



Government of Bermuda
Ministry of Environment and Planning
OFFICE OF THE PERMANENT SECRETARY

20th November 2013

Appleby (Bermuda) Limited
P.O. Box HM 1179
Hamilton HM EX

Attention: Scott Swainson

Re: Land Title Registration Act 2011 ("the Act")

Dear Mr. Swainson,

Following the presentation by the Land Title Registry Office (LTRO) on 18 September 2013 to members of the Conveyancing Bar and others and the discussion that followed, I am writing on behalf of the Minister, the Hon. Sylvan D. Richards, JP, MP to provide you with the formal response to your letter of 31 May 2013 as was promised at the meeting.

As I hope you will appreciate, it was the LTRO's plan to organize the presentation and discussion first, with the aim of allowing opportunity for those who have concerns to have those concerns allayed, if possible, by hearing first-hand the reasons for the form of the legislation in the relevant areas and to engage in discussion on the issues. The Minister senses from the tenor of the discussion at the meeting that some who attended remain unconvinced by the presentation. That is a pity, because the legislation is not "ill considered and unsuitable for Bermuda" as some describe it. On the contrary, it is well-considered and entirely suitable for Bermuda.

It is well-considered and suitable because it was drawn up with expert assistance that took full account of existing Bermuda legislation, and with the assistance of appropriate local consultation. It is also well-considered because it draws upon a detailed consideration of the characteristics, advantages and disadvantages of the land title registration systems in a considerable number of different jurisdictions, including various Caribbean countries, including the Cayman Islands, Nova Scotia, Northern Ireland and England and Wales. In the end the decision was to draw upon the legislation in place in England and Wales, being the jurisdiction upon which Bermuda property law is founded. That legislation has developed over the space of 150 years. It has had the assistance over time of various expert Royal Commissions and studies. It has also been extensively modernized within the last 10 years following lengthy and detailed work by the Law Commission of England and Wales. In other words, Bermuda starts with legislation that benefit from the extensive experience and expert input that has been directed to refining the system from which it draws over many decades. Consideration was given to other possible land title systems that exist. However, it was sensibly decided to build upon the system that is in place (and very successfully so) in the jurisdiction whose property system most closely resembles that in Bermuda.

Turning then to the specific areas under the bold headings in your letter, these were of course the specific focus of the presentation on 18 September. Care was taken to explain the reasoning behind the legislation in each of the areas of concern and why, in each area, there really is no cause for concern. However, by way of substantive response to your letter (using your headings for convenience) —

[A] The definitive Boundary/Indicative Boundary Issue

- 1 This issue was considered very carefully from the outset. The very clear conclusion was that a system of fixed boundaries (being the alternative to a system of indicative boundaries) would have been entirely inappropriate for Bermuda. Whilst of course some development still takes place, Bermuda is generally a territory with a mature state of development. This derives from the innumerable private property transactions that have taken place over the four centuries since the Islands first became permanently settled. It is the uncountable chains of private transactions and the actions of successive landowners over time that provide the information that needs to be drawn upon in any case where, for whatever reason, the precise legal boundaries of a property need to be ascertained. As was made clear in the presentation, Bermuda is particularly well placed in terms of the available information. This is due to the high quality of the surveyor drawn plans that are routinely relied upon and the precision with which conveyances have sought to define the land conveyed. However, the relevant point here is that the information is, in aggregate, already in place through the on-going actions of landowners now and in the past.

In the circumstances it would make no sense for the Government to replace this system with a separate, newly minted, system of fixed boundaries. Such a system would involve the imposition on landowners of a Government controlled authority empowered to fix the position of their legal boundaries and take away from them the role that they themselves currently have. Even though such a system would undoubtedly draw upon the wealth of information I have already referred to, it would be entirely unwelcome to the landowners themselves. It would also be extremely costly and bureaucratic in a way that would ultimately fall as a burden on them.

