

THE REAL ESTATE
LAW REVIEW

SEVENTH EDITION

Editor
John Nevin

THE LAWREVIEWS

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PREFACE

I am delighted to introduce the seventh edition of *The Real Estate Law Review*. This edition extends to 35 jurisdictions, and we are delighted to welcome new contributions from distinguished practitioners from around the world. I am very grateful to each and every contributor for their hard work and essential role in the continued success of the *Review*. Each chapter provides an invaluable insight into key legal issues and market trends in the author's jurisdiction and, together, they offer an up-to-date synopsis of the global real estate market.

The *Review* seeks to identify distinctions in practice between the different jurisdictions by highlighting particular local issues. We believe that this offers investors and occupiers and their professional advisers an invaluable guide to real estate investment outside of their own back yard. The years since the first edition, back in 2012, have confirmed that real estate is a truly global industry. Overseas investors are increasingly prepared to look beyond traditional markets and sectors in order to exploit international opportunities as and when they arise. Often, investors need to act quickly and we hope that the *Review* provides an advantageous starting point to understanding cross-border transactions in the light of the reader's own domestic forum.

International economic and political instability continues to have a significant effect on the global real estate market. In the UK, Brexit generates uncertainty as the negotiations for leaving the EU continue. However, the continued attraction of UK real estate to overseas investors confirms that each event or development in a particular country must be seen in a global context to ascertain the bigger picture. It is no longer possible to ignore globalisation and view real estate markets in isolation. Brexit notwithstanding, the UK remains a safe haven for investors from around the world and this year has seen record levels of investment in central London from overseas buyers.

In addition to all the distinguished authors, I would like to thank the *Law Review* team for their tireless work in compiling this seventh edition of *The Real Estate Law Review*.

John Nevin

Slaughter and May

London

February 2018

CAYMAN ISLANDS

*George Loutas*¹

I INTRODUCTION TO THE LEGAL FRAMEWORK

The Cayman Islands has adopted the Torrens Title system of land registration.² This system was introduced to obviate the need for a chain of title and the necessity of tracing the vendor's title through a series of documents (to the extent that there is no need to investigate prior dealings affecting property). The fundamental principle of this system of land registration is title by registration (whereby interests in land pass upon registration and not upon execution of any dealing, resulting in the indefeasibility of a registered interest) rather than registration of title.

The main legislation in relation to the registration of interests of land in the Cayman Islands is the Registered Land Law (2004 Revision) (RLL). Pursuant to the RLL, the title (also known as the register) for each parcel of land in the Cayman Islands is created by a system of land registration (registration), which is maintained by the Registrar of Lands (Registrar).

Additionally, the register for each parcel of land in the Cayman Islands sets out the proper description and location of the land, the ownership of the land and the identity of any parties claiming an interest in the land by way of security or otherwise. Unregistered or 'overriding' interests (being statutory exceptions to indefeasibility of title) in land are created pursuant to Section 28 of the RLL.

Overriding interests are defined by Section 28 of the RLL as follows:

- a* rights of way, rights of water and any easement or profit subsisting at the time of the first registration under the Law;
- b* natural rights of light, air, water and support;
- c* rights of compulsory acquisition, resumption, entry, search, user or limitation of user conferred by any other law;
- d* leases or agreements of leases for a term not exceeding two years, and periodic tenancies (in certain exceptions);
- e* any unpaid monies that, without reference to registration under the Law, are expressly declared by any law to be charged upon the land;
- f* rights acquired or in the process of being acquired by virtue of any law relating to the limitation of actions or by prescription;
- g* the rights of a person in actual occupation of land or in receipt of rents and profits, save where enquiries made of such a person and the rights are not disclosed; and

1 George Loutas is an associate at Maples and Calder.

2 Originally conceived by Sir Robert Torrens in South Australia.

- b* electric supply lines, telephone and telegraphic lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any law.

No disposition of land (whether by way of transfer, charge or otherwise) is effective unless registered in accordance with the terms of the RLL. Priority of competing interests is determined by the order in which instruments are actually registered.

The government guarantees the correctness of each register. Part X of the RLL provides for the indemnification by the government with moneys provided by the Legislative Assembly (Parliament) in respect of errors or omissions that cannot be rectified by the Registrar or the courts.

