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DIVISION I

Introduction to title registration

'Land is the source of all material wealth. From it we get everything that we use or value, whether it be food, clothing, fuel, shelter, metal, or precious stones. We live on the land and from the land, and to the land our bodies or our ashes are committed when we die. The availability of land is the key to human existence, and its distribution and use are of vital importance. Land records, therefore, are of great concern to all governments. The framing of land policy, and its execution, may in large measure depend on the effectiveness of 'land registration', as we can conveniently call the making and keeping of these records.

Land registration must, however, be kept in perspective. It is a device which may be essential to sound land administration but it is merely part of the machinery of government. It is not some sort of magical specific which will automatically produce good land use and development; nor is it a system of land holding; it is not even a kind of land reform, although it may be a valuable administrative aid to land reform. In short, land registration is only a means to an end. It is not an end in itself. Much time, money, and effort can be wasted if that elementary truth be forgotten.'

S Rowton Simpson '*Land Law and Registration*'¹

1. THE DIFFERENT SYSTEMS OF CONVEYANCING: PUBLIC SYMBOLIC TRANSFERS, PRIVATE CONVEYANCING, DEEDS REGISTRATION AND TITLES REGISTRATION

Historically, there have been four general types of systems according to which land transactions in common law jurisdictions have been carried out. They may be very broadly classified as public symbolic transfers, private conveyancing, deeds registration and title registration. By considering each of these systems briefly, the advantages likely to accrue from a system of title registration can be better appreciated.

(a) Public symbolic transfers

The earliest system of land transfers was one involving publicity and requiring no permanent or written record of any kind. When communities

1. Cambridge University Press (1976) Ch 1, p 3.

were small and land transactions did not involve such sophisticated concepts as equitable interests, mortgages, leases, easements etc, land was simply transferred by way of oral declaration accompanied by a symbolic delivery of a piece of earth. Boundaries would usually be demarcated by physical markers but, if the need arose, the boundaries would be publicised by the witnesses walking round and acknowledging the boundaries. The reason why this ceremony was performed publicly in the presence of witnesses from the community was so that the witnesses could, if the need arose, testify that a transfer of the land had been made and could identify the boundaries of the land. Since the transfer depended for its validity upon publicity, the community was responsible for the protection of the rights of the individual landowners.

This procedure could be found in Roman law² and was also used for the alienation of feudal land in the early days of English conveyancing, being called 'feoffment with livery of seisin'.³

(b) Private conveyancing by way of written records

(i) The evolution of private written conveyancing

As communities expanded and cross-community land transfers were recognised and as the nature of land transactions became more varied and complex, it soon became clear that the traditional mode of oral symbolic transfer before witnesses was unsuitable and inadequate. Local knowledge and repute was an uncertain and unsatisfactory basis for the foundation of title.

To remedy these difficulties, landowners recognised that what was needed was written evidence showing the transfer of land and charters were introduced to create a permanent record of important transactions. In England in 1845, the *Real Property Act* for the first time required a deed to effect a transfer. Deeds of ownership, lease and mortgage were introduced and consequently a person who owned land was enabled to prove his ownership of land by the production of his deed of title; a tenant or mortgagee could prove his rights by production of the deed of lease or deed of mortgage. As the reports said:

[T]he purchaser shall have all the charters, deeds and evidences, as incident to the lands ... for the evidences are, as it were, the sinews of the land.⁴

2. Land was conveyed by way of 'mancipatio', a ceremony performed in the presence of the vendor and purchaser and six Roman citizens as witnesses.

3. The publicity element of feoffment was subsequently avoided by the use of private witnesses – see *Perryman's Case* (1599) 5 Co Rep 84a at 84(b). Although feoffment was often accompanied by a charter of feoffment, it was not until 1677 that written evidence of a feoffment was made mandatory by s 1 of the *Statute of Frauds*.

4. Co Lit 6a.

Once the system was introduced whereby conveyances of land were effected by a written transfer of the deeds, the former important element of publicity fell away, because it no longer rested upon the community to bear witness as to who owned the land. Conveyancing had become a private matter.

