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By Hand
31 May 2013

Dear Sir

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Land Title Registration Act 2011 ("the Act")

Thank you for your letter dated the 25 April, 2013 (the "April Letter") (received on the 2nd May, 2013).

Your response appears capable of being summarized as follows:

- (i) the Conveyancing Bar has misconstrued the word "**indicative**," (as defined in Section 17 of the Act) within the context of boundary lines and lot area calculations;
- (ii) the Conveyancing Bar has misconstrued the word "**provisional**" within the context of the title classification designations specified in the Section 28 of the Act;
- (iii) the Act already adequately controls the exercise of the Registrar's discretion in respect of the title classification process;
- (iv) the guarantee component of the Act stands to offer local property owners guarantees from individual law firms upon each initial registration, (in addition to the Government guarantee that is contemplated in section 12 of the Act), which makes this component more palatable; and
- (v) members of the Conveyancing Bar did at all material times participate in the drafting of the Act, as well as in the formulation of the related "policy decisions" and "a large number" of us have acknowledged the "benefits" that the Act (as drafted) will offer "to the public and to the conveyancing profession."

Unfortunately, these points do not appear to be supported by the relevant provisions of the Act, or by historical fact. Further, the Conveyancing Bar having now been afforded the opportunity of reviewing the Act in conjunction with the draft Land Title Registration Rules ("the Rules") (that were finally shared with us on the 11th April, 2013) and the "Notes On

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Clauses” relating to the Act (“the Notes”), we would like to confirm that **our** position in respect of the Act remains unaltered. Accordingly, we **do not** support the implementation of the Act (as drafted), because it remains ill-considered and unsuitable for Bermuda.

Please find below our comments in respect of the substantive issues, which take into account the five points raised in your April Letter.

[A] The Definitive Boundary/Indicative Boundary issue

1. Any confusion regarding the interpretation of the term “**indicative boundary**,” is clearly attributable to the actual language that appears in sub-section 17 (2) of the Act, which reads “**An indicative boundary does not determine the exact line of the boundary of the registered estate.**” (“the Indicative Language”). The import of the Indicative Language, which is reiterated in the Notes, speaks for itself. It necessarily causes a reader to think in terms of a boundary line that is “suggestive” (being the dictionary definition of “indicative”), or “general,” or otherwise less than “accurate.” If sub-section 17 (2) was as you assert, intended to connote the “the highest accuracy...” under your “...up to date mapping system”, then we would appreciate your explaining why it was not drafted in such terms?
2. One key question that is triggered by the Indicative Language is linked to the title classification process that is specified in section 28 of the Act. In this regard the Indicative Language causes one to question the extent to which an individual title classification could be capable of extending to a registered parcel of land if “**the exact**” boundary lines of the parcel are not being determined. Might (by way of example), an “**absolute**” title classification given to a property owner (namely “Mr Smith”) pursuant to section 28, extend to the whole of his parcel as shown on the “**Index Map**”, or perhaps to 50% of his parcel”, or perhaps to some other percentage, and if so, to which portion might the classification apply? Alternatively, might the designation extend to the footprint of any buildings erected on his land (only)? Further, if Mr. Smith’s parcel, as described historically, and shown on his existing deed plan, includes a substantial retaining wall, might an absolute title designation extend to and include this structure? If so, would you please direct us to the provision(s) of the Act that address these questions? While a similar retaining wall example was included in our previous letter, your response simply suggested, in dismissive and inadequate terms, that this issue would be “supported on the LTRIM.” Given that these fundamental questions go to the root of the Act’s functional integrity, we would appreciate receiving a more meaningful and detailed response.

