

## Scott Swainson

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**From:** Reid, Debbie G.N. <dgnreid@gov.bm>  
**Sent:** Wednesday, 8 February 2017 2:50 PM  
**To:** Scott Swainson  
**Cc:** mstone@wq.bm; kgeorge@mglaw.bm; 'Lorren Wilson'; Moniz, Trevor G.; 'Shawn A. McKee'; dsummers@bcec.bm; dkuhn@brcl.bm; 'Sara Schroter Ross'; hkitson@clarienbank.com; j.d.massa@hsbc.bm; 'shaun.morris@butterfieldgroup.com'  
**Subject:** RE: Land Title Registration Amendment Bill and Rules [APPLEBY-BM\_LEGAL.FID1586144]

Dear Scott

Thank you for your email dated the 16<sup>th</sup> of January and for once again taking the time to conduct a thorough review of the Land Title Registration legislation and give your detailed comments. I have looked at them and consulted with the AG Chambers and our comments are as follows (using the same numbering as in your message): -

### Letter dated the 19th of February 2014

The 'Existing Problems' outlined in your letter were:-

- i) **"the indicative as opposed to fixed boundary system"**; indicative boundaries have been removed and replaced with surveyed boundaries (See sections 10 and 21 of the Amendment Act). This point should no longer be an issue.
- ii) **"the potentially inequitable and unconstitutional title classification system"**; the classification of titles has been amended to take your wishes into account so that attorneys will continue to certify titles (See section 15 of the Amendment Act). This point should no longer be an issue.
- iii) **an indemnity scheme "likely to expose Government and ... the public purse to unnecessary liability"** on the Government purse. The Government backed indemnity fund and matters associated with it e.g. insurance cover as contained in sections 10, 11 and 12 of the original Act have all been removed. This point should no longer be an issue.
  - a) **"inadequate system for recording "Encumbrances"** (by your definition judgments, mortgages, matrimonial court orders and other rights affecting land etc.). This has been addressed with the creation of the new 'judgments register' which was specifically requested by the AG and is contained in sections 11, 13 and Schedule 11 of the Amendment Act and inserts the new register into s. 20A of the original Act. Under s. 23 of the original Act, estates vested in a mortgagee can be registered voluntarily or they are required to be registered under s. 24. (1) (d). Court orders are also covered by s. 24 (1) (a) (III) and s. 24 (1) (b) (II). Other rights such as easements will be picked up by LTRO staff when the deeds to a property are examined at the point of registration. Please also see paragraphs 2, 3 and 4 of Schedule 6 of the original Act, which specifically talk about changes of the register pursuant to a court order and the rules which will govern this process.
  - b) **"the glaring absence of legislation that governs priority positions as between 'Encumbrances'**. As has been mentioned previously, such matters (but only those created after the Land Title Registration Act has come into force) will be registered in chronological order. Attorneys will still have to carry out a search of the Causes Book in the existing manner at the Supreme Court until such time as the information contained in the book has either been integrated into LTRO records or the Court has created its own electronic register. As you may already be aware the LTRO has been in discussions with the Supreme Court Registrar to try and obtain the information in the Causes Book but unfortunately to date this has not happened. It has also created the judgments register referred to above to specifically record judgments and other Cause Book related information. You will note, however the Act and Rules do contain specific provisions which might alter the chronological rule e.g. sections 63 (3), 70 and 71 in the original

Act and Rule 55 deal with specific changes to the priority of such matters in certain situations. The general position is that a matter which is already protected by registration will have priority over any later matters which are required to be registered. You will also have noted I am sure that section 88 of the original Act makes provision for priority searches (including exclusive priority periods) which will protect an application from all others whilst the 'priority period' (as specifically defined in Rule 118 in Part 13 of the Rules) granted with the search result is still in effect. Very specific details about what information will be in the results are set out in Schedule C of the Rules (this includes paragraphs H and J in Part 2 which will set out the exact time a search expires). The bottom line is make your application on time and no other application will be able to trump it. Paragraph 8 in Schedule 6 of the Act also refers to very specific instances where the priority of matters on the register may be altered in accordance with the relevant Rules. Rule 98 also permits the order of priority of matters to be altered on the register pursuant to a direction of the court or Rule 100 following agreement between the owners of the relevant charges. Rule 99 of course, specifically sets the order of priority of all charges as being the order in which they appear in the register (as mentioned previously).

Lastly, Rules 130 to 137 are extremely detailed as to the priority of applications lodged in different situations (e.g. at the same time) and how they may be altered.

