

立法會

Legislative Council

LC Paper No. CB(2)2058/01-02

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by the Administration)

Ref : CB2/PL/AJLS

**Legislative Council
Panel on Administration of Justice and Legal Services**

**Minutes of meeting
held on Wednesday, 20 March 2002 at 4:30 pm
in Conference Room A of the Legislative Council Building**

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Miriam LAU Kin-yee, JP
Hon Emily LAU Wai-hing, JP
Hon Audrey EU Yuet-mee, SC, JP

Member Absent : Hon Mr Ambrose LAU Hon-chuen, GBS, JP

Public Officers Attending : Item V

Mr Michael SCOTT
Senior Assistant Solicitor General

Miss Doris LO
Senior Government Counsel
Legal Policy Division

Item VI

Mr John READING, SC
Deputy Director of Public Prosecutions

Mr Wayne WALSH
Deputy Principal Government Counsel
International Law Division

Mr Michael SCOTT
Senior Assistant Solicitor General

Miss Selina LAU
Acting Senior Government Counsel
Legal Policy Division

By Invitation : Item V

Law Society of Hong Kong

Mr Vincent LIANG
Ms Wendy CHOW
Ms Angela LEE
Ms Christine CHU

Hong Kong Bar Association

Mr Horace WONG

Consumer Council

Mr LI Kai-ming
Deputy Chief Executive

Ms Rosa WONG
Legal Counsel

The Hong Kong Conveyancing & Property Law
Association Limited

Mr S H LEUNG
Ms Emily Y M LAM
Mr Paul K C CHAN

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Arthur CHEUNG
Senior Assistant Legal Adviser 2

Mr Bernice WONG
Assistant Legal Adviser 1

Mr Paul WOO
Senior Assistant Secretary (2)3

Item IV

Mr Watson CHAN
Head, Research and Library Services Division

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I. Confirmation of minutes of meetings
(LC Paper No. CB(2)1386/01-02)

The minutes of the meeting held on 25 February 2002 were confirmed.

II. Information paper issued since last meeting
(LC Paper No. CB(2)1311/01-02(01))

2. Members noted that the paper on "Competence and compellability of spouses in criminal proceedings" had been issued.

III. Items for discussion at future meetings
(LC Paper No. CB(2)1388/01-02(01))

3. Members agreed that the following items should be discussed at the next regular meeting on 22 April 2002 -

- (a) Process of appointment of judges;
- (b) Fidelity Fund; and
- (c) Persistent sexual abuse of a child.

4. On item (a), members noted that the consultation period for the Consultation Paper on "Process of Appointment of Judges" issued by the Panel had expired on 15 March 2002. Members agreed that the respondents to the Consultation Paper should be invited to make oral presentation on their submissions and exchange views with the Panel at the next meeting.

Number of Directorate Posts in the Department of Justice

(LC Paper No. CB(2)1391/01-02(02) - Paper prepared by the Administration)

Recruitment of Court Prosecutors

(LC Paper No. CB(2)1360/01-02(03) - Paper prepared by the Administration)

5. Members agreed that the above information papers prepared by the Administration should be circulated to all Members of LegCo for the purpose of the relevant session of the special Finance Committee meetings to examine the draft Estimates 2002-03.

(Post-meeting note - The papers were circulated under cover of LC Paper No. CB(2)1409/01-02 dated 22 March 2002)

IV. Mechanism for handling complaints against judges

(LC Paper No. CB(2)1388/01-02(03))

6. Head, Research and Library Services Division (H(RL)) introduced the proposed research outline on "Mechanism for Handling Complaints Against Judges in Overseas Places" (LC Paper No. CB(2)1388/01-02(03)). The research would study the mechanism for handling complaints against judges in Canada, the United Kingdom, the United States and the State of New York. The following aspects would be covered -

- (a) Roles of the Judicial, Legislative and Executive Branches in handling complaints against judges;
- (b) Complaint handling procedures in the Judicial Branch, including :
 - (i) Complaint filing procedures;
 - (ii) Initial screening process;
 - (iii) Investigation;
 - (iv) Formal proceedings in handling complaints;
 - (v) Remedial actions;
 - (vi) Disciplinary actions;
 - (vii) Evaluation of complaint mechanism (effectiveness and independence); and
 - (viii) Appeal procedures;

Action
Column

- (c) Comparison of the various attributes of the mechanism among the overseas places to be studied; and
- (d) Reference for Hong Kong.

H(RL)

7. Ms Emily LAU suggested that the research should also provide information on the number of complaints against judges, the nature of the complaints, investigations taken and the outcome of the investigations.

