

**Legislative Council Panel on Administration of Justice and Legal Services
Meeting on 24 June 2002
Information Paper**

**Consultation Paper on Proposed Amendments to the
Conveyancing and Property Ordinance (Cap. 219)
Execution of Conveyancing Documents by Corporations**

Background

Section 20(1) of the Conveyancing and Property Ordinance, Cap. 219, deems a document executed by a corporation to be duly executed if the affixing of the corporate seal is authenticated by two signatories whose respective character or office is stated and each have the requisite character or office according to section 20(1). Section 23 of the Ordinance provides that an instrument appearing to be duly executed should be presumed, until the contrary was proved, to have been duly executed. 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.

2. In July 2001, the Court of Appeal in the case Grand Trade Development Ltd v Bonance International Ltd [2001] 3 HKC 137 held that section 23 only applies where, on its face, 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, section 23 would have been engaged. Failing such specific words appearing on the face of the assignment, section 23 cannot apply.

3. The Law Society of Hong Kong 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 was:

“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.”

4. In January 2002, the Administration issued a Consultation Paper to the Law Society, Bar Association, Consumer Council, Hong Kong

Conveyancing & Property Law Association Limited and various other interested persons or bodies (numbering 17 in total) with a request for comments to be submitted by 31 March 2002. A copy of the Consultation Paper is attached at Annex A.

5. In paragraphs 26 to 36 of the Consultation Paper, the Administration provisionally took the following views on the proposed section 23A.

- (a) The presumption in the proposed section 23A appeared to be unduly wide.
- (b) 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 to apply to instruments executed by corporations in future.
- (c) 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. There can be no guarantee that some transactions may have been unauthorised in substance.
- (d) The proposed section 23A introduces a presumption of due execution without the requirement for an instrument to “appear” to be duly executed and would substantially alter the established law and practice.

- (e) 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.

6. The Administration then proposed an alternative provision at paragraphs 37-44 of the Consultation Paper. 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 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.

7. In paragraph 46 of the Consultation Paper, the Administration invited comments on the proposed amendments, particularly the following issues:

- 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?

Responses to the Consultation Paper to date

8. As at 6 June 2002, the Administration had received comments from 25 respondents. The responses are summarized in a table at Annex B. 20 respondents agree that legislation is needed. 4 respondents support the

proposed section 23A(1) unconditionally. 16 respondents consider the proposed section 23A(1) unduly wide, but 10 of them would accept a narrower version. As to the proposed section 23A(2), 4 respondents accept the subsection unconditionally. 10 respondents reject section 23A(2) without further consideration. Regarding the Administration's proposal, 8 respondents accept it as an addition to the proposed section 23A. A more detailed summary is attached at Annex C.

The Revised Section 23A

9. In a letter to the Administration dated 26 April 2002, the Law Society submitted a revised section 23A which was jointly worked out with the Hong Kong Bar Association and the Hong Kong Conveyancing & Property Law Association Ltd. The revised section 23A is as follows:

“23A(1) For the purpose of proof of title, a deed (whenever executed) purporting to be executed by or on behalf of a corporation aggregate and attested by a 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 by the purported signatory or signatories with the authority conferred in accordance with the Articles of Association or other constitutional document of the corporation in question, whether or not the source of the authority in question or the means by which it was purportedly conferred is apparent from the deed in question.

(2) Where any deed is or has been produced by a vendor as proof of title to any land and that deed purports to have been executed by a corporation aggregate not less than 15 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 the deed was validly executed

Provisional Comments by the Administration on the Revised Section 23A

10. The application of the presumptions in the revised section 23A has been substantially narrowed to deal with the identified mischief. The presumptions apply to deeds only. The unintended “side-effects” of the original section 23A on documents other than deeds have been removed.

11. The presumptions in both subsections are created only for the purpose of proving title. It does not apply to deeds effecting the immediate transaction. The standard of care and diligence currently required of practitioners when dealing with current transactions is not undermined.

12. The revised section 23A(2) is modeled on section 13(4A) and is consistent with the current requirements for proving title. Under section 13(4A), any document which is or has been produced by a vendor as proof of title to any land and that document purports to have been executed under a power of attorney not less than 15 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 as between the parties to that contract and in favour of the purchaser under that contract as against any other person that the power of attorney was validly executed, in force at the time of the execution of that document and validly authorized the execution of that document.

13. Under the revised section 23A(2), in respect of deeds purporting to have been executed by a corporation not less than 15 years before the contract of sale of the land, the presumption of due execution is conclusive.

The purchaser's interests will not be affected even if contrary evidence subsequently revealed a defect in execution.

