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

Introduction

This paper seeks comments on amendments proposed by the Law Society to the Conveyancing and Property Ordinance (Cap. 219) to rectify a problem concerning the execution of conveyancing documents by corporations. The paper sets out the current law, the problem identified by the Law Society, the historical background of the problem, the submissions by the Law Society on the proposed amendments, and the provisional views of the Administration.

I The problem under the current law

The current law

2. It is a principle of corporate and conveyancing practice that the affixing of the seal of a corporation to an instrument should generally be carried out, and attested to, by two directors of a corporation. However, the articles of association of a corporation may provide that only one signatory is needed, or that the board of directors may authorise the signing in some other manner.

3. Section 20(1) of the Conveyancing and Property Ordinance deems a document to be duly executed if a seal is authenticated by two signatories whose respective character or office is stated and who each have the requisite character or office according to section 20(1) (namely, the secretary or other permanent officer of the corporation and a member of the corporation's board of directors or other governing body or by two members of that board or body).

4. Section 23 of the Ordinance provides that an instrument appearing to be duly executed shall be presumed, until the contrary is proved, to have been duly

executed.

5. Regarding the way in which a single director should sign in order to trigger the presumption under section 23, one commentator has identified a broad distinction in Hong Kong case law between articles of association with direct and indirect provisions for attesting the affixing of the seal (Philip Smart "Conveyancing and Companies: The Single Director and the Company Seal (Part 2)" in Hong Kong Lawyer (October 2001) 44, at p.48).

6. Direct provisions specifically authorise the persons who may sign (e.g. two directors, one director and the secretary, the chairman or managing director, or one director). Where an authorised signatory signs and adds a description of himself that corresponds with the description of a person who is authorised in the articles to sign (e.g. "Director"), that will be sufficient to trigger the presumption under section 23.

7. Indirect provisions do not specifically identify the persons who may sign but merely leave it open to the board of directors to decide by resolution who may be allowed to sign. In order to trigger the presumption under section 23 in indirect cases, the instrument must on its face suggest that the board has actually exercised its power to confer authorisation upon the person who has signed. Without such a statement in the instrument, a board resolution or other evidence of the authorisation must be produced in order to prove due execution.

The problem

8. The Law Society has 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 may now be impossible to prove or presume due execution. As a result, many vendors will be unable to prove good title to their property.

Background

9. In 1990 and 1991, the Law Society sought advice from a London QC concerning the binding effect of the execution of documents by corporations having regard to sections 20 and 23 of the Ordinance.

10. The matter of particular concern to the Law Society was whether the presumption in section 23 is available where the affixing of a corporation's seal is authenticated by one attesting signatory alone.

11. The London QC advised that a corporation's execution of a deed of assignment supported by one attesting signature only was covered by the presumption in section 23 if the articles of association provide either that –

(i) only one signatory is needed; or

(ii) that two signatories are needed with an option for the board of directors to authorise signing in some other manner.

12. In the former case, the advice reasoned that if the capacity of the signatory is stated in the document and is the relevant capacity (if any) stated in the articles, the document will "appear" to have been duly signed by the relevant person. This would also apply if the document did not state the relevant capacity since production of the articles would establish that only one signatory is needed and the document would "appear" to be duly signed and sealed. In the latter case, the advice was that section 23 makes it unnecessary to produce an authorising board resolution where the relevant article, being available, is expressly to the effect that the board may authorise the use of the seal attested by one signature only. In such case there was no apparent defect in the execution of the assignment which therefore was a document appearing to be duly executed and is presumed, until the contrary is proved, to have

been duly executed. In either case, the production of a board resolution would only be necessary if the articles of association could not be produced to establish that only one signatory is needed.

