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Review of the Legal Framework for Land Administration

FINAL DRAFT ISSUES PAPER - REGISTRATION OF TITLES LAW

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Final Draft Issues Paper – Registration of Titles Act

PROPOSALS FOR REFORM/REVISION OF THE REGISTRATION OF TITLES ACT AND CERTAIN GENERAL PROPERTY MATTERS

Scope of this Draft Final Issues Paper

This section of our Final Draft Issues Paper deals with the *Registration of Titles Act* cap 230 (often referred to simply as RTA).

A review of the *Registration of Titles Act* is one of the key elements in the *Review of the Legal Framework for Lands Administration*. Because of its key nature, this Paper goes further than most of our considerations of other aspects of the *Review*, in that it includes draft legislation to give effect to our recommendations. We refer to this draft legislation as the *Draft RTA 2010*.

Our earlier draft Issues Paper on the RTA also included draft legislation (which we called the *Draft Registration of Titles Act 2008*, and which we refer to in this Paper as the *Draft RTA 2008*). In this Draft Final Issues Paper, we have taken the opportunity to refine our views on some of the matters in the *Draft RTA 2008*.

Crucially, this Final Draft Issues Paper takes into account the comments which the Law Reform Working Group (LRWG) made as a result of the LRWG retreat on 24 January to 27 January 2010.

PART I: Registration of Titles Act

1.1 Introduction

1.1.1 Literature review

In preparing our earlier Draft Issues Paper, and in preparing this Final Draft Issues Paper, we have made an extensive literature review of the law and practice of title registration systems. In addition, we bring to our discussion many years of research and investigation into title registration systems in the common law world. Two of the Subconsultants (Professor Peter Butt and Dr John Mugambwa) have published extensively in the field, including a number of books and many journal articles. Dr Mugambwa's books are specifically on Ugandan land law. Professor Butt's books include several on the Torrens system of title registration (being the system in force in Uganda). Appendix 1 to this Paper lists the material we have reviewed.

Response to LRWG's comments

The LRWG considered that our literature review was inadequate, saying that we should have referred also to books such as Wade and Burn, Megarry's *Manual on Real Property,* Wiseman, and H W West. However, we respectfully beg to differ. Wade and Burn, and Megarry, are texts on English Real Property Law. Uganda's RTA is a Torrens title statute, and England does not have a Torrens system; and so these books (as with most other English texts) contain no detailed treatment of Torrens title. Wiseman is a text on the Torrens system; but it was published in 1931—well before modern developments and experience in the operation of Torrens systems around the world. West's book (*Land Policy in Buganda*, 1972) has one chapter on land registration, but it deals with the history of land registration, and not the provisions of the legislation (which is not entirely surprising, as West was not a lawyer).

1.1.2 Case law

As part of the preparation, we have also considered recent judicial decisions on Ugandan land law, particularly on matters relating to the *Registration of Titles Act*. This is because any proposals for reform must take into account existing case law. They must also, so far as reasonably possible, predict the effect of existing judicial precedent on proposals for reform. We list some of these decisions in Appendix 2 to this Paper.

In our respectful view, some of these decisions incorrectly apply certain provisions of the Registration of Titles Act. For that reason (as will be seen), as part of our recommendations for reforms of that Act, we propose adding "notes" or "examples" to the text of the Act. They will give practical illustrations of how the provisions are intended to operate. This will help ensure practitioner understanding and judicial consistency in the application of the Act.

1.1.3 Historical considerations

In addition, in preparing the Draft Issues Paper, we have kept in mind certain historical considerations. These have informed our views on matters of law revision generally. They are:

a) Many of the land-sector laws listed in the Terms of Reference for review are outdated. They were enacted in the colonial era, with principles imported from English Law or from the laws of other English colonies, without due regard to the customs, traditions and practices of Uganda.

b) In the countries from which some of these laws were imported, later revisions have been made to reflect corresponding changes in social and economic conditions in those countries. These changes have not always been copied into the corresponding Ugandan provisions. This has happened with the Registration of Titles Act.

We now consider the specific areas which we have been asked to address. After discussing each issue, we summarise our recommendations.

1.2 Overview, computerisation, organisational structure and decentralisation

1.2.1 Overview

The Registration of Titles Act has been in force for many years. It is based on a 1915 statute from the Australian state of Victoria. It is a "Torrens title" statute: that is, it reflects the underpinning concept of state-guaranteed title ("indefeasibility of title") that is the hallmark of Torrens systems around the world. However, it has remained frozen in time. It has not been updated to reflect changes to, and judicial interpretations of, Torrens statutes in other jurisdictions. In principle, we believe that its underlying promise of state-guaranteed title still makes it the ideal statutory framework for land law in modern-day Uganda. In practice, however, it needs substantial reform if it is to serve the needs of Uganda in the 21st century. And so our aim in considering the Act and the need for reform generally has not been to change the fundamental premises on which the legislation is drafted, but rather to suggest modifications that will make it better serve Uganda's needs for the 21st century.

1.2.2 Computerising the operations of the Land Registry.

At the time the Registration of Titles Act was enacted, land registers were, of course, kept entirely in manual form. The drafting of the Act reflects this. But we are now in the age of coumputerisation. We take it as a given that the Register should be computerised as soon as reasonably possible. Of the many reports into the Ugandan land market in recent years, none has suggested otherwise.

There are, of course, many practical problems involved in moving to computerisation. Not the least of them is cost. This makes wholesale and immediate conversion to a computerised Register impossible. Conversion must be done in stages, with pilot projects to test procedures and competencies. We understand that pilot programs are in fact already underway.

The Registration of Titles Act must be amended to support the conversion to computerisation. This, in our view, is not difficult. Simple changes to the Act will ensure that the legislative framework supports the move towards computerisation. The legislation should be drafted in broad terms, to allow for phased development, as part of the development of a comprehensive land information system (LIS).

As computerisation occurs, it should eventually become possible to lodge documents electronically. When that stage is reached, it should also become possible to make on-line title searches. Also when that stage is reached, personal attendance at the Registry should not be required for either lodgement or searching. The Registration of Titles Act can easily be amended to ensure that this becomes possible in stages, and then more universally as resources and technology allow.

Further, in due course, it may be possible to introduce paperless conveyancing transactions, where all dealings and payments take place electronically. This will be many years ahead. Even in countries with sophisticated computerised land registers, the move towards electronic conveyancing is proving difficult.[1] Nevertheless, there is no reason why the Registration of Titles Act cannot be amended now to provide for the change, if and when technology allows it to happen.

Recommendation: that the Registration of Titles Act be amended to allow for computerised land records (including pilot projects), and in due course to allow for electronic lodgment of documents, on-line title searching, and electronic conveyancing.

1.2.3 Should the Registry become an autonomous or semi-autonomous entity, and to what extent should it be subject to Ministerial control?

This issue is contentious. Recent studies support a change in status of the Land Registry to one that is autonomous or semi-autonomous.[2] Benefits are said to include greater flexibility in management practices and improved employment conditions for staff. But the question remains: what form should the new status take? And assuming that change is favoured, a further issue is how it should be achieved? Specifically, should it be done directly (in the Registration of Titles Act) or indirectly (in a stand-alone Land Information System (LIS) statute, with the Land Registry being one of the sub-components of the LIS)?

As an example, Finland has a standalone Land Information System Act while the provisions for governance of the institutions overseeing land registration and land information services are contained in separate legislation[3]. Singapore[4], Western Australia[5] and the Canadian Province of British Columbia[6] each have legislation dedicated to governance of the institutions overseeing land registration and land information while the laws regulating Land Surveys, Land Titles, e.t.c, are contained in separate Statutes.

Elsewhere, we will make recommendations in relation to an LIS for Uganda. There, we will propose the establishment of a semi-autonomous Institution (Uganda Land Information Infrastructure - ULII) with a secretariat - The Uganda Land Information Centre (ULIC) hosted by the Ministry of Lands Housing and Urban Development. The

[1] Eg Australia: see http://www.necs.gov.au/

[2] For example, as early as 2000, the Medium-term Competitive Strategy (MTCS) for the Private Sector (2000-2005), Ministry of Finance, Planning and Economic Development (July 2000) stated the Government's policy of making the Land Registry an agency, with a Chief Executive directly accountable to a Minister.

[3] Act on the Land Information System and Related Information Service (453/2002)

[4] Singapore Land Authority Act (No. 17 of 2001)

[5] Land Information Authority Act 2006. But Registration of Titles and other land transactions continues to be governed by the Transfer of Land Act 1893

[6] Land Title and Survey Authority Act, Chapter 66, British Columbia

institution should be administered by a steering committee appointed by the Minister, and will undertake land information functions on behalf of the government. The functions of registration of interests and transactions in land will remain with the existing Department of Land Registration. The semi-independent institution should be responsible for developing information systems to support land information management in each of the user departments and to ensure that the information systems and data therein are interoperable. The institution should also be responsible for building the capacity of the local staff in the user departments to develop, maintain, update and manage the local information systems. However, the data and databases developed remain the property of the parent institutions. The LIS unit should have full access to the databases so that users who need land information refer to a one-stop-centre, even if the information is stored in various databases. Specifically, we will be proposing that the current administrative structure for administering the Land Registry and related offices (including the departments of Land survey, Planning and land valuation), shall remain under the Ministry. We will give our reasons in detail in our discussions in relation to LIS. However, the over-arching point for present purposes is that, whatever structure is adopted, it need not be legislated in the Registration of Titles Act. Other legislation, such as a general LIS statute, can make the necessary provisions.