3. Another key question relates to the level of boundary accuracy, described in your letter within the context of the Indicative Language. In this regard we would appreciate your explaining how the boundaries of a registered parcel could be capable of being shown on the register "...in square meters to at least two decimal places...", if the "exact" lines of the parcel's boundaries are not being determined by virtue of subsection 17(2) of the Act. In other words how might it be possible (mathematically), to complete the necessary square area calculation and to produce the result that you describe?
4. The fact of the matter is that Bermuda already enjoys a fixed "legal" boundary system that would serve to confirm absolute title to the entirety of Mr Smith's parcel of land as shown on his deed plan, including his retaining wall. Boundary surveys are already routinely procured, (at reasonable cost levels) as part of most day to day sale and purchase transactions. Where discrepancies involving neighbouring properties are discovered, such discrepancies are usually definitively resolved on the basis of either boundary adjustment agreements between the relevant parties, or Court proceedings. These procedures, which obviously take into account considerations such as long standing boundary features, evidence of peaceful possession and the effluxion of time, enable definitive legal boundaries to be established in a reasonable, tried and tested manner. Any new system that offers a less definitive result would constitute a retrogressive step.
5. While your April Letter speaks to the LTRIM's accuracy and potential, which would incidentally, appear to be of little practical value to Mr. Smith within the context of his retaining wall, it fails to address the mechanics of how information collected by the Registrar pursuant to sub-section 15(2) of the Act, such as any existing Cadastral survey information supplied by an applicant on the one hand and any orthophotographic survey information supplied by the Government Survey Section on the other, will be compiled, assessed and reconciled (if necessary). Assuming that:
 - (a) all such information will be processed by the Registrar for the purpose of completing the LTRIM;
 - (b) the LTRIM will represent the final word, or position in respect of the surveying status of each registered parcel; and
 - (c) no ongoing privately procured surveying work will (as you allege) be required after a parcel of land has been registered, (save and except in the event of a subsequent subdivision step);

one would have expected for the Act to have included a surveying based adjudication process, that would address (inter-alia) any inconsistencies that may arise between the two streams of surveying information. The absence of an adjudication component causes one to assume that any such inconsistencies would (like title classification decisions) be left to the whims of the Registrar and determined in her sole and absolute discretion, which is wholly unacceptable.

6. Please note that we are in the process of liaising with the Bermuda Surveyors Association (whom we have copied) regarding the Indicative Language, as well as other surveying related issues that flow from the Act. Thus far it would appear that the surveyors and the Conveyancing Bar share similar concerns, insofar as both groups do not appear to have been adequately consulted before the Act was passed. We also understand that the Surveyors Association will be writing to you directly for the purpose of expressing their concerns in respect of both the Act and the surveying related statements that were included in your April Letter. After reviewing these statements, one well experienced and now retired surveyor, namely Mr. Ian Waddington, felt compelled to direct a letter to the writer (for onward transmission to you), voicing his concerns and we enclose a copy of his letter for your perusal that was received by email and in word form.

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

1. Given that “**absolute title**”, which you acknowledge as being “the best class of title”, appears to be available by virtue of section 28 of the Act where “**a person’s title to the estate is such that a willing buyer could properly be advised by a competent professional advisor to accept**”, or where a “**defect will not cause the holding under the title to be disturbed**,” we have difficulty understanding how a “**provisional title**” designation could be construed otherwise than as “a wholly inferior class of title”. Common sense would appear to dictate that a potential purchaser would target a property (post registration) that has been granted an absolute title designation, rather than one that has been saddled with a provisional designation. Further, a mortgagee/lender would likely prefer and possibly insist upon lending where a loan is capable of being secured on the basis of an absolute title designation (as opposed to a provisional title designation). These factors would necessarily serve to render properties possessing provisional designations “wholly inferior.”
2. The larger issue that arises from section 28 is of course, the extent of the Registrar’s discretion within the context of the title classification process. Once

again, the language that appears in section 28 speaks for itself. In this regard while it provides various guidelines that are clearly intended to assist the Registrar in reaching a classification decision, it is ultimately the Registrar's sole "opinion" that dictates the final result. The use of the word "may" (as opposed to "shall") in each of subsections 28 (2), (3) and (4) is consistent with this interpretation. Clearly, this merely permissive language ("the Permissive Language"), does not place the Registrar under a direct obligation to accept input from any other person before making a title classification determination. To suggest that section 28(2) imposes such an obligation on the Registrar is blatantly incorrect and if this result is intended, then section 28(2) ought to be amended for the purpose of removing the Permissive Language.

3. Once again, the fact that section 28 fails to incorporate a fair and reasonable appeal (or tribunal) component into the title classification process that is capable of being relied upon before a classification determination, represents a material shortcoming that ought to be addressed by way of an amendment to the Act. If this shortcoming is not addressed, then we anticipate section 28 being challenged in the Courts in relatively short order on constitutional grounds.
4. To suggest in consolatory terms, that the Registrar "is always obligated to comply with an order of the Court granted pursuant to Schedule 6 to the Act, after the title classification process has been completed (effectively on a judicial review basis), is wholly unacceptable and unreasonable. This is because by this juncture, an applicant would have had to incur all of the costs associated with both the initial registration step and the subsequent Court proceedings, most of which would be irrecoverable, (even in the event of a successful Court result). Further, such proceedings could last for years, which would prove extremely inequitable, especially if (by way of example), the initial application had been triggered by a mortgage transaction and the applicant was already desperately in need of funds at the outset. A title upgrade that is applied for after the fact, in accordance with section 81 of the Act, would present similar challenges and would, in any event, remain subject to the Registrar's sole discretion.
5. Your letter also seems to suggest that assurances from the Registrar and others, within the context of the title classification process, ought to have a place in a blackletter discussion involving section 28. Such a suggestion is unhelpful and inappropriate. Section 28, as well as the balance of the provisions the Act ought to be capable of being clinically and literally construed (word by word) on the basis of their actual language, without needing to be underpinned by non-binding assurances and extraneous embellishment.