Furthermore, the imposition of a system of fixed boundaries on a territory in a similar state of mature development has been tried before and shown to fail. Specifically, when land title registration was first introduced into England and Wales through the UK Land Registry Act 1862, the legislation required the imposition of fixed boundaries. It gave rise to serious problems that were only alleviated when the system was altered to allow for registration with general boundaries (their equivalent to indicative boundaries). This can be summed up by the following quote from the Royal Commission Report that led to the change in the system—

...But the Act of 1862 prevents a transfer on these terms [i.e. on terms that leave legal boundaries undefined]. People who are quite content with an undefined boundary are compelled to have it defined. And this leads to two immediate consequences, both mischievous. First, notices have to be served on adjoining owners and occupiers which may and sometimes do amount to an enormous number, and the service of which may involve great trouble and expense. ... The second [mischief] is that people served with notices immediately begin to consider whether some injury is about to be inflicted on them. In all cases of undefined boundary they find that such is the case, and a dispute is thus forced on neighbours who only desire to remain at peace.

It would have been folly for Bermuda to attempt to base its land title legislation on a system that has been found to fail in the past. Instead we have sought to learn from the past mistakes of others and provide for a system of indicative rather than fixed boundaries. This is of no detriment whatsoever to Bermudian landowners because they can continue to rely upon the wealth of conveyancing and survey information they have built up for themselves in the past. This is because the available information can and will be recorded as part of the land title registration system. They can also continue to add to this wealth of information in the future by using the same high quality plans and property descriptions as in the past, in the context of the simplified forms of transfer that will replace traditional conveyances. There will also be no need to repeat extensive and detailed property descriptions in future (except where there is subdivision) because a registered title will effectively carry forward the detailed property description that defined the property in the past.

So, the plans aspects of registered titles, which will be embodied in the Land Title Registry Index Map (LTRIM), will have indicative boundary status. The Index Map will indeed be highly accurate, as described, because it is based upon the latest and most accurate mapping available in Bermuda. But it will not define or fix the legal boundaries. Legal boundaries, as and when necessary, will need to be precisely ascertained by reference to the available title information (which will be fully recorded by the LTR system) and all the other factors that need to be taken into account when such an exercise is carried out.

- 2 Where absolute title is granted, the class of title will extend to all the land that is actually in the title as it is registered. Though the LTRIM does not show the exact position of the boundaries, it shows the location of the property and its general extent subject to the indicative boundaries principle. The characteristics of registration with absolute title will then apply to all the land that is within the legal boundaries of that title as might, if necessary, be ascertained through obtaining a decision of the Court (though such determination is very rarely required in practice because interested parties generally rely upon the precise descriptions and plans that the conveyancing system provides).

To focus on the example provided, if Mr. Smith wants to check the general extent of the land in his title, he will refer to the LTRIM and he will then be able to see the extent of his registered property as shown with indicative boundaries. This will be sufficiently accurate for most purposes, since the mapping of his title by the LTRO will have been by reference to the plans and conveyance descriptions that have been supplied on first registration (or supplied later in connection with subsequent registered transactions). However, if Mr. Smith needs to see his property at a further level of detail, he will have access to the relevant surveyor drawn plans and conveyance descriptions that will form part of the title documents that will have been scanned by the LTRO as part of his register. If, beyond that, there is some reason why he needs to ascertain the precise legal boundaries to his title, then he will need to do this in the same way as he would do now under the unregistered system. This is because this process involves the consideration of other issues beyond the title documents themselves. But to the extent that the process draws upon the title documents as a starting point, the necessary information will be available from the registration system. In these circumstances the only way in which a registration could be limited to 50% of the area shown on the LTRIM is if his legal title now would only extend to 50% of the land in the surveyor drawn plan that comprises part of his existing unregistered title – a situation that on the face of it seems unlikely in the extreme.

- 3 For registration purposes stated areas will be taken from the information provided in the conveyancing documentation lodged on first registration (information routinely provided by the surveyors involved in producing the related plans). The register information will therefore be precisely as accurate as it is now.
- 4 As a result of its history, Bermuda enjoys a very high degree of accuracy in the way landowners' properties are mapped and their boundary measurements are ascertained. However, that is not the same as saying that we enjoy a fixed legal boundary system. This is implicit in the comment referring to occasions where discrepancies involving neighbouring properties are discovered. The new system does not offer any less definitive result than is the case now, because it carries forward the title information available from the past.
- 5 The kind of expensive and bureaucratic adjudication process to which you refer is avoided in the new system precisely because of its adoption of indicative boundaries.
- 6 As comments made at the meeting on 18 September show, Bermuda surveyors fully understand and accept the indicative boundaries system that is being adopted and appreciate the reasons for its adoption. The Minister has noted Mr. Waddington's letter. The records and plans to which he refers can continue to inform landowners and their surveyors in the future if they are made available to the LTRO when land is registered. And there is nothing in the legislation that prevents surveyors continuing to perform their valuable role in the conveyancing process, and