Response to LRWG's comments

The LRWG considered that we should further analyse the issues of a land registration "authority" versus a land registration "agency". We do in fact consider these issues further in our Draft Issues Paper on the Land Information System (LIS). Ultimately, it is a political decision, depending on the degree of control that the Government wishes to exercise over the Land Registry and the resource envelope.

Furthermore, in earlier interfaces with MLHUD Project Staff, preference was also shown for a semi-independent Land Information institution and the retention of the existing departmental structure for the statutory offices of the Registry, Surveys, Valuation and Planning. A firm decision therefore needs to be made whether to unify or to separate regulatory responsibilities from service delivery in the operations of land sector.

For the present time, therefore, our recommendation is as follows.

Recommendation: the current administrative structure for administering the Land Registry and related offices for the statutory functions of Planning, Survey and land valuation), shall remain under the existing departments in the Ministry of Lands, Housing and Urban Development. Separately, we will propose the establishment of a semi-autonomous Institution (Uganda Land Information Infrastructure - ULII) with a secretariat - The Uganda Land Information Centre (ULIC) hosted by the Ministry of Lands Housing and Urban Development. The institution should be administered by a steering committee appointed by the Minister, and will undertake land information functions on behalf of the government.

1.2.4 Should the Land Registry be decentralised?

The answer to this question also seems self-evident. Decentralisation is Government policy, and many studies have supported it. The Registry needs to be located in city, town and country, particularly to allow access by poorer members of the community, for whom cost and transport are important issues.

The MTCS (and its successor the CICS) in combination with the LSSP contain a plan for decentralization of land records in order to improve access. ***Subcomponent 3.1:*** **Land Registration Sector** of the PSCP II also aims to help increase the effectiveness of public land institutions so as to make it easier to obtain and transfer evidence of land ownership. The Land Subcomponent of the PSCP II recognizes that in order to increase their effectiveness, the public land institutions responsible for dealing with land records have to increase their outreach and accessibility. The Land Subcomponent of the PSCP II therefore incorporated a Plan for the rehabilitation of nineteen existing land registry offices to secure the land records, the decentralization of responsibilities to these offices, capacity building, e.t.c.

The Land Act 1998 (as amended) also took the decentralization policies further by providing in Section 59 (6) that each district council shall have a district land office containing (in amongst other) district registrar of titles[7].

The Consultant understands that on completion of Phase I Offices in the PSCP II financed rehabilitation of District Land Registries certain Land Records, for example Leaseholds that are currently all centrally kept at the Kampala Titles Office, will be transferred appropriately so that Leasehold Titles are relocated to the District Land Office nearest to the locality where the land is situated.

The Consultant shall make appropriate provision for the decentralization of the Register of Titles, in consonance with the decentralization policy and Land Act Provisions.

Decentralisation of the Land Registry may, of course, pose considerable practical difficulties institutional and financial capacity, management and co-ordination. According to the Uganda Land Alliance[8], to-date, most of the District Land Offices are manned by only a Land Officer, which defeats the purpose and intention of a decentralized land administration system.
However, drafting the legislative mechanism to allow effective decentralisation of the Land Register is not difficult. It has be done by an appropriate provision in the proposed new Registration of Titles legislation

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7. In addition to the offices of the district physical planner, the district land officer, the district valuer, and the district surveyor.

8. "Challenges to District Land Boards in the First Five Years of their Existence Reviewing the District Land Boards", The Uganda Land Alliance, Unpublished.

Response to LRWG's comments

The LRWG commented (as is correct) that our analysis deals only with the land registry, and that there is a need for an appreciation of other registries. We are not sure what is meant by this in the context of our Terms of Reference. However, if the issue is whether other document or business registries (e.g., Births and Deaths, Motor Vehicles, Companies, Business Names, Documents, e.t.c) also ought to be decentralized, this is not a matter for the Registration of Titles Act.

During the course of research for this Project for Reform of Land Registration Laws, we interacted with Service New Brunswick (SNB) the agency that operates four registries of public information in the Canadian Province of New Brunswick[9]. The components of the SNB registries are:

- the Real Property Registry – deeds, wills, subdivision plans, etc. related to land parcels in New Brunswick;
- the Personal Property Registry – security interests, judgments, and other claims related to personal property such as automobiles, recreation vehicles, and furniture;
- the Corporate Affairs Registry – corporations, partnerships, and business names registered in New Brunswick;
- the Vital Statistics Registry – vital events data (births, stillbirths, marriages, and deaths), vital events certificates, change of name, churches/religious denominations seeking to perform marriages in New Brunswick.

While such an enterprise is possible, we note that besides being way beyond our Terms of Reference, there are:

⇒ Resource and institutional issues involved that clearly outside; and

⇒ parallel initiatives which started under the MTCS and are now being pursued under the CICS and the PSCP II particularly as relates to the Uganda Registration Services Bureau.

The LRWG also suggested that we "revisit the whole concept of decentralization under the Land Act and Government policy". However, this again is beyond the remit in the present Issues Paper. Here we comment only on decentralisation of the Land Register.

The LRWG also suggested a need to discuss decentralization in the context of customary tenure. However, we do not envisage decentralisation based on type of customary tenure, We envisage decentralisation based on delivery of services. It would be legally possible,

[9]. www.snb.ca

for example, to have a land office with a register in each district. Whether the country can afford it, is another question.

The surrounding Planning, logistical and capacity-building nightmares are also described by the LIS - Baseline Evaluation Report (in the context of the LIS) as follows:-

> With the process of decentralisation and the demarcation of the country from **thirty-nine** to **fifty-six districts**, the unique property key has been found to be inappropriate and as a result, the process of conversion of cadastral plans to digital format has halted, pending the implementation of a more appropriate unique property key.
> This makes an identifier inappropriate to use in the registration system. Failure to adopt a suitable key will lead to dire consequences for the land sector in Uganda and will entrench the status quo and no meaningful progress will be made in LIS.[10]

However, the process of Districts creation has continued and to date there are 97 Districts in Uganda. There are therefore very weighty logistical and capacity issues involved.

But once the land titles system becomes computerised, it should be easy and relatively inexpensive to set up an office in each district and more – although that is very far off.

We have drafted the *Draft RTA 2010* in such a way as to encourage a policy of decentralisation, but in a way that leaves the Registrar free to determine its nature (eg, whether based on districts or regions, and whether with centralised control over standards and quality of service), degree, and speed of implementation. Thus, our recommendation is essentially unchanged.

Recommendation: that the Registration of Titles Act provide specifically for decentralisation of the Register.

1.3 What steps can be taken to reduce the incidence of fraud in the operation of the Registration of Titles Act?

1.3.1 Overview

Any title registration system is susceptible to fraudulent activity. The Registration of Titles Act is no different. Fraud can arise in a number of situations. The following are the two most common:

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[10]. P.52

Situation 1: A person acquires an interest in land by means of their own fraud. To illustrate: assume that A is the registered proprietor of land. Now assume that X steals A's certificate of title, then forges A's signature on a transfer of the land in favour of himself (X) and then becomes registered as proprietor of the land. In this situation, the Registration of Titles Act does not guarantee X's title: A may set it aside on the ground of X's fraud.

Situation 2: An innocent person acquires an interest in land by means of the fraud of a third party. To illustrate: assume that A is the registered proprietor of land. Now assume that a third party (X) steals A's certificate of title, impersonates A to sell the land to B who is ignorant of the fraud, and then forges A's signature on a transfer in favour B, who becomes registered. Here, the Registration of Titles Act guarantees B's title. A cannot set it aside.

The result in Situation 1 is straightforward, and accords with justice and common sense: X cannot acquire a good title by means of his or her own fraud.

However, the result in Situation 2 is more controversial. Someone must lose out because of X's fraud: but is it to be A or B? Over the years, courts have come to different conclusions, based on two differing concepts of indefeasility: "immediate" and "deferred".

1.3.2 "Deferred" indefeasibility versus "immediate" indefeasibility

In the early days of the Torrens system, in Situation 2 the courts favoured A. They applied a doctrine of "deferred" indefeasibility. Under this doctrine, although the statute promised "indefeasibility" (that is, state-guaranteed title), it could not be invoked by B. If B acquired title by means of fraudulent activity (even though not his own), the courts would allow the original proprietor (A) to recover the land. The indefeasibility was not "immediate", but "deferred" to the next taker after B—that is, the person to whom B might later transfer the land (such as a purchaser) or an interest in the land (such as a mortgagee). This approach was based largely on the Privy Council decision in *Gibbs v Messer* [1893] AC 248 (which, incidentally, was decided under the Victorian forerunner of the legislation on which the Registration of Titles Act is based).

However, in more recent years, in Situation 2 judicial attitudes have changed. Now courts favour B. Indefeasibility under the statute is now treated as "immediate". As soon as B becomes registered, A loses the right to recover the land (and is relegated to an action in damages against X or a claim against the statutory Assurance Fund). B's title is secured—immediately. The leading illustration of this principle is another Privy Council decision, *Frazer v Walker* [1967] 1 AC 569. Of course, this result assumes that B was not aware of the fraud, and did not participate in it in any way.