The system of private conveyancing by way of deeds evolved in such a way that an owner who wished to sell or mortgage his land was required to establish his ownership by way of written documents of title and conveyancing procedure became considerably more complicated. The twin duties of giving and showing title came to rest upon a vendor or mortgagor. He had to first produce his title documents extending back to the root of his title and then establish that his title was a good one. As the chain of title became longer and more complex, skilled persons were required to demonstrate that titles were good and skilled persons required to investigate them; conveyancing solicitors were born. Arguably with adverse consequences, this complex system of private written conveyancing, which had gradually evolved to take account of the special nature of land holdings in England, was exported to many colonies and protectorates to which English land law principles were applied.

(ii) The shortcomings of private written conveyancing

The system of private conveyancing, however, carries with it several shortcomings:

- (A) Each transaction involving the land must be individually investigated, thereby rendering the system of conveyancing slow. A check carried out privately for one transaction cannot safely be relied upon when the next transaction takes place. There is, in consequence, much duplication of time, effort and expense.
- (B) The length of the chain of title and the progressively increasing number of transactions affecting the title require careful investigation of title, rendering conveyancing transactions slow.
- (C) The need for specialist legal assistance on the part of both the vendor and purchaser in investigating title renders private conveyancing expensive. Further, since the solicitor will himself be liable to his client if he fails to check the title carefully and thereby causes loss to his client, he will need insurance. His fees will be increased accordingly.⁵

5. It is interesting to compare the position in the United States of America, into which English land law was introduced by the Pilgrim Fathers in 1620. To supplement the system of 'deeds recordation', a system of 'title insurance' has been widely introduced, whereby many companies maintain private title registers and will not only investigate the title for an intending purchaser but will also insure that title.

(D) The system of private conveyancing has brought with it considerable procedural complexity. Vendors must show and give good title unless they agree otherwise; they must reveal all defects in title of which they know or should reasonably know to purchasers; they must answer requisitions reasonably raised. Further, since title documents are held by the parties, their solicitors or by banks, the risk of their being lost or destroyed is not negligible. To reduce this risk, certified copies should be made, but a plethora of copies of title documents inevitably increases the possibility of fraud.

(iii) Conclusion

In summary, it can be said that the system of private documentary conveyancing is generally slow, expensive and complex.

(c) Deeds registration

(i) The introduction and administration of a system of deeds registration

Although deeds registration in England never achieved widespread introduction,⁶ many jurisdictions into which English land law and conveyancing was introduced responded to the problems inherent in the system of private written conveyancing by introducing a system of deeds registration. Under a system of this nature, a Deeds Register is established in which all deeds affecting interests in land are registered, thereby putting on record all transactions affecting land. The registration is based either upon the parcel of land involved or upon the names of the persons who have executed the deed.⁷

Deeds will conventionally be recorded either by hard copying or microfilming the entire document or by entering on the register memorials containing a summary of the more important particulars found in the deed. This register might, or might not, be open to public inspection. In Hong Kong it always has been.

6. Deeds registration was introduced in Middlesex in 1708 by the *Middlesex Registry Act* and in Yorkshire in 1884 by the *Yorkshire Registries Act*. In contrast with England, deeds registration was introduced for the whole of Ireland by the *Registration of Deeds Act (Ireland) 1707*. The legislative ancestry of deeds registration in Hong Kong is described by WK Thompson in *The Land Registration Ordinance of Hong Kong: Historical and Legal Aspects* (1974) 4 HKLJ 242 at 244-7. Thompson concludes that the Hong Kong *Land Registration Ordinance 1844* owes much to the Irish Act of 1707.

7. A system of registration based upon the parcel of land rather than the names of persons executing deeds is clearly more effective. This has been demonstrated by the success of the Hong Kong Land Registry system which is based upon parcels and has proved infinitely superior to the ordinary deeds registration system.

(ii) The effect of the system of deeds registration

The fundamental principles upon which a system of deeds registration is based are generally threefold:

- (A) registered instruments take priority over unregistered instruments;
- (B) registered instruments rank, for their priority, in order of their creation or registration; and
- (C) failure to register a deed might render the interest created by the deed void as against a subsequent bona fide purchaser.

Some interests may, however, still bind a purchaser even though they do not appear on the register of deeds, and these would conventionally include, for example, short term tenancies, constructive and resulting trusts, and matters rendering a title defeasible.

(iii) The advantages of a system of deeds registration

It cannot be denied that the introduction of a system of registration of deeds simplifies the conveyancing procedure. Perhaps its most significant advantage is that a purchaser/mortgagee can himself check the register and satisfy himself from public records as to the nature of the title he is intending to purchase or accept by way of security. He can also largely ignore dealings off the register.