8. H(RL) informed members that the research project would be completed by June 2002. The Chairman said that the research report, when completed, would be considered by the Panel together with a paper on the subject which had already been submitted by the Administration (LC Paper No. CB(2)1388/01-02(02)).

V. Consultation paper on proposed amendment to the Conveyancing and Property Ordinance (Cap. 219) concerning execution of conveyancing documents by corporations
(LC Paper Nos. CB(2)931/01-02(01); 1388/01-02(04) & (05); 1401/01-02(01) & (02))

9. Senior Assistant Solicitor General (SASG) briefed members on the above consultation paper issued by the Administration (circulated under LC Paper No. CB(2)931/01-02(01)). The consultation paper sought comments on amendments proposed by the Law Society to the Conveyancing and Property Ordinance (CPO) to rectify a problem concerning the execution of conveyancing documents by corporations. The paper also explained the background to the problem identified by the Law Society, the legislative proposals made by the Law Society and the provisional views of the Administration. The major issues set out in the consultation paper were set out below.

10. Section 20(1) of the CPO deemed a document to be duly executed if a seal was authenticated by two signatories whose respective character or office was stated and who each had the requisite character or office according to section 20(1). Section 23 of CPO provided that an instrument appearing to be duly executed should be presumed, until the contrary was proved, to have been duly executed. The Law Society had noted that, owing to an apparent misunderstanding of the effect of section 23, many conveyancing documents executed in the past on behalf of corporations were attested by a single director in such a manner that it might now be impossible to prove or presume due execution. The companies might now be defunct and the responsible person could not be found, or the requisite board resolutions might have been lost. As a result, many vendors would be unable to prove good title to their property. The Law Society had submitted a case for amending the law by introducing a

presumption under a new section (proposed section 23A) of the Ordinance. It was suggested that under the presumption, a conveyancing document purporting to be executed by or on behalf of a corporation would, until the contrary was proved, be presumed to be duly executed. The proposed section 23A(1) and (2) read as follows -

"23A(1) A deed or other instrument (whenever executed) relating to conveyancing purporting to be executed by or on behalf of a corporation aggregate shall be presumed, until the contrary is proved, to have been duly executed.

(2) A party to a transaction relating to conveyancing shall neither be bound nor entitled to inquire as to the authority of the signatory or signatories to any such deed or instrument in any case where such signatory or signatories is or are (as the case may be) a person or persons who could according to the Articles of Association or other constitutional documents of the corporation in question have been authorised by that corporation and whether or not the source of the authority in question or the means by which it was purportedly conferred is described or alluded to in the deed or instrument in question."

11. The Administration, however, took the view that the presumption in the new section 23A as proposed by the Law Society appeared to be unduly wide. For example, it was likely to be impossible for the contrary to be proved in cases where the Articles of Association of the corporation could not be found. The proposed presumption under proposed section 23A(1) would in effect be converted into an irrebuttable presumption.

12. The Administration then proposed an alternative provision which was also set out in the consultation paper for public consultation. Under such alternative provision, where there was no appearance of due execution on the face of an assignment (so that the presumption under section 23 was unavailable), it would nevertheless be presumed, until the contrary was proved, that good title was conveyed under an assignment notwithstanding a formal defect in its execution where, in the circumstances, it appeared beyond reasonable doubt that (i) the vendor intended to vest title in the purchaser and (ii) that there was no real risk that the assignment would be set aside in future proceedings.

13. The Chairman invited the deputations to present their views on the subject. Detailed written submissions from the deputations had been circulated to members before the meeting.

The Law Society of Hong Kong
(LC Paper No. CB(2)1401/01-02(01))

14. The Law Society's major responses were as follows -

- (a) The legislative amendment proposed by the Law Society was in the interest of the public. The proposal was intended to deal with executions of conveyancing documents by corporations where title to the properties (which would otherwise have been good and valid) had been rendered defective on technical grounds, not because of any fraud or illegality;
- (b) The word "appearing" in section 23 had caused much confusion and there was divergence in opinion on its meaning even among judges. It was necessary to address the uncertainty and inadequacies of section 23 in relation to corporate execution of conveyancing documents by introducing legislative amendments;
- (c) The "mischief" which the proposed section 23A sought to cure was principally of a technical nature, i.e. one relating to the practical difficulties of producing board resolutions of the company which had been lost, rather than queries as to whether the signatory attesting the conveyancing documents had the proper authority to do so. The proposed section 23A would be sufficient to deal with the problems identified;
- (d) The proposed section 23A had a limited effect. The presumption in the proposed section 23A(1) was subject to contrary evidence and the vendor was not released from the obligation of proving valid execution of the conveyancing instrument under the proposed section 23A(2). The vendor would still be required to produce the relevant Articles of Association to prove that the document was signed in the manner which could have been authorised by the Articles. As a matter of fact, Articles of Association of Hong Kong companies were registered and readily available from the Companies Registry. Hence, the presumption in the proposed section 23A(1) would not be turned into an irrebuttable presumption;
- (e) The proposed section 23A(2) was a mechanical provision to facilitate proof of title in situations where the words "duly authorised" or wordings to that effect were omitted from the conveyancing documents thereby denying vendors of the presumption which they should otherwise be entitled under section 23. The operation of the proposed section 23A(2) would not prevent purchasers from producing contrary evidence to rebut the