13. However, the case law after 1991 tended to establish that a document not covered by section 20 cannot be said to appear to be duly executed under section 23 unless either the document states on its face that the director was authorised to sign by the resolution required under the articles or, if there is no such statement, the relevant authorising resolution is produced (Hillier Development Limited v Tread East Limited [1993] 1 HKC 285; Wong Yuet Wah Mandy v Lam Tsam Yee [1999] 3 HKC 268; Lim Siu Chun v Billion Light Investment Ltd [2000] 2 HKC 621). On the other hand, in Grand Trade Development Ltd v Bonance International Ltd [2000] 4 HKC 57, it was held at first instance that section 23 applied because the company seal was affixed and (in the absence of express governing provisions) the two assignments in question appeared to have been duly executed. Further, in Chan Sai Hung v Well Develop Ltd [2000] 4 HKC 50, section 23 was held to apply although there was no reference to evidence which provided an appearance of due execution.

14. The conflict regarding the interpretation of section 23 has been settled in favour of the narrower approach. In Grand Trade Development Ltd v Bonance International Ltd [2001] 3 HKC 137, 150A-B, the Court of Appeal held –

> "[Section 23] only applies where, on its face [emphasis added], the instrument appears to be duly executed. … Had the relevant signatory signed with a description such as 'the person duly authorised by the board of directors' rather than simply as one of its directors, s 23 would have been engaged. Failing such specific words appearing on the face of the assignment, s 23 cannot apply."

15. The judgment of the Court of Appeal in Grand Trade is reinforced by an

earlier judgment of the Court of Final Appeal in Leung Kwai Lin Cindy v Wu Wing Kuen [2001] 1 HKC 567. For relevant purposes, the Court of Final Appeal (at pp. 577E-F and 578G-H) held that section 23 is remedial, to facilitate conveyancing, and should receive a liberal construction. A liberal construction, however, entails that a rebuttable presumption arises once evidence establishes that the instrument appears at any time on its face to have been duly executed. It is that fact and that fact alone which attracts the statutory presumption. Other circumstances may only serve to reinforce the presumption or to rebut it.

16. The Law Society's concern arising from such development is that the question of due execution may arise in a current transaction to which the corporation is not a party. For example, a conveyancing transaction may involve a chain of title that includes a document executed by a corporation many years ago. Following the advice of the London QC (which the Law Society notified to its members in two circulars issued in 1990), the Law Society considers that there is likely to be a significant number of cases where board resolutions have not been kept with the title deeds or a corporation has ceased to exist or for some other reason the resolution necessary to prove good title to property is unavailable.

II The Law Society's case for an amendment to the law

17. The Law Society considers the judgment in Grand Trade to be incorrect. It has submitted a detailed case (set out in the Annex) for amending the law by introducing a presumption under a new section 23A of the Conveyancing and Property Ordinance (Annex, paragraph 6). Under the presumption, a conveyancing document (whenever executed) purporting to be executed by or on behalf of a corporation would, until the contrary is proved, be presumed to be duly executed. The case is in three parts –

(1) a critique of the judgment of the Court of Appeal in Grand Trade;

(2) non-legislative solutions;

(3) an analysis of the proposed section 23A.

III Provisional views of the Administration

18. The Administration's comments below on the Law Society's proposals as set out in the Annex are made for the purpose of assisting discussion and feedback on these matters from consultees rather than as concluded views.

(1) A critique of Grand Trade (Annex, paragraphs 1 to 4)

19. The Administration notes the Law Society's comments but recognises that Grade Trade represents the current state of the law.

(2) Non-legislative solutions (Annex, paragraph 5)

20. It has been suggested that the problem of incorrectly executed instruments can be overcome in practice by the vendor's solicitor (where necessary) including a special condition in the sale and purchase agreement. The condition would state that the purchaser shall accept that the instrument as sealed with only one attesting signature was duly executed by the corporation. The purchaser would then know the exact state of the vendor's title and could decide whether or not to accept the risk, which he could insure against.

21. For the reasons set out in paragraph 5(A) and (B) of the Annex, the Law Society submits that these solutions are not viable.