(iv) The imperfections of a system of deeds registration

Although bringing advantages that are lacking in a system of private conveyancing, the system of deeds registration generally carries with it several imperfections.

- (A) A deed, even when registered, does not prove title. It is merely a record of a transaction affecting the land. Since the fact that a deed has been registered merely shows that a transaction has taken place, it does not show that the deed was *effectively executed* or that the transaction was *validly performed*. The parties to a transaction will still, through their solicitors, have to carry out a painstaking investigation of all the title documents to ensure that the preceding transactions affecting the title have been properly effected and that the vendor/mortgagor has good title to the land. Indeed, a defect in title going back many years might still render the present title defective.

In an attempt to reduce this deficiency, in some jurisdictions, the Land Registry will attempt to check upon the validity of all transactions effected by deed before registration will be permitted; but even this system cannot be relied upon. The present deeds registration system operating in Hong Kong goes some way towards meeting this need. Assistant Registrars in the Land Registry scrutinise all memorials and deeds to check that the memorial is

was intended to exist has expired or the event upon which the covenant was intended to determine has occurred.³⁴⁷

(iv) *Discharge and modification of covenants*

The High Court may, on an application by any person interested in registered land affected by a covenant (whether or not the covenant came into existence before or after the appointed day), make an order wholly or partially extinguishing or modifying the covenant (with or without payment by that person of compensation to any other person suffering damage in consequence of the order), on being satisfied that:

- (A) by reason of changes in the character of the land or the neighbourhood or other circumstances of the case which the High Court deems material, the covenant ought to be held to be obsolete; or
- (B) the continued existence of the covenant impedes the reasonable user of the land for public or private purposes without securing practical benefits to other persons or, as the case may be, will, unless modified, so impede such user; or
- (C) the proposed extinguishment or modification will not injure the person entitled to the benefit of the covenant.³⁴⁸

This power, however, will not apply to a covenant provided for in a registered charge or an equitable charge the subject of a consent caution.³⁴⁹

Where an order of this nature is made, the Registrar must give effect to the order.³⁵⁰

(v) *Covenants existing on the date of first registration of the land*³⁵¹

Covenants which run with the land and exist on the date of first registration of the land are constituted overriding interests³⁵² and do not need to be registered for protection. Covenants in deeds of mutual covenants which have been executed before the Bill comes into force will not, therefore, require to be registered when the Bill comes into force.

347. Cl 46(2) of the Bill.

348. Cl 47(1) of the Bill.

349. Cl 47(2) of the Bill.

350. Cl 47(3) of the Bill.

351. 'First registration' means (a) in the case of land held under a Government lease granted before the appointed day (see cl 2(1)), the appointed day; and (b) in the case of land held under a Government lease granted on or after the appointed day, the date on which a register is opened in relation to the land – cl 13 of the Bill.

352. Cl 21(1)(c)(iv) of the Bill.

(q) *Dispositions to joint owners*³⁵³ or owners in common³⁵⁴

The instrument must show the capacity of the transferees and, in the case of ownership in common, the undivided shares of each owner

Where any instrument is made in favour of two or more persons, it will not be registered unless it shows, in respect of the registered land to which it relates, whether the persons are joint owners or owners in common.³⁵⁵ Further, where the persons own the land as owners in common, the instrument must stipulate the undivided share of each owner.³⁵⁶

Upon registration, the entry in the Land Register will show the particulars as to the capacity of the joint owners as required above.³⁵⁷

9. TRANSMISSIONS

(a) *The meaning of 'transmission'*

'Transmissions' must be contrasted with 'dispositions'. Whereas a disposition involves the positive act of the owner in transferring, charging or granting an easement over his land,³⁵⁸ a transmission occurs where the title to land passes from the registered owner to another by operation of law.³⁵⁹ The most obvious examples of cases in which transmission occur are the death of the owner, the bankruptcy of an individual or the winding-up of a company.

(b) *Transmission upon the death of a joint owner*

Where a joint owner³⁶⁰ of registered land dies, the land passes by

353. 'Joint owners' means joint tenants under the common law – cl 2(1) of the Bill.

354. 'Owners in common' means tenants in common under the common law – cl 2(1) of the Bill.

355. According to s 9 of the *Conveyancing and Property Ordinance*, where land vests in two or more persons under an instrument or will, it will be presumed that they are tenants in common of the land, unless a contrary intention is expressed in the instrument or will. Cl 49 of the Bill renders this presumption unnecessary where the title to the land is registered, since the nature of the joint ownership must be expressly stipulated.