14. Where a deed purports to have been executed by a corporation less than 15 years before the contract of sale of the land, the conclusive presumption in the revised section 23A(1) would not apply. However the revised section 23A(1) might do so. Under this subsection, a deed shall be presumed, until the contrary is proved, to be duly executed, provided the signatory or signatories is or are (as the case may be) a person or persons who could have been authorised by the Articles of Association or other constitutional documents. This subsection would certainly facilitate conveyancing transactions. However, it is a rebuttable presumption. Some executions may in fact be unauthorised and subject to challenge. The purchaser's interests will be seriously prejudiced if, after having purchased the property, the presumption is subsequently rebutted by evidence.

15. To protect purchasers' interests, the Administration considers that the presumption under the revised section 23A(1) should only be triggered when certain specified circumstances exist. To minimize the risk of the presumption being rebutted, the circumstances specified should be so compelling that there was no real risk of the purchaser's title being successfully challenged.

16. The Administration therefore suggests adding after the revised section 23A(1) the following subsections, which are based upon suggestion by a law lecturer of the University of Hong Kong:

- (2) The presumption in subsection (1) shall only operate where:
 - (a) the deed was executed more than ten years prior to the contract of sale of that land; or
 - (b) the deed was executed more than five years prior to the contract of sale of that land and the corporation was dissolved

more than three years prior to the contract of sale of that land;
or

(c) the deed was executed more than five years prior to the contract of sale of that land and the corporation was placed in liquidation more than four years prior to the contract of sale of that land.

(3) For the purposes of subsection (2), the expressions “dissolved” and “liquidation” refer to the appropriate procedures specified from time to time in the Companies Ordinance (Cap. 32) or any equivalent procedures under the law of the place of incorporation of a corporation.

17. If the presumption under the revised section 23A(1) does not apply, the vendor may still rely on the presumptions under sections 20(1) and 23 (if appropriate) and prove title in accordance with the present requirements.

18. The revised section 23A(2) suggested by the Law Society would then be re-numbered as section 23A(4).

19. Subject to the amendment proposed in paragraph 16 above, the Administration considers the revised section 23A to be a workable solution to the mischief identified by the Law Society.

20. The Administration proposes, subject to the response to this paper, to make a bid for a legislative slot to introduce a Bill incorporating the proposed amendments in the first half of the 2002-2003 legislative session.

Department of Justice

June 2002

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

Annex A

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) **Presumption may be too broad**

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 not 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) The formal requirements of execution and the public interest

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) A possible alternative approach

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) Suggested alternative provision

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) Possible advantages

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) **Possible disadvantages**

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 –

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January 2002

**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) An analysis of the proposed section 23A

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.

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

	Q1	Q2	Q3	Q4
	Do you agree that legislation is needed?	Do you support the proposed section 23A(1), or a narrower version of it?	Do you support the proposed section 23A(2)?	Do you support the presumption suggested by the Administration, either as an alternative or as an addition to section 23A?
The Law Society of Hong Kong	√	√	√	X
Hong Kong Bar Association	√	X	√ (with reservations)	√ (as an addition, if only clear and statutory guidelines and criteria are built into the proposed legislation to avoid introducing unnecessary uncertainties into this area of the law)
The Hong Kong Conveyancing & Property Law Association Limited	√	√ (if the narrower approach suggested by the Association is not accepted)	√ (if the narrower approach suggested by the Association is not accepted)	X as an addition

	Q1	Q2	Q3	Q4
The Real Estate Developers Association of Hong Kong	√	√ (but a distinction should be drawn between documents executed before and after the amendment)	√ (but a distinction should be drawn between documents executed before and after the amendment)	√ (as an addition if the requirement of “beyond reasonable doubt” is dispensed with)
Consumer Council	√	Supports the addition of a remedial provision, but in a version narrower than the proposed section s23A(1).	X	X as an alternative Has not decided whether to support the proposal.
The Hong Kong Association of Banks	√	√ (but not limited to conveyancing documents)	√ (but not limited to conveyancing documents)	X (may consider the UK approach that deeds executed by companies do not need to be executed under seal)
Hong Kong Monetary Authority	No comment	No comment	No comment	No comment
Estate Agents Authority	√	√ a narrower version	√ (should consider ways to protect consumers in situations where the presumption is subsequently rebutted)	√ (as an addition)

