

## THE REGISTRATION OF DEEDS ACT<sup>1</sup>

THE Registration of Deeds Act an Act, to repeal and to re-enact with amendments the Registration of Deeds Act Cap. 261 of the 1985 Revised Edition was enacted as law in July 1988 but is not as yet in operation.<sup>2</sup> The first Registration of Deeds Ordinance modelled on the Yorkshire Registries Act 1884 was passed in 1886 with the declared objective of preventing fraud.<sup>3</sup> This was to be achieved by according priority to the first deed to be registered. The equitable doctrine of notice was cut down to the extent that only actual fraud would postpone a priority acquired by earlier registration. In this context it was expressly stated that mere notice was not to be construed as fraud. Registration was not required for validity but unless the deed was registered it would not be admissible as evidence of title in a court of law.

The 1886 Ordinance has received amendments through the years but none of these affected the major provisions. Since it was enacted there have been some cases raising basic questions such as (1) what instruments may be registered?<sup>4</sup> (2) to what extent did the section conferring priority (section 15) on the first to be registered and section 17 affect the basic principle of *nemo dat quod non habet*?<sup>5</sup> (3) what is the effect of registration?<sup>6</sup> and (4) was tacking still relevant and if so to what extent?

The first question has been for the most part answered. The position in regard to meeting the objective of the legislation is not entirely satisfactory in that not all transactions relating to land are in a form that requires registration or can be registered. Questions (2) and (3) despite the Privy Council's decision in *Chung Khiaw Bank v. United Overseas Bank Ltd.*<sup>7</sup> are still not satisfactorily answered. There are lingering doubts as to the impact of the Act on basic principles of conveyancing law. If the expectation of this 1988 Act which repeals and re-enacts with amendments the former Act is that these doubts

<sup>1</sup> No. 13 of 1988

<sup>2</sup> Section 1 provides that the Act shall come into operation on such date as the Minister shall by notification in the gazette appoint. Since the submission of this note to the printers, this Act has come into force. The date of this is 30th November 1988.

<sup>3</sup> See the Objects and Reasons accompanying the Registration of Deeds Ordinance 1885 and the preamble to the Registration of Deeds Ordinance 1915.

<sup>4</sup> *Kasmerah v. Haji M.* 70/6(1904) S.S.L.R. 113; *Tan Joo Kwang v. Chop Sin Hup Kit* 14 S.S.L.R. 176; *Khoo Keat Lock v. Haji Yusof* [1929] S.S.L.R.210; *In the matter of an Indenture of Mortgage between Tan Lian Chye and the Great Eastern Life Assurance Co. Ltd.* (1949) 15 M.L.J. 292 and *Collector of Land Revenue v. Hoalim* [1977] 1 M.L.J. 88.

<sup>5</sup> *Ismail Saiboo v. Quah Beng Kay* [1895] S.S.L.R.28; *Fung Sin Wan v. Chan Mot Hen* (1897) 5 S.S.L.R.; *Ng Boo Bee v. Khaw Joo Choo* (1921) 14 S.S.L.R.90; *Lim Seng Keang v. Lim Ah Chan* [1928] S.S.L.R.241 and *Chia Chuan Chip v. Dunlop* (1901) 6 S.S.L.R.98.

<sup>6</sup> *Ho Hong Bank Ltd. v. Tea Chin Chay* [1929] S.S.L.R. 195 and *Chung Khiaw Bank Ltd. v. United Overseas Bank Ltd.* [1970] 1 M.L.J. 185.

<sup>7</sup> [1970] 1 M.L.J. 185.

will be resolved, then the disappointment will be great. This Act does no such thing.<sup>8</sup> With the exception of the question as to the existence of tacking which has at least been resolved, in that under the new section 15 there is limited tacking for further advances, for the most part the amendments concern the mechanics of registration.<sup>9</sup> The Act however has expanded the number of provisions for caveats although the need for some of the provisions is not apparent and the new provisions themselves give rise to more ambiguities.

### 1. *Sections affecting registration*

Section 5 of the 1988 Act is patterned on section 5 of the old Act. However, the new section 5 does not expressly provide for provisional registration and does not indicate when this is effected. Section 5(1) and (4) of the old Act have been omitted. This is unfortunate as these omissions create unnecessary ambiguities on a fundamental part of the legislation.

It is clear that the Act does not aim to alter the existing sequence of registration *viz.*, first provisional registration, then on the compliance of section 13(1) registration is deemed to be effective from the date of provisional registration. Section 5(2) and (3) of the 1988 Act refer to "provisional registration" of instruments. Section 7(1) provides that on the compliance with section 13(1) an instrument "provisionally registered" is deemed to have been registered. Later sections *e.g.*, sections 9, 11 and 12 also refer to "provisional registration". These provisions suggest that there is provisional registration but there is no express provision as to what is provisional registration or when it is done. It may be argued that by implication from section 7(1) that which has been done under sections 5 and 6 must be provisional registration. But this is an unnecessary point of ambiguity.