356. Cl 49(1) of the Bill. The problems that can arise for the co-owners of a multi-storey building where there is no clear allocation of the undivided shares in the building are clearly illustrated in *Lee Tak Chun v East Weal International Ltd* [1994] 1 HKC 722.

357. Cl 49(2) of the Bill.

358. See the definition in cl 2(1) of the Bill.

359. Cl 2(1) of the Bill defines 'transmission' as meaning the registration of a matter to effect the passing of the title to registered land or a registered charge from one person to another by operation of law, and includes any instrument providing for such passing.

360. 'Joint owner' means a joint tenant under common law – cl 2(1) of the Bill.

operation of law, by virtue of the principle of *jus accrescendi* (the right of survivorship), to the surviving joint tenant and the right of survivorship takes precedence over any disposition by will.³⁶¹ In such a case, the surviving joint owner should apply³⁶² to the Registrar in the prescribed form, supporting his application by evidence of the death of the joint owner and of the fact that the land was owned by joint owners, and the Registrar must remove the name of the deceased joint owner from the Register.³⁶³

(c) Transmission on the death of a sole owner or an owner in common

(i) Registration of a personal representative as the owner

Where a sole owner or an owner in common³⁶⁴ of registered land³⁶⁵ dies, his personal representative³⁶⁶ should first obtain a grant of representation³⁶⁷ and, upon the presentation of the grant to the Registrar, the personal representative will be entitled to be registered, by transmission, as the owner of the land in place of the deceased and his registration will relate back to the date of death.³⁶⁸ After the name of the personal representative, the words 'as executor of the will of ... deceased' or 'as administrator of the estate of ... deceased' will be added to show the capacity in which the personal representative owns the land.³⁶⁹

Alternatively, the Registrar may, without requiring the registration of the personal representative as the owner, register a transfer by the personal representative of the land to another or register a discharge of the charge by the personal representative.³⁷⁰

(ii) Protection of persons dealing with the personal representative

After his registration as the owner, the personal representative holds the land subject to all interests to which the deceased owner was

subject, just prior to his death, which are unregistered and enforceable.³⁷¹ For the purposes of dealing with the land, however, the personal representative is placed in a better position than the deceased, since he is deemed to have been registered as the owner with unrestricted powers of sale over the land and all the rights of an owner of registered land who acquired it for valuable consideration.³⁷² The purpose of this provision is to protect purchasers from the personal representative, who will take the land free from unregistered incumbrances and claims, and, if the personal representative acts to the detriment of the beneficiaries, their action will lie against the personal representative rather than against the purchasers or the estate. It is a further illustration of one of the primary purposes of the Bill which is to avoid the need of persons dealing with the owner of registered land going behind the Land Register.

(d) Transmission on the death of a trustee³⁷³

Following the provisions of section 20 of the *Trustee Ordinance* (Cap 29), where the owner of registered land dies when he is registered as a trustee of that land, his personal representative or any surviving or newly appointed trustee will be entitled to be registered by transmission as owner of the land 'as trustee'.³⁷⁴

(e) Transmission on bankruptcy

(i) Registration of trustee in bankruptcy as the owner

Where the High Court has adjudged the owner of registered land³⁷⁵ bankrupt under section 22 of the *Bankruptcy Ordinance* or directed that the estate of a deceased owner of registered land³⁷⁶ be administered according to the law of bankruptcy (section 112 of the *Bankruptcy Ordinance*), and a trustee in bankruptcy has been appointed, the property of the bankrupt will vest in the trustee in bankruptcy³⁷⁷ and the trustee in bankruptcy must thereupon present a sealed copy of the court order to the Registrar, who will register the trustee as the owner of the land³⁷⁸ by transmission in place of the owner with the words 'as trustee of the property of ... a bankrupt'.³⁷⁹

361. *Swift v Neale v Roberts* (1764) 3 Burr 1488; *Gould v Kemp* (1834) 2 My & K 304, 309.

362. Cl 2(2)(a) of the Bill.

363. Cl 55 of the Bill.

364. 'Owner in common' means a tenant in common under common law – cl 2(1) of the Bill.

365. Or a registered charge.

366. 'Personal representative' means the executor of the will or the administrator of the estate – cl 2(1) of the Bill.