suitably guarantee their work where this is needed (most particularly where land is subdivided). Where this work results in the production of future conveyance or transfer plans, the benefit of the accuracy that they bring to the process will be made available through the land title registration system.

[B] Classes of Title – Absolute Title and Provisional Title

- 1 The presentation at the meeting on 18 September dealt with this issue in some detail. The primary aim of the LTRO is to maximize the number of titles that are registered with absolute title. The grant of provisional title will be limited only to those cases where absolute title would be inappropriate, as the language of section 28(4) (b) makes clear. Though it is a lesser class of title, the ability of the registrar to grant such titles in appropriate cases needs to be seen as a benefit. Without the possibility of granting provisional title the only option for the registrar would be to refuse to grant any title where absolute title would be inappropriate. It is still possible that a wholly defective title would need to be refused, but the option of granting provisional title leaves it open to the registrar to provide a "half way house" in cases where there is a defect in the title that is not as serious as that. It is difficult to see what is objectionable about this option.

It needs to be borne in mind too that it would be possible for the grant of provisional title in the first instance to be positively sought by an applicant, if this were to be considered beneficial. For example, if there is a concern about the time taken for a conveyance to be stamped, it would be open to an applicant with a good title to seek the grant of provisional title immediately based on a certified copy of the conveyance, with the relevant entry in the register for title limiting its provisionality solely to the absence of the deed having been stamped. This would confer on the applicant at an early stage the general benefits of registration, with the entry in the register making it clear that an upgrade of title to absolute will be a formality once the conveyance had been stamped. There would be no obligation to pursue this course but it would be an available option. It might be attractive to a lending bank in place of having to wait before registering.

- 2 As discussed in the presentation, the conferring on the registrar of discretion by the language of section 28(3) is unexceptionable. Legislation often confers discretion on ministers, boards and other officials, particularly where it concerns the operation of technical and detailed procedures involving applications that require individual scrutiny and decision-making. This is one such case. The important question is how the discretion will be exercised in practice.

In the first place the language of section 28 makes it clear that the central criterion for the exercise of the registrar's discretion is the holding by her of the opinion that the person's title to the estate is such as a willing buyer could properly be advised by a competent professional adviser to accept. Where she holds such an opinion it would be wholly exceptional for her to decline the grant of absolute title. And any such exception would need to be fully explained. An example might be where the title itself is entirely satisfactory but the applicant turns out not to be entitled to hold land under the Bermuda Immigration and Protection Act 1956 or the Companies Act 1981.

In the second place it is the registrar's express policy to grant absolute title wherever possible. Since you have that assurance, The Minister is not sure what more is required. However if, hypothetically, the registrar were to start refusing to grant absolute title in cases where absolute title is justified then, as explained in the presentation, the principles of administrative law prevent a public official exercising a statutory discretion from acting on a whim. The registrar can be held to account for maladministration by the Ombudsman and her unreasonable decisions would be open to judicial review. Overall, there may be cases where the registrar can only grant provisional title, or may have to refuse the grant of title altogether. However, this will only be in cases where there are clear reasons for such decisions. The registrar will be obliged to explain the reasons to the applicant and, in the case of provisional title, record them in an entry on the register.

- 3 The reasons why a formal appeal process was not adopted were explained in the presentation. The experience in the Land Registry for England and Wales (where no such appeal process has ever been in place or called for) shows that such a process would have been unnecessary in Bermuda. The setting up and running of such a process would have involved unnecessary expense and, in the extremely unlikely event that someone encounters a refusal to grant absolute title without sufficient and justifiable reason for the decision, it will be open to that person to challenge the registrar's decision by way of judicial review we say "extremely unlikely" because we are assured that the Land Registry in England and Wales, which deals with around a thousand times the volume of applications that the LTRO is expected to deal with, encounters very few such cases indeed. Judicial review cases are few and far between (perhaps one or two cases in a year) and even such as are encountered rarely involve challenging the registrar's decision in a first registration case.