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.”** A mechanism for helping to resolve such disputes was contained in the original Act (the Adjudicator in s.93) However in consultation with the Attorneys it was suggested that a Lands Tribunal be created instead. This has happened and is contained in s. 26 of the Amendment Act, which inserts sections 92A, B and C into the original Act.

d) **“the unnecessary mortgage registration/perfection time lags that are experienced, which are directly due to protracted adjudication and other Governmental procedures”.** Under Land Title Registration ('LTR') the registration of a mortgage will be much quicker provided all documents are in order and there will also be no need for the property to be re-conveyed to the owner once the mortgage has been paid off. This is because mortgagors will be shown as the owner of the property from the point of registration under the terms of s. 23 of the original Act rather than mortgagees as currently happens. Mortgages will be registered as legal charges as soon as possible under the new system and it will therefore be quicker, simpler and more efficient. Provided an attorney keeps their priority search up to date, then the mortgage will be protected whilst the registration process takes place. This is an extra level of protection which attorneys and their clients do not currently have in Bermuda and is another benefit of land registration. If a priority period is due to expire the party in whose favor it is will receive a reminder of this from the LTRO and it will ask them if they wish to renew it or not. Provided this is done in time then the protection will last until the mortgage has been registered. Any difficulties that you experienced with the previous system should no longer apply. This will be one of the main benefits of LTR.

e) **“the glaring absence of legislation that governs information disclosure, within the context of land law now or formerly held in trust”** All documentation held by the LTRO (except for Trust Deeds) will be disclosed as it is a public register save for any information redacted from it in accordance with an application pursuant to Rule 122. Any land held in trust will list the name of the relevant trustee as being the owner of the land/property. The names of the beneficiaries to the trust will not be disclosed and if a copy of the Trust Deed is required to be seen by the LTRO it will not be kept by it in its records.

### **Email dated 16<sup>th</sup> January 2016**

(i) There is no need for the Act to comprise of two parts. It is very clear in its current format how the system works. Please clarify what the “serious transnational challenges that are likely to flow from the new advertisement requirements” are? As you may recollect you did make the request that we remove the notice from the Rules and place them in the Act. You confirmed that such notices are already issued by Departments such as Planning and Immigration in accordance with the legislation which governs them. You and your colleagues will therefore be used to dealing with and looking out for such notices. This should put you in a strong position for dealing with LTRO notices when they are issued.

(ii) As I have highlighted above all of the Existing Problems have clearly been catered for in either the original Act or the Amendment Act and have therefore been resolved. I note that you have raised two new concerns. namely the

- Companies Act 2014 and the case of Burch v Westend Properties Limited 2011 no. 445 (10<sup>th</sup> February 2016) in relation to LTR.

Any concerns that you have re the Companies Act should be rightfully raised with the appropriate Ministry. LTR is designed to fit neatly into current Bermudian land law.

As regards the case of Burch v Westend Properties Limited this does no more than clarify existing adverse possession law on island. LTR will still be able to be introduced in spite of it. You will have noted that s. 108 in Part 17 of the Act already specifically states how LTR will affect adverse possession. In short, it will be much harder to claim once a property has been successfully registered. This is yet another benefit of LTR which your clients will greatly appreciate.

(iii) The Existing Problems have been addressed.

(iv) Your firm and any others will not be exposed to any more liability than they are at the moment. You proposed that the certification process be carried out by attorneys in the same way that they currently do and this was accepted some time ago by the LTRO to remove your concerns about the establishment of indemnity fund – a fund set up to give your clients' title protection. Once a property is in the process of being registered your client will want to become the legal owner and this will not happen until you have successfully registered it at the LTRO in accordance with the provisions of the Land Title Registration Act 2011 (as it may be amended). It will be your duty to do so in order to comply with the law (and act in the best interests of your client which you are also duty bound to do). The LTRO will accept your certification and record it on the registers kept by it. If anything untoward is found at a later date then it is highly likely that your client will have a property which it cannot sell and would make a claim against your firm's insurance policy in the usual (existing) way. Without the Government indemnity fund there would be no other option available to them.

(v) We did consult with the surveyors before when drafting the original Act and the surveyors were happy with its form and contents. We don't see anything in the changes which should cause them any undue concern.

(vi) Assumptions and reservations are not strictly required in the Act as they will no doubt be contained in your report on title or in the surveyor's report/plan which are both specific to your client as part of the process of them engaging you (or the surveyor) to act for them. Obviously, as the LTRO system is new we want it to be accurate and reflect the correct position re a property as to its owner, size and location. It therefore makes perfect sense for all such information to be supplied to the LTRO as this will be up to date, accurate information available concerning a property.