Generally, there are no restrictions for individuals or companies purchasing one residential property for personal use and up to two further residential properties for rent. However, if that number is exceeded, this will be deemed as carrying on trade and business in the Cayman Islands, and suitable business licensing will be required.³

Ownership of commercial real estate by either an individual or a company will also be deemed as carrying on a trade and business in the Cayman Islands, and suitable business licensing will be required.⁴

If a purchaser wishes to acquire a property in the name of a company, it will need to be purchased in the name of either a Cayman Islands ordinary company (ordinary company), a Cayman Islands branch (foreign company) or a Cayman Islands exempted limited liability company (exempted company) (although an exempted company is an unpopular choice for reasons set out in Section IV, below).⁵

II OVERVIEW OF REAL ESTATE ACTIVITY

The year 2017 was strong in terms of real estate activity in the Cayman Islands and 2018 appears like it is going to be strong too.

There was an abundance of activity in the hotel tourism sector, including:

- a* the sale of the Ritz Carlton Grand Cayman Resort to the Dart Group;
- b* the renovation of the Westin Grand Cayman Seven Mile Beach Resort & Spa and the Sunshine Suites;
- c* the ongoing renovation of the former Treasure Island Resort and its rebranding as a Margaritaville Resort by a Canadian-based consortium;
- d* the finalisation of the Kimpton Hotel on Seven Mile Beach; and
- e* discussions regarding a proposed Four Seasons Hotel.

Additionally, the Dart Group has been busy progressing with its realignment of parts of West Bay Road (on the Seven Mile Beach seafront), the construction of a tunnel and overpass as well as the widening and extension of the Esterly Tibbetts Highway, all part of a strategic plan to maximise the position of its significant land holdings in Grand Cayman.

3 Sections III and IV of the RLL.

4 Ibid.

5 Section III of the RLL.

On the infrastructure front, the Owen Roberts International Airport is in the process of being expanded dramatically and the government is in the process of the tender of a cruise port in George Town to accommodate the Genesis class of cruise ships.

III FOREIGN INVESTMENT

As mentioned in Section I, above, individuals or companies may purchase up to one residential property for personal use and two further residential properties for rent without the need for trade and business licensing.

As also previously mentioned, the ownership of commercial real estate by either an individual or company will be deemed as carrying on trade and business in the Cayman Islands, and suitable business licensing will be required.

The primary legislation dealing with business licensing in the Cayman Islands is the Trade and Business Licensing Law (2014 Revision) (TBL Law) and the Local Companies Control Law (2015 Revision) (LCC Law).

Besides the exemptions set out above, an individual or a corporation engaging in almost any business locally is required to be licensed under the TBL Law (TBL licence). The provisions of this Law are mainly administrative. Depending on the nature of the business, certain other approvals may need to be secured in connection with the grant of the TBL licence (e.g., approvals from the Department of Environmental Health or from the Central Planning Authority of the Cayman Islands).

The application procedure for the TBL licence consists of completing the prescribed application form, and providing corporate information and certain other due diligence documents relating to the applicant to the TBL Board together with a cover letter outlining details of the business to be conducted. Currently, a processing fee of US\$92 must be paid along with the licence fee as set out in the schedule to the particular law attributed to the business in question (licensing fees currently range between US\$183 and US\$487,808).

The applicant is able to designate a trading name for the business, which may be different from the name of the applicant. Such a name is subject to the approval of the TBL Board.

The TBL licence is renewable annually, and the renewal application form must be submitted 28 days prior to the expiry of the current licence together with the process and renewal fees (which are identical to the fees submitted on the initial application).

For an application to be entertained pursuant to the TBL Law, the applicant, if an individual, must possess Caymanian status or hold a work permit; if a corporation, the applicant must either be beneficially owned or controlled up to at least 60 per cent by persons of Caymanian status, or hold a licence under the LCC Law (LCC licence).

Where an LCC licence is required, the application should be made in conjunction with the TBL licence, as the TBL Board is also responsible for approving the LCC licence.

