

**THE HONG KONG CONVEYANCING &
PROPERTY LAW ASSOCIATION LIMITED**

c/o S.H. LEUNG
Room 502 Aon China Building, 29 Queen's Road Central
Hong Kong
Tel: 28101606 Fax: 28106911

Our Ref. SHL/LOL
Your Ref. CB2/PL/AJLS

14 March 2002

Legislative Council,
Legislative council Building
8 Jackson Road
Central
Hong Kong.
Attn: Mrs. Percy Ma
Clerk to Panel

Dear Sirs,

Re: Consultation paper on proposed amendments to the Conveyancing and
Property Ordinance (Cap.219) relating to executing of conveyancing
documents by corporations

Thank you for your letters dated 1 February 2002 and 27 February 2002.

(I) Public interest to introduce the amendment and the formal requirements
of execution (paragraph 36 of the consultation paper)

It is submitted that it is for the public interests to introduce the amendment. Practitioners have relied on the opinion of Leolin Price Q.C. and the Law Society's Circulars and the practice adopted by the profession and now find that they are blamed or might be sued by their former clients who cannot sell their properties because of the decisions of Wong Yuet Wagh Mandy v Lam Tsam Yee & Another and Grand Trade Development Limited v Bonance International Limited. It is not easy to explain to a layman why his former Solicitors did not pick up such alleged defect of title and why at present he cannot sell his property without the written Broad Resolution from his predecessor in title which is a limited company. Lay clients were even more dissatisfied when they were told that they might not be able to sue their former Solicitors because such former Solicitors were not negligent.

We also agree with the view of the Administration that it is in the interest of

corporations that unauthorized transactions should not be facilitated.

(II) Provision which deals with good title in all circumstances rather than solely with due execution as set out in paragraph 37 of the consultation paper

The Association agrees with the view of the Administration and does not support the above for the reasons that if Solicitors closed their eyes in putting through the title, for example, if there were three vendors and only two vendors executed the assignment and Solicitors acting for the purchaser accepted title, there is no reason why legislation should be introduced to give good title to the purchaser.

(III) Law Society's proposal

We support the Law Society's proposal. The criticism of the Administration is that the presumptions proposed by the Law Society may be too broad (paragraph 26 of the consultation paper). An example is given in paragraph 27 of the consultation paper in case where the Articles cannot be found: however, unless the records in the Companies Registry have been lost, both the Vendor and the Purchaser can have access to the Articles registered with the Companies Registry. The other example is given in paragraph 28 of the consultation paper i.e. a conveyance executed by a person described as a clerk, however, it appears that if the Articles states the document may be executed by a person appointed by the Board of Directors to execute, there is no reason why the title is obviously defective. It appears to us therefore the presumption of the proposed Section 23A by the Law Society is not too broad. On the assumption that the proposed Section 23A by the Law Society is not too broad, our answers to the issues raised by the Administration in paragraph 46 of the consultation paper are as follows:-

Answer to Q1 – we agree that legislation is needed.

Answer to Q2 – we support the proposed 23A(1).

Answer to Q3 – we support the proposed 23A(2);

Answer to Q4 – we do not support the presumption suggested by the administration in addition to Section 23A for reasons set out in paragraph (IV) hereinafter mentioned.

(IV) Alternative provision suggested by the Administration as set out in the consultation paper

Regarding the alternative provision suggested by the Administration, it appears that four conditions have to be satisfied i.e.:-

1. there was no appearance of due execution on the face of an assignment so that presumption under Section 23 was unavailable;
2. there is a formal defect in the execution;
3. it appears beyond reasonable doubt that the Vendor intended to vest title on the purchasers; and
4. there was no risk that the assignment would be set aside in future proceedings

It is submitted that if the alternative provision submitted by the Administration is accepted, it would not help to solve the present problems because there would be further argument as to whether there is an appearance of due execution on the face of an assignment and whether there is any risk

that the assignment would be set aside in future proceedings.

(IV) Alternative proposal by the Association

If the general view is that the presumption proposed by the Law Society is too broad, the Association suggests that Section 23A(1) and Section 23A(2) proposed by the Law Society be amended 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 unless the mode of execution is clearly contrary to the Articles of Association or other constitutional documents of the corporation in question.
- (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 authorized 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 unless the mode of execution is clearly contrary to the Articles of Association or other constitutional documents of the corporation in question.”

The proposed amendment preserves the effect of Company Law; for example if the Articles of association requires 2 directors with no alternative methods execution and if only one director executed, the amendment proposed by the Association does not help. If the proposed amendment by the Association is accepted, it would not facilitate unauthorised transactions as mentioned in paragraph 36 of the consultation paper. The proposed amendment does not relax generally the established formal requirements of corporation execution as alleged in paragraph 35 of the consultation paper but only helps the public through no fault of their own to sell the property in future. Unless fraud was involved, as far as the Association believes, no corporation who had sold their property have tried to set aside the transaction: it would be inequitable for such company so to do because it had received the purchase price, had stopped paying government rent, rates and maintenance charges. Such corporation would be estopped from denying that the transaction was not a valid transaction.

Another alternative proposal is that if the proposal by the Law Society or our above alternative proposal is not accepted in total, it is suggested that the following provisions be introduced as follows:-

Another alternative proposal is that if the proposal by the Law Society or our above alternative proposal is not accepted in total, it is suggested that the following provisions be introduced as follows:-

“23A Where any document is or has been produced by a vendor as proof of title to any land and that document purports to have been executed by a corporate aggregate not less than 3 years before the contract of sale of that land, it shall for the purposes of any question as to the title to that land be conclusively presumed:-

- (a) as between the parties to that contract; and
- (b) in favour of the purchaser under that contract as against any other person, that:-
 - (i) the document was validly executed; and
 - (ii) such corporate aggregate validly authorized the execution of that document.”

As pointed out above, unless fraud was involved, the Company who received the purchase price would not set aside the transaction and even if fraud was involved, such fraud would be able to be discovered by other directors and shareholders within 3 years. Limited companies are required to have the account audited annually and the auditor can easily discover the fraud if title deeds are missing.

Our answer to the issues raised by the Administration in paragraph 46 of the consultation paper are as follows:-

Answer to Q1 – Yes. We agree that legislation is necessary .

Answer to Q2 – If the amendment proposed by the Association is not accepted, we support the narrower version of 23(A)(1).

Answer to Q3 – If the amendment proposed by the Association is not accepted, we support the narrower version of 23(A)(2).

Answer to Q4 – We do not support the presumption suggested by the Administration as an addition to Section 23A.

Yours faithfully,

S.H. LEUNG
PRESIDENT