1.3.2. 1 Discussion

In a sense, deferred indefeasibility may help deter the incidence in fraud. It encourages a person in B's position in Situation 2 to make careful enquiry about the bona fides of the person with whom B is dealing; for if that person (namely, X) is fraudulent, then B's title is liable to be set aside by A. It also gives some confidence to a person in A's position: he or she need not fear immediate loss of title by the fraud of a third party—although, as all the cases on deferred indefeasibility point out, A will need to act before B enters into a subsequent transaction with the land, because B's title forms the basis of a good title in favour of the next taker. Thus, if, before A takes action to set aside B's title, B were to transfer the land to a purchaser, C, who became registered, then it would be too late for A to recover the title from B; and if B were to grant a lesser interest (such as a mortgage) to C, then although A could recover the land from B, the land would remain encumbered with the mortgage to C.

In short, deferred indefeasibility favours existing holders over new holders, and may help discourage fraud by making purchasers and mortgagees enquire more diligently about the possibility of fraud.

Deferred indefeasibility could also take a variant form—indefeasibility could be deferred for a stated period of time, such as three years. Under this variant (to return to Situation 2), B's title would remain liable to be set aside for (say) 3 years, after which it would become indefeasible.

However, in our view, deferred indefeasibility runs counter to one of the chief motivations behind our review of the land laws—namely, to encourage a vigorous and confident land market. Deferred indefeasibility could deter investors in the land market. To return to the position of B in Situation 2: under a regime of deferred indefeasibility, B risks losing the land—regardless of his or her own innocence. This deters purchasers. For mortgagees, the same risk exists—regardless of their own innocence, the mortgage is liable to be set aside; this deters mortgagees (and so impedes lending).

One way for purchasers or mortgagees to avoid the risks posed by deferred indefeasibility would be to take out title insurance. Specifically, a purchaser or mortgagee could take out insurance to protect against the risk that, although they were personally innocent, their title was infected by fraud. The insurance premiums would be fixed by market forces. Whether the premiums would be expensive is impossible to predict at this stage. However, in a market such as Uganda's, where (anecdotally) fraud is regularly encountered, the premiums could be expected to be more expensive than in other Torrens countries where fraud is not as frequent. Purchasers would have to factor the premiums into the price, possibly dampening the housing and land market. Mortgagees would doubtless pass the expense on to borrowers, increasing the cost of borrowing.

In response, it might be said that title insurance is a well-known component of the US

land market and does not appear to have dampened the land market in that country. However, it must be remembered that the US has almost no Torrens-style legislation. In the US there is no general doctrine of state-guaranteed "indefeasible" title.[11] In our view, it would be unfortunate to introduce the unpredictable expense of title insurance into the Ugandan land market where the statute already provides for state-guaranteed title. A better proposal, which we discuss below, is to widen the protection available under the existing compensation provisions of the Registration of Titles Act in those situations where innocent registered holders find their title infected by a third party's fraud.

On balance, then, if the choice were solely between deferred indefeasibility and immediate indefeasibility, we would favour immediate indefeasibility. And there is another strong argument in favour of immediate indefeasibility: most other Torrens title jurisdictions adopt it. There are exceptions, it is true; but they are rare. It would be unfortunate, in our view, if Uganda were to adopt a view of indefeasibility that Torrens jurisdictions generally have rejected.

1.3.2.2 A new option: Presumptive indefeasibility

In the light of the above discussion, we would offer a further option—a kind of half-way house. We call it "presumptive indefeasibility".

Let us illustrate by returning to Situation 2. Under "presumptive indefeasibility", we would start with the "default" presumption that ownership stays with the new registered taker (B). However, the deprived owner (A) would have the right to seek to have that position reversed and have the ownership restored to A, leaving B with a right to claim compensation under the Assurance Fund (considered later).

Under this option, the Registration of Titles Act would prescribe the criteria to be taken into account in deciding whether to allow the title to stay with B or be restored to A. Criteria would include matters such as the characteristics of the property, the parties' attachment to it, their use of the property, their willingness to accept compensation, and the circumstances of the transaction.

In order to quiet titles, there would be a time limit (say, 3 years) within which A must seek to have the property restored. The caveat provisions would be amended to give A the right to lodge a caveat once the fact of fraud was discovered (the amendment being necessary because, under the "default" presumption, once B is registered, A's interest no longer exists).

"Presumptive indefeasibility" seems to us to combine the best of both immediate and deferred indefeasibility. It confers (as the "default" position) immediate indefeasibility, with its security of title and therefore incentive for investment. Yet it concedes the reality

[11] Shick and Plotkin, *Torrens in the United States* (1978); Young, "Why did the Torrens system succeed in Australia, yet fail in North America?" (1994) 2 *Australian Property Law Journal* 225.

that fraud occurs, and it recognises the social circumstance that Ugandan people have a close attachment to their land and that in appropriate circumstances it may be better to return the land to the deprived former owner. (We give a concrete example, below.) The onus would lie on the former owner to move within (say) 3 years to overturn the effects of registration by, in effect, proving a closer connection with the land than the new taker. As with deferred indefeasibility, A could not seek restoration of the title to the extent that the new taker (B) had already transferred or dealt with the land in favour of C (unless B and C had colluded in a transaction in an attempt to deprive A of the right).

In practice, under a system of "presumptive indefeasibility" purchasers and mortgagees might still seek to take out title insurance to cover the risk of the presumption being reversed. But the risks of that reversal are clearly less than in the case of deferred indefeasibility, and so we would not envisage premiums posing a serious impediment to the land market.

There is then the question: under "presumptive indefeasibility" who is to decide whether the title should remain in B or be restored to A? If A's remedy were limited to taking court proceedings, A could be faced with considerable expense and delay; and (from a market perspective) the title could be tied up for years (depending on court time and processes). This could have a dampening effect on the land market. And so we would suggest that the decision-making power be given to the Registrar, with a right of appeal to the court. The Registrar would also be given the power to compensate the losing party out of the statutory compensation fund (see our discussion of compensation, below). On this basis, we consider that the majority of applications would be decided relatively quickly.

LRWG's comments

The LRWG clearly gave careful consideration to our discussion of this topic. However, it is possible that they misconstrued the two examples we considered above. In Situation 2, the LRWG suggests that we do not made it sufficiently clear that we are alluding to the position of a bona fide purchaser. Perhaps that is true; we took it for granted that the purchaser was bona fide, because a purchaser who acts mala fide does not obtain an indefeasible title.

To further clarify, and at the risk of repetition, it might be useful for us to expand our discussion of "presumptive indefeasibility". Under the present law, once a bona fide purchaser is registered as proprietor, he or she obtains immediate indefeasibility of title. The only remedy for the victim is compensation from the government for loss of their land. The loss of the subject land might mean much more to the victim than any compensation he or she obtains from the government. To illustrate: suppose that the subject land is A's ancestral land (family house plus his ancestors' graves) and A and his family expect to be buried on that land (in Luganda, "*butaka*"). Now suppose that X, A's eldest son, fraudulently causes the land to be transferred to B, who purchases in good faith

and that he (B) becomes registered proprietor of the land. At present under the RTA, A is only entitled to obtain compensation from the government for the loss of his land. Generally, the compensation would be the market value of the land. If the value is, for example, 50 million shillings, that is all A would get. But from A's point of view, no amount of money is enough to compensate him for loss of his ancestral land—the land is priceless. Our recommendation seeks to address this situation by giving the victim (A) the opportunity to recover his land as long as he acts within 3 years and provided B has not in the meantime transferred title to another person who purchased in good faith.

The period of 3 years, is arbitrary—it could be more or less. But if the period is too short, there may not be enough time for the victim to challenge the "presumptive title" of the new owner. And if it is too long, then it might be unfair to the new owner (who is also an innocent party). We chose 3 years as a middle ground.

As far as we know, this "presumptive indefeasibility" is a novel concept. It seeks to address one of the common criticisms of the compensation regime of the Torrens system—namely, victims losing their land, which to them means much more than any compensation. Nor is it inherently complicated. However, we recognize that it does have some negatives. For example, it might unsettle some buyers or mortgagees, since for 3 years they would not know for sure whether the house they purchased or the money they lent is secure. Again, if the former owner challenged the presumptive owner's title, it might take several years for the matter to be resolved by the courts. With the case hanging over his or her head, the new owner might not know whether to develop the land or wait for the court decision. These responses might, or might not occur. Nevertheless, we still consider "presumptive indefeasibility" to be a realistic response to the very real problem of fraud; and any realistic response to the problem of fraud must help engender confidence in the land market.

The LRWG also suggested that, in recommending presumptive indefeasibility, we need to study the root causes of fraud. However, with respect, we do not consider that to be necessary. There seems little point in studying why, for example, some people forge signatures to transfer land, or sell the same piece of land to several different people and abscond after collecting the purchase price from all of them; or why, indeed, some employees in the Registrar's Office accept bribes. The LRWG states that "most fraud surfaced in 2003 and not prior". However, that does not appear to be correct. In the 1980s, the then Registrar of Titles (and other workers in the office) was sacked, allegedly, for involvement in fraudulent transfers of land. In 1989 the *Memo of the Technical Committee of the Registrar of Titles to the Minister* discussed fraud in the registry and proposed certain measures. The term "*empewo"* ("empty air") was coined in the 1980s to refer to the fraudulent practice (which, anecdotally, is still common), whereby people purchased land only later to discover that the land was non-existent or that the instruments of transfer were forgeries.

