

## Scott Swainson

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**From:** Scott Swainson  
**Sent:** Monday, 3 October 2016 8:55 AM  
**To:** 'dgnreid@gov.bm'  
**Cc:** mstone@wq.bm; Lorren Wilson; kgeorge@mglaw.bm; 'tgmoniz@gov.bm'  
**Subject:** FW: Land Title Registration. [APPLEBY-BM\_LEGAL.FID1586144]  
**Attachments:** LTR Amendment Bill 2016 - 2 September.pdf; Land Title Registrar (Recording of Documents) Bill 2016 - 6 September.pdf; Land Title Registration Bill Land Registration Act-ESS amended 14.09.14.DOC; Pamplin P ltr 19-2-14.PDF

**Importance:** High

Hi Debbie,

Further to my email below it has proven difficult, given that the draft Bills arrived at the tail end of the summer vacation period and also given the relatively short 24 day review period provided, to obtain detailed input from other members of the conveyancing group.

However, having read through the attached Bills, namely the Land Title Registration Amendment Act 2016 (the "Amendment Act") and the Land Title Registrar (Recording of Documents) Act 2016 ("The Recording Act") by reference to:

- (a) the Land Title Registration Act 2011 (the "Act");
- (b) our proposal letter dated 19<sup>th</sup> February, 2014 (the "2014 Letter"), which I attach for ease of reference; and
- (c) the amended and annotated draft of the Land Title Registration Act that was directed to you on the 14<sup>th</sup> September, 2014 (the "2014 Draft") (also attached);

it would appear that a number of the key points that were raised in the 2014 Letter and in the 2014 Draft, have not been included in the draft Bills (in particular the Amendment Act). Further, the proposals and notes that were specified in both the 2014 Letter and the 2014 Draft, were expressly intended to evoke continuing discussions between Government and members of the conveyancing Bar with a view to resolving, as part of the transition process, as many of the inherent problems that affect our practice area on a day to day basis ( the "Existing Problem(s)) as possible. Sadly, very few such discussions have occurred. In fact I do not recall there being any substantive discussions since the meetings that were held more than two years ago in July 2014 (being before the 2014 Draft was directed to you). I was also given to understand that Government/the LTRO would be inviting surveyors, bankers and other stakeholders to participate in the discussions as matters progressed. To my knowledge this has not occurred either.

Please find below some key points regarding the Amendment Act and the Recording Act that I forward for consideration, pending receipt of additional comments from other members of the group.

### [1] The Amendment Act

- (a) The 2014 Letter provides details in respect of Existing Problems that make it difficult for us to confirm good and marketable title in a number of instances. Since the Act (as amended) will introduce a title vetting system that will rely in large part upon title confirmations (or certificates of title) from attorneys, it would be in everyone's best interest to ensure that as many of the Existing Problems as possible are addressed on or before the commencement of the Act. This is with a view to increasing the number of positive "good and marketable" title confirmations following commencement. Please note that the Companies Amendment Act 2014, which was implemented in March 2014, introduced new corporate land holding provisions that have presented additional problems, or title related concerns. These concerns are already

causing corporate/hotel and other developers to pursue legislative steps that are intended to exclude (or navigate around) these new problematical provisions.