Contractual provisions and title insurance

22. The Administration is disappointed that current practices are such that vendors are committing themselves to sell property on terms that may not take into account the state of their title to the property. The role of solicitors acting for the vendors of property should be to protect them from possible legal liability based on

their inability to perform their contractual obligation to produce a good title. It seems that, at present, no system is in place to enable local solicitors to do this.

23. It is also disappointing to note that title insurance, which is commonly available in other jurisdictions, does not seem to be part of Hong Kong's system.

Rectification

24. The Law Society has considered another possible non-legislative solution, namely obtaining a rectification of the defective instrument by the company involved. For the reasons set out in paragraph 5(C) of the Annex, the Administration accepts that this may not be an available solution in many cases.

(3) An analysis of the proposed section 23A (Annex, paragraphs 6 and 7)

25. The Law Society proposes that the Conveyancing and Property Ordinance be amended by the addition of a further presumption under a new section 23A in the following terms –

> "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.

(3) A deed instrument or transaction shall be one relating to conveyancing for the purposes of this section if it relates to land or any interest in or over or covenant given or grant charge or other incumbrance made concerning land."

(a) <u>Presumption may be too broad</u>

26. If the purpose of the presumption is as set out in paragraph 7(A) of the Annex, the proposed section 23A appears to be unnecessarily wide since it is not limited to the situation where –

(1) the affixing of the common seal is attested by a single signatory; and

(2) the articles allow this either directly or indirectly.

27. For example, the presumption would cover the situation in which there was a single signatory but the articles cannot be found. Such a presumption would go beyond putting the law into the state which some believed it to be in, by (in effect) presuming that all articles of association (directly or indirectly) authorise a single signatory. Moreover, where the articles cannot be found it is likely to be impossible to prove that they did <u>not</u> contain such an authorisation. The rebuttable presumption in section 23A will in effect be converted into an irrebuttable presumption. The advantages of this to a vendor with a problematic title are such that the intentional "losing" of articles if section 23A were enacted cannot be ruled out.

28. The proposed presumption also appears to be unduly wide in that it would, for example, cover a corporate conveyance executed by someone described as a clerk. There does not seem to be any reason why purchasers should be required to

accept such obviously defective titles, nor is such a situation part of the mischief that needs to be cured. If there is to be a new presumption, there may be a case for narrowing its application by reference to the identified mischief.

29. There are, however, limits to the application of the proposed presumption. If, for example, the affixing of the company seal was attested by one director when the articles required two directors, the lack of due execution could easily be established if the articles were readily available. Further, the presumption would not necessarily have altered the result in all of the Hong Kong cases regarding due execution. For example, in Li Ying Chi v Air Sprung (HK) Ltd [1996] 4 HKC 414 and Lo Wing Wah v Chung Kam Wah [2000] 1 HKLRD 227, the respective articles (which were available) specified signature by the chairman of the board or by two directors, and, further, each execution clause in question described the single signatory as a director.

(b) Instruments executed by corporations in the future

30. Now that the effect of section 23 has been clarified by the courts, solicitors acting for corporate vendors in the future should have no difficulty in ensuring that the instrument is properly executed and that a good title can be conferred on the purchaser. It therefore appears that no case has yet been made for the proposed amendment in respect of instruments executed by corporations in the future.

31. It would be better to ensure that future instruments are properly executed in accordance with the accepted formal requirements than that they are effectively deemed to be properly executed. The proposed presumption may assist the vendor in selling his property but, if evidence emerged that the instrument was in fact unauthorised, the presumption would be rebutted and the purchaser will not get a good title. If a new statutory presumption concerning the formalities of execution can be justified, it could be limited to past documents of title purporting to be sealed by a company and bearing what purports to be one attesting signature, where the articles

allow this directly or indirectly.

(c) Loss of purchasers' rights

32. Arguably, the benefit provided to vendors by the proposed presumption would be at the expense of purchasers. Under the current law, in the absence of a contractual condition to the contrary, a purchaser is entitled to refuse to complete if a good title has not been proved or presumed. The proposed amendment would take that right away in respect of transactions executed by a single director. Although the defect may often be one only of form, there can be no guarantee that some transactions may have been unauthorised in substance.