The LRWG suggests that the 3-year period will "choke" land transactions. We doubt that that will occur, although (as we have conceded above) we cannot rule out some effect on the market.

Finally, the LRWG says that "fraud" needs to be analysed and categorized. However, again with respect, we do not consider this necessary. How does one categorize fraud? It is not like fraud under the penal code. Our *Draft RTA 2010* defines "fraud"—but only to point out that it requires "actual" fraud, a concept well established in Torrens title case law.

For these reasons, our recommendation is unchanged.

Recommendation: that the Registration of Titles Act provide a system of "presumptive indefeasibility´, under which a registered taker of land (B) would gain immediate indefeasibility, but with a right for the former owner (A) to approach the Registrar within 3 years to seek to overturn B's interest on the basis that B's interest had been acquired as the result of fraudulent activity by a third party. Until the expiry of the 3 years, A would retain a caveatable interest. The onus would lie on A to overturn B's registration; and if by the time of A's application B had already dealt with the land in favour of a further party (C), it would be too late for A to take action against C (in the absence of collusion between B and C). As between A and B, the losing party would be relegated to a right to statutory compensation (see later). An appeal would lie to the court against the Registrar's decision.

1.3.3 Should registered interests defeat unregistered interests, even though taken with notice of those unregistered interests?

Related to the topic of indefeasibility of title is the question whether unregistered interests should be defeated by registered interests.
To highlight the issue, we give the following examples:

> *Example 1*: Assume that the owner of land (A) has given a mortgage to a lender (B). Assume that the mortgage is unregistered, and that B has not protected the mortgage by caveat or by taking possession of the certificate of title. Now assume that A sells the land to a purchaser (P), who has notice of the mortgage. P becomes registered. Does P take free of the mortgage?
>
> *Example 2*: Assume that the owner of land (A) enters into a contract to sell the land to a purchaser, P, who does not register or lodge a caveat. Now assume that A then enters into a contract to sell the same land to another purchaser, Q. Assume that Q knows of P's interest. Q becomes registered. Does Q take free of P's interest?

Some Ugandan case law would hold that in examples such as these, the registered interest

defeats the unregistered. Specifically, they hold that in Example 1, P takes free of B's interest, and that in Example 2, Q takes free of P's interest. The reasoning is that, under the Registration of Titles Act, a registered interest defeats an unregistered interest, despite notice—and that to take with notice of an unregistered interest is not to act fraudulently (as the term "fraud" is understood in the context of Torrens title statutes).[12] But other Ugandan case law would hold to the contrary: namely, that in Example 1, P takes subject to B's interest and in Example 2, Q takes subject to P's interest. This is based on the reasoning that registration in the face of knowledge of an unregistered interest is fraudulent.[13]

In our view, based on the wording of the RTA and the case law in jurisdictions with identical or similar legislation, the former view is correct. That is, a registered interest defeats an unregistered interest, despite notice. Specifically, to become registered as the holder of an interest with notice of an existing unregistered interest is not to act fraudulently (as the term "fraud" is understood in the context of Torrens title statutes). This result, in our view, is compelled by the existing Registration of Titles Act: see section 136.

Further, in our view, this result not only accords with the philosophy of the Torrens system but also helps promote a confident land market. The Torrens title system assumes that persons will register the interests they acquire in land—or else take the risk of losing out at the hands of a later interest-holder who does register. One of the system's underlying principles is that persons acquiring an interest in land should be able to rely on the Register as a "mirror" of the title: that is, they should be able to assume that the land is bound only by the interests currently registered or caveated, and therefore ascertainable by search of the Register. They should *not* be bound by interests that are *un*registered or *un*caveated — being interests which, by definition, are not ascertainable by search of the Register. In short, they should not be concerned about unregistered interests whose holders have not sought the protection of registration or caveat.

In line with this philosophy, under the Registration of Titles Act a person taking an interest in land should be expected to register it, on pain of losing out to someone who later acquires a registered interest in the land. The unregistered holder's remedy lies in their own hands: they can register or they can lodge a caveat. This latter course is available particularly for interests that are inherently unregistrable (such as the interest of a purchaser under a contract for sale); and for other interests which, though inherently registrable, might be embodied in documents that, for one reason or another, are not in

[12] An example is *Shah v Modern Sweet Mart Ltd* (1956-1957) 8 ULR 99, discussed in Mugambwa, *Principles of Land Law in Uganda*, p 76.

[13] An early example is *Katarikawe v Katwiremu* [1977] HCB 187, discussed in Magambwa, *Principles of Land Law in Uganda*, p 77. This seems now to be the approach taken generally: for example, see per Odoki CJ and other members of the Supreme Court, in *Kampala District Land Board v Chemical Distributors* (Civil Appeal No 2 of 2004).

registrable form. The caveat is sufficient to prevent extinction of the interest through registration of a competing interest. In short, then, unless an unregistered interest is protected by caveat, it should be liable to defeat by a later registered interest, even if the later interest-holder had notice of the unregistered interest.

This result, of course, does not affect the operation of the principles relating to fraud. If the later interest holder has been fraudulent in acquiring the interest, then their registered title is liable to defeasance for fraud. But, as section 136 of the Registration of Titles Act states, notice, of itself, is not fraud. In our view, section 136 of the Registration of Titles Act should be allowed full reign. It is central to the aim of encouraging a confident land market.

We would add an important rider here. It may be argued that our recommendation will leave vulnerable persons unprotected—that Uganda has seen a proliferation of "new" unregistered interests, whose owners will know little or nothing of the need to register or caveat to protect the interests from defeat at the hands of later registered holders. However, it is impossible to protect all vulnerable persons. If we tried to do so, the Registration of Titles Act would become unworkable, to the detriment of persons dealing in land and to Uganda's land market. We add also the obvious point that our recommendation does not change the law. In our view, this has always been the situation under the Registration of Titles Act. All we are doing is recommending that it continue. The remedy lies, ultimately, in educating people to the need for registration.

LRWG's comments

In our earlier Draft Issues Paper, we pointed out that the "numerous" new unregistered interests included interests of "bona fide" and "lawful occupants". We ventured the view that those interests would be protected as exceptions to indefeasibility under the amendments to section 64 of the Registration of Titles Act proposed by the 2005 amending legislation. Similarly the rights in relation to "family land" would be protected under the new section 64(3), to be inserted by the same amending legislation.

That proposed legislation did not become law, as the LRWG pointed out. However, in our view, the proposals made good sense. Accordingly, we have amended our recommendation (below) to ensure that these interests are protected as exceptions to indefeasibility; and our proposed s 34 of the *Draft RTA 2010* so provides.

The LRWG also commented that we had not taken into account section 54 of the RTA, which provides for documents taking effect upon registration. However, with respect, this comment may have been based on a misconception of the RTA. Section 54 deals with when a document is deemed to be registered under the Act (to which we propose no change). Our recommendation is about documents or interests that are *not* registered. Section 54 is not relevant in this context.

Amended recommendation: that the provisions of section 136 of the Registration of Titles Act be affirmed, to ensure that (subject to the caveat system and to considerations of actual fraud or unconscionable conduct) registered interests prevail over unregistered, regardless of notice of the unregistered interest; and that the rights of unregistered bona fide occupants and lawful occupants be protected as exceptions to indefeasibility.

1.3.4 To what extent should the Registrar be allowed or required to demand proof of identity of persons who are parties to documents lodged for registration?

This issue, too, is related to the problem of fraud. Proof of identity is one way of ensuring that parties to documents are who they say they are. Proof of identity is crucial both in relation to persons disposing of interests (vendors, mortgagors, lessors, and the like) and persons acquiring interests (purchasers, mortgagees, lessees, and the like)—for persons acquiring interests may later dispose of their interests. A number of reports have recommended that the Registry apply biometric methods of establishing identity. In addition, suggestions have been made to allow (or require) the Registrar to demand PIN or other information from those who are involved in land transactions.

The comparative effectiveness (including cost-effectiveness) of available biometric techniques is a scientific topic not within our area of expertise. However, we support the introduction of appropriate methods to aid the Registrar in proof of identity.

Nevertheless, in our view the Registration of Titles Act should not be prescriptive in this regard. It should be facilitative only. That is, it should allow the Registrar to trial different techniques, and from time to time to vary techniques already adopted. It should not bind the Registrar to any particular technique. In short, the Registration of Titles Act should allow the Registrar a wide discretion to apply whatever biometric techniques he or she considers appropriate from time to time to ensure integrity in land transactions and registration procedures.

LRWG's comments

The LRWG agreed with our proposal, that the legislation in this regard should be permissive, not mandatory. Accordingly, our recommendation is unchanged.

Recommendation: that the Registration of Titles Act be clarified to allow the Registrar to apply whatever biometric or other techniques he or she considers appropriate from time to time to properly identify parties to documents lodged for registration.

1.3.5 Should the right to act for persons dealing with land and interests in land be limited to specified classes of persons; and if so, which classes of persons?

This issue, too, is related to concerns about fraud in the operation of the Registration of Titles Act. Most countries that have adopted English common law principles of

conveyancing law have imposed restrictions on the classes of persons who can act for reward in conveyancing transactions. In many countries, for example, lawyers or accredited land agents have been given a statutory monopoly in relation to land transactions.[14] The result, of course, is a monopoly.

While this monopoly seems, at face value, to be anti-competitive, its purpose is generally to protect the public against unqualified, or under-qualified, operators. This benefit is seen to outweigh the detriment of anti-competitiveness.