- (b) While the Amendment Act helpfully introduces provisions that are intended to facilitate the registration of all land related judgments at the LTRO (as proposed in the 2014 Letter), it does not appear to address priority issues as between judgments, mortgages, and other encumbrances, in the manner proposed in the 2014 Letter. In this regard the relevant priority positions ought to be clearly confirmed both upon commencement of the Act (insofar as pre-existing judgements, mortgages and orders are concerned) and following registration (insofar as judgments, mortgages and orders filed in accordance with the Act are concerned).
- (c) I note that section 4 of the Amendment Act introduces a new section 3A that incorporates the proposed certificates of title that will be given by attorneys/law firms. Each law firm will need to determine whether the language contained in its insurance policy permits the sharing of such certificates with the LTRO and other third parties who are not clients. It may (for example) be determined that third party sharing is permissible, but only to the extent that no additional liability is assumed as a consequence. In any event section 3A will need to be amended in a way that expressly excludes an attorney's (or law firm's) liability to the LTRO or to any other third party who is given access to a title certificate after filing. This requirement is consistent with the proposals/notes contained in both the 2014 Letter and the 2014 Draft.
- (d) Section 3A should also require that a "survey report" and a "survey plan" be delivered with each certificate of title, as part of the application package, especially given that each parcel of land as shown on a survey plan and reported upon in a survey report, will form the subject matter of the certificate of title. In this regard most survey reports expressly confirm whether a parcel of land bounds and measures in accordance with the subject survey plan. This confirmation is then relied upon for the purpose of the certificate of title. Of course the inclusion of a survey report and a survey plan in this way, is likely to raise liability/insurance concerns for surveyors as well. This underscores the need to include them in the discussions.
- (e) Section 4 of the Amendment Act also introduces two new sections, namely 3B(1) and 3B (2). These sections address the extinguishment of potential claims (or challenges to title) 6 years after registration (the "Six Year Period"). This six year extinguishment component is perhaps the most significant of the proposals that were included in the 2014 Letter and in the 2014 Draft. Unfortunately, the language contained in these new sections appears to materially diminish the impact of this component, by making an extinguishment result, subject to adverse possession, easements and other overriding claims. The proposal (as presented and discussed) was intended to enable virtually all claims and challenges from third parties in respect of a registered parcel of land, to fall away after the Six Year Period expires (in the absence of a credible challenge commenced during the Six Year Period, or evidence of say fraud). The introduction of overriding claims in this way makes the whole registration process less viable. It also creates an argument in favour of reintroducing the Government indemnity component with a view to having same take effect after the Six Year Period expires.
- (f) I note that the amendments that have been effected to section 24 of the Act, fail to limit the menu of transactions (or triggers) that will need to be registered on a compulsory basis in the manner proposed in the 2014 Letter and in the 2014 Draft, namely to those transactions that would normally require a certificate of title from an attorney. The failure to limit the triggers in this way raises serious liability and costs concerns that will affect both attorneys and property owners (or applicants). As explained in some detail in previous correspondence, the liability and cost differentials between (for example) an open market sale and purchase transaction (or conveyance) that would normally require a title certificate (and a survey report) and a voluntary conveyance transaction that would not, are significant.
- (g) I would appreciate your clarifying the interplay between the amendments to section 28 of the Act (as introduced by section 15 of the Amendment Act), which relate to "absolute title" on the one hand and the extinguishment component that is included in the new clause 3B on the other? While the 2014 Letter proposed a delay in the grant of absolute title until after the expiration of the Six Year Period, the amendments to section 28 do not appear to be inconsistent with this.

- (h) I note that the amendments to section 32 of the Act (as introduced by section 16 of the Amendment Act) anticipate notice of application for first registration being dealt with by a process that is covered by the "Rules" (as opposed to being addressed in the Act itself). The 2014 Letter proposed a robust (far reaching) statutory public notice procedure that would require the service of notice both in the "Gazette" and by way of letter correspondence. This was intended to incorporate transparency and to also invite credible claims by any third party who is likely to be negatively affected by a registration step. A notice process that is clearly expressed in statute would appear to be essential from (inter-alia) a constitutional perspective, especially given that a third party's property rights/claims could dissipate after the expiration of the Six Year Period. Please note that other statutes relating to land, such as the Immigration Act and the Development & Planning Act, expressly include notice procedures of this nature.
- (i) I note that the new section 91A of the Act (as introduced by section 18 of the Amendment Act) establishes a Land Title Registration Tribunal that will consider claims brought during the Six Year Period. Since the Tribunal will be primarily considering questions of title and extent, section 91A should be amended in manner that expressly requires the Tribunal to include at least two fully qualified property attorneys and two professional surveyors (all possessing at least five years practice experience in Bermuda).
- (j) The assumptions specified in the new Schedule 10 to the Act (as introduced by section 32 of the Amendment Act), will have to be carefully reviewed by property attorneys/law firms and updated.

## [2] The Recording Act

My main comment in respect of the Recording Act relates to the consolidation objectives that were expressed in the 2014 Letter. In this regard it would be helpful if any statutory filing /recording steps that are required by virtue of the current system of unregistered land, such as Land Transfer Notices, which are currently filed in accordance with the Registrar General (Recording of Documents) Act 1955 and Corporate Bodies Notices, which are currently filed in accordance with Corporate Bodies Lands Act 1936, cease to apply after a parcel of land is registered. This is on the basis that the particulars filed at the LTRO in accordance with the Act, should render such historical filing/recording requirements unnecessary.

I look forward to hearing from you regarding the above at your earliest convenience.

Regards,

Scott

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**From:** Scott Swainson

**Sent:** Tuesday, September 06, 2016 3:56 PM

**To:** 'dgnreid@gov.bm'

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**Subject:** FW: Land Title Registration. [APPLEBY-BM\_LEGAL.FID1586144]

**Importance:** High

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**By Hand**

19 February 2014

Dear Madam

## **Land Title Registration Act 2011 ("the Act")**

We refer to our meeting on the 5 February 2014, during which you kindly permitted us to voice our concerns regarding the Act (as currently drafted). We would like to thank you once again for giving us this opportunity.