33. It is argued in paragraph 5(A)(ii) of the Annex that there is no reason for a purchaser to accept a special condition in the sale and purchase contract, restricting his right to raise requisitions or requiring him to accept the risk that the title may not be perfect, when he has agreed to pay the market price for the property. Yet the proposed amendment would put purchasers in the same position as if they had accepted such a special condition.

(d) The common law

34. It appears that section 23 is no more than a statutory statement of a presumption established at common law, as described in Emmet on Title, para. 20.002 –

> "In ordinary everyday practice if a deed on the face of it appears to have been duly executed and there are no suspicious circumstances, the fact of such due execution is accepted without enquiries or further proof (*Law Society's Digest*, Opinion No. 125)."

35. Therefore it appears that the Law Society's proposal to introduce a presumption of due execution without the requirement for an instrument to "appear"

to be duly executed would substantially alter the established law and practice. For example, it would, on its face, derogate from the duty of care and diligence to ensure that instruments appear to be duly executed that is incumbent on solicitors under both section 23 and the common law presumption. The requirement for an appearance of due execution is also reflected in section 20(1), under which signatories should state their respective character or office.

(e) <u>The formal requirements of execution and the public interest</u>

36. One question which arises in the above context is whether or not it would be in the public interest to introduce an amendment, such as the proposed section 23A, which would relax generally the established formal requirements of corporate execution for the purpose simply of dealing with a small number of past formally defective assignments. For example, the law should (as it presently does) continue to give purchasers a reasonable assurance of good title, and it is in the interest of corporations that unauthorised transactions not be facilitated. Arguably, therefore, the established formalities should not be diluted. Where formal defects occur, it appears that it would be preferable to deal with these in the circumstances of each case rather than by creating a presumption which would reduce the accepted minimum formal requirements, and possibly also the standard of care, such as evinced in sections 20(1) and 23 and the common law.

(4) <u>A possible alternative approach</u>

37. The essential question appears to be whether, in any particular circumstances, a good or secure title can be passed despite a formal defect in execution (including a lack of appearance of due execution) in the chain of title. Therefore if legislation is required, that problem, as considered below, might more appropriately be dealt with by way of a provision (to be retrospective) which specifically deals with the matter of good title in all the circumstances rather than solely with due execution.

(a) <u>Suggested alternative provision</u>

38. Under such 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 is proved, that good title was conveyed under an assignment notwithstanding a formal defect in its execution where, in the circumstances, it appears beyond reasonable doubt that the vendor intended to vest title in the purchaser and that there was no real risk that the assignment would be set aside in future proceedings.

(b) <u>Possible advantages</u>

39. Advantages of the suggested alternative provision may include –

(a) it would provide an identifiable statutory presumption required to facilitate conveyancing in addition to that under section 23;

(b) unlike section 23, it would avoid the disadvantage of having what may in some cases be an unduly technical requirement for the appearance of due execution before other – and possibly decisive – circumstances can be considered which may indicate that the assignment was effective to convey a good title despite a formal defect in execution;

(c) because of its focus on all the circumstances rather than on the formalities of execution, it may be a more reliable presumption than that under section 23 or the proposed new section 23A since, if the circumstances required to trigger the presumption appear beyond reasonable doubt, it may only be exceptionally that proof to the contrary (e.g. fraud or some other illegality) would emerge. By contrast, mere proof of a formal defect in execution would rebut the presumption under section 23 or the proposed new section 23A;

(d) overall, a presumption of this type may be desirable where nothing more than a formal defect in execution effectively nullifies an assignment which, in all the circumstances, should be considered as vesting good title in the purchaser. This would avoid the potential injustice that the vendor or purchaser may be left with an unsaleable property simply because of a formal but otherwise totally inconsequential defect in the execution of an assignment somewhere in the chain of title.