However, there is also a further benefit, which may be of particular relevance to the Ugandan land market. By controlling the persons who can engage in land transactions for others, there is an opportunity to control their conduct and ethics. This is particularly the case if the professional bodies to which such persons belong require their members to adhere to codes of conduct.

Despite the apparent anti-competiveness inherent in limiting the class of persons who can act for others in conveyancing transactions, we consider the benefits to outweigh the detriments. For Uganda, the key benefits are: (1) assured competence, and (2) the opportunity to police conduct. And so we recommend that the right to act for reward in conveyancing transactions should be restricted to certain categories of persons. The intent of such a change would not be to prevent persons acting for themselves; nor, of course, would it eliminate fraud entirely. But in our view, it would help ensure competence and reduce the incidence of fraud in those cases where persons appoint agents to act for them in land transactions.

The next question is: which categories of persons should be allowed to act for reward in conveyancing transactions? Without being exhaustive, examples could be:

- lawyers
- registered estate agents[15]
- registered surveyors
- registered valuers
- physical planners.

However, at this stage of the reform agenda, we would not be completely prescriptive. The key consideration is not the generic professional background from which the agent comes, but their individual competence and integrity. The question is: do persons offering their services for reward in conveyancing transactions have sufficient legal knowledge to

[14] We add, for completeness, that section 195 of the Registration of Titles Act allows the Registrar to require a lawyer who lodges a document for registration on behalf of a client, to produce evidence of entitlement to practice. However, the section does not specify that only lawyers are entitled to act for persons in conveyancing transactions.

[15] Elsewhere, in our report on Estate Agents, we will be recommending the institution of a system of registration for real estate agents.

be able to provide competent legal advice, and do they have an appreciation of the ethical restraints on their conduct?

On the matter of legal knowledge, the services of "conveyancing agents" (as we may call them) would extend beyond mere mechanical form-filling. They must be competent to deal with legal issues that arise from time to time in conveyancing transactions. Such issues could include:

1 Whether a binding contract has come into existence
2 The law relating to deposits
3 Objections to title, and proof of title
4 Time in the performance of contracts
5 Rescission and termination of contracts
6 Remedies for breach—including notices to complete, rescission, termination and damages.

It may be that the only class of persons with the requisite width and depth of knowledge at present are lawyers. Members of the other professions we have listed above may have expertise relevant to different stages of the transaction, but may not have the overall expertise required to ensure a high degree of protection for clients.

However, we would not favour restricting the class to lawyers. Many people cannot afford to hire qualified lawyers—which is why they hire "bush lawyers" to act for them. In addition, a recommendation to restrict the class to lawyers might be met with some cynicism, given the anecdotal perception that some lawyers are not above fraudulent activities in land transactions.

Therefore, we recommend that the right to act for others in land transactions be granted to any persons with the requisite qualifications to be accredited as "conveyancing agents". Of course, at the moment there are no such persons in Uganda. But in due course an educational institution, or even the Law Society in conjunction with other bodies—including the Registry, Uganda Law Development Centre, Surveyors' organizations, and so on— could develop an appropriate syllabus for a certificate/diploma for "conveyancing agents". Perhaps lawyers and accredited estate agents would qualify automatically for admission to practice as conveyancing agents. Models for such courses are available in other countries (such as Australia) where similar systems exist. The candidates need not hold legal qualifications—they could be paralegals or holders of other academic qualifications.

Obviously, it will take some years before there are enough qualified conveyancing agents. The commencement of the requirement for qualified agents could be suspended —say for three years—to allow enough people to qualify before any change takes effect.

In relation to bank transactions, we understand that there is an accepted practice for bank attorneys to act for the bank in land transactions. In essence, the bank is acting for itself, through its attorney. We see no harm in this practice being allowed to continue, as banks are well able to look after themselves and would choose only reputable and experienced persons to appoint as their attorneys. However, we would recommend the power of attorney must first be registered (so that its terms are open to scrutiny by persons dealing with the bank attorney).

LRWG's comments

The LRWG agreed with this recommendation, although they suggested that a preferable name would be "land agent". Having considered this, we still prefer "conveyancing agent", as "land agent" is a much more generic term and might be confused in the popular mind with "estate agent".

The LRWG also suggests that the regulations should clarify who may act as a qualified. We agree, and have added this to our recommendation.

Amended recommendation: that the Registration of Titles Act be amended to ensure that, 3 years after the commencement of the amendment, only qualified "conveyancing agents" may act for others in conveyancing transactions, and that consideration be given to setting up training courses to train such persons. There would be an exception for bank attorneys acting for the bank under a registered power of attorney. The Regulations should specify who may act as a conveyancing agent.

1.3.6 Duplicate certificates of title

1.3.6.1 Duplicate certificates of title in fraudulent transactions

Finally on matters of fraud, we consider the role of the duplicate certificate of title. Evidence in other countries suggests that frauds often involve criminal conduct in relation to the duplicate certificate of title—for example, the theft of the duplicate certificate of title, or the fraudulent obtaining of a replacement duplicate certificate of title.

Some studies suggest that reducing the availability of duplicate certificates of title helps reduce opportunities to commit fraud. For example, in some Australian states the Registrar no longer issues duplicate certificates of title. The original electronic certificate (or "folio of the Register", as it is now often called) is the only certification of title. Essentially, it is a paperless Register. A duplicate certificate is issued only where the registered proprietor demands it. Studies are inconclusive as to whether this change is playing a significant role in the reduction of fraud.

Should Uganda abolish duplicate certificates of title and adopt a paperless Register? We think not, at least as a general practice. It is unlikely that landowners in Uganda would feel secure without paper titles in their hands as evidence of ownership. Part of the reason

for this is that possession of a certificate of title has always been regarded as conclusive proof of ownership. Further, reported incidents of unscrupulous employees in the Registry being implicated in fraudulent land transactions would most likely reinforce the landowners' fears of a paperless Register.

However, some proprietors might be persuaded that the risk of fraud in relation to the duplicate certificate of title, or (more simply) the risk of loss of the duplicate certificate of title, is such that they would prefer a paperless title. We therefore suggest that the Registrar should have the power not to issue a paper certificate of title if the registered proprietor requests that it not be issued. Unless the proprietor so requests, the Registrar should continue to issue paper certificates of title.

LRWG's comments

The LRWG agrees with our recommendation, but suggests that it should be done in a phased manner. We agree. That should happen under our recommendation, as the Registrar only declines to issue a certificate of title if the registered owner so requests.

Recommendation: The Registration of Titles Act be amended to include optional non-issue of paper certificates of title. Specifically, to use current terminology, the Registrar should not issue a duplicate certificate of title if the registered proprietor so requests.

1.4 Compensation for loss of land

1.4.1 The need for effective compensation

We move now from issues of fraud to more general matters that have arisen during the course of our researches. We start with the matter of effective compensation for loss of land.

Most Torrens title statutes provide that persons who lose land, or an interest in land, through the workings of the registration system (including as the result of fraud) should have access to statutory compensation. Often, the compensation is payable out of a statutory fund, called the "Assurance Fund". The right to compensation is seen as an important concomitant to "immediate" indefeasibility of title. The following example illustrates the need for compensation:

> Assume that A is the registered proprietor. X steals A's certificate of title and forges A's signature on a transfer of the land in favour of B, an innocent purchaser. B pays the full purchase price to X, who then disappears. B registers and obtains an (immediately) indefeasible title. A has lost the land. Technically, A has an

action against X, but X has disappeared. A has no action against B.[16] Therefore, under standard Torrens title provisions, A can recover from the Assurance Fund the value of the land under a scheme of statutory compensation.

The Registration of Titles Act has a series of sections that, together, would give A rights to recover from the Government: sections 178, 179, 180, 183-187. This equates to a right to recover from a "fund". However, in our view, these provisions are excessively complex and (in some respects) unclear in their operation. This can undermine confidence in the land registration system, for a person deprived of land by fraud is uncertain of the right to compensation.

In our view, in order to underpin confidence in Uganda's title registration system, the compensation provisions of the Registration of Titles Act should be redrafted so as to free-up access to compensation and to make clear the circumstances in which claims can be made.

1.4.2 Discussion

We have heard anecdotal evidence that one reason why people do not make claims for compensation is that they believe that they need to take court proceedings for recovery. This belief is not entirely correct, as section 186 allows the Registrar (if the Minister agrees) to pay a claim before court action is initiated.

We do not have any evidence about whether the Registrar routinely accedes to claims, or whether the Minister agrees to the Registrar's decisions on claims—or indeed, whether claims are ever made. Nevertheless, we think it advisable to include in the Registration of Titles Act a provision allowing the Registrar to pay claims, without needing Ministerial approval.[17] It should not be necessary for parties to bear the costs or suffer the delays in court proceedings for recovery. We are confident that the Registrar's office will have the expertise to decide on claims. And there would remain the right under the existing Act to challenge the Registrar's decision in court.

1.4.3 Suggested approach

As to the right to make claims for compensation, we would recommend the following structure:

- A person who suffers loss as a result of the operation of the Act in specified circumstances should be able to recover the loss.
- Compensation for the loss would be paid from a statutory fund (see below).
- If the loss is caused by the Registrar's own act, the person to be sued is the Registrar as administrator of the fund.

[16] Subject to our recommendations above in relation to "presumptive indefeasibility".
[17] The removal of Ministerial control is even more logical if recommendations about the autonomy of the Registry are accepted.