presumption in the proposed section 23A(1). On the other hand, in the past, cases of purchasers challenging the validity of title because of a technical defect in corporate execution were rare; and

- (f) The Administration's alternative proposal was not a viable solution and would create confusion and litigation in future. It required proof of (i) formal defects in execution, (ii) the intention (beyond reasonable doubt) of the vendor to vest title in the purchaser, and (iii) no real risk (beyond reasonable doubt) that the assignment would be set aside in future proceedings. These requirements were likely to create more problems than the proposal was intended to solve.

The Hong Kong Bar Association
(LC Paper No. CB(2)1401/01-02(02))

15. The Bar Association's (the Bar) comments on the consultation paper were as follows -

- (a) The Bar agreed that legislation was needed to deal with the problems of proving due execution of conveyancing documents by corporations. However, the proposed section 23A(1) was drafted in very wide terms, with the presumption of due execution being not only confined in its application to deeds executed by corporations and attested by a single signatory with the company's seal, but also to other types of conveyancing instruments which were intended to have legal effect whenever executed. The Bar therefore did not support a statutory presumption of due execution as provided for in the form of the present proposed drafting of section 23A(1), the width of which allowed a lot of room for unintended "side-effects";
- (b) The Bar supported the proposed section 23A(2) which would facilitate transactions involving corporate executions, particularly transactions in which the capacity of the signatory was not specified in the relevant conveyancing documents thus giving rise to the question of proper authority;
- (c) The advantage of the Administration's alternative proposal was that it would address, in a more direct way, the injustice caused to an owner who was left with an unsaleable property by reason of a formal but unrectifiable defect in the execution of a conveyancing document by a corporation somewhere in the chain of title. However, any legislation along the line of this approach might provide a fertile ground for litigation, as owners with a defective title would resort to the legislation to save their title. Therefore,

the Bar considered that clear and definite statutory guidelines and criteria should be built into the legislation to avoid uncertainties in the legislation.

The Consumer Council

(LC Paper No. CB(2)1388/01-02(04))

16. The Consumer Council (the Council) presented the following views -

- (a) The Council was supportive of introducing legislation to rectify the problems with execution of deeds by corporations. However, a proper balance between the interests of vendors and purchasers should be preserved;
- (b) Section 23A(1) proposed by the Law Society was too wide for its intended purpose. It required none of the standards prescribed in sections 20 and 23 and in fact required no prerequisite to trigger the presumption of due execution. The Council did not support a statutory presumption that was drafted in such loose terms;
- (c) The drafting of section 23A(2) would undesirably restrict the purchaser's right to raise requisition on title such as the authority of signatories attesting the document. The Council proposed a combined version of sections 23A(1) and (2) which read :

"A deed or other instrument (whenever executed) relating to conveyancing purporting to be executed by or on behalf of a corporation aggregate and attested by signatory or signatories where such signatory or signatories is or are (as the case may be) a person or persons who could according to the Articles of Association or other constitutional documents of the corporation in question have been authorized by that corporation shall be presumed, until the contrary is proved, to have been duly executed whether or not the source of the authority in question or the means by which it was purportedly conferred is apparent from the deed or instrument in question.";

- (d) The Administration's alternative proposal had the advantage of being able to deal with the matter of good title in general terms rather than solely with execution by corporations. However, there might be uncertainties involved in the operation of the presumption in that it would introduce such elements as to whether a defect was formal rather than of substance, proof of "beyond reasonable doubt", the vendor's intention to vest title and whether there was any real risk of setting aside the assignment in future proceedings etc. In considering the alternative proposal, the Administration

should explore (i) the feasibility of setting out in the presumption provision a non-exhaustive list of factors indicative of the vendor's intention and of the absence of real risk, or (ii) ways to protect purchasers who accepted title by relying on the presumption but ended up with unmarketable title because subsequent purchasers were able to rebut the presumption.