367. 'Grant' is defined in cl 56(3) of the Bill as the probate of the will, letters of administration of the estate or summary administration of the estate under s 15 of the *Probate and Administration Ordinance* (Cap 10). It also includes the case where an overseas grant is resealed in Hong Kong.

368. Cl 58(2) of the Bill.

369. Cl 56(1) of the Bill.

370. Cl 56(2) of the Bill.

371. Cl 58(1)(a) of the Bill.

372. Cl 58(1)(b) of the Bill. For the meaning of 'valuable consideration', see cl 2(1) of the Bill.

373. A 'trustee' includes a personal representative – cl 2(1) of the Bill.

374. Cl 57 of the Bill.

375. Or a registered charge.

376. Or a registered charge.

377. See 58(2) of the *Bankruptcy Ordinance*.

378. Or charge.

379. Cl 59(1) of the Bill.

(ii) *Protection of persons dealing with the trustee*

The trustee will hold the land subject to any restrictions provided for in the *Bankruptcy Ordinance* (Cap 6) and any interests subject to which the bankrupt held the land prior to his bankruptcy and which are unregistered and enforceable.³⁸⁰ A trustee in bankruptcy has power to sell the property of the bankrupt³⁸¹ and, for the purpose of dealing with the land, he will have unrestricted powers of sale and all the rights of an owner of registered land who acquired the land for valuable consideration.³⁸² Again, this provision protects persons dealing with the trustee in bankruptcy.

(f) **Transmission on liquidation***Registration of a liquidator*³⁸³

Where a company is in the process of voluntary or compulsory winding-up and a liquidator has been appointed, the liquidator must present to the Registrar the resolution or order under which he has been appointed for entry on the Land Register.³⁸⁴ Unlike the position upon death or bankruptcy, the company's property upon its winding-up does not automatically vest in the liquidator; he merely takes over its custody.³⁸⁵ He does, however, have the power to sell the property both in the case of a winding-up by the court³⁸⁶ and a voluntary winding-up.³⁸⁷ After the registration of the appointment of the liquidator on the Register, all instruments which have to be executed must be signed by the liquidator and, in the case of a company required by law to have a common seal, be sealed with the common seal of the company and be attested to by the liquidator.³⁸⁸

Where, however, an order has been made under section 198 of the *Companies Ordinance* (Cap 32) vesting any registered land or charge owned by the company in the liquidator, he will be registered as the owner of the land or charge upon his presentation to the Registrar of the order.³⁸⁹

380. Cl 59(2) of the Bill.

381. S 60(a) of the *Bankruptcy Ordinance*.

382. Cl 59(2)(b) of the Bill. For the meaning of 'valuable consideration', see cl 2(1) of the Bill.

383. 'Liquidator' includes a provisional liquidator – cl 2(1) of the Bill.

384. Cl 60(1) of the Bill.

385. S 197 of the *Companies Ordinance*.

386. S 199(2)(a) of the *Companies Ordinance*.

387. S 255(1)(b) of the *Companies Ordinance*.

388. Cl 60(2) of the Bill.

389. Cl 60(3) of the Bill.

(g) **Transmission as a result of a court order or under any enactment**

Where a person has become entitled to registered land or a registered charge under an order of the High Court or under an enactment, the Registrar will, on the presentation of the order or other such evidence as the Registrar requires, register the person so entitled as the owner.³⁹⁰

For example, if a person who claims that he transferred land as a result of duress or undue influence, having registered a non-consent caution, subsequently obtains a court order setting aside the transfer, the order will take effect as a transmission and the Registrar will remove the subsequent transfer from the Register and reinstate the previous owner. The same result will apply where a transfer is set aside as being a fraudulent preference³⁹¹ or where a disposition made by a bankrupt within the two or ten-year period prior to a receiving order being made is subsequently set aside.³⁹²

10. TRUSTS

(a) **Declarations of trust and transfers to persons by way of a trust**

Express trusts may be created either by a declaration of trust by the trustee or by the transfer of land to a person in the capacity of a trustee. Where a person acquires registered land³⁹³ as a trustee (other than as a personal representative³⁹⁴ or a trustee in bankruptcy),³⁹⁵ he may be described by that capacity in the instrument of acquisition and, if so described, the words 'as trustee' will be added to the entry in the Register.³⁹⁶

(b) **The particulars of the trust will not be entered in the Register**

The particulars of the trust must not, however, be entered in the Land Register.³⁹⁷

