

AN OUTLINE OF THE FEATURES OF THE LAND TITLES ORDINANCE 2004

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Introduction

On 07 July 2004, 16 years and three months after the first meeting of the Registrar General's working party on land titles, the *Land Titles Ordinance* ["the LTO"] was enacted. The ordinance will change the deeds system of conveyancing currently in force in Hong Kong to a system of registration of title. When fully implemented, the important consequence of this change will be that an executed Assignment, which at present passes title to land, will have no effect in relation to the land, merely creating contractual rights. Instead, obtaining title to the land will require the registration of a statutory form of transfer in the land registry. This will mean that instead of having to search a chain of title deeds to establish title, only the register needs to be searched. Other amendments will result in the required use of a statutory form of instrument for all registrable dealings. Any duplicate certificate of title issued by the Registry will reflect only the state of the title at the time when the certificate was issued. However the register certificate of title will contain these details as well as subsequent notifications and registrations.

What type of system is being introduced?

It is accepted that by and large the new system reflects the principles of the Torrens system which are in force, in varying degrees, in jurisdictions such as the Australian States, Malaysia, Singapore, Fiji, New Zealand, several nations in Africa, several provinces in Canada and in other places.

The Torrens system was introduced in South Australia in 1858. Certainty of title and simplicity of conveyancing were hallmarks of the system. Although there have been some changes in individual examples of the system, the main, and general, features of the system are:

- a. a paramount register requiring registration of dealings in statutory form to effect title to or an interest in land;
- b. an indefeasible title, subject to a proviso in the case of fraud by the registered owner, which is good from attack by all;
- c. statutory protection by way of entry of a caveat for an unregistered dealing. As Equity was to be barred from the system, some device was needed to give protection to an interest prior to registration, and the caveat fulfilled this function;
- d. the possibility of rectification of the register where necessary, either at the initiative of the registrar or under court order;
- e. an assurance system providing compensation to party suffering loss in certain cases; and
- f. dealings with the land, such as mortgages and leases, required registration.

Many of these features of the Torrens system are present in the LTO, though with variations in some instances.

When will the legislation take effect?

The legislation will be implemented in three stages.

1. Stage one - the "freeze" on the implementation of the LTO; at present this is scheduled to last two years;
2. Stage two - the incubation period with partial implementation of the LTO; at present this is scheduled to last twelve years; and
3. Stage three - total conversion to, and implementation of, the provisions of the LTO.

The initial two years of the new legislation will be a time for preparation for the introduction of the new system. During this “freeze” on implementation, the current system of conveyancing will continue as at present for all land, and the LTO will remain inactive awaiting the date of implementation. This will be on the “appointed day” which remains to be gazetted. The time will be spent drafting regulations and forms, training staff, providing public education about the new system, and drafting and enacting amendments (including several which have already been highlighted) to the legislation. After that initial freeze period, there will be a further incubation time (12 years) in which the only dealings on the new land titles register, commencing on the appointed day, will be those involving new grants of land.

However, whilst both of these periods may be shortened so that the complete change-over to registration of title may result in a far shorter period than currently envisaged, it is thought more likely that only the 12 year period will be able to be reduced. This reduction will depend on all preparations progressing well.

In any case, because there are certain steps which should be taken by those claiming interests in land where those claims have not been registered under the *Land Registration Ordinance* [LRO], it is timely to note the terms of the LTO. Amendment to the LRO will facilitate certain protective measures for those not yet registered under that ordinance. These amendments include provision for a caveat and for a caution against conversion.

The incubation period

After the initial freeze in which the current system will continue to operate for LRO land, there will be a further period, referred to as “the incubation period” in which there will still be no change for LRO land, but where the LTO will operate in respect of new grants and dealings in such land. The term “new grant of land” applies to any land alienated by the Government made on or after the appointed day, ie the date on which the LTO comes into effect which is the commencement of the incubation period.

At this time there will be two registers in the land registry – the LRO land registry and the LTO land registry.

There will be also be one major change in respect of certain transactions which are not protected at present under the LRO but which are by reference to common law principles. The amendment relates to the manner in which unwritten equities are to be dealt with.

Unwritten equities

At present, a person claiming an interest in land under a transaction which has not been reduced to writing cannot register the claim in the Lands Registry because only written claims to land may be registered. Once the LTO operates to affect LRO land, the claim behind the unwritten equity will be lost if previously it had not been registered under the LRO. To enable this, the LRO has been amended by the LTO to introduce a caveat procedure which, on registration, gives notice of the claim. So once the LTO comes into force, ie the incubation period commences, the claimant will have to register a caveat to retain the proprietary nature of the claim.

One example of an unwritten equity is that referred to as “the bus driver’s interest” which was considered in *Wong Chim Ying v Cheng Kam-wing* (1991). That interest was said to be a beneficial interest under a resulting trust. As only interests which were registered under the LRO were recognised in a contest with a bona fide purchaser of the subject land, the unwritten equity was able to be ignored by such a purchaser, even one who took with notice of it. However, in a radical decision, the Court of Appeal held that the claim to the interest was to be protected under non-statutory notice provisions; largely perhaps because it was said that the purchaser in that

case had had notice of the possibility of a claim. Despite the failure to register the interest, it was binding on the purchaser because common law principles would bind the purchaser in equity.

Once the incubation period ends and the LTO binds LRO land, a pre-existing, unwritten equity will not be permitted to affect land unless it had been caveated during the incubation period. On conversion to the LTO, the caveat will become a Non-consent caution. Without registration, the claim will be lost as a proprietary interest in the land, and the position will be the same as prevailed prior to 1991: at most the interest will be contractual.

