

**Consumer Council 's submission to
LegCo Panel on Administration of Justice and Legal Services on
Consultation paper on proposed amendments to the
Conveyancing and Property Ordinance (Cap.219) relating to
execution of conveyancing documents by corporations**

1. Overall View

- 1.1. The Consumer Council agrees that legislation is needed to address the problem that may arise when vendors are to prove title relating to conveyancing documents executed by corporations. The Council thinks that there is public interest in amending the Conveyancing and Property Ordinance to assist vendors facing predicament not of their own making and which has evolved over time through succession of events rather than blatant negligence of their legal representatives.
- 1.2. The Council feels that the average vendors may not be aware of the existence of the problem so much so that they would not anticipate the need to make contractual provision for purchasers to accept a possibly lesser title when they come to sell their properties. And it may be unfair to subject vendors to the time and expenses of seeking rectification on a case by case basis, perhaps with the risk of postponed or fallen-through completions, if they acquired title in line with proper standard and practice prescribed by the Law Society for conveyancing transactions at the relevant time.
- 1.3. The Council feels that it is undesirable to leave individual cases to be dealt with as and when they arise since sale and purchase of properties do not take place at regular intervals and the problem may be kept alive indefinitely in the absence of legislative intervention. It is expected that amendments of the CPO will facilitate conveyancing and reduce litigation between vendors and purchasers.

2. Section 23A(1) as proposed by the Law Society

- 2.1. On the proposed section 23A(1), the Council considers it too wide for its intended purpose. There are certain minimum standards built into the current sections 20 and 23 of the CPO. Section 20 requires attestation by

bearer of responsible office in corporations for due execution to be deemed. Section 23 requires an appearance of due execution for due execution to be presumed. The proposed section 23A(1) requires none of the above and in fact prescribes no prerequisite to trigger the presumption of due execution. If the proposed section 23A is intended to rectify one particular aspect of execution by corporations which has become problematic, the Council does not find justification in its being drafted in such loose terms as to require no proof of due execution in effect and therefore goes beyond addressing the mischief identified.

- 2.2. Moreover, the Council is cautious against a statutory presumption that is so wide as to upset the balance of interest between vendors and purchasers in conveyancing transactions. In normal cases, a vendor shall prove his title to property at his own expense and shall make and furnish to the purchaser deeds or documents of title, wills and matters of public record necessary to prove such title. On the other hand, a purchaser is entitled to make any objection or requisition either as to title or any matter appearing on the title deeds. Under the proposed section 23A(1), a deed will be presumed to be duly executed by a corporation until the contrary is proved. That would shift the burden onto the purchaser's solicitors to come up with contrary evidence to trigger requisition.
- 2.3. Whilst the Council is supportive of a remedial measure to assist vendors who acquired title to their properties in good faith, it is concerned that the balance between the interest of vendors and purchasers should not thereby be upset. In the Council's view, a provision that seems too much in favour of vendors' interest may not be justified in the circumstances. The Council therefore supports the addition of a remedial provision, but in a version narrower than the proposed section 23A(1).

3. The proposed section 23A(2)

- 3.1. Turning to the proposed section 23A(2), the Council feels that the section should be able to address the mischief identified. However, the Council has reservations about the way in which the section is now phrased. Bearing in mind the vendors' obligation to prove title and the purchasers' entitlement to raise requisition on title, the Council considers that the wordings of the proposed section 23A(2) is prohibitive towards the purchasers' right. If the proposed 23A(2) is adopted in its entirety, purchasers will not be entitled to enquire as to the authority of signatories where the attestation is permissible under the relevant articles of association.

3.2 The Council considers that the appropriate gear to equip the vendors with in the particular circumstances should be a shield rather than a sword. The Council suggests that a suitably revised version could serve the combined effect of the proposed sections 23A(1) and (2) without upsetting the balance of interest between vendors and purchasers. The Council's suggested combined version reads,

"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."

4. The presumption suggested by the Administration

4.1 Coming to the presumption suggested by the Administration, the Council thinks it is a presumption of good intention because such a presumption suitably drafted may indeed deal with the matter of good title in general terms rather than solely with due execution by corporations. The Council agrees that it will be wider in scope than the proposed version by the Law Society and therefore of greater application. However, the Council sees problem with the presumption in that it would introduce such elements as whether a defect is formal rather than of substance, what would appear to be beyond reasonable doubt (rather than on the balance of probability), the vendor's intention to vest title, and whether there is any real risk. Since the existence or otherwise of these elements are not determined according to an invariable set of criteria, there will be uncertainty involved. For example, it may not be easy to judge what sort of circumstances are indicative that a particular assignment was effective to convey a good title despite a defect in execution. As such, it will be difficult for the solicitors for the vendor and the purchaser to agree that the proposed presumption of good title should be relied on, so much so that it may give scope for further argument and possible litigation.

4.2 The Council thinks that even if the Administration's presumption can be suitably drafted, it will not be as straightforward a solution to rectify defects in deeds executed by corporations as an improved version of the

Law Society's proposed section 23A. The Council therefore tends not to prefer adopting the Administration's presumption as an alternative to the proposed section 23A. However, at this stage the Council has not yet arrived at a definite position as to whether or not to support the Administration's presumption, or to support it as an addition or alternative. Under such circumstances, the Council would like to request the Administration to elaborate on the philosophy behind its proposal. The Council will further deliberate on the matter.

- 4.3 In the case that the Council supports the Administration's presumption, the Administration may be invited to explore (1) 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 in order to facilitate conveyancing transaction and reduce litigation, or (2) ways to protect the purchasers who accept title by relying on the presumption but end up with unmarketable title because their subsequent purchasers are able to rebut the presumption.

5. Conclusion

- 5.1 In conclusion, the Council reiterates its support for legislating to rectify likely problem with execution of deeds by corporations that may arise as a result of discrepancy between the Law Society advice to its members given back in 1990 and the Court of Appeal judgment delivered in 2001. The Council feels that it is preferable to deal with the problem once and for all rather than leave it to individual vendors to explore solutions as and when the problem surfaces.
- 5.2 The Council is however mindful that the proper balance between the interest of vendors and purchasers should be preserved where measures over and above existing practice are to be adopted. The Council therefore urges the government to bear that balance in mind when fine-tuning the drafting of the intended new legislation.

Consumer Council
13 March 2002