An LCC licence will not be required where the company falls into one of the following exempted categories (although a TBL licence will normally need to be held in these cases, unless an exemption exists pursuant to law):

- a* the company has 60 per cent Caymanian shareholders, who maintain 60 per cent of the economic and voting control of the company (the TBL Board must be satisfied that effective control is not, either directly or indirectly, or by reason of any arrangement,

- artifice or device, invested in, or permitted to pass to, persons who are not Caymanians (e.g., by way of shareholders' agreements, special share classes provided for in constitutional documents)). The TBL Board applies this rule (the 60/40 rule) strictly;
- b* the applicant has successfully applied to the Governor in Cabinet of the Cayman Islands subject to Section 4(3) of the LCC Law that exceptional circumstances exist (having regard to the public interest) to exempt the applicant from the provisions of the LCC Law (which may be done subject to such terms and conditions as the Governor in Cabinet may deem fit); or
- c* the applicant falls within one of the exceptions to the meaning of carrying on business as set out in Section 2(2) of the LCC Law, including the following:
- the applicant is carrying on, from a principal place of business in the Cayman Islands, business exterior to the Cayman Islands;
 - the applicant is doing business in the Cayman Islands with any person, firm or corporation in furtherance only of the business of that company carried on exterior to the Cayman Islands;
 - the applicant is buying or selling or otherwise dealing shares, bonds, debenture stock, obligations, mortgages or other securities issued or created by any exempted company, foreign partnership or a resident corporation incorporated abroad;
 - the applicant is transacting banking business in the Cayman Islands with and through a licensed bank;
 - the applicant is effecting or concluding contracts in the Cayman Islands and exercising in the Cayman Islands all other powers, so far as may be necessary, for the carrying on of the business of the company exterior to the Cayman Islands;
 - the business of an exempted company is with another exempted company, a foreign partnership or a resident corporation incorporated abroad;
 - the business is carried on by a mutual fund as defined by the Mutual Funds Law (2015 Revision) in the course of holding common management of an investment, or the acquisition or disposal of an investment;
 - the activity is the administration of mutual funds by a person licensed as a mutual fund administrator under the Mutual Funds Law (2015 Revision); or
 - the applicant's business is otherwise exempt from requiring an LCC licence.

Companies that are unable to avail themselves of one of the exceptions set out above will require an LCC licence, which, once obtained, will exempt them from complying with the 60/40 rule. An LCC licence enables a company to have more than 40 per cent foreign ownership and control where approved by the TBL Board.

The award of an LCC licence is discretionary, and the following factors, *inter alia*, will be taken into account by the TBL Board when considering an application:

- a* the economic situation of the Cayman Islands and the due protection of persons already engaged in business in the Cayman Islands;
- b* the nature and previous conduct of the company and any persons having an interest in that company, whether as directors, shareholders or otherwise;
- c* the advantage or disadvantage that may result from the company carrying on business in the Cayman Islands;
- d* the desirability of retaining in the control of Caymanians the economic resources of the Cayman Islands;

- e* the efforts made by the company to obtain Caymanian participation;⁶
- f* the number of additional people from outside the Cayman Islands who would be required to reside in the Cayman Islands were the application to be granted;
- g* whether the company, its directors, and employees have and are likely to continue to have the necessary professional, technical and other knowledge to carry on the business proposed by the company;
- h* the finances of the company and the economic feasibility of its plans;
- i* whether the true ownership and control of the company have been satisfactorily established; and
- j* the environmental and social consequences that would result from the carrying on of the business proposed by the company.

Foreign investment, if considered beneficial to the Cayman Islands economy, is generally encouraged.

The initial and annual licence fee for an LCC licence is currently US\$3,049, plus an initial and annual application and processing fee of US\$244. The LCC licence is issued for a duration of no longer than 12 years, and in January of each year, the company will be required to file a return of shareholdings with the TBL Board as at 31 December of the previous year.

An existing foreign corporation wishing to purchase or lease (or otherwise hold an interest in) real estate in the Cayman Islands must be registered at the Cayman Islands Companies Registry as a foreign company; such a registration will then enable the corporation to apply for a TBL licence and an LCC licence (if required). Additionally, overseas investors may wish to incorporate an ordinary company and, once incorporated, the ordinary company will be able to own and lease Cayman Islands real estate and apply for a TBL licence and an LCC licence (if required).

IV STRUCTURING THE INVESTMENT

A popular structure for holding real estate is through an ordinary company.