- If the loss is caused by someone else, the proceedings can be brought (at the claimant's election) either against the person who caused the loss, or against the Registrar as administrator of the fund; it should not be necessary first to sue the person who caused the loss. Where the Registrar is sued, the Registrar would be subrogated to the claimant's rights against the wrongdoer.
- The right to sue would cover loss arising from any of the following circumstances:
  - the wrongful registration of another person as proprietor of the land or an interest in the land;
  - an error, misdescription or omission in the Register in relation to the land;
  - an act or omission of the Registrar in carrying out his or her statutory duties under the Act in relation to the land.

However, the right to claim would be subject to exceptions. Some of these would be designed to make people responsible for their own actions, rather than casting the obligation on the statutory compensation fund. Others would be intended to protect the fund where other sources of compensation are available. Specifically, the amount claimable would be reduced:

- to the extent that the loss or damage resulted from the claimant's own act or omission;
- to the extent that the loss or damage resulted from the fraud or neglect of a professional (eventually, a "conveyancing agent") and is compensable under a professional indemnity policy;
- to the extent that the loss or damage has been offset by a benefit;
- to the extent that the loss or damage arises from the breach of trust by a registered proprietor (on the ground that the claimant should be left to pursue remedies against the trustee).

Also, no claim could be made by a person with an equitable or unregistered interest, who had failed to protect that interest by lodging a caveat. We have already considered the need to encourage persons to protect their interests by registering or lodging a caveat. A person who could have lodged a caveat, but failed to do so, cannot complain if, as a result, their interest is overridden.

1.4.4 Two further comments

We note two further matters regarding the statutory compensation fund. The first concerns the doctrine of "presumptive indefeasibility" which we recommended earlier. Where, under that doctrine, the Registrar decides to restore the former owner, then the party to be compensated would of course be the new proprietor who has now lost the benefit of indefeasibility.

The second concerns the case of a forged mortgage in favour of a mortgagee who acted bona fide without notice of the forgery. Such a mortgagee could sell the property if the (defrauded) land owner failed to pay the amount owing under the mortgage. This seems unfair. We consider that the mortgagee should be required to accept a payout from the fund, rather than being able to sell the property in exercise of a power of sale (if, as is likely, the "mortgagor" is unable to pay the amount to discharge the mortgage). For a mortgagee, the mortgage is purely an investment; and provided the mortgage is repaid, it should not matter whether the source of repayment is the sale of the land or the statutory fund. Therefore, we recommend in the case of a forged mortgage in favour of an innocent mortgagee, that either the mortgagor or the mortgagee may claim from the fund the amount required to discharge the mortgage or the value of the property (whichever is the lesser); and further, that the mortgagor should be entitled to lodge a caveat to prevent a sale by the mortgagee pending payment of that amount.

LRWG's comments

The LRWG appeared to misconstrue our example of a forged mortgage. We have in mind the all-too-common situation where a rogue impersonates the registered proprietor, forges the registered proprietor's signature in favour of a mortgagee (eg, a bank) who is unaware of the fraud, and then decamps with the money. Under the existing law, the mortgagee's registered title is indefeasible, and the hapless registered owner must repay the mortgage—or face a sale by the mortgagee to recoup the money.

Our proposal is that the bank should be compensated out of the Fund, so that the registered owner may regain the house free of the mortgage. It makes sense because the bank (unlike the owner) has no emotional attachment to the mortgaged land. All it wants is payment of the money outstanding on the mortgaged loan. Thus, our recommendation remains unchanged.

Recommendation: that the statutory compensation provisions be amended to provide:

- **the circumstances under which claims may be made from the statutory fund (in accordance with the above discussion);**
- **the exceptions to those circumstances (in accordance with the above discussion); and**
- **that a mortgagee under a forged mortgage must accept compensation from the fund rather than being able to sell the mortgaged property.**

1.4.5 How should the statutory compensation fund be financed?

The preceding recommendation may lead to a rise in claims against the statutory compensation fund. It will be necessary to ensure that the fund be sufficient to meet them. In most Torrens jurisdictions, the fund is financed by a proportion of standard fees paid to the Registrar when documents are lodged for registration or recording. We understand that, in theory, this is the system that operates in Uganda.

However, in practice, we understand that the amounts collected are in fact paid into Consolidated Revenue, so that no stand-alone fund exists. Given that practice, there seems little point in establishing a separate fund now. As long as compensation is available, the land market is unlikely to be concerned about which fund is the source of payment. The critical issues are to ensure that compensation is available, and that it is paid promptly.

The fees must not be so onerous as to disadvantage poorer members of the community.[18]

LRWG's comments:

The LRWG considered that the term "lodgement" fee was inappropriate, and pointed out that fees are prescribed by regulation. In our view, the precise term is not important: what is important is that sufficient funds be available to pay claims. Nevertheless, we have amended our recommendation to accommodate this concern.

Amended recommendation: that the Registration of Titles Act be amended to:

- **provide for payment of claims out of Consolidated Revenue**
- **require payment into Consolidated Revenue of a proportion of fees payable when documents are lodged for registration (the proportion to be prescribed by regulation).**

1.4.6 Should the compensation fund be "decentralised"?

In our Inception Report we asked whether the statutory compensation fund (which we then termed the "Assurance Fund") should be decentralised? By this, we meant whether the operation of the fund—in particular, claims against the fund—should be administered centrally in Kampala and nowhere else. The key issue would relate to the Registrar's power to pay claims up to the prescribed limit (assuming that our recommendation on this is accepted). It would be important to ensure transparency in decision-making and consistency across district offices.

On this point, we have reviewed our opinion as discussed in the Draft Issues Paper. There are two views on this matter. On one view, if the decision is taken to decentralise the Registry, then all aspects of its operations should be decentralised. This includes the power to pay claims against the fund. However, on another view, we can see merit in not decentralising the administration of the fund; in particular, a centralised office would produce a greater likelihood of consistency in decision-making, transparency in operation, and avoid the problem of some offices exceeding their "budget" for payments from the fund.

[18] One study we have seen suggests that the cost of establishing an assurance fund has pushed up the cost of registration in Uganda to 1% of the improved value of land and %0.5 of the unimproved value: Lilian Keene-Mugerwa, *Review of Land Tenure Legislation: Draft Report from a Gender Social Development Lense* (MWLE, 2004), p 16.

Whether decentralized or not, consistency in the operation of the fund could be aided by "Registrar's Guidelines" that would indicate the circumstances in which claims are accepted and the amounts that are generally paid. This ties in with the next matter we discuss: dissemination of material by the Registrar.

LRWG's comments:

The LRWG does not favour decentralization of the fund. It does not give reasons; but presumably they are similar to the reasons we have mentioned above. For that reason, we have amended our recommendation, and now recommend that the administration of claims against the fund should not be decentralized. Our *Draft RTA 2010* also so provides (section 10).

Amended recommendation: that in the interests of consistency and transparency, the administration of claims against the statutory compensation fund (ie, Consolidated Revenue) should not be decentralised.

1.5 Dissemination of material by Registrar (a Practice Manual)

In a number of overseas jurisdictions which we have reviewed, Registrars not only issue circulars about recent developments in their offices but also publish detailed commentaries on office procedures. Sometimes these commentaries are published by the Registry itself; sometimes they are published by commercial publishing houses, but written or edited by Registry staff. Lawyers with whom we discussed this matter in Kampala said that they would greatly value material of this kind from the Registrar. So also, no doubt, would others involved in conveyancing practice.

In our view, public confidence in the practice of the Registrar's office would be considerably aided by the publication of a "Practice Manual". The cost of producing the Manual would be offset by sales.

Should production of such a Manual be compulsory, or should it be voluntary? We do not know of any jurisdiction in which it is compulsory. In our Draft Issues Paper, we expressed the view that in Uganda it should be made compulsory. This was because in our discussions with lawyers and others, we have encountered a public perception that the Registry's procedures and practices are less than transparent. (We do not comment on that perception; we merely record it.) A Practice Manual would make public and transparent the workings of the Registry, and would help allay public concerns.

However, we also appreciate that the Registry is under great pressure of work, with significant staffing and operational problems. And so we would not want to force the Registrar to divert important (and senior) resources to this task when other matters also demand urgent attention. Hence our recommendation that a Practice Manual be produced "as soon as reasonably practicable".

LRWG's comments:

The LRWG expressed agreement with the concept of a Practice Manual, but that it should not be legislated. However, after considering that view, we remain of the opion that, in the interests of public confidence in the operations of the Registry, and to ensure consistent, transparent and equitable procedures, a Manual is worth legislating into existence—but only when reasonably practicable. Hence our recommendation on this point is unchanged.

Recommendation: that the Registration of Titles Act be amended to require the Registrar to produce, as soon as reasonably practicable, a Practice Manual of office procedures. The Manual should be made available to the public at a reasonable cost.

1.6 Giving power to the Registrar to "approve" forms

While on the matter of the Registrar's office, we mention the matter of "prescribed forms". At present, the forms required for use in the Registry are "prescribed"—that is, prescribed by statute. No doubt requests by the Registrar to the Government for new forms to be "prescribed", or existing forms to be changed, are acceded to as a matter of course; but the need to "prescribe" the forms adds a level of bureaucracy, complexity and potential delay to the administration of the Registration of Titles Act.