The Hong Kong Conveyancing & Property Law Association Limited (HKCPLA)

(LC Paper No. CB(2)1388/01-02(05))

17. The major responses of HKCPLA to the consultation paper were summarised as follows -

- (a) HKCPLA agreed that legislation should be introduced to address the problems in question. HKCPLA also supported the proposed section 23A(1) and (2), with a recommendation to add the following phrase at the end of each of the subsections to address the concern that the statutory presumption was too broad :

"unless the mode of execution is clearly contrary to the Articles of Association or other constitutional documents of the corporation in question.";

- (b) The alternative provision proposed by the Administration would not help in solving the present problems because it would give rise to arguments as to whether there was an appearance of due execution on the face of an assignment and whether there was any real risk that the assignment would be set aside in future proceedings.

18. Ms Miriam LAU and Ms Audrey EU sought the deputations' views on whether the proposed presumption of due execution should apply to instruments executed both in the past and in future.

19. Ms Wendy CHOW and Ms Angela LEE said that the basic objective and spirit of the Law Society's proposal was to facilitate the conduct of conveyancing involving corporate execution and to ensure that the title to properties would not be unnecessarily affected by purely technical defects. The proposed section 23A would make transactions easier and less costly through reliance on the presumption of due execution, relieving purchasers of the unnecessary trouble and expense of having to verify whether there was a problematic title. The Law Society was of the view that the proposed presumption should be of general application to past as well as future cases.

20. Ms Wendy CHOW added that the presumption of due execution in the proposed section 23A(1) was not intended to absolve solicitors in future transactions from their duty to ensure that the parties had validly executed the conveyance in question, because it would be relatively easy for solicitors to insert a description of the signatory to the title document and keep a copy of the board resolution with the title deeds in future cases. Therefore, the remark made in paragraph 35 of the Administration's consultation paper that the presumption in the proposed section 23A(1) would on its face derogate from the duty of care and diligence incumbent on solicitors did not stand.

21. Mr Horrace WONG said that the Bar supported the view that remedial legislation should be introduced to apply to both past and future transactions.

22. Mr LI Kai-ming said that the Consumer Council supported a legislative remedy which was of general applicability in the particular area of corporate conveyance. He further said that the Consumer Council was also aware of a large number of cases involving small individual owners of old properties who were unable to sell their properties because of the impossibility to prove good title. The Consumer Council considered that the Administration should also explore ways to deal with these cases.

23. Mr S H LEUNG said that members of HKCPLA had not reached a consensus on whether the proposed statutory presumption should apply to past and future cases alike. He said that he personally supported the Law Society's position.

24. Mr Albert HO and Ms Miriam LAU said that they were in favour of a legislative measure which, if implemented, would be of general applicability not limited only to assignments executed before a certain point in time.

25. Ms Audrey EU said that there were apparently no disputes among interested parties that real problems existed and legislative changes were necessary to deal with such problems. The major concern, however, was the wide scope of section 23A(1). She expressed the view that the proposed presumption of due execution and the phrase "until the contrary is proved" in section 23A(1) had the effect of shifting the burden of proving valid title from the vendor to the purchaser. She was concerned that this might create great difficulties for the purchasers.

26. Ms Audrey EU added that the draft Land Titles Bill which had yet to be introduced might have a relevant bearing on the issues being discussed. She enquired about the timetable for introduction of the Bill to LegCo. SASG undertook to give a reply in writing on the present position.

27. The Chairman said that in view of the strong support for legislative change to deal with the problems, the Administration should finalise the

proposed legislative amendments expeditiously after the consultation exercise and revert to the Panel on the progress.

28. SASG advised that he expected that a Bill on the subject matter would be introduced some time at the beginning of the next legislative session.

VI. The giving of evidence by overseas witnesses via live TV link
(LC Paper Nos. CB(2)1360/01-02(01) & (02))

29. SASG introduced the paper prepared by the Administration on the proposal to amend the law to provide for the giving of evidence by overseas witnesses in criminal proceedings via live TV link (LC Paper No. CB(2)1360/01-02(01)). The general principles and details of the legislative proposal were explained in the paper. He added that the Administration was in the process of consulting the legal professional bodies and the law faculties of the University of Hong Kong and the City University on the relevant proposal.

30. The Chairman informed members that the Law Society had advised in writing (LC Paper No. CB(2)1360/01-02(02)) that it was considering the legislative proposal and would prepare a submission in due course. The Bar Association supported the proposal in principle.