(c) <u>Possible disadvantages</u>

40. Disadvantages of the suggested alternative provision may include –

(a) the additional presumption may lead solicitors for corporate vendors to exercise less care in complying with the due execution requirements under section 23. Arguably, however, such a presumption would not have this effect since it would be much easier to ensure compliance with the formalities of due execution in the first place than to show beyond reasonable doubt that, in the circumstances, the title was good despite a defect in execution;

(b) it may give scope for further argument and possible litigation. A counterargument may be that this is unnecessarily the case with section 23, compounded by the narrow focus of the presumption under that section on the appearance of due execution on the face of the assignment. If the legislative object is remedial to facilitate conveyancing – including a reduction in the potential for litigation, given the number of disputes generated by section 23 – then the suggested alternative provision may assist in cases where, in the circumstances, a formal defect in execution has a disproportionate effect on the saleability of property.

(d) The circumstances which would trigger the presumption

41. The problems arising from the execution of corporate assignments by a single director were considered by Ho Koon Ki Tommy in "Due Execution: By What Criteria?" (2001) HKLJ 105. It appears that certain of the solutions or circumstances which Mr Ho suggests (at pp.120-121) should be considered as evidence of the appearance of due execution under section 23 (since ruled out by Grand Trade in the Court of Appeal and Leung Kwai Lin Cindy in the Court of Final Appeal) would be relevant to triggering the suggested additional presumption of good title notwithstanding a formal defect in execution. These circumstances include –

(a) the number of assignments which have been executed and the lapse of time since the problematic assignment was executed;

(b) in the absence of fraud, proof that the purchase price was paid directly into the company rather than to the attesting director;

(c) the fact that the company has been wound up, so that there is no risk that the problematic assignment would be set aside;

(d) the situation where the company remains in business and confirms the assignment or does not contest it.

42. Further circumstances which would be relevant to triggering a presumption of good title are indicated by Mr Peter Lo in "Reasonable Doubt in Conveyancing" in Hong Kong Lawyer (June 2001) 42, at p.45, namely, where a vendor company had agreed to sell a property, had received consideration under the agreement and had parted with possession to the purchaser, and where possession consistent with the title had been quietly enjoyed. Similar circumstances have been specified by the Law Society, as noted in paragraph 7(B) of the Annex.

(e) Legal support for the suggested alternative provision

43. Mr Lo, at p.45, notes that the law only requires a title to be proved beyond reasonable doubt. In other words, mathematical certainty is unnecessary (Lyddall v Weston (1739) 2 Atk. 19). He cites (as does Mr Smart in Part 3 of his article in Hong Kong Lawyer (November 2001) 46, at p.50) Lord Russell of Killowen in MEPC Ltd v Christian-Edwards [1981] AC 205, 220 –

> "In my opinion, if the facts and circumstances of a case are so compelling to the mind of the court that the court concludes beyond reasonable doubt that the purchaser will not be at risk of a successful assertion against him of the incumbrance, the court should declare in favour of a good title shown."

44. In Part 3 of his article, Mr Smart notes, at pp.47 and 50, that there are some recent Hong Kong cases on the application of the principle in MEPC to assignments signed by single directors. In Lo Wing Wah, Yuen J ruled in favour of the vendor on the ground, among others, that on the facts there was no real risk of the purchaser's title being successfully challenged by the company concerned. In that case an assignment was signed by a single director in 1987, the company had gone into liquidation in 1993, and neither the liquidators nor the shareholders had questioned the validity of the assignment. Similarly, in Hui Yuk Chun v Tang Wai Hang Henry (1998) HCMP No. 1 of 1998, Hartmann J held that there could be no successful challenge to the vendor's title in relation to an assignment in 1973 by a company which was wound up in 1977 and all the company's books had been destroyed.