(vii) Only certain triggers will become operational when LTR come into force. Those are the three which your Committee specifically asked for (being sales for value, mortgages of \$750,000 or more and leases above the threshold term (21 years or more)). The other triggers will remain in the original Act as drafted and be introduced by the Government of the day at a later date when it considers it an opportune time to do so. Rather than having to return to the Legislature for approval before activating each additional trigger, the negative resolution procedure would be the most appropriate method of activating those triggers

Kind regards

Debbie G N Reid

Land Registrar

D G N Reid

Land Registrar

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**Ministry of Public Works** | Department of Land, Surveys & Registration

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**From:** Scott Swainson [<mailto:SSwainson@applebyglobal.com>]

**Sent:** Wednesday, February 08, 2017 12:27 PM

**To:** Reid, Debbie G.N.

**Cc:** [mstone@wq.bm](mailto:mstone@wq.bm); [kgeorge@mglaw.bm](mailto:kgeorge@mglaw.bm); 'Lorren Wilson'; Moniz, Trevor G.; 'Shawn A. McKee'; [dsummers@bcec.bm](mailto:dsummers@bcec.bm); [dkuhn@brcl.bm](mailto:dkuhn@brcl.bm); 'Sara Schroter Ross'; [hkitson@clarienbank.com](mailto:hkitson@clarienbank.com); [j.d.massa@hsbc.bm](mailto:j.d.massa@hsbc.bm); 'shaun.morris@butterfieldgroup.com'

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

**Importance:** High

Dear Debbie,

Further to my email below, we have heard nothing further regarding the meeting that you proposed for the purpose of discussing the outstanding issues that affect the Land Title Registration legislation. Given that the Land Title Registrar (Recording of Documents) Act 2017 appears to have been approved by Parliament on the 3<sup>rd</sup> February, 2017 (as recorded in yesterday's Royal Gazette) and given that the Minister has promised to "tenaciously" pursue the passing of the Amendment Act following the budget period, I would appreciate your confirming (by return), whether we can expect any further consultation or dialogue?

Regards,

Scott

**Scott Swainson** | Partner | Group Head, Bermuda | Property

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**From:** Scott Swainson

**Sent:** Monday, January 16, 2017 7:07 PM

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

**Cc:** [mstone@wq.bm](mailto:mstone@wq.bm); [kgeorge@mglaw.bm](mailto:kgeorge@mglaw.bm); Lorren Wilson; 'tgmoniz@gov.bm'; 'smckee@bcec.bm'; [dsummers@bcec.bm](mailto:dsummers@bcec.bm); [dkuhn@brcl.bm](mailto:dkuhn@brcl.bm); 'Sara Schroter Ross'; 'hkitson@clarienbank.com'; 'j.d.massa@hsbc.bm'; 'shaun.morris@butterfieldgroup.com'

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

Dear Debbie,

Thank you for your email below, as well as for the amended legislation (attached).

Given that a few members of the conveyancing group are currently away, we will not be available to attend the meeting that you have proposed (as a group) until the 26<sup>th</sup> of January at the earliest. Once

again it would be helpful if both the land (or boundary) surveyors and members of The Bermuda Bankers' Association were able to attend and provide input.

Please find below a number of comments and concerns regarding the proposed amendments to the Land Title Registration Act ("the Act"). Some of these comments/concerns were flagged in respect of the previous drafts. For ease of reference I attach copies of the conveyancing group's initial proposal letter dated 19<sup>th</sup> February, 2014 ("the 2014 Letter") that was directed to the then Minister of Public Works, the email dated 3<sup>rd</sup> October, 2016 ("the October Email") that I directed to you and the note/letter that you directed to me on the 5<sup>th</sup> December, 2016.