As for your reference to anticipating section 28 being challenged in the Courts on constitutional grounds, you do not say what those grounds might be and we cannot see there are any. In any case, it is difficult to see who would wish to pursue such a challenge – certainly not the overwhelming majority of successful applicants, who obtain the grant of absolute title in practice.

- 4 Whilst the Minister notes what you say, the fact remains that there is an avenue available to those who wish to challenge the decisions of the registrar and consider they have grounds to do so. There is also good reason for the legislation not to have included a separate formal appeal process, as already explained.
- 5 As already explained, the registrar will be operating in a role where a degree of discretion is warranted. With the many considerations that apply to the examination of title, the process is not one that it would have been practical to deal with in the primary legislation. Members of the Conveyancing Bar have asserted that the process is particularly intricate in Bermuda. If so, then it is clearly not an area where the legislation should have done more than it has.
- 6 The point about the provision by attorneys of title certificates is that, if an attorney (i.e. a competent professional adviser) confirms that he/she has in fact advised a willing buyer that the title is acceptable, then this is the strongest possible evidence on which the registrar can base the opinion that section 28 requires. And, since her expressed policy is that absolute title will be granted wherever possible, there would have to be a very good and justifiable reason, which she explains to the applicant, not to grant such title. For example, if an application is lodged accompanied by an attorney's certificate, but the registrar receives an objection to the application under section 92, it will not be possible at that stage to grant any title. The outcome of the matter would depend on the objection process. If the objector was successful, then absolute title might not be available (at least not without some entry required to protect the objector's interest).
- 7 The Minister understands the Bermuda Bankers Association fully support the principles of land title registration.

[C] Guarantees – Government Liability

- 1 As explained in the presentation, the examination of title is a necessary precursor to the grant of a registered title on first registration. There are two possibilities. Either the lodging attorney confirms the proper examination of the title to the LTRO or the LTRO arranges for the examination to be conducted internally. Attorneys clearly have the professional skill and competence to examine titles and advise clients as to their sufficiency. It is part of the work that they already carry out for their clients in conducting transactions for consideration, such as conveyances and mortgages. It is therefore perfectly reasonable for the land title registration system to operate on the basis of seeking to rely on that examination when registering titles. To require the LTRO to duplicate internally the same process that has already been carried out externally is to propose a system with built in inefficiency. Yet that seems to be the end result of attorneys refusing to make available to the LTRO the very information they have already provided to their applicant clients.

Nor is it easy to understand why this might be the stance of an attorney seeking to serve his/her client's best interests. If the attorney has confirmed to the client that the title has been examined and is safe to acquire, what is the objection to confirming that to the LTRO? Examining a title on behalf of a client carries with it a potential risk, in case the attorney has overlooked something of relevance. However, this presumably happens very rarely, given the training, experience and familiarity with conveyancing in Bermuda that the typical attorney benefits from. And if a problem were to occur, then this would give rise to a potential liability to the client first. Any subsequent liability to the LTRO resulting from a certificate given to it would be in substitution for the liability to the client, not in addition to it. The client will not be able to claim indemnity from the LTRO and damages from the attorney at the same time. And in terms of the attorney's professional insurance, no greater risk attaches to the insurer, as payment to the LTRO would be in substitution for rather than in addition to payment to the client.

The LTRO accepts that there are cases where first registration will be triggered when there has been no examination of title by an attorney. In that case it remains open to the attorney to give an assurance as to the title if that is what is agreed with the client to be appropriate. However, if that is not the case, then the LTRO may be left to examine the title in-house. It will then clearly need to call for all the same information about the title as the attorney would require if he/she were to be carrying out the work, including the results of appropriate searches as well as the title documents. The attorney assisting the applicant will therefore need to advise the client as to the information that needs to be supplied, even if he/she does not provide any certificate to the LTRO.