6. Additionally, your letter suggests that the Registrar, will upon the filing of an application for first registration, become “obligated” to rely on title related certificates procured from individual law firms (or attorneys). The presence of the Permissive Language in clause 28 renders this suggestion incorrect. Please note that our general concerns regarding attorney title certificates, are addressed below under the heading “Guarantees”.
7. Clearly, it remains to be seen whether the Bermuda Bankers Association (whom we have copied) and other stakeholders will remain supportive of the LTR system, after the provisions of the Act have been fully and properly scrutinized and also after all of the underlying risks to their mortgage portfolios and the local property market generally have been fully assessed.

[C] Guarantees-Government Liability

1. As indicated above, the only new consideration that your April Letter offers within the context of the risks that the guarantee component will present to the public purse, is the prospect of individual law firms (or attorneys) underwriting (or separately guaranteeing) Land Title Registration Office (“LTRO”) incompetence. As a preliminary matter, we would appreciate your confirming (in writing) the specific provisions of the Act that would operate to saddle law firms with this obligation and liability? Based on recent discussions between members of the Conveyancing Bar and the Registrar, it is our understanding that this safety net mechanism is intended to hinge on the execution of a “certificate of legal effect” (as per section D of the LTRO’s Form A1), procured pursuant to paragraph 15 of Schedule 3, upon each initial registration from the relevant law firm. However, this paragraph appears to be of very limited assistance, because it only applies where an initial registration application is submitted under section 21 of the Act, which relates to voluntary registrations (only). Paragraph 15 of Schedule 3 does not extend to Section 24 of the Act, which relates to compulsory registrations and is of much wider application. Further paragraph 15 of Schedule 3 only applies where an attorney (or law firm) voluntarily engages in the application process on the behalf of an applicant, meaning that an attorney (or law firm) may, given the guarantee or liability risk that has now been flagged, opt not to participate in this process at all. Of course if a certificate of legal effect is not given pursuant to paragraph 15 of Schedule 3, the Indemnity component that is specified in paragraph 10(c) of Schedule 1 to the Act, is not capable of taking effect. This would of course leave the LTRO fully responsible for reviewing title, completing all necessary due diligence steps and ultimately certifying title itself, which would, given the absence

of local practice experience amongst the LTRO's ranks, cause the risk based concerns that were outlined in our previous letter to remain relevant and unaddressed.

2. Fundamentally, the Conveyancing Bar has serious concerns in respect of any provision of the Act that would require attorneys (or law firms) to provide intellectual capital to Government and to assume liability to Government without being compensated by Government. Further, demanding that we do so would appear to contravene the provisions of paragraphs 1. and 4. of Schedule 2 to the Bermuda Constitution Order 1968. Accordingly, such a demand would appear to be capable of being successfully challenged in the Courts (if necessary).
3. We also have serious concerns in respect of the passing of these risk related costs on to the general public, especially taking into account the combined effect of both sub-section 24(1) of the Act and the Bermuda Bar Association Recommended Scale of Fees. In this regard, (and by way of example), most of the transactional triggers that are included in subsection 24(1) currently result in our charging relatively nominal (approximate) \$1,500.00 fee rates to clients (Bar Scale). This is because we are not required to opine on title in such instances. If all of a sudden an attorney is required to opine on title to Government as part of a registration requirement, following the completion of (for example) a voluntary conveyance involving Mr. Smith's property, and our liability exposure is increased to a level that equates to the full market value of his property and if we are also required to complete additional due diligence steps, then the Bar Scale rate would need to be increased to take these matters into account. In such circumstances, the conveyance (or transfer) rate would apply and if Mr. Smith's property were to be valued at say \$1,000,000.00, the Bar Scale fee would amount to approximately \$8,000.00. This would represent a \$6,500.00 Government Induced fee increase. Clearly a fee increase of this magnitude would not benefit Mr. Smith, or any other residential property owner in Bermuda. A similar result would feature within the context of a larger (higher value) developer driven transaction and could have a colossal impact on same. In this regard an inter-group voluntary conveyance involving a multi-million dollar (say \$100,000,000.00) transfer value, would result in a \$130,000.00 (plus) Bar Scale fee increase over and above the standard \$1,500.00 rate. Clearly, such an increase would not be appreciated by developers and it could have an adverse impact on Bermuda's property market.
4. Essentially, the Bar Scale Rates to which we currently adhere, are linked to both the work that we complete and the transactional risk that we assume (on a case by case basis). Altering the nature of the work performed and the level of risk