390. Cl 61 of the Bill.

391. S 49(1) of the *Bankruptcy Ordinance* and s 266 of the *Companies Ordinance*.

392. S 47(1) of the *Bankruptcy Ordinance*.

393. Or a registered charge.

394. For the rules regulating the transmission of land to personal representatives, see cl 56 of the Bill.

395. For the rules regulating the transmission of land to trustees in bankruptcy, see cl 59 of the Bill.

396. Cl 62(1) of the Bill.

397. Cl 62(1) of the Bill.

21. INDEMNITY

The Bill makes provision for the indemnification by the Government, in closely defined circumstances, of persons sustaining loss as a result of the system of registered title and a trading fund was established within the Land Registry on 1 August 1993 to provide the funds for the payment of any indemnity.

(a) The purpose of a Government indemnity

In systems of registered conveyancing, the vesting of ownership is effected, not by the execution of documents by the parties, but by act of the Registrar in registering title. Accordingly, a person who loses some interest or suffers loss by that act of registration suffers at the hands of a Government officer. It follows, therefore, that compensation for that loss should be paid, if at all, by the Government. Many registration of title systems make no provision at all for the payment of an indemnity⁵⁵⁴ and little complaint is heard from landowners who 'suffer' under these systems. This is probably because, even in those systems which do provide a state indemnity, claims have been remarkably few.⁵⁵⁵

The Hong Kong Bill makes provision for the indemnification by the Government, in closely defined circumstances, of persons suffering loss as a result of the system of title registration and a trading fund has been established within the Land Registry from which any awards will be paid. The purpose of the indemnity provision, therefore, is to ensure that persons who suffer financially as a result of error or fraud in respect of the matters identified below are entitled to be compensated for their loss.

(b) Entitlement to indemnity from the Government

Subject to what is said below, a person who suffers loss by reason of an entry on or omission from the Land Register, any land title records or an applications index or applications day book, where the entry has been obtained, made or omitted by or as the result of fraud on the part of any person or any mistake or omission on the part of the Registrar and his staff,⁵⁵⁶ will be entitled to be indemnified by the Government in respect of that loss.⁵⁵⁷

554. This is the position, for example, in the land registration systems of Malaysia, Sudan and Fiji.

555. The experience in Australia and England, where provision has been made for the payment of an indemnity, is that very few claims have been made successfully. Thus, Kerr was able to say in *Australian Land Titles* (1927) at p 498: 'The highest tribute that could be paid to the success of the Torrens system is the infrequency of claims on the Assurance Fund.'

556. As defined in cl 8(3) of the Bill.

557. Cl 75(1) of the Bill.

Although not expressly stated in the Bill, it would appear that the entitlement to an indemnity will exist whether or not the Land Register is rectified. This is important since rectification will become impossible where the land comes into the possession of a bona fide purchaser.⁵⁵⁸ In a situation of this nature, the defrauded landowner, unless he himself had caused or contributed to his loss through his fraud or negligence,⁵⁵⁹ will still be entitled to an indemnity, although the Land Register may not be rectified.

A memorable illustration of the working of the indemnity provision provided by S Rowton Simpson⁵⁶⁰ is that of the notorious acid-bath murderer John George Haigh. Haigh obtained the land certificate to the house of one of his victims and forged a transfer of the property to himself, becoming the registered proprietor. He then sold the land to another, who purchased in good faith and went into possession. The personal representatives of the deceased victim sought redress, but could not recover the land by way of rectification of the register as the transferee from Haigh had purchased the property in good faith and had entered into possession. They were, however, awarded an indemnity because the loss to the estate had been occasioned by the act of registration.

(c) Cases in which no indemnity is payable

No indemnity will, however, be payable in the following cases:

- (i) where the person claiming the indemnity has himself caused or substantially contributed to the loss by his fraud or negligence; or
- (ii) where the person claiming the indemnity has derived title, otherwise than under a registered disposition made in good faith and for valuable consideration,⁵⁶¹ from a person who so caused or substantially contributed to the loss.⁵⁶²

- (i) *Person claiming indemnity has caused or substantially contributed to the loss*

This would be the case in the illustration provided above by *Re 139 High Street, Deptford* [1951] Ch 884,⁵⁶³ because the registered proprietor had contributed to the mistake by negligently failing to check the extent of the property transferred to him. It should be borne in mind that the solicitor representing the purchaser has a duty to verify that,

558. Cl 74(2)(a) of the Bill.

559. Cl 75(2)(a) of the Bill.

560. *Land Law and Registration* Cambridge University Press (1976) at p 185.