- (i) Having reviewed the Act and the rules, it would appear that greater clarity could be achieved if the Act were to comprise two distinct parts (as suggested in the 2014 Letter), namely a deeds registration, or transitional part commencing with the initial advertisement step and ending at the point when absolute title designations are achieved, followed by (as the second part) full blown land title registration that relies on absolute title designations and the form of electronic conveyancing contemplated in Part 18 of the Act. The transitional part could provide a comprehensive framework for addressing the potentially serious transactional challenges that are likely flow from the new advertisement requirements. It could also address (using the new Land Title Registration Tribunal facility coupled with current conveyancing documentation and procedures) the wider title related challenges that will need to be resolved as part of the process, especially the challenges associated with transactions involving multiple undivided shares, life interests and remainders, land trusts, mixed fee simple/possessory titles and subdivision difficulties. The transitional part could of course, also address as many of the "Existing Problems" (as described in the 2014 Letter) as possible. The bottom line is that we need transitional provisions that are comprehensively drafted for this jurisdiction so that we end up with an efficient and cost effective system.
- (ii) As stated in the October Email, the amendments to the Act **do not** adequately address the "Existing Problems," which (in fact) have yet to be properly discussed. The prospect of implementing a new system that fails to take the Existing Problems into account and to resolve them (to the extent possible) is wholly unacceptable. The continuing title uncertainty and the procedural time lags caused by the Existing Problems will jeopardise the success of any new system. The Existing Problems, including the problematical amendments that were effected to the Companies Act in 2014, need to be specifically addressed through legislative reform as part of the transitional process. The recent ruling in *Burch -v- Westend Properties Limited*, Supreme Court Civil Jurisdiction 2011 No. 445 (dated 10<sup>th</sup> February, 2016), has elevated the level of title uncertainty. In this case provisions of the Conveyancing Act 1983 were construed in a manner that resulted in a 1969 root conveyance tendered by the defendant being primed (in title terms) by a 1939 registration memorandum tendered by the plaintiff (without the plaintiff actually deducing any title deeds).
- (iii) Ultimately, if the Existing Problems are not addressed, the associated title uncertainty will increase the volume of claims or disputes that are referred to the Land Title Registration Tribunal. This will overburden or clog this facility (and possibly the Courts) and cause material delays in respect of the rendering of decisions. Clearly any disputed title (or property) that gets caught up in such a logjam is likely to be far less marketable while this state of affairs subsists. This could present financial and other challenges for the affected property owner(s), as well as any bank or lender holding title to the subject property as security.
- (iv) The liability and other issues surrounding the filing of title certificates at the LTRO still need to be properly discussed and **specifically addressed** in the Act, especially given the impact that wider title certificate disclosure will have on (inter-alia) existing insurance arrangements. The Act needs to make it clear that the filing of title certificates will not expose law firms to wider liability (over and above that which we already assume to our clients).

- (v) Having spoken to Shawn McKee (whom you will note I have copied) who chairs the land or boundary surveyors committee, I have been given to understand that the survey report requirements that are specified in the Act have yet to be discussed with them. Shawn also indicated that the surveyors are likely to have liability and insurance related concerns in respect of the filing of their reports and plans at the LTRO. Additionally, he stated that uniform surveying standards would need to be adopted by local surveyors in order for their survey reports (and plans) to be legitimately relied upon in the manner contemplated in the Act.
- (vi) Once again, the assumptions and reservations that are specified in section 3A(4)(b) and Schedule 10 to the Act, need to be properly discussed and agreed, especially taking into account the ruling in Burch -v- Westend Properties Limited. Further, the surveyors are likely to require their own menu of assumptions and reservations.
- (vii) Section 24 of the Act (as currently drafted) is (once again) unacceptable. We have proposed making title certificates available to the LTRO on a compulsory basis in circumstances where they would ordinarily be given to client purchasers and/or mortgagees (**only**). Both Section 24 and Schedule 3 to the Act should therefore, be amended accordingly. The prospect of a negative resolution procedure in this context is unacceptable.

It would be helpful if the above mentioned matters could be discussed during the meeting.

Regards,

Scott

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**From:** Reid, Debbie G.N. [<mailto:dgnreid@gov.bm>]

**Sent:** Friday, December 16, 2016 3:51 PM

**To:** Scott Swainson

**Subject:** FW: Land Title Registration Amendment Bill and Rules

Good Afternoon Scott

The Attorney General Chambers have made some slight amendments to the LTR Act and Rules which are now attached, Brian Eaton has also included an explanatory memorandum in the Act. Please can you Circulate the changes to the Land Title Registry Sub- Committee.

Please note that the Attorney General Chambers and I would welcome a meeting with the Sub- Committee to discuss the legislation prior to it being debated in February.

Kind regards

Debbie

D G N Reid

Land Registrar

Government of Bermuda | **Land Title Registry Office**

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**Ministry of Public Works** | Department of Land, Surveys & Registration

**From:** Eaton, Brian

**Sent:** Friday, December 16, 2016 3:34 PM

**To:** Reid, Debbie G.N.

**Cc:** Moniz, Trevor G.; Richardson, Francis; Balfour-Swain, Cathryn; Simmons, Myron E.

**Subject:** Land Title Registration Amendment Bill and Rules

Good afternoon Debbie,

The draft Bill and Rules are attached for review. As discussed, I've included a marked-up version of the Bill, showing the most recent changes, which will make the changes easy to follow, particularly for the conveyancing attorneys you sent the last draft to.

Regards,

Brian

**Brian Eaton**

**Parliamentary Counsel**

**Attorney-General's Chambers**

**Tel: 292-2463 (ext. 4418)**

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