In many other jurisdictions, the system of "prescribed" forms has been superseded by a system of "approved" forms. Statute in these jurisdictions gives the Registrar the power to "approve" forms. This adds flexibility, and allows for the efficient change in forms as and when required. We recommend a similar change in relation to the Registration of Titles Act.

LRWG's comments:

The LRWG favours retaining the existing system of "prescribed" forms. In its view, section 200 of the RTA covers all the concerns, and that the scheduled forms are important to maintain uniform standards in land transactions. We agree with the need to maintain uniform standards—in this context, uniform forms. We do not intend to depart from the benefits of standard, simple forms. Our point rather is that the Act should allow more flexibility to introduce new forms, or vary existing forms, as circumstances require. The Registrar, charged with the administration of the Act, is the appropriate person to oversee that role. In our experience, most modern Torrens statutes have made the change to forms "approved" by the Registrar. Uganda should do the same. Hence our recommendation is unchanged.

Recommendation: that the requirement in the Registration of Titles Act for forms to be "prescribed" be replaced by a power in the Registrar to approve forms for use

under the Act.

1.7 Clarifying the relationship between the need for spousal consent to dealings with family land and the concept of indefeasibility.

In our Draft Issues Paper, we referred to amendments proposed (in 2005) to be made to the Registration of Titles Act cap 230 in relation to requirements for spousal consent to dealings with family land. These proposals would have affected, inter alia, the following sections of the Registration of Titles Act cap 230:

- section 92 (no transfer of family land without spousal consent)
- sections 101 and 109 (no lease or sublease of family land without spousal consent)
- sections 115 and 129 (no mortgage, including equitable mortgage, of family land without spousal consent)

The 2005 proposals were presumably made with section 39 of the Land Act in mind. As the LRWG noted, the proposals did not become law.

However, s 39 of the Land Act has been amended by the Land (Amendment) Act 2004. We presume that s 39 is intended to provide a complete "code" governing spousal rights in relation to dealings with "family land". We also presume that, given the importance of the Land Act in Ugandan social and legislative history, if an inconsistency occurs between the provisions of the Land Act and the provisions of the Registration of Titles Act, the Land Act should prevail. Accordingly, we recommended then, and we still recommend now, amending the provisions of the Registration of Titles Act to remove any apparent conflict in relation to spousal consent and ensure that the provisions of the Land Act are paramount.

LRWG's comments:

The LRWG states that for purposes of mortgages, spousal consent is not required in relation to "family land" but in relation to "matrimonial property". We take this to be a reference to section 5 of the Mortgages Act 2009. The LRWG is correct in pointing this out. However, we have been careful in our *Draft RTA 2010* to preserve the rights of spouses in relation to all relevant transactions covered by other legislation, including mortgages.

Further, the LRWG states that "Spousal consent must be dealt with comprehensively". We agree with that statement. However, in our view, it is dealt with comprehensively in the Land Act and the Mortgage Act. All that is required in the Registration of Titles Act is to make it clear that the protections in those other Acts carry over to registered land. On that basis, our recommendation remains basically unchanged, although we have added express reference to the Mortgage Act as well.

Amended recommendation: that the Registration of Titles Act be amended to expressly provide that:

- **if an inconsistency arises between the provisions of the Registration of Titles Act and the provisions of the Land Act, the Land Act prevails to the extent of the inconsistency; and**
- **if an inconsistency arises between the provisions of the Registration of Titles Act and the provisions of the Mortgage Act, the Mortgage Act prevails to the extent of the inconsistency**.

1.8 Should the Registration of Titles Act be limited solely to matters relating to registration of title?

Most jurisdictions with Torrens title registration principles comparable to those in Uganda separate the registration of titles legislation from general property law legislation. This provides a convenient division of subject-matter: the Torrens statute deals with the registration of interests in land, while the general property law statute (or statutes, for often there is more than one) deals with more technical and discrete property law principles. A reader who wants to understand registration of title principles goes to the Registration of Titles Act; and a reader who wants to understand more general and underlying principles relating to land—such as the general principles regulating leases, mortgages, easements, covenants, and the like—goes to the general property statute.

Unusually, the Ugandan Registration of Titles Act covers both registration of title and general property law issues. This makes it a large, complex and somewhat unwieldy statute, and one that needs to be amended every time an amendment is desired to any of the "general" property law issues it covers. Streamlining the legislation, by stripping out general property law provisions, would make it easier to amend—as well as easier to use.

We note that this stripping-out is already happening. For example, the Mortgage Decree (1974), while it existed, regulated some aspects of mortgage law. More recently, the *Mortgage Act 2009* takes from the Registration of Titles Act almost all of the general provisions regulating mortgages and puts them into a stand-alone mortgage statute. Likewise, the Uganda Law Reform Commission's recent work on landlord and tenant law may lead to a "stand-alone" code of landlord and tenant law, separate from the registration of titles legislation.

It is not part of our Terms of Reference to draft a general property law statute. However, we see the benefits of such a statute.

LRWG's comments:

The LRWG appears to agree with our proposal.

Recommendation: that, in time, the provisions of the Registration of Titles Act that relate to "general property law" matters be removed from the Act. They should be re-enacted in a general property law statute. In due course, discrete topics can be removed from that general property law statute and re-enacted in specific statutes—such as one dealing with mortgages (as in the case of the Mortgage Act), one dealing with landlord and tenant, and so on.

1.9 Should the Registration of Titles Act be redrafted in modern, plain and gender-neutral English?

The answer to this question seems self-evident. The present Act is drafted in archaic, technical legalese. Its style reflects an outdated attitude that precision and intelligibility are necessarily inconsistent. Modern statutory drafting aims for both precision and intelligibility. Nothing in the subject-matter of the Registration of Titles Act makes clarity and precision impossible to achieve.

The complex language of the Registration of Titles Act might explain some of the apparent inconsistencies in the judicial interpretation and application of the Act. An example is the effect of registration on unregistered interests in land, which we considered earlier: does the registered holder take free of the unregistered interest? To repeat the illustration we used earlier:

> Assume that the owner of land (A) has given a mortgage to a lender (B). Assume also that the mortgage is unregistered, and that B has not protected the mortgage by caveat or by taking possession of the duplicate certificate of title. Now assume that A sells the land to a purchaser (P), who has notice of the mortgage. P becomes registered. Does P take free of the mortgage?

As we indicated in our earlier discussion, some Ugandan judges would answer "yes"; others would answer "no". This imports an unhelpful conflict into the application of the Act.

One way of avoiding this conflict of judicial interpretation is to give an example in the Act itself of how the relevant provisions are intended to operate. This should resolve any dispute—simply, and without the parties to a dispute having to expend money to clarify differences of judicial opinion.

The LRWG's comments:

The LRWG appears to agree with our comments here, while adding the cautionary note (with which we agree) that the plain language must not distort the legal meaning.

However, the LRWG says that "giving illustrations is not an acceptable idea". With respect, we beg to differ. The drafting technique of adding notes or examples to statutes is now becoming common. The intent is to aid readers by giving concrete illustrations of what can be difficult legal concepts, or by reminding them of other provisions in the Act that relate to the one they are considering. We can see no harm in these modern techniques; indeed, on the contrary, we consider them useful. That said, we have used them only sparingly in our *Draft RTA 2010*.

The LRWG also says that marginal notes are crucial to understanding other laws and for cross-referencing. We agree. In our *Draft RTA 2010* we do not use marginal notes as such, but we do use generous headings, together with occasional notes and examples. These have much the same combined effect as the more traditional marginal notes.

Recommendation: that the Registration of Titles Act be redrafted in plain English, including (where useful) occasional notes and illustrations (as part of the Act) to help more easily understand how key provisions of the Act work.

1.10 General harmonisation of Registration of Titles Act with Land Act

Our task in this particular Draft Final Issues Paper is not to carry out a systematic review of the provisions of the Land Act. Rather, it is to consider only those aspects of the Land Act that might need review in order to ensure harmonisation with the Registration of Titles Act. In our view, we have considered all relevant harmonisation issues between the Land Act and the Registration of Titles Act.

However, we note the following matters:

- The Land Act gives the Registrar power to take whatever steps are necessary to carry out his or her functions under that Act (section 91). It also confers a lengthy list of specific powers in this regard. The section clearly empowers the Registrar to make appropriate Land-Act-motivated changes to the Register kept under the Registration of Titles Act. It would be helpful (even if strictly unnecessary) to include in the Registration of Titles Act reference to the Registrar's exercise of the powers conferred by the Land Act, if only to alert readers of the Registration of Titles Act to those powers.
- Similarly, it would be useful (even if not strictly necessary) in the Registration of Titles Act to expressly refer to the Registrar's power to issue certificates of title for freehold and leasehold titles acquired under the various provisions of the Land Act.
- We do not consider that provision should be made in the Registration of Titles Act for *registration* on the certificate of title of certificates of customary ownership, or certificates of occupancy, issued under the provisions of the Land Act. These certificates have their force by virtue of the Land Act and do not need the additional bolster of registration under the Registration of Titles Act. Indeed, to

register them might suggest that they have the quality of "indefeasibility" under the Registration of Titles Act—a quality not conferred by the terms of the Land Act.

However, on further reflection since our earlier Draft Issues Paper, we can see the usefulness of *noting* (technically "recording") certificates of customary ownership, or certificates of occupancy, on the certificate title for the relevant land, so that Register provides an accurate mirror of the title. Further, we can see the merit in listing rights under such certificates as exceptions to indefeasibility, so that they remain enforceable against the land whether or not actually recorded on the title. We have amended the recommendation in our Draft Issues Paper accordingly (and have correspondingly amended our *Draft RTA 2010*).