Anyone holding such a claim, whether a current interest or one created prior to the end of the incubation period, should register a caveat against the land even if it is not clear that the interest does affect the title to the land or an interest therein. There is a wide variety of circumstances which can give rise to such equities and if the interest is thought to be proprietary, then the holder should caveat. This is so even though the owner of the land or interest can take action to have the caveat removed. Further if the caveat had been wrongfully registered the owner can seek damages against the caveator for loss suffered by its registration.

Caution against conversion

During the incubation period, anyone, who has not been registered as owner under the LRO but who claims title to the land, or a beneficial interest in it, will need to register a caution against conversion thereby putting the owner on notice of an attack on his title or on the interest. The cautioner will need to take timely court action to advance his claim. So if it has not been removed earlier, this caution lasts for one year, although it can be extended for another year by the court. Where action to support the claim has been undertaken during the currency of the caution, and a *lis pendens* has been registered, the life of the claim will be thereby extended.

The owner of the land can take action to have the caution removed, and if it has been wrongfully registered he can seek damages against the cautioner for loss suffered.

The caution does have a short life so as to cause claimants to take timely action to pursue their claims.

The full conversion

Once the incubation period has past, then subject to certain exceptions all LRO land will be converted into LTO land. The main exception applies to land which is subject to a valid caution against conversion which had been registered when the land was still LRO land, and not yet disposed of. The second exception is that if registration under the LRO of a dealing is in progress, there will be no conversion until the completion of that transaction.

From the full conversion date all dealings with the land must comply with the terms of the LTO, a duplicate certificate of title may be issued to the owner, and title will be indefeasible within the terms of section 21. The LRO land registry will become inactive, and the LTO land registry will be used for all transactions in land thereafter – save for LRO land not yet converted..

Indefeasibility of LTO land

The feature which distinguishes a registration of title system from all others is that under that system, title to the land or to an interest in the land comes from registration of an instrument in statutory form in the land registry: section 21. Without registration the interest can be the subject of a caution, consent or non-consent, but no title has passed to the claimant and his rights are compensable in contract only.

Once a person is registered as owner of the land, or of an interest in the land, that title is indefeasible. This means that it is good against attack from “the whole world” (meaning from any other party) unless

- a. the owner had obtained registration through his fraud or the fraud of another to which he was a party or by which he was bound;
- b. a mistake or omission had been made;
- c. the registered instrument was void or voidable: sections 21 and 81.

In any of these cases, the registered title is liable to be set aside when action is taken against the owner and the register is ordered by the court to be rectified under section 81.

The indefeasible title is subject to certain interests even if they have not been created by the owner. These include

- a. covenants, exceptions, reservations etc in the Government lease: section 21 (2) (a);
- b. any registered matter affecting the land; section 21 (2) (b);
- c. any overriding interest affecting the land as provided for in section 24: section 21 (2) (c).

There is a large list of these overriding interests including:

- a. Chinese custom or customary rights in the New Territories;
- b.. any public rights;
- c. easements registered under the LRO, rights of way and rights of water;
- d. easements of necessity;
- e. a wide variety of statutory rights including those for resumption, demolition, or redevelopment;
- f. a first charge under the *Stamp Duty Ordinance*;
- g. leases for terms not exceeding three years; and
- h. rights accruing or acquired by adverse possession.

The title is subject also to any dealing entered into by the owner where the other party has registered a Consent caution. It is also subject to the claim to an interest in a Non-consent caution.

There is no indefeasibility for land boundaries : sections 19 and 92.

Section 51 provides for the registration of a Deed of Mutual Covenant as an encumbrance against title. This will act as a further exception to the indefeasible title.

New grants will become indefeasible, subject to the exceptions mentioned, on registration during the incubation period. LRO land will become indefeasible on the conversion at the end of the incubation period ceases when the LTO comes into full force.

Long Leases

The LTO seeks to distinguish “long leases”, ie those for a term of not less than 21 years remaining at the time of registration granted at rack rent and for which a premium *has* been paid, granted by the owner of the land from leases of lesser terms. In substance, a long lease is a sub-lease by the Government lessee and does not confer any greater rights than usual for a sublessee. However, the reason why the long lease is distinguished under the terms of the LTO is that it is often treated more as giving rights of “ownership” than those of a sub-leasee; the payment of the premium encourages this view. Dependent on its terms, the lease can be sold, mortgaged or the subject of the sub-sub-lease and it has a marketable value.

The reference to the long lease means that in effect there will be three types of leases capable of affecting land. These are the long lease (which must be registered: sections 22 and 47), the lease for a period of more than three years (which also must be registered: section 46), and the lease for a period not exceeding three years at market rent without payment of a premium where the

lease takes effect in possession (which cannot be registered but which acts as an overriding interest under section 24). The current rule that an option in an unregistrable lease must be protected by registration will continue to operate.

The Indemnity Fund

Indefeasibility in a Torrens system is usually accompanied by an Assurance or Indemnity Fund, as well as by the power of the Registrar to rectify the register in limited situations.

Under the LTO a claim against the indemnity fund will be capped at HK \$30 million.

In general the indemnity scheme will provide compensation

- a. for the land where there has been an entry, or omission to make an entry, due to the fraud of any person: section 82 (1) (a). and
- b. for loss caused by the entry in or omission from the register as a result of a mistake or omission on the part of the Land Registry: section 82 (1) (b).

The current provisions of the LTO, in relation to double payment where there has been a claim against a solicitor, may be amended prior to implementation of the LTO following a pending review by the Law Society of the Solicitors (Professional Indemnity) Rules and the Professional Indemnity Scheme.

Section 82 (5) provides that professional indemnity insurers will not be able to be subrogated to the rights of a claimant against the Indemnity Fund.

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