	Q1	Q2	Q3	Q4
Mr Philip Smart University of Hong Kong	√	X	X	Not indicated Suggests a new s20A
Mr Chan Sze Hung of Messrs. Chan, Lau & Wai	√	Not indicated	Not indicated	Not indicated (but suggests to amend s23)
Mr Ho Fu Wah of Messrs. Joseph C.T. Lee & Co.	√	√	√	√ (as an addition)
Chu & Lau	√	√ a narrower version	√ a narrower version	√ (as an addition)
Cheung Tsang Wah Polly	√	√	√	√ (as an addition, provided the presumption is clearly worded and precise)
Mr Nathan S.K. Au of Messrs. C.M. Li, Chow, Pang & Others	√	√ (do not mind having a narrower version)	√	√ (as an addition)
Messrs. T C Foo & Co.	√	√ a narrower version	√ a narrower version	√ (as an addition)
Mr. Chris C.L. Ng & Mr Chan Lap Chung	√	√ a narrower version	X	X

	Q1	Q2	Q3	Q4
Messrs. Deacons	√	√	√	√ (as an addition)
Messrs. Fred Kan & Co.	√	√ (apply to documents executed prior to the <i>Grand Trade</i> case only)	X	X
Mr Arthur K H Chan of Messrs. Arthur K H Chan & Co.	√	No definite view.	No definite view.	√ (as an addition)
CLP Power Hong Kong Limited	√	√ a narrower version	X	√ (either as an alternative or an addition)
First American Title Insurance Company	X	X	X	√
Secretary for Planning and Lands	Not indicated	X	X	Not indicated
Director of Lands	√	√ a narrower version	X	X
Standing Committee on Company Law Reform	X	X	X	X
Judiciary Administrator	X	X	X	X

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**Summary of Responses to
Consultation Paper on Proposed Amendments to the
Conveyancing and Property Ordinance (Cap. 219)
Execution of Conveyancing Documents by Corporations**

1 The Law Society of Hong Kong

- 1.1 The Law Society of Hong Kong is the proposer of the new s23A.
- 1.2 In response to the consultation paper, the Law Society clarifies that:
 - 1.2.1 the Law Society considers the judgment in the Grand Trade Development Ltd v Bonance International Ltd [2001] 3 HKC 137 to be inadequate, rather than incorrect;
 - 1.2.2 the proposed s23A is not to be confined to single signatory cases, but is to include cases where there is more than one signature but the capacities of the signatories are not stated in the document, or if stated are not the specific capacities required under the articles of association;
 - 1.2.3 the proposed s23A(2) is intended to address situations where the words “duly authorised” or other words to that effect are omitted from the documents thereby depriving vendors of the presumption to which they would otherwise be entitled under s23.
- 1.3 Submits that s23A(2) will only preclude a purchaser from making more inquiries if the vendor has produced the relevant articles of association to prove that the document is signed in the manner which could have been authorised by the articles.
- 1.4 Does not support the presumption proposed by the Administration (“the Administration’s proposal”).
- 1.5 Submits that the Administration’s proposal will exacerbate the existing difficulties in proving title, lead to more litigation and put

the public to unnecessary costs and expense. The reasons for the submission are:

- 1.5.1 The meaning of “formal defect in execution” is unclear.
 - 1.5.2 What amounts to “beyond reasonable doubt” will differ from case to case and different lawyers will take different views. It is unlikely that a prudent solicitor acting for a purchaser will be prepared to assume proof beyond reasonable doubt without raising all sorts of requisitions and queries, most of which the vendor’s solicitors will be quite unable to satisfy or answer. What is required is a crystal clear test to prove good title and not for practitioners to make “judgment calls”.
 - 1.5.3 The proving of the intention of the vendor requires either direct evidence (which will not be forthcoming for past transactions) or the production of the relevant board resolutions – which are exactly the problems now faced by the vendor.
 - 1.5.4 It is difficult to convince a purchaser that there is no “real risk” that the conveyancing documents will be set aside in future proceedings.
 - 1.5.5 Different courts have different views on what amounts to “real risk”.
- 1.6 By a letter to the Administration dated 26 April 2002, the Law Society submitted a **revised s23A** jointly worked out with the Hong Kong Bar Association and the Hong Kong Conveyancing & Property Law Association Ltd (see paragraph 9 of the Information Paper).

2 The Hong Kong Bar Association

- 2.1 Agrees that legislation is needed.
- 2.2 Submits that if an assignment is defectively executed by a company, it will not be effectual in passing the legal estate. The absence of

risk will not help to save the legal title. Unless the present owner is able to find a purchaser who is prepared only to buy an equitable estate, he will not be able to prove good title. It is impractical to expect a vendor to make special provisions in provisional agreements limiting the title to be sold to equitable title only. Rectification is in many cases not possible. Title insurance is presently not commonly available in Hong Kong. Non-legislative solutions do not appear to be practical. Legislative intervention appears to be the best way out.