561. 'Valuable consideration' means money or money's worth and includes marriage, but does not include a nominal consideration – cl 2(1) of the Bill.

562. Cl 75(2) of the Bill.

563. See p 113.

to the best of his knowledge, information and belief, the transaction is effective in law⁵⁶⁴ and a purchaser who loses his right to an indemnity on such grounds as have been illustrated above, might have a claim against his solicitor.

(ii) *Person registered as the proprietor has derived title other than as a bona fide purchaser*

There are two distinct categories of persons disqualified under this provision. Firstly, the effect of this provision is that a donee, who receives the land from the registered owner whose title has been obtained by fraud, will not be entitled to an indemnity. Thus, if land is registered in the name of X as the proprietor and another person forges a transfer of the land to Y, who gives no consideration for the transfer and the Register is subsequently rectified in favour of the former proprietor X, Y will not be entitled to an indemnity because he was not a bona fide purchaser of the land. Indeed, this provision is sensible, since the donee is in no worse a position than if the disposition had not taken place, unless he has spent money on the improvement of the property.

Secondly, even if the registered proprietor has furnished consideration, he will be disqualified from receiving an indemnity unless he has purchased the land in good faith. If he knows, for example, that the property is being transferred to him by way of a forged transfer, he will be disqualified from receiving an indemnity if he suffers loss by reason of the Register being subsequently rectified in favour of the rightful owner.

(d) **Extent of the indemnity in respect of acts committed before the appointed day**

The *Land Registration Ordinance* makes provision for a claim to be made against the Land Registrar and his staff for actions involving their wilful or negligent failure to perform their registration functions;⁵⁶⁵ the Bill also makes it clear that any claims made before the appointed day will not be affected.⁵⁶⁶

Because a remedy already exists, the Bill provides that no indemnity will be payable in respect of any fraud, mistake or omission discovered before the appointed day.⁵⁶⁷ In respect of any fraud, mistake or omission which occurred before the appointed day, but was only discovered after the appointed day, no indemnity will be payable unless the person claiming the indemnity would, if that fraud, mistake or omission had been discovered before that day and a claim been made under the

564. Cl 2(2)(c) of the Bill.

565. S 23A of the *Land Registration Ordinance*.

566. Cl 75(3)(a) of the Bill.

567. Cl 75(3)(b) of the Bill.

Land Registration Ordinance, have been entitled to damages in respect of his loss.⁵⁶⁸

(e) **The amount of the indemnity**

(i) *Indemnity in the case of fraud*

In any case where an entry has been obtained, made or omitted by or as the result of fraud by any person, the amount of indemnity may not exceed the value of the interest in the registered land immediately before the discovery of the fraud, or an amount fixed by the Financial Secretary by notice in the Gazette⁵⁶⁹ before the discovery of the fraud, whichever sum is the lesser.⁵⁷⁰ This provision, therefore, gives the Financial Secretary power to fix a ceiling to any indemnity which may become payable.

The date on which the order of the High Court for the Register to be rectified was made⁵⁷¹ will be taken as the appropriate date for the purpose of determining the date of the discovery of the fraud, in any case where an order for rectification has been made.⁵⁷²

The value of the interest before the fraud is discovered

The amount of indemnity recoverable may not exceed the value of the interest in the land immediately before the discovery of the fraud. Let us take an illustration. X is the registered proprietor of land of which Y forges a transfer to Z, who purchases it for valuable consideration in good faith and enters into possession. X will be unable to secure a rectification of the register because Z is in possession as a bona fide purchaser. X, therefore, can only seek an indemnity from the Government and the sum recoverable may not exceed the value of the land immediately before the discovery of the fraud.

(ii) *Indemnity in the case of mistake or omission*

In any case of mistake or omission by the Land Registrar and his staff, the amount of indemnity payable may not exceed the value of the interest in the registered land immediately before the discovery of the mistake or omission concerned.⁵⁷³

Again, the date on which the order of the High Court for the Register to be rectified was made⁵⁷⁴ will be taken as the appropriate

568. Cl 75(3)(c) of the Bill.

569. The Financial Secretary is empowered to determine the maximum sum recoverable by notice in the Gazette – cl 76(3) of the Bill.