### 2. *Documents to be presented for registration*

#### (a) *Memorials required*

In regard to the documents that must be presented for registration, section 5(1)(d) of the Act concerning probates and letters of administration speaks of memorials made in accordance with the rules. This follows the existing provision except that reference to the existing section 6 is omitted as this has been repealed in the Act. [Presumably the existing section 6 if still desired will be included in these rules — a much neater arrangement.] However, section 5(1)(a), (b), (c) and (e) include memorials as documents which must be submitted when instruments referred to are presented for registration. This is new.

The comment here is simply that there is no mention in the Act of the form that these memorials are to take. It is most unlikely since the

\* Perhaps there is no need to since it is a matter of time when all land will be brought under the Land Titles Act Cap. 157 1985 Rev. Ed.

<sup>9</sup> Although it is not stated in the Explanatory Statement of the Bill, the amendments are prompted largely by the computerisation of the Registry of Deeds.

Act is precipitated by the forthcoming computerisation of the Registry that the intention is to permit the memorials to take any form so long as they record essentials of the instruments. This free for all in forms would lead to chaos. Therefore, in all probability the forms will appear in the Rules that will be made under section 29 but if this is to be so there should have been a statement to this effect in the Act itself.

(b) *Omission of caveat*

Under section 5(2)(f) of the old Act it is provided that for the registration of a caveat the original caveat should be submitted. However this provision is omitted from the Act. What then is to be submitted when a caveat is to be registered? It could be argued that the Act has changed the law regarding caveats so that they are no longer registrable. However, as is stated below this cannot be the intention since the section on caveat refers to registration of the caveat. It would seem therefore that this is an unintentional omission.

### 3. *Memorandum of lien*

Section 6 of the Act follows the existing section 7 except that the existing subsections (2) and (5) have been omitted. Again, these concern the content of the memorandum and the form that it should be in. In view of the fact that a memorandum of a lien or charge may take different forms including that of letters it would be useful to state that the memorandum is to be in a form prescribed in the rules. If this is in fact the intention then it should have been clearly provided in the main legislation as it was under the old.

### 4. *Caveats*

The provisions in the Act regarding caveats are largely new. It would seem that the intention is to make the caveat under the new Registration of Deeds Act more like that under the Land Titles Act. There may be some advantage in this. However, as the relevant sections in the Act now stand more problems are envisaged.

(a) *Provisions for registration*

Under the old Act now in force there is only one way whereby a caveat can come into existence. The caveat is given by the owner of the estate to the person claiming the interest (section 9). It is also provided that the caveat may be registered (section 9(2)), and for registration the original of the caveat must be presented (s.5(2)(f)). Under the Act a caveat may either be given by the owner of the estate or lodged by the person claiming the interest to be protected (section 8). This is fine so far as the objective is simply to say that there are two ways in which a caveat may come into existence.

However, it would appear from the provisions that follow that the giving of the caveat or the lodgment of it is to be a provisional registration (section 8(5), (8) and section 9(1)). This cannot be right. The caveat whether given or lodged has to be presented to the Registrar for registration, *cf.* the requirements for deeds and other instruments

which may be registered. This should then be followed by an act of the Registrar which effects the registration. In the old Act this is provided for in section 5(4) for all instruments including the caveat. As pointed out above this vital subsection has been omitted from this Act. Registration cannot be effect by acts of private individuals; it has to be an act of an official.

Section 8(1) itself may be interpreted as indicating that the intention is to treat the caveat differently from the other instruments which may be registered (*cf.* the caveat under the Land Titles Act). So a caveat is not registered but lodged. But this interpretation breaks down almost as soon as one reads section 8(4), (8) and (9) and sections 9, 10 and 11.

So since the intention then seems to be to treat the caveat as being registrable just like deeds and other instruments, it should be stated in section 8 itself that the Registrar may register a caveat (*cf.* section 9(2) of the old Act) and the caveat be included in section 5(1) of the Act (*cf.* section 5(2)(f) of the old Act).

(b) *Notice to proprietor*

Section 8(7) of the Act is new. It seeks to impose an obligation on the caveator who lodges a caveat to give notice of this lodgment to the proprietor and such persons who have registered instruments in respect of the same land prior to the lodgment of the caveat. The questions are:

- (1) What is the purpose of this provision? If it is to give notice to the proprietor and others who have interests prior to the caveator's then should these persons not also be notified when the caveat comes into existence by the proprietor giving a caveat to the person claiming the interest?
- (2) Why should the obligation to give notice be on the caveator? Under the Land Titles Act this is for the Registrar to do.
- (3) If it is mandatory for the caveator to give notice, what is the sanction for not so notifying? What are the consequences if he does not comply?