Subject to licensing requirements, this type of company will be able to own and lease Cayman Islands property, hire Cayman Islands-based employees, transact business, both with the public of the Cayman Islands and internationally, and apply for a TBL licence and an LCC licence (subject to the criteria mentioned in Section III, above).

While the fees for establishing an ordinary company are more attractive than for other types of companies, there are additional annual and other requirements that must be met to maintain an ordinary company (e.g., holding an annual general meeting (which may be done by proxy) and filing an annual declaration outlining details of shareholdings with the Registrar of Companies). The annual return must detail, *inter alia*, the names and addresses of shareholders and the number of shares held by them, the amount of the capital of the company and the number of shares into which it is divided, and various details about calls made on shares. An ordinary company is not able to apply for a tax exemption certificate

⁶ The TBL Board requires this condition to be fulfilled by means of public advertising. Such a requirement may be waived under various circumstances, and guidelines are provided by the TBL Board on the timing and content of such advertisements.

(TEC). An ordinary company is one whose primary purpose is to carry out business in the Cayman Islands, and is therefore the main vehicle that is recommended where the business will entail direct dealings with the public of the Cayman Islands.

Another popular structure for holding real estate is through a foreign company. The foreign company model is particularly useful if a foreign company wants to operate a physical presence in the Cayman Islands directly without setting up a separate legal entity, and it may do so by registering under Part 9 of the Companies Law (2016 Revision).

Subject to satisfying licensing requirements, the foreign company will be able to own and lease Cayman Islands property, hire Cayman Islands-based employees, transact business both with the Cayman Islands public and internationally, and apply for a TBL licence and an LCC licence (subject to the various criteria for these; see Section III, above). When selecting the structure, certain activities of the main company (even where these are not conducted from within the Cayman Islands) could cause the foreign company to be subject to additional licensing requirements under Cayman Islands law. Examples of businesses where additional licensing may be imposed include banks, trust companies, insurance companies, management companies, mutual funds, mutual fund administrators or entities carrying on securities investment business.

The least popular form of investment vehicle is the Cayman Islands exempted company. This type of company will, in limited circumstances, be able to own or lease Cayman Islands property, hire Cayman Islands-based employees, and transact business internationally (but generally not with the public of the Cayman Islands).

The objects of an exempted company must be carried out mainly outside the Cayman Islands, and it is not permitted to trade in the Cayman Islands with any person, firm or corporation accepting furtherance of the business of the exempted company carried on outside the Cayman Islands. This does not prevent the exempted company from effecting contracts in the Cayman Islands and exercising in the Cayman islands all of its powers necessary for the carrying on of its business outside the Cayman Islands.

As a result, an exempted company structure usually suits a company that wants to own or lease an office to transact business externally from the Cayman Islands. Additionally, an exempted company may apply for a TEC.

V REAL ESTATE OWNERSHIP

i Planning

The following legislation deals with planning control in connection with the development of real estate: the Development and Planning Law (2017 Revision) (DPL), the Development and Planning Regulations (2017 Revision) and the Development Plan 1997.

The DPL also establishes a central planning authority for Grand Cayman as well as a Development Control Board for Cayman Brac and Little Cayman. These authorities generally review and consider applications to obtain planning permission for development as well as taking enforcement actions (where deemed necessary). Planning permission is required for any development, change or use of land, including carrying out building, engineering or other operations in, on, over or under any land; materially changing the use of any land or the use of any building on the land; and dividing land.

ii Environment

There is no current law in the Cayman Islands dealing with the environment; however, it is generally accepted that the polluter pays.

iii Tax

In addition to registration fees that are payable in connection with the conveyance of real estate, stamp duty is payable on the transfer instrument for each piece of real estate purchased. Pursuant to the Stamp Duty Law (2013 Revision) (the SD Law), stamp duty on a conveyance or transfer of real estate is payable on 7.5 per cent of the consideration. Consideration, for the purposes of the SD Law, is the higher of either the purchase price paid for the property or the market value of the property conveyed or transferred. Further, the market value of any property is the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing, where the parties have each acted knowledgeably, prudently and without any compulsion.

iv Finance and security

The most common forms of security granted over real estate are as follows:

- a* legal charges registered over land;
- b* legal or equitable charges over shares in a company that holds land;
- c* debentures creating fixed and floating charges over assets held by a company holding land; and
- d* assignments of rent.