2.3 Does not support the proposed s23A(1). Submits that if the proposed s23A(1) is to become part of the law, a very wide presumption would be introduced into the law with the effect that all conveyancing documents are presumed to have been duly executed until the contrary is proved. Such a presumption goes well beyond the “mischief” complained of by the Law Society. It has not made out a case for a legislation of such breath and width. There would be much room for unintended “side-effects”:

2.3.1 The proposed presumption is applicable to all deeds or *other instruments*, whenever executed, relating to conveyancing. According to section 2 of the Conveyancing and Property Ordinance, “instrument” means “any document having legal effect except a will”. The presumption will apply to all contracts, nominations, security agreements, equitable charges, and all other documents intended to have legal effect (except a will) relating to land.

2.3.2 For foreign companies which do not have a place of business in Hong Kong and are not required to be registered their memorandums and articles of association. In view of the presumption, there would be every incentive for a vendor not to produce the articles or charter or other constitutional document of a foreign company which might contain provisions regarding

the mode by which deeds may be executed. In cases of execution of deeds, where the articles cannot be found, it is likely to be impossible for the contrary to be proved.

2.3.3 Subject to s32 of the Companies Ordinance, Cap. 32, no particular formal requirements are applicable to the execution of corporate documents which are not deeds. The articles are usually silent on the execution of such documents. As to authority to make contracts on behalf of a company, the same is governed by the general law. A managing director would normally have the usual authority to enter into contracts on behalf of the company, while a clerk would not normally have such authority unless he has been held out by the company to have the necessary authority. If a clerk purports to sign an agreement for sale of a piece of land, without using the company's chop or any other indication that he has been authorised to do so, the presumption under the proposed s23A(1) will immediately bite to presume that the agreement so signed has been duly executed. Production of the articles will not help to prove the contrary. The burden will lie on the party to dispute the execution to prove that the document was in fact not properly executed. This would be a drastic change of the law beyond s23 which requires the relevant instrument to have an appearance of due execution before the presumption under the section will bite.

2.3.4 The proposed s23A(1) goes beyond sealing formalities and applies to other aspects of execution. It is difficult for a party to challenge the execution on the ground of, say, apparent discrepancy in the signatures, which is a legitimate basis for a requisition under the present law. It is to be noted that the subsection requires proof to the contrary, and not just "in the absence of evidence to the contrary".

- 2.3.5 Because the proposed presumption in s23A(1) would apply to any deed “purporting to be executed..... *on behalf of* a corporation aggregate”, and this clearly includes the purported execution by someone who describes himself as an agent executing on the company’s behalf. The presumption would apply even if the articles do not expressly empower such execution, for silence is not proof to the contrary.
- 2.4 The Bar supports the proposed s23A(2), subject to 2 reservations:
- 2.4.1 Firstly, whether the sub-section should be made to apply to instruments other than deeds.
- 2.4.2 Secondly, as to the words “or entitled to”.
- 2.4.2.1 At common law, a person cannot rely on the indoor management rule if he has actual notice of the irregularity or has been put on inquiry. Where the party to the transaction has notice of some irregularities, there is really no reason why he should be prevented from going behind the indoor management rule to contend that there are in fact irregularities in the execution of the instrument in question.
- 2.4.2.2 At common law, Turquand’s rule would only operate in favour of outsiders to the company. The proposed s23A(2) does not distinguish between outsiders and insiders.
- 2.4.3 Given that the proposed s23A(2) is designed to facilitate conveyancing, and not only to remedy previous problems, it should be made to apply to both past and future transactions.
- 2.5 Supports the Administration’s proposal if clear and statutory guidelines and criteria are built into the proposed legislation to avoid introducing unnecessary uncertainties into this area of the law. The Administration’s proposal should not be seen as an alternative to the proposed s23A(2).

- 2.5.1 The great advantage of the Administration's proposal is to address, in a more direct way, the grievance and/or injustice caused to an owner who is left with an unsaleable property by reason of a formal but unrectifiable defect in the execution of a corporate conveyance somewhere in the chain of title which is otherwise "inconsequential" in terms of risk.
- 2.5.2 However, it would be optimistic to assume that the respective solicitors handling the transaction would be able to come to an agreement on the assessment of risk, and thus many of these cases would ultimately have to be decided by the courts. The possibility of opening a floodgate of disputes must be guarded against. Any law which requires the profession to carry out a weighing exercise is not likely to be conducive to the certainty of the law.
- 2.5.3 It is suggested that definite and certain statutory criteria be provided for determining the risk which would in turn trigger the application of the proposed statutory presumption e.g. only an assignment more than 15 years old or the company has been wound up or has been defunct for more than 5 years would qualify as a relevant circumstance.
- 2.6 By a letter to the Administration dated 26 April 2002, the Law Society submitted a revised s23A jointly worked out with the Bar and the Hong Kong Conveyancing & Property Law Association Ltd (see paragraph 9 of the Information Paper).