LRWG's comments:

With respect, we found the LRWG's comments on these proposals a little difficult to follow. However, we believe that they support the thrust of our amended recommendations.

Amended recommendations: the Registration of Titles Act be amended to:

- **include in the Registrar's powers the power to carry out acts required or permitted under the Land Act, and to issue certificates of title authorised under the Land Act; and**
- **permit the recording on the relevant certificates of title the issuance of certificates of customary ownership, or certificates of occupancy; and**
- **provide that rights under certificates of customary ownership or certificates of occupancy are exceptions to indefeasibility regardless of whether the issuance of the certificates is in fact so recorded.**

2. General Property Law Statute

2.1 The need for a general property law statute

Earlier we discussed stripping-out from the Registration of Titles Act all those provisions that relate to general property law principles. We pointed out that this is the legislative pattern in most other countries. At the end of our discussion we recommended that the provisions of the Registration of Titles Act that relate to "general property law" issues be removed from the Act, to be re-enacted in a single stand-alone general property law statute. In due course, discrete topics could later be removed from that general property law statute and re-enacted in specific statutes—such as one dealing with mortgages (as has in fact occurred), one dealing with landlord and tenant, and so on.

In line with that recommendation, we consider that in due course the following topics

could usefully be removed from the Registration of Titles Act:

- Leases and subleases
- Mortgages (as has already happened); but we would retain key conceptual provisions, such as RTA section 116 on the nature of a Torrens title mortgage
- Powers of attorney
- Surveys (some provisions are more appropriate in the Survey Act; others can be relegated to regulations)
- Certain miscellaneous provisions
- Such of the Schedules to the Act that relate to the above topics.

As we also pointed out in our earlier discussion, this removal process is already occurring. The sections of the Registration of Titles Act dealing with mortgages have been moved to the Mortgage Act. And we understand that the Law Reform Commission is currently reviewing the law of landlord and tenant—an area that also is suitable for inclusion in a general property statute or a stand-alone statute.

Recommendation: that at some time in the future, there be removed from the Registration of Titles Act those provisions more relevant for a general property law statute.

2.2 Additional matters

In our Draft Issues Paper, we mentioned a number of other matters that had arisen in our research. We saw them as arising from the needs of modern property development and the increasing diversity of modern real estate concepts. To deal with them in detail is beyond our remit. However, we considered it useful to mention them for future consideration by the Ministry or the Law Reform Commission. They are as follows:

1 Whether "step-in-rights" should be provided in relation to failed or abortive projects located in city centres or prime sites leased by Land Boards or the Uganda Investment Authority.[19] In the public interest, it could be useful to be able to re-enter without the risk of claims for damages or claims in the nature of "relief against forfeiture". Likewise, in cases of failed PPPs or joint ventures, it could be useful to be able to take over the project and grant development rights to another developer or public authority — a power akin to a receiver's powers under a mortgage.

The LRWG considered that these matters should be covered by the agreement between the relevant parties.

2 Whether an improved legal and regulatory framework is required for building schemes, gated communities, housing estates, and the like. Elsewhere, we consider the Condominium Property Act. This Act has been in operation for a number of years, but—if the "take-up" rate is any guide—it seems not to have been popular with developers. Of course, other condominium-like schemes are possible: for example, company title[20] or tenancy in common[21]. However, they lack the sophistication, convenience, and the statutory safeguards of modern condominium law.

The LRWG considered that these matters were appropriate for the "real estates law". Some in fact we take up in our Issues Paper on condominium ownership.

3 Whether the law should allow the enforcement of positive covenants over land. This could be useful in assisting effective development outside the scheme of the Condominium Property Act. The courts have steadfastly set their face against

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[19] See "Kampala Industrial and Business Park at Namanve, Implementation Plan — Business and Commercial Aspects", at

http://www.cics.go.ug/docs/Kampala%20Industrial%20and%20Business%20Park%20 at%20Namanve.pdf

20 Under this system, a company is formed to build and own the land and the buildings on it. "Purchasers" of units in the building are allocated shares in the company, each group of shares entitling the holder to occupy a particular unit. The "purchasers" do not own their unit, but only the shares.

[21] Under this system, all owners are tenants in common of the land and building; a purchaser therefore acquires a proportionate interest as tenant in common with other owners.

allowing "positive" covenants to run with freehold land.[22] This makes the enforcement of obligations difficult, no matter how reasonable. For examples, absent statute, obligations to contribute to common expenses, to keep common areas clean, or to obey building "rules", are difficult to enforce against successive purchasers from the original owners of high-rise flats or offices. (For this reason, much high-rise unit development in England is based on leasehold title, not freehold; for positive covenants in a lease do "run" to bind assignees of the lease.) However, there is no reason in principle why statute should not override the common law and allow positive covenants to run with freehold land, so that successive owners of a high-rise flat or office would be bound to observe the covenants entered into by their predecessors.

There may be some resistance to the concept of a "positive covenant". However, the concept is well established in the USA (and possibly elsewhere). A compromise may be to permit government and public authorities to impose positive covenants, but not private individuals. This compromise is adopted in some Australian states (such as New South Wales and Western Australia).

The LRWG considered that these matters were appropriate for the "real estates law". We in fact make provision for positive covenants in our *Draft RTA 2010*.

2.3 Easements

It appears to us that a number of aspects of easements law could benefit from reform. We mention two in particular:

1 *Easements in gross*: At common law, a valid easement requires both a dominant and a servient tenement—that is, it requires both benefited land and burdened land. Easements cannot be created over one parcel of land unless they benefit another parcel of land. Such "easements in gross" (as they are termed) are enforceable between the parties to their creation as a matter of contract law, but they cease to bind the burdened land once the burdened land is transferred. However, there seems no reason in principle to deny this kind of easement. Some other countries (including the United States of America) recognise them. They are useful, for example, if a local authority wishes to burden land with an easement without also benefiting other land owned by the authority (for example, easements for drainage in favour of and enforceable by a local council).

The LRWG's response to this suggestion is a little difficult to follow, except for the statement that the issues "should be considered in other laws". Our *Draft RTA 2008* included provision for easements in gross. We have retained the provision in the *Draft RTA 2010*.

[22] The latest example of high authority is *Rhone v Stephens* [1994] 2 AC 310 (House of Lords). In the US, this seems not to be a problem, and courts do allow the burden of positive covenants to run with land.

2 *Court orders forcing the creation of easements*. Many jurisdictions in recent years have found it useful to legislate for a court power to create an easement in circumstances where the public interest requires one but the owner of the land to be burdened by it refuses to grant it. The power has been found particularly useful in encouraging the development of land. The form of the legislation varies considerably from jurisdiction to jurisdiction; but it has the same overall purpose—to enable development that is seen to be in the public interest, by overriding objections from an unwilling landowner who will be affected. Almost always, the legislation requires compensation to be paid to the affected (and unwilling) landowner.

In Uganda, the Access to Roads Act, cap 350, gives land tribunals power to grant a person a right of access over another's land. Section 2 of the Act provides that where a landowner fails through negotiations to obtain leave from adjoining landowners to construct a road of access over their land to a public highway, he or she may apply to a land tribunal for permission to do so. The tribunal has discretion to refuse the application, or to grant the application subject to any conditions, including payment of compensation as it deems appropriate. The power can be useful in many circumstances. For example:

> A landowner may wish to develop land by constructing a number of houses. The land may be landlocked; or, if not landlocked, the existing access to a public road may be inadequate. The lack of access will thwart the development. A court power to create an easement may allow the development to proceed. It should cause no undue hardship if the legislation requires the benefited owner to compensate the affected owner.

However, the scope of the Access to Roads Act is limited to situations where a person is seeking a right to construct an access road over another's land. It does not cover other situations where a person seeks access over another's land for a temporary purpose. For example, a builder may be constructing a high-rise building on a crowded city site. The construction requires the use of tall cranes, which swing into the airspace above neighbouring property. That constitutes a trespass. The owner of the affected land can prevent the trespass as of right; he or she cannot be forced to consent to it, even though the consequence is to thwart the construction.[23] A court power to create an easement for the duration of the construction may be useful—particularly if the legislation requires the person who benefits to compensate the person who is affected.

We agree that the courts/tribunals should have the power to grant a right of access to another's land in situations such as the above, subject to payment of compensation as the courts/tribunal may deem appropriate. We also consider that the power to grant such a right should be part of a wider power to grant easements for other purposes, in the public

[23] *Jaggard v Sawyer* [1995] 1 WLR 269; *Bendal v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464.

interest. The appropriate place for such a provision would be in the General Property Law Act we recommend elsewhere in this Report.

The LRWG did not have specific comments on this recommendation, except to say that it should be considered in relation to other laws. Our recommendation is unchanged.

Recommendation: that the Access to Roads Act be repealed, and the General Property Law statute should provide a power to force the creation of easements in the public interest, but only after attempts have first been made to negotiate the grant of an easement and upon prior payment of proper compensation.

Appendix 1

Literature review

The following are the main materials surveyed in our literature review.

Books

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Acknowledgements

Some of the information analysed in preparing this Report was readily available in print. Other material we obtained through our own researches. In addition, we are indebted to the following:

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[End of Final Draft Issues Paper]