As discussed, our key concerns as summarized in our letter dated the 24 January 2014 include:

- (i) the indicative (as opposed to fixed) boundary system that the Act stands to introduce;
- (ii) the potentially inequitable and unconstitutional title classification system that the Act incorporates; and
- (iii) the Act's guarantee or indemnity components that are (based on the surrounding facts), likely to expose Government and ultimately the public purse to unnecessary liability.

In addition to the above-mentioned concerns, we also expressed concerns in respect of wider inherent problems that materially affect the existing conveyancing system on a day to day basis. While we are currently liaising with Government with a view to resolving some of these problems, such as those relating to corporate land holding, as well as the negative effects of the Bermuda Immigration and Protection Amendment Act 2007, other problems have yet to be discussed at all such as:

- (a) the inadequate system of recording judgments, mortgages, matrimonial Court orders and other encumbrances affecting land (together "Encumbrances");

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- (b) the glaring absence of legislation that governs priority positions as between Encumbrances;
- (c) the glaring absence of legislation that could assist in definitively resolving title and boundary disputes between property owners in an economical and timely manner, while fully taking into account current conveyancing practices and procedures, as well as the fixed boundary principles that underpin the existing system;
- (d) the unnecessary mortgage registration/perfection time lags that are experienced, which are directly attributable to protracted adjudication and other Governmental procedures;
- (e) the glaring absence of legislation that governs information disclosure, within the context of land now or formerly held in trust, being a problem that is giving rise to title difficulties that are often incapable of being resolved.

The above mentioned problems (the "Existing Problems"), which all raise unnecessary liability issues and cast our jurisdiction in a negative light, ought to be addressed as a matter of urgency. This is because allowing the Existing Problems to subsist will continue to hamper transactional and development activity and negatively affect any land registration system that is implemented in Bermuda, in the same manner as the current system is being negatively affected. Thankfully, most of the Existing Problems can be resolved by way of relatively minor or limited legislative steps that can be completed on an expedited basis. Some of the Existing Problems can even be addressed by way of amendments to the Act.

In our view the most cost effective, time effective and generally beneficial approach would be to consider land registration within the context of wider legislative reform and to amend the Act in a manner that specifically addresses as many of the Existing Problems as possible, rather than intentionally ignoring them. The Act should also be amended in a manner that introduces a deeds registration component (based on fixed boundary principles) as a first step, or transitional step toward full blown title registration. The latter ought to then take a form that retains as many of the Act's current characteristics as reasonably possible, while taking into account the overriding need to incorporate fixed boundary principles and fair and reasonable adjudication/appeals procedures into the final product. A hybrid approach of this nature could enable the recording and mapping provisions of the Act, as well as the related facilities and expertise that has already been established at the Land Title Registration Office ("LTRO") to be fully utilised, while simultaneously integrating historical title and surveying information in a full and proper manner.

A hybrid system of this nature could also enable law firms to continue to perform the title certification role that we currently perform based on historical title information and up to date surveying information and to remain liable to our individual clients, as they proceed with the registration of their deeds. Our liability obligations and insurance arrangements could essentially continue in substantially the same form and to the same extent as they always have (subject to the liability time frame adjustment that is suggested in item 6 below). Such an approach would enable Government to avoid providing Indemnities or guarantees during the first registration period, being the period that is likely to attract the highest level of liability. It would also enable Government to avoid the associated insurance/reinsurance costs, as well as the additional staffing requirements that the Act (as currently drafted) will necessitate for the purpose of completing due diligence steps.

Ultimately a hybrid approach would enable the indicative boundary difficulties, the title classification difficulties and the Government guarantee difficulties that we have identified in earlier correspondence to effectively fall away.

Please find below a number of preliminary proposals that we would like to suggest for discussion purposes within the context of a potential hybrid registration system and also within the context of wider land law reform.