(c) *Purpose of caveat*

However the basic question which is raised is what is the purpose of a caveat under the Registration of Deeds Act?

It is common knowledge that registration of deeds under the Registration of Deeds Act unlike that under the Land Titles Act is not required for validity. It only confers the advantage of earlier priority and is necessary where the deed is required as evidence in court of title to land. With the two exceptions of the memorandum of a charge and the caveat, only deeds and such instruments which are assurances of land are registrable. Hence in respect of transactions which do not require deeds or are not in registrable form *e.g.*, an agreement of sale, a caveat if one is registered gives notice to intending purchasers of the claim. Then when the caveated transaction is followed by a formal deed which is later registered, priority dates from the date of the registration of the caveat. In this way a caveat is important under the

Registration of Deeds Act. A caveat under this Act in regard to a dealing which is not in registrable form serves the same function as registration of a deed or other assurance of title to land. It preserves the priority of the claimant should his claim materialise into an assurance of title. It may also be argued that as the caveat is registered when so registered it also comes within the ambit of section 14(1) so that the time of registration of a caveat would also determine its priority as against other registered or registrable instruments.

A caveat under the Land Titles Act<sup>10</sup> serves a different function. Registration under the Land Titles Act, as is common knowledge, is necessary for validity and confers indefeasibility of title on the registered proprietor. Not all interests in land can be registered. Where a dealing is not a registrable interest or in registrable form lodgment of a caveat is essential for the protection of the claimant. A caveat seeks to prohibit any registration of a dealing subsequent to the caveator's claim without his consent, it gives the caveator an opportunity of disputing the attempted registration of a dealing which would adversely affect his claim. Under the Land Titles Act, a caveat is not registered but lodged. But it is the Registrar who has the duty of notifying the registered proprietor of the caveat.

In view of the basic differences of the function of registration and of the caveat under the two systems of registration, under the registration of deeds system where is the need for the proprietor and the persons who may have registered instruments in respect of the same land to be notified of the registration of the caveat?

(d) *Lifespan of the caveat*

The caveat under the old Act has a lifespan of six months. This emphasises the transient function it is intended to perform.<sup>11</sup> In the new Act the caveat is given a lifespan of 5 years unless earlier cancelled or withdrawn. This is similar to that of a caveat under the Land Titles Act. The six-month caveat of the old Act did not meet with the needs of conveyancing practice where matters are necessarily left in the agreement stage for a long time particularly in phased developments. In the light of the experience of the caveat under the Land Titles Act, should it not have been provided that a caveat may be extended for a further period of so many years with perhaps a maximum period beyond which there are to be no more extensions?

## 5. *Tacking*

Section 16 of the old Act provides that priority of mortgages through tacking whether to a legal estate or to any interest was no longer allowed. This seemed to follow as a logical consequence of according priority to deeds according to their dates of registration. However tacking for further advances is a commercial convenience and doubts as to whether such tacking was also abolished are not helpful. Consequently this new section 15 which allows tacking for further advances provided either the prior mortgage provides for the giving of

<sup>10</sup> Cap. 157 1985 Rev. Ed.

<sup>11</sup> See Stevens, *Registration of Deeds Ordinance* (1922) at p.37.

further advances or the subsequent mortgagee agrees to it is welcomed. The position is essentially similar to that under the Land Titles Act.

#### 6. *Computer print-outs*

Section 22 provides for computer print-outs of a public record maintained by the Registrar to be admissible as evidence. This provision is new and it caters to the high-tech world of computers but is based on the same principle as section 21 which relates to certified copies of documents enrolled in the register.

#### 7. *Leases not exceeding seven years*

Under the old Act leases of three years and under need not be registered in order to preserve their priority so long as they are accompanied by actual possession. Section 25(1) of the 1988 Act extends this privilege to leases of seven year and under. This is another welcome amendment. It would prevent cluttering of the Registry.

#### 8. *Summary*

This Act does contain some welcome amendments. The complaint is not that it does not attempt to resolve the lingering doubts in regard to some of the main provisions of the old Act. But the criticism is simply that in regard to the amendments which affect the mechanics of registration, there are omissions which should not have been. As for the new sections on the caveat, it seems to be that there has been an attempt to graft on to the registration of deeds system the provisions relating to caveats under the Land Titles Act. Since the functions of the caveats under the two systems of registration are different it is suggested that this graft is ill-fitting and raises more questions.

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