Legal charges over property must be registered on the title for the land at the Cayman Islands Land Registry (the Land Registry).

Debentures creating fixed and floating charges are noted on the title for the land at the Land Registry, but are not capable of being registered in their own right.

Charges over shares are recorded on the Register of Shares for the land holding company, and an assignment of rental income is created by way of a deed. Notice of the assignment must be given to the tenant to perfect the securities.

VI LEASES OF BUSINESS PREMISES

Commercial types of leases in the Cayman Islands typically include net leases, gross leases and turnover rent leases.

There are no statutory provisions governing the term length of the lease, rent review mechanisms or renewal right provisions; these commercial terms are governed by contractual arrangements between parties.

Pursuant to the SD Law, stamp duty is assessed on leases on the following bases:

- a* if the term of the lease does not exceed five years, stamp duty will be equal to 5 per cent of the average annual rent;
- b* if the term of the lease exceeds five years but does not exceed 10 years, stamp duty will be equal to 10 per cent of the average annual rent; and
- c* if the term of the lease exceeds 10 years, stamp duty will be equal to 20 per cent of the average annual rent.

In calculating the length of the term for the purposes of the SD Law, the term will include a right to extend or an option to extend that lease. By way of illustration, if a lease is for an original term of five years with a right to extend for a further period of five years and one day, then stamp duty equal to 10 per cent of the average annual rent will be payable.

If the Land Registry deems the average rent is below market value, it will assess stamp duty on the basis of the market value. Market value, for the purposes of the SD Law, is the estimated amount for which the property should let on the day of valuation between a willing lessor and a willing lessee on appropriate lease terms in an arm's-length transaction after proper marketing, where the parties have acted knowledgeably, prudently and without compulsion.

In the Cayman Islands, all leases must be stamped, and the obligation to pay stamp duty is with the tenant. For any leases to be admitted as evidence in any court hearing, and pursuant to Section 23 of the SD Law, the party propounding that instrument will be required to stamp those instruments.

Pursuant to the RLL, all leases for a term exceeding two years must be registered at the Land Registry.

It is generally in a tenant's interest to have a lease registered, as registration of a lease on title gives 'notice to the world' of its interest in that property. If a lease is unregistered, it is arguable that it does not constitute a legal interest but rather an equitable interest in the property. It is also arguable that a new registered proprietor of property would not be required to take title to that property, subject to an unregistered lease, unless there are existing circumstances where, as a matter of equitable principles, an unregistered tenant is able to argue that it is unconscionable for a purchaser of the property not to recognise that lease. It is likely that mere notice is not enough for that.

In the Cayman Islands, an assignor of a lease is not accountable to the landlord for the assignee from the date of assignment.

VII DEVELOPMENTS IN PRACTICE

During 2014 and 2015, a proposed bill on new strata legislation was passed for comment by the Law Reform Commission of the Cayman Islands. Discussion on a draft bill commenced in 2010, and much of the impetus was caused by the effect of Hurricane Ivan on Cayman, and the various inadequacies of our current strata law to deal with the insurance, financial and property destruction issues following that natural disaster. (The current strata legislation is based on New South Wales Law from the late 1950s, and is largely outdated.)

Additionally, because of the increasing sophistication of strata developments in the Cayman Islands, a committee was approached to draft a Strata Titles Bill, which has gone through various drafts.⁷ The Strata Titles Bill addresses concepts such as tiered, phased and Crown leasehold strata developments. It also updates insurance requirements, winding up and new enforcement mechanisms.

Amendments to the current Strata Titles Law are welcomed on the basis that any of the concepts set out in the draft law are required because of the increased sophistication and volume of strata titled developments in the Cayman Islands.

⁷ Maples and Calder has been approached by the Cayman Islands Law Society to lead a review on the Bill.

VIII OUTLOOK AND CONCLUSIONS

The year 2017 was strong in terms of investment in real estate in the Cayman Islands, and all indications point to 2018 being very promising in terms of real estate development in the jurisdiction, especially in the areas of infrastructure, tourism and hospitality projects. On the infrastructure front, the Owen Roberts International Airport is in the process of being expanded dramatically and the government is in the process of discussing the development of a cruise port in George Town to accommodate the Genesis class of cruise ships.

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