(f) Conclusion

45. Given the support of such law, in cases where circumstances of the type noted in paragraphs 41 and 42 above apply, it should not be difficult for the solicitors for the vendor and the purchaser respectively to agree that the proposed presumption

of good title should be relied on, particularly in respect of older assignments which have never been contested by the companies concerned. Such presumption of good title should also obviate, or substantially diminish, any practical need for purchasers to raise requisitions on the formalities of execution where it appears from other circumstances that the vendor has shown good title beyond reasonable doubt. Further, it appears that the proposed presumption would correspondingly avoid any need for litigation concerning such requisitions.

IV Comments sought

46. Comments on this paper, and in particular on the following issues, by 31 March 2002, would be greatly appreciated –

Q1. Do you agree that legislation is needed?

Q2. Do you support the proposed section 23A(1), or a narrower version of it?

Q3. Do you support the proposed section 23A(2)?

Q4. Do you support the presumption suggested by the Administration, either as an alternative or as an addition to section 23A?

47. The address for receiving comments is –

Michael Scott
Senior Assistant Solicitor General
Department of Justice
1/F High Block

Queensway Government Offices
66 Queensway
Hong Kong

Legal Policy Division
Department of Justice
January 2002

Annex

Detailed case submitted by the Law Society for an amendment to the law regarding the execution of conveyancing documents by corporations

(1) A critique of Grand Trade

1. The Law Society notes that, in Grade Trade Development Ltd v Bonance International Ltd [2001] 3 HKC 137, the Court of Appeal held that –

(a) the mere affixing of the common seal of the company would not be sufficient to pass the legal title to the purchaser. The court considered that the general rule, stated in Agar v The Official Manager of the Athenaeum Life-Assurance Society (1858) 3 CB (NS) 725, 756, that "a corporation is bound by an instrument under its seal, unless it can be shown that its execution was obtained by fraud, or there is some illegality in the transaction", takes effect subject to the express provisions as to execution in the articles of association (at pp.147E-148B, 149C);

(b) if the articles of association contain a deeming provision relating to use of the seal as in the present case, section 23 would only be applicable if, on its face, the instrument appears to be duly executed. In the present case, the sealing provision of the company provides that, "Every document required to be sealed with the Seal of the Company shall be deemed to be properly executed if sealed with the Seal of Company and signed by the Chairman of the Board, or such person or persons as the Board may from time to time authorize for such purpose". Since it was common ground that the director signing did not purport to sign as

chairman, the court considered that, unless there were specific words appearing on the face of the assignment indicating that the director was the person duly authorised by the board of directors, section 23 cannot apply and "the absence of the additional words indicating that the director was the person authorized by the board to sign" was fatal to the application of section 23 (at pp.141G-H, 149C-150D);

(c) the court distinguished Registrar General v Northside Developments Pty Ltd (1988-1989) 14 ACLR 543, and held that the Turquand rule was not applicable on the basis that the signature of the director was not described as a person "duly authorized by the board". The court went on to say, "Any person, whether or not a director, could have been authorized by the board but as far as I am aware, there is no presumption that if the signatory is a director, he must have been duly authorized by the board. What the position would have been had there simply been a signature without the description 'director' is a question that does not arise for decision" (at pp.151B-152D);

(d) the court concluded that, "If a conveyancer is not able to show that a deed comes within either the terms of the articles of the company concerned or the provisions of s 20 of the Conveyancing and Property Ordinance (Cap 219), then he or she may be well advised to insert a special provision in the sale and purchase agreement relating to the deed in question" (at p.153B).

2. The Law Society considers the judgment in Grand Trade to be incorrect for the following reasons (using the notation in paragraph 1 above) –

(a) In the present case the articles of association provide that, "The Seal of

the Company shall be kept by the Board of Directors and shall not be used except with their authority." The deed in question being sealed with the common seal of the company, it must on the face of it have been used with the authority of the board, there is therefore no reason for the company not to be bound by the deed. The court did not consider the issue of estoppel.