570. Cl 76(1)(a) of the Bill.

571. Under cl 74(1) of the Bill.

572. Cl 76(2) of the Bill.

573. Cl 76(1)(b) of the Bill.

574. Under cl 74(1) of the Bill.

date for the purpose of determining the date of the discovery of the mistake or omission.⁵⁷⁵

(f) The procedure for claiming indemnity

Applications for indemnity must be made to the High Court, which will determine whether a right to indemnity has arisen and make an award accordingly, together with an order as to such costs and expenses as appears to the court to be just.⁵⁷⁶

(g) Time limit for claiming the indemnity

The liability to pay an indemnity is deemed to be a simple contract debt⁵⁷⁷ and the limitation period will, therefore, be six years from the date of the accrual of the cause of action.⁵⁷⁸ The cause of action will be deemed to have arisen at the time when the claimant knew or, but for his own default, might have known of the existence of the claim.⁵⁷⁹

(h) Recovery by the Government of the indemnity paid from the person who caused the loss

The Bill renders the Government an indemnifier of first resort; in other words, there is no requirement for the person seeking an indemnity to pursue what remedies he might have for compensation from the person who has committed the fraud before seeking an indemnity from the Government.⁵⁸⁰ Accordingly, where the Government has paid by way of an indemnity, it is entitled to recover by legal proceedings or otherwise any sum so paid from any person who caused or substantially contributed to the loss by his fraud or negligence.⁵⁸¹ However, in any case where the liability to pay an indemnity was occasioned by the act of the Registrar or his staff, no sum can be recovered from them where they have acted in good faith in the performance or purported performance of their duties.⁵⁸²

In seeking to recover any sum paid by way of indemnity, the Government will be entitled to enforce any express or implied agreement or other right, as by way of subrogation, which the person who has been indemnified would have been entitled to enforce in relation to the matter in respect of which the indemnity has been paid.⁵⁸³ In other

575. Cl 76(2) of the Bill.

576. Cl 77 of the Bill.

577. Cl 78 of the Bill.

578. S 4(1)(a) of the *Limitation Ordinance*.

579. Cl 78 of the Bill.

580. There was such a provision in an earlier draft of the Bill.

581. Cl 79(a) of the Bill.

582. Cl 8 of the Bill.

583. Cl 79(b) of the Bill.

words, the Government is entitled to step into the shoes of the person indemnified and enforce any rights against the person who caused the loss which the indemnified person might have had.

(i) Person indemnified may recover any shortfall from person responsible for his loss

The Bill makes it clear that a person who has been indemnified will not, by virtue of his acceptance of an indemnity from the Government, be barred from recovering, by legal suit, damages in respect of any loss that he has sustained over and above the sum paid by way of indemnity.⁵⁸⁴

(j) No indemnity in respect of errors in survey

As between the Government and the owner of registered land, no claim to indemnity will lie on account of any errors in a survey.⁵⁸⁵

22. APPEALS

(a) Application to the High Court by the Registrar for directions

The Registrar has been given a general right to apply to the High Court for directions in any case of doubt or difficulty arising by virtue of the provisions of the Bill.⁵⁸⁶

(b) Appeals against decisions of the Registrar

As we have seen, the Registrar has considerable discretion in carrying out his functions under the system of registered titles⁵⁸⁷ and the Bill,

584. Cl 79(2) of the Bill.

585. Cl 80 of the Bill.

586. Cl 81 of the Bill.

587. For example, the Registrar has the discretion to permit any matter to be registered (cl 4(d)); require a person to present any document to him relating to registered land (cl 7(2)(a)); require a person to appear before him and give any information or explanation in respect of any matter relating to registered land (cl 7(2)(b)); require a person to verify information on oath (cl 7(2)(c)); refuse to register matters (cl 7(2)(d)); make an order that his costs and expenses of investigation be borne by another person (cl 7(2)(e)); remove obsolete entries from the Register (cl 15); combine parcels by closing registers (cl 18(1)) and effect a division by opening fresh registers (cl 18(2)); register an overriding interest (cl 21(2)); require a person to present an application (cl 29(1)); remove an entry relating to an easement or covenant (cl 46(2)); refuse to register a caution (cl 63(5)); remove a non-consent caution (cl 65(1)(b)(ii)); make an order prohibiting all dealings with the land (cl 70(1)) and remove or vary such order (cl 72(1)); and rectify the Register in the case of minor errors or omissions (cl 73(1)); and

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