Reference has been made to the complexities that can occasionally arise in Bermuda where, I understand, even attorneys may need to consult amongst themselves in order to resolve the issues. If such cases are encountered by the registrar when examining titles in house, then the registrar will have the option, built in to the Land Title Registration Rules, to refer any issues for specialist assistance and to act upon the advice received (see Rule 166).

Ultimately however if, despite the LTRO's aim of registering with absolute title wherever possible, there prove to be obstacles in the way of the registrar arriving at the opinion required by section 28(2), then a provisional title may be all that is available.

- 2 As already discussed, any "liability to Government" would only be in substitution for the attorney's liability to his/her client. The attorney will have been compensated for their work and effort in relation to the transaction and subsequent registration process through the fees charged to the client.

As to the references to sections 1 and 4 of the Bermuda Constitution, the Minister fails to see how, as a result of the legislation, anyone is at risk of their life, liberty, security, freedom of conscience or assembly, or of being deprived of their property (section 1). And it seems bizarre to suggest that the legislation gives rise to any possibility of slavery or forced labour (section 4). In any case, one of the important functions that Parliamentary Counsel has, when drafting legislation, is to check that no part of the legislation will breach any provision of the Constitution. This process was carried out in relation to the Bill that became the 2011 Act in the normal way.

- 3 The Minister notes your references to the Bar Scale. The contents of the Bar Scale are, of course, a matter for the Bermuda Bar Association, not Government. However, a reading of the current Scale does not suggest it has the effect you refer to. In relation to the conduct of transactions for monetary consideration, there is a scale of recommended minimum fees that relates the fee to the amount of the consideration (*ad valorem*). There are also *ad valorem* scales in relation to conveyances of equity and mortgages. Such fees will no doubt be charged in those cases referred to in section 24(1)(a)(i) that involve monetary consideration and those cases referred to in section 24(1)(d).⁶ In other cases under section 24(1), these would appear to be covered by other provisions of the Bar Scale that involve fixed fees rather than *ad valorem* fees.

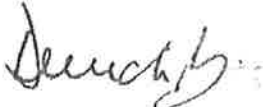
There appears to be no *ad valorem* fee that applies simply because the attorney carries out an examination of title. So, in the case of Mr. Smith's voluntary conveyance the fee would continue to be the fee of \$1,500 to which you refer, whether or not there is an examination of title. Perhaps there would be available to the attorney the ability to raise additional charges under paragraph 13(3) of the Bar Scale on the basis of its being a "case of difficulty." However, such an additional charge would need to be made on a time basis rather than a value basis. There is nothing that appears to justify charging Mr. Smith the fee of \$8,000 to which you refer.

- 4 The fees that attorneys charge their clients are a matter for them and, insofar as the fees are related to the Bar Scale, the Bermuda Bar Association.
- 5 Whilst the Minister notes what you say regarding professional insurance, any liability to the LTRO would be in substitution for a liability to the client. In that case an insurer would be no more at risk under its policy than before. It is not therefore clear why a suitable amendment to policies should give rise to any practical difficulty. In England and Wales the Land Registry receives appropriate confirmation from solicitors as to their having examined titles lodged on first registration. If such solicitors do not encounter difficulties with their professional indemnity insurers in this respect, then it is difficult to see why Bermuda attorneys should encounter any.

[D] General

Harry Kessaram has been advising the Land Title Registry Office since 2007, he also assisted with some advice during the drafting process. On May 16th 2011 the draft bill was circulated for general comments on all areas of the Bill to Harry Kessaram, Neil Molyneux, David Cooper, Kevin George, Christopher Swan, Simon Davis, and Nadine Francis. On 18th July 2011 a meeting was held and the Attorneys who reviewed the Draft bill were invited to attend the meeting to discuss any comments or concerns that they may have. The only Attorney who provided any comments was Neil Molyneux; a copy of the points that he raised is enclosed with a copy of our response. The above Attorneys had ample opportunities to raise comments on sections 11, 12, 17 and 18 but sadly none of them did.

Sincerely,



Derrick S. Binns, Ph.D.
Permanent Secretary

DS/at

Enc.

cc: Ian Truran – Chairman of the Bermuda Bankers Association