. Consideration should be given to whether this provision should be extended to cover the creation of a charge over a portion of registered land or some undivided interest in registered land.

#### **s 66 & 67 Standard terms documents**

15. It is difficult to see any justification for the standard terms document to be made registrable. These documents would not be able to affect any interest in

land by themselves. No doubt it is anticipated that many documents affecting land may incorporate the terms set out in the standard terms documents and it may be thought that the registration of such standard term documents may provide a convenient source for one to find out what are the terms to be incorporated. However the down side of allowing the registration of such standard term document is that the register would be reduced into a miscellaneous register and not just a title register.

### **s 88 Effect of registration as trustee**

16. Care should be given to the wordings of section 88(2). As they now stands, they are well capable of conferring on all persons registering as trustees all the power of sale mortgage or disposal as though they are absolute owners. This would to a large extent render s56 of the Trustees Ordinance otiose.

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Hong Kong Bar Association