1. A hybrid system could initially require any transfer or conveyance for valuable consideration (only) to the registered on a compulsory basis, while still providing for the voluntary registration of other deeds and transactions, on the basis of considerations and requirements such as those that are already included in sections 21 to 23 of the Act, as well as in Schedule 3 thereto. In this regard the systematic geographical registration requirements that are contemplated in Schedule 3, could (by way of example) enable the registration in higher volume, of residential estates that form the subject matter of large scale subdivision plans and zoning orders. Such estates ought to possess relatively consistent boundary lines as between the building lots that they operated to create and this should in turn assist in making the registration process in respect of these lots relatively straight forward.
2. Any initial registration step, whether compulsory or voluntary, could be preceded by a public notice period (of say 30 days duration) that requires the key particulars of the proposed transaction to be advertised in a far reaching manner, such as (for example) in the daily newspapers. Notices could also be required to be directed by registered post to the parties who are most likely to be affected by the subject transaction. Such notice requirements could be implemented with a view to inviting any credible challenges and resolving any historical title or boundary difficulties that may exist as part of the first registration step.

3. The registration application could be required to include (in addition to the subject transfer or conveyance deed), the following documents (together "the Documents"):
  - (i) a copy of the relevant attorney's title certificate confirming good and marketable title (if applicable) in the form presented to the applicant and based on established conveyancing practice, (inclusive of standard assumptions and reservations) (a "Title Certificate") ;
  - (ii) an accurate and up to date deed plan showing the metes and bounds of the subject property, any rights or easements that may affect the property and also showing the metes and bounds of any abutting properties;
  - (iii) a copy of the relevant survey report; and
  - (iv) the original title deeds (inclusive of any other supporting documentation).
4. In the event that the Documents are registered on the basis of a Title Certificate , title could remain capable of being challenged as it the normally would, but for a more limited period of time. In this regard perhaps 6 years (In each case), following the date of first registration (the "Transitional Period"), as opposed to the standard 20 year period that is currently specified in section 16 of the Limitation Act 1984, would be more appropriate. Any arising title or surveying challenge or appeal could be referred to a land tribunal established for this purpose for determination in the first instance and ultimately directed on appeal to the Courts (if necessary). The tribunal could comprise attorneys, surveyors, valuers and LTRO staff members and it could also be chaired by the Registrar (of the LTRO).
5. In the event that an attorney is not in a position to confirm good and marketable title to all or part of the subject property at the time when the Documents are filed, then a "provisional" title designation could be made available to the applicant (in a manner similar to that currently contemplated in the Act). This provisional designation could then remain capable of being reviewed, appealed, challenged or upgraded thereafter by the applicant, or by any other interested party, especially on the basis of new information or developments that clearly stand to improve this designation.
6. It would be helpful if law firms and surveying firms could remain liable to an applicant for a finite period of time following first registration, such as for the duration of the Transitional Period (only).

7. Following the expiration of the Transitional Period, title could be deemed to become "absolute" (in a manner that is largely consistent with that currently contemplated the Act) and title could also come to be guaranteed by Government at this point (to the extent that this is deemed to be necessary).
8. A hybrid system could also be geared in a manner whereby any transfer in respect of a registered parcel during the Transitional Period could be effected on the basis of a Title Certificate. However, following the expiration of the Transitional Period, the need for such certification would be likely to largely fall away and come to be required in limited instances (only), such as where boundary adjustments or subdivision steps are being effected in respect of a registered parcel, or where rights are being granted or released.
9. The system could also provide for title to be transferred following first registration, on the basis of simplified documents that are substantially in the form of the documents that are already appended to the rules (that have been made pursuant to the Act).
10. The whole due diligence process could be simplified and streamlined if all historical mortgage, voluntary conveyance, alien registration, corporate land holding, judgement and other recording facilities relating to land that are currently housed at the Office of the Registry General, as well as at other Government Registries, were to be relocated to the LTRO. The Act would obviously need to be amended to accommodate this approach and any resulting amendments could also be extended to address recording facilities for new transactions and Encumbrances, as well as priority issues as between Encumbrances affecting land. Of course consequential amendments to other pieces of legislation would also be required.
11. In terms of judgements specifically, (which currently present a number of unique challenges) the Act, as well as the Real Estate Assets Act 1787 and the Supreme Court Act 1905 could all be amended (as necessary) to require any historical judgments that are thought to attach to land, to be recorded at the LTRO within a finite period of time following the implementation of the Act. This step could (subject to any Constitutional considerations), be absolutely required in order to enable such judgments to continue to encumber the subject parcels of land.



We look forward to discussing the concepts outlined above in more detail at your earliest convenience and would also welcome the opportunity to discuss them with members of the LTRO, as well as with surveyors, valuers and other interested stakeholders.

Yours faithfully

  
**Appleby (Bermuda) Limited**

cc: Kevin George, Moniz & George  
Lorren Wilson, Cox Hallett Wilkinson Limited  
Michelle Stone, Wakefield Quin Limited