(b), (c) and (d) According to the judgment, a deed executed by a corporation would either have to comply with section 20 or the wording of the articles of association of the company would have to be followed by describing the signatory in exactly the same way as that provided in the articles of association, failing which section 23 will not be applicable. The judgment has deprived section 23 of its legal effect for deeds executed by a corporation. If (as the court considered) the description in the deed follows the exact wording of the articles of association, the deeming provision of the articles of association would apply and there is no need for the vendor to rely on the presumption under section 23. If the execution of the document is in accordance with section 20 there is already an irrebuttable presumption, and, again, section 23 would not be applicable. It follows that the legislative intent cannot be that postulated by the court. The enactment of section 23 was intended to facilitate proof of execution of deeds by the parties. The interpretation of section 23 in Grand Trade is unduly restrictive.

3. The Law Society also considers that Grand Trade erred in the view that there is no presumption that a director signing was authorised by the board, and in excluding the Turquand rule on that basis. It notes that in British Thomson-Houston Company, Limited v Federated European Bank, Limited [1932] 2 KB 176, which concerned the validity of a guarantee executed by a single director when the articles

of association required any guarantee to be executed by two directors, the English Court of Appeal held (at p.180) that, "the articles of association of the defendant Company … confer upon the directors two powers: (1) to delegate to one or more of their number any of the powers of the board of directors and (2) to decide who shall sign contracts and other documents on the Company's behalf. Then Royal British Bank v Turquand and Mahony v East Holyford Mining Co. decided that if the articles of association give a power, persons dealing with the company, though they are deemed to have notice of the extent of the power, are not bound to inquire into what is called the "indoor management" of the company to see whether the power has been properly and regularly exercised with all the prescribed formalities, and if they find an officer of the company openly exercising an authority which the directors have power to confer upon him, they are relieved from the duty of further inquiry and are entitled to assume that the power has been regularly and duly conferred." Accordingly, it was held (at pp.181-182) that the signatory being held out as the chairman of the board was a person acting normally in the affairs of the defendant company. The plaintiff was entitled to assume that the signatory was duly authorised to act for the company and the guarantee was held to be enforceable against the guarantor.

4. The Law Society notes that British Thomson-Houston was approved and followed by the English Court of Appeal in Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 WLR 618, a case relating to the ostensible authority of a director. The judgment in Grand Trade did not refute the possibility that the director may have been authorised to sign. It is therefore difficult to see why the Turquand rule did not apply so as to validate the transaction. The decision, if it stands, could upset a number of titles in cases where the company executing the (on this authority) defective deed has not only purportedly conveyed a property but also has received and disbursed the entirety of the purchase price. However, even a successful appeal of the decision would ultimately resolve only that

case and not the current situation faced by vendors.

(2) Non-legislative solutions

5. The Law Society has also explored possible non-legislative alternative solutions to the problem concerning Grand Trade and other cases and considers that they have the following practical difficulties.

(A) **Contractual provisions.** It has been suggested that a special condition to the effect that the purchaser shall accept that the deed as sealed with only one attesting signature was duly executed by the corporation should be inserted in the sale and purchase agreement. This would alert the purchaser to the problem and give him a choice whether to accept the risk, which he could insure against. The Law Society submits that this is not a viable solution for the following reasons –

(i) the provisional agreement for sale and purchase, which is a binding contract, would already have been signed at the estate agent's office before the parties instruct solicitors to prepare the formal agreement for sale and purchase. If there is no condition in the provisional agreement for sale and purchase restricting the right of the purchaser to raise requisitions on documents executed by a corporation, the vendor would not have the right to insist on the inclusion of such provision in the formal agreement for sale and purchase;

(ii) there is no reason for a purchaser to accept a clause in either the provisional agreement for sale and purchase and/or the formal agreement for sale and purchase restricting his right to raise requisitions or to accept a title which may not be perfect when he

has agreed to pay the market price for the property;

(iii) in most cases the title deeds would still be with the mortgagee bank, and the vendor's solicitors, when preparing the agreement for sale and purchase, may not have the benefit of first perusing the title deeds in order to include a condition relating to the questionable deed in the formal agreement for sale and purchase;

(iv) the purchaser's solicitors would also be reluctant to advise clients to accept such a condition as banks may not agree to it and the client will be put in jeopardy if a mortgage could not be taken out to finance the purchase;

(v) the solicitors acting for the bank will have difficulty in advising the bank to accept a lesser title.