31 May 2013

assumed across the board, would necessarily cause fee rates to increase across the board and this would have a detrimental effect on the economy and would also prove grossly unfair to property owners, especially given the current economic climate.

5. Law firms are also required to adhere to a number of professional engagement requirements that are largely insurance driven and include limiting the benefit of our opinion or title certificates to our immediate clients (only). Such requirements would make it extremely difficult for us to extend our opinion certifications and liability exposure to Government, without each law firm having to revisit its existing insurance arrangements. Any widening of our liability exposure is likely to increase premium levels and by implication, the overall costs of our doing business in Bermuda.

[D] General-our position

While we trust that this letter definitely confirms, the Conveyancing Bar's position in respect of the Act (as drafted), we remain intrigued by your insistence that some of our members, in particular " the Chairman of the Conveyancing Bar in 2007, were involved "throughout the whole drafting process right up to the debate in Parliament". Given that the LTR Bill was not, based on our records, circulated in the first instance (and on a very limited basis only) until August 2011 (being about 4 months before the Act was passed by Parliament) and given that the Rules, (sight of which would clearly have been essential in order to fully and properly review the Act), were not circulated, until April of this year (and remain in draft form only), the level of drafting input that you describe would appear highly questionable. We would therefore, appreciate your providing evidence of any such drafting input, especially any written correspondence relating to the most problematical sections of the Act, namely sections 11, 12, 17 and 28.

We look forward to hearing from you as soon as possible.

Yours faithfully



Enc

cc: Mr Shawn A McKee - President of the Bermuda Surveyor's Association
Mr Ian Truran - Chairman of the Bermuda Bankers Association

May 13, 2013

Apartment 501
10 Dundonald Street West
Hamilton HM 09

Appleby Limited
22 Victoria Street
Hamilton HM EX

Attention: Scott Swainson

Dear Scott,

Re: Land Title Registration

I have had the privilege of reading a letter copy to you from Mr. Charles Brown, acting permanent secretary for the Ministry of Environment and Planning. I understand that this is a response to correspondence submitted by you on April 2nd 2013.

I have been involved with many attempts to introduce land registration to Bermuda over the past 35 years. I think I have sat on at least 3 committees during this time frame. I would like to say that I have been a supporter of land registration for Bermuda and continue to support it, in a suitable and advantageous form.

Having digested the letter above mentioned, dated April 25th 2013, I feel compelled to respond to some of the most fundamental basic inaccuracies relating to existing survey methods and criteria mentioned in the correspondence. It is difficult for me to understand how the Government of Bermuda could be so badly misinformed on several issues relating to surveying methods in Bermuda.

While in business in Bermuda I was fortunate to follow and understand the subdivision process brought forward by the likes of the late Thomas Godet, Robert H. Clarke, P.A.D. Smith and others, who historically preserved the principles of land subdivision based on previous records and plans. In fact we ended up purchasing these records in order to maintain consistency when establishing property lines and marks, based on previous criteria and history. Subdivisions are breakdowns of all previous subdivisions and surveyors in Bermuda have always recognized this fact.

Turning to page 2 of the referred letter, I refer to paragraph 3 of 1. 'Boundaries of registered parcels'.

As surveyors employed to establish boundaries and for which they charge a fee, they do in fact guarantee the position of boundaries. Surveyors can be challenged on their work and they must ensure that their work has taken into account all of the information pertaining to the property and surrounding parcels. The legal boundary is not an imaginary line dividing parcels, it is a line that can be re-established at any time by any surveyor who is hired to act for a landowner. To state that a line is rarely identified with any precision on the ground is just not true. Furthermore, to

similar to what is done by local surveyors today, albeit not necessarily on the BNG. If the government has done it, then I don't see why the private sector cannot do it.

I am more than happy to discuss further the business of land registration for Bermuda and I am more than willing to sit down for a fourth time to make sure that the system adopted is the best for Bermuda. The opinions expressed in this correspondence are my opinions and not associated with any other surveying body in Bermuda.

Yours sincerely,

Ian Waddington AssocRICS