



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

香港中環德輔道中十九號環球大廈1403室
Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

Paper for Joint Subcommittee on Amendments to Land Titles Ordinance for meeting on 29 April 2010

Background

The enactment of LTO in 2004

1. The Land Titles Ordinance ("LTO") was passed into law in 2004 but on condition that it would not be brought into effect until a comprehensive review was carried out by the Administration.

An ideal title registration system

2. Under an ideal title registration system:-
 - a. An intended purchaser is entitled to assume that the person registered as the owner in the title register is the real owner, without further investigation, so that when he buys from the registered owner, he will obtain indefeasible title to the land in question, even though the registered owner's title was tainted with defects or fraud.
 - b. To protect the innocent owner who, through this system, has lost his title, the innocent owner will be compensated in full (by reference to the market value of the land).

The Administration insists on a cap on indemnity

3. However, the Administration has insisted that:-
 - a. The Government will not take on the primary responsibility of compensating the innocent owner.
 - b. Compensation must be paid out of an Indemnity Fund which is financed by levies imposed on the users of the services of the Land Registry.
 - c. To limit the Government's exposure (including perhaps political pressure to fund any shortfall in the Indemnity Fund), a cap must be placed on the indemnity provided to the innocent owner. A tentative figure of HK\$30 million was put forward.



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REDA's consistent position - either no cap or mandatory rectification

4. REDA's position has always been that the innocent owner's interest must be protected, so that:-
 - a. there should be no cap on the indemnity, but
 - b. if a cap on the indemnity is to be imposed, there should be a Mandatory Rectification Rule ("MRR"), to the effect that an innocent owner who has lost his title as a result of fraud for which he is not responsible should be entitled to have his name restored as registered owner. In other words, the loss would fall on the purchaser to whom the cap is to apply.
5. In order to secure the passing of the LTO, the Administration (i) agreed to the MRR and (ii) under the LTO, as passed, a cap applies to the indemnity ("Compromise Situation").

The Administration proposes exceptions to the MRR

6. Since the LTO has passed, the Administration has proposed 3 exceptions to the MRR, namely:-
 - a. Where land had been surrendered or resumed prior to the discovery of the fraud. (REDA and the Law Society have questioned why this should be so where the surrender is effected not for a public purpose, but for the purpose of, say, a private land exchange.)
 - b. Where land has passed into multiple ownership prior to the discovery of the fraud.
 - c. Where the current owner was a bona fide purchaser who had not dealt with the fraudster.
7. Consistent with its position, REDA has no objection to the exceptions provided that the cap on the indemnity in respect of the 3 exceptions is removed. It is, however, not entirely clear whether the Administration will agree to the removal of the cap for the exceptions. REDA would like to have a clear statement from the Administration that the cap will be removed for the exceptions.



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Position of Law Society - no MRR and no cap on indemnity

8. As the Law Society has rightly pointed out in their letters to the Land Registrar dated 21 September 2009 and 1 March 2010, the Compromise Situation is not a good system as it fails to achieve the aim of a title registration system:-
- a. No purchaser of registered land is protected by the title register against the effect of fraud prior to the transaction in which he is involved.
 - b. This would greatly undermine confidence in the title register and the security and ease of conveyancing that the LTO aims to achieve.
 - c. A purchaser may need to go behind the title register to investigate prior transactions in order to obtain greater assurance that he will not be at risk - this would amount to a reversion to the old costly and time-consuming system of investigation of title under the current Land Registration Ordinance.

The cap on indemnity

9. REDA understands from the Land Registrar that no other major jurisdiction imposes a cap on the indemnity. Questions have been raised as to whether the Administration is over cautious when it insists on a cap on the indemnity. On this point, it would be helpful if:-
- a. The Administration would share with REDA any studies or consultants' reports assessing the extent of exposure of Government or the Indemnity Fund if the cap were to be removed.
 - b. The Administration would confirm its position that in any event, the cap will not apply to the exceptions to the MRR.

REDA's views and position

10. At the end of the day, a much better system for Hong Kong would be one for which:-
- a. there is no MRR; and
 - b. there is no cap on the indemnity either.



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11. REDA's position is that:-

- a. the Administration should seriously consider adoption of a system of indefeasible title where there is no MRR and no cap on the indemnity;
- b. but, if there is to be a cap on the indemnity, (i) the MRR should remain and (ii) no cap should apply to the exceptions to the MRR proposed by the Administration.

26 April 2010

The Real Estate Developers Association of Hong Kong