(B) **Title insurance.** The Law Society considers that title insurance is not a practicable solution, since –

(i) title insurance is not presently available and, even if it were, there is no established market in which the rate of premium and accessibility could be readily ascertained;

(ii) obtaining title insurance would be time-consuming and it is likely that the premium would be expensive given the strictness of approach shown by recent authorities;

(iii) it is not certain that banks would accept title insurance for such cases;

(iv) title insurance may therefore be of little practical help, although in some cases the risk of challenge by a defunct company may be so remote that an insurer might be willing to issue a title guarantee and the vendor may be justified in requiring a special condition of sale qualifying the obligation to prove good title.

(C) **Rectification by the companies whose execution of the title deeds has been called into question.** The Law Society submits that this possible solution has the following difficulties –

(i) some of the companies may now be defunct and the responsible person cannot be found;

(ii) the difficulties will be the most acute where the relevant company acted as confirmor as there is no incentive for the company to do anything;

(iii) the requisite board resolutions might have been lost or cannot now be found.

(3) <u>An analysis of the proposed section 23A</u>

6. The Law Society proposes that the Conveyancing and Property Ordinance be amended by the addition of a further presumption under a new section 23A in the following terms –

"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.

(3) A deed instrument or transaction shall be one relating to conveyancing for the purposes of this section if it relates to land or any interest in or over or covenant given or grant charge or other incumbrance made concerning land."

7. The Law Society has analysed the intended scope and effect of the proposed new section 23A as follows –

(A) The proposed amendment would be restricted to the execution of conveyancing documents by corporations so that if the documents could be executed by the affixing of the common seal and signed by a single signatory (where, under the articles of association, a single signatory is allowed), it will be presumed that the deed has been duly executed, irrespective of the description in the deed, unless the contrary is proved.

(B) As a matter of principle, the amendment should apply retrospectively as

well as prospectively. Since the presumption is only a rebuttable presumption, there is no legal justification for differentiating between past deeds and current deeds. Under the existing law, even with the production of board minutes, a person acting in good faith will not be protected where, for example, forgery is involved. In cases where no forgery is apparent, a party dealing with the company should not be required to produce board resolutions or other proof of authority when the company allows its common seal to be affixed to the document and the articles of association allow for a single signatory. In such cases there is no reason why the Turquand rule should not apply and in fairness the company should not be allowed to assert that it was not bound by the deed, particularly when the purchase price and/or the requisite consideration has been received by company. In practice, of course, the objections are raised not by the company but by a purchaser who is unwilling to accept what is in reality an unchallenged title.

(C) The amendment would not be retrospective in any substantive sense. It concerns ultimately the incidence and mode of how title is to be proved. It will relate to proof of title in transactions which occur or are current at the date the amendment comes into effect. As with all amendments affecting practice and procedure, it will apply to facts which antedate the amendment in question. That is true of all legislation affecting evidence and modes of proof but this does not make the amendment in substance retrospective. The amendment, if passed, will determine the proof which will then (not at some past date) be required to establish the validity of transactions which may have already occurred.

(D) Conveyancing practice has in the past been based in good faith on the advice of the London QC (as conveyed to members of the profession in

Law Society Circulars 105/90 and 172/90) who advised that the protection given by section 23 was more extensive than the subsequent authorities have established to be the case. The proposed amendment seeks merely to restore the position to what the profession believed it to be in the light of the London QC's advice and to validate transactions which might have been structured differently in the absence of that advice.