31. In reply to the Chairman's enquiry about the intended ambit and application of the proposed legislative proposal, Deputy Director of Public Prosecutions (DDPP) said that the proposed arrangements were intended to cover situations where a witness was resident abroad and where the witness was unable or reluctant to come to Hong Kong to testify. At present, the only alternative was to take evidence by way of a letter of request issued by the Hong Kong court or by a request made by the Secretary for Justice under mutual legal assistance procedures. This involved delay in questioning the witness in the requested jurisdiction and presenting the evidence in written form in Hong Kong. Allowing an overseas witness to give evidence from abroad via live TV link to a Hong Kong court would significantly reduce inconvenience to the witness and the travel costs associated with bringing him to Hong Kong to testify. It would also enable the court to facilitate cross-examination and observe the demeanour of the witness.

32. DDPP added that under the proposed legislation, adducing and hearing evidence of an overseas witness by live TV link would require the prior approval of the Hong Kong court, upon application of a party to the proceedings who wished to resort to such arrangements. The party might decide whether he wanted to make the arrangements using the mutual legal assistance channel or by private arrangement without the assistance of any overseas authority.

33. Referring to paragraph 10 of the Administration's paper on reciprocal arrangements between Hong Kong and overseas jurisdictions, Mr Albert HO asked why witnesses in Hong Kong should be "permitted" to give evidence via live TV link to an overseas court.

34. DDPP replied that it was generally anticipated that there would be a private voluntary arrangement. But there might be situations where mutual legal assistance was sought from a requesting overseas jurisdiction to have evidence taken of a witness in Hong Kong via live TV link, through order of the court in Hong Kong. Also, the arrangements for giving of evidence via live TV link would necessitate the use of court facilities in Hong Kong.

35. The Chairman asked how often requests were received from overseas jurisdictions.

36. The Deputy Principal Government Counsel (International Law Division) replied that at present, requests were received about once a month, and it was becoming more prevalent for overseas jurisdictions to make such requests to Hong Kong.

37. DDPP supplemented that similar legislation was available in most other common law jurisdictions to give effect to the giving of evidence by live video-link. He said that in Singapore, for example, technology in video link was used not only for the purpose of taking evidence from overseas witnesses, but also for the purpose of preliminary proceedings where the parties, though available locally, did not have to appear in court in person.

38. In reply to Mr Albert HO, DDPP advised that High Court Judges at present had the power under the High Court Rules to permit the mode of evidence taking by live TV link to be used in civil proceedings on a voluntary basis.

39. In response to the Chairman's question on the legislative timetable, DDPP said that a Bill was expected to be introduced into LegCo in May 2002. He added that a technology courtroom, which would be equipped with overseas TV link facilities, was being installed in the High Court and was expected to be in full operation by September 2002.

40. The Chairman said that she expected that the details of the legislative proposal would be looked at by a Bills Committee in due course. She suggested that the Administration should start gathering information on the arrangements adopted in overseas jurisdictions to facilitate consideration of the Bills Committee when set up.

VII. Any other business

Motion debate on "Civil Justice Reform"

41. The Chairman informed members that the consultation period for the Interim Report and Consultative Paper on Civil Justice Reform (IRCP) prepared by Chief Justice's Working Party would end on 30 April 2002. To enable Members to give views on this important matter, she had earlier proposed that a motion debate should be held at the Council meeting on 24 April 2002, the last Council meeting before expiry of the consultation period. However, as the allocation of debate slots would have to be determined by ballot among Members who wished to move a debate at the same Council meeting, she sought members' views on the way to proceed with the matter. In particular, she sought members' views on whether the Panel should seek the agreement of the House Committee to allocate a slot for the Chairman of House Committee to sponsor a motion debate on the subject, as there were precedents of the Chairman of House Committee moving a motion on important subject matters under public consultation.

42. The Clerk advised that the ballot to determine allocation of debate slots for the Council meeting on 24 April 2002 would be held on 8 April 2002.

43. Members generally agreed that in view of the specialised nature of the IRCP, it would be preferable for the Panel Chairman to move the motion. Furthermore, members considered that there should be no problem for the Working Party to take into account the Council's views even if the motion debate on IRCP was held after the expiry of the consultation period. The meeting agreed that the Chairman of the Panel should move the motion debate on the subject after successfully securing a debate slot.

(Post-meeting note - The Chairman has secured a debate slot for the Council meeting on 8 May 2002.)

44. The Clerk was requested to convey the decision of the Panel to the Working Party in writing.

Clerk

45. There being no other business, the meeting ended at 6:30 pm.

Council Business Division 2
Legislative Council Secretariat
24 May 2002