3 The Hong Kong Conveyancing & Property Law Association Limited

- 3.1 Agrees that legislation is needed.
- 3.2 Supports the proposed s23A, with a recommendation to add the following phrase at the end of each of the sections 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”

- 3.3 Does not support the Administration's proposal as an addition. 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.
- 3.4 By a letter to the Administration dated 26 April 2002, the Law Society submitted a revised s23A jointly worked out with the Bar and the Hong Kong Conveyancing & Property Law Association Ltd (see paragraph 9 of the Information Paper).

4 The Real Estate Developers Association of Hong Kong

- 4.1 Agrees that legislation is needed.
- 4.2 Supports the proposed s23A(1) and s23A(2). For documents executed prior to the amendment, a remedial approach should be adopted and the proposed section should be enacted. However, for documents executed after the amendment, consideration should be given to restricting the presumption to documents signed or purported to be signed by either a director or a secretary or other permanent officer of the corporation.
- 4.3 Supports the Administration's proposal as an addition to s23A, provided the requirement of “beyond reasonable doubt” is dispensed with.

5 Consumer Council

- 5.1 Agrees that legislation is needed. A proper balance between the interests of vendors and purchasers should be preserved.

- 5.2 Supports the addition of a remedial provision, but in a version narrower than the originally proposed section s23A(1).
- 5.2.1 The proposed s23A(1) was too wide for its intended purpose. It requires no prerequisite condition to trigger the presumption.
- 5.2.2 It shifts the burden onto the purchasers to come up with contrary evidence to trigger requisition. It seems to be too much in favour of vendors' interests and may not be justified in the circumstances.
- 5.3 The proposed s23A(2) would undesirably restrict the purchaser's right to raise requisitions on title.
- 5.4 The Council proposed a combined version of sections 23A(1) and (2) which is set out at Annex D.
- 5.5 The Administration's proposal has the advantage of being able to deal with the matter of good title in general terms rather than solely with execution by corporations.
- 5.6 There might be uncertainties involved in the operation of the presumption in that it would introduce such elements as whether a defect was formal rather than of substance, proof "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
- 5.7 Inclines not to adopt the Administration's proposal as an alternative to the proposed s23A. Has not yet decided whether to support the Administration's proposal as an addition or alternative.
- 5.8 In considering the proposal, the Administration should explore:-
- 5.8.1 the feasibility of setting out in the presumption a non-exhaustive list of factors indicative of the vendor's intention and of the absence of real risk;
- 5.8.2 ways to protect purchasers who accepted title by relying on the presumption but ended up with an unmarketable title because subsequent purchasers were able to rebut the presumption.

6 The Hong Kong Association of Banks

- 6.1 Agrees that legislation is needed.
- 6.2 Supports the proposed s23A(1) and s23A(2), but suggests that it not be limited to documents “relating to conveyancing”. The submission is based on the following:
 - 6.2.1 There may in some cases be an argument as to whether the document does or does not relate to conveyancing.
 - 6.2.2 The presumption ought generally to be available for documents executed under seal.
- 6.3 Does not support the Administration's proposal.
 - 6.3.1 It does not enhance clarity on legal title.
 - 6.3.2 It would cause litigation in a large number of cases.
 - 6.3.3 “Beyond reasonable doubt” is a very heavy burden.
 - 6.3.4 There is no body of jurisprudence to assist the court on the burden of “beyond reasonable doubt” in relation to conveyancing transactions. It is difficult for the parties to the transactions to decide whether and when the presumption can be relied upon.
- 6.4 Suggests the UK approach whereby deeds executed by companies do not need to be executed under seal. This would also facilitate execution of conveyancing documents in Hong Kong by overseas corporations and banks, some of which do not have seals.

7 Hong Kong Monetary Authority

- 7.1 Does not propose to comment on the issues.

8 Estate Agents Authority

- 8.1 Agrees that legislation is needed.
- 8.2 The proposed section 23A(1) is considered to be too wide as it categorically gives a rebuttable presumption in favour of any instrument executed by a corporation. A narrower version of it, in a form similar to section 23A(2) is preferred.
- 8.3 The proposed section 23A(2) should be considered with due regard to ways and means of protecting consumers in situations where the presumptions are subsequently rebutted.
- 8.4 The Administration's approach should be an addition, and not an alternative, to the proposed s23A(2).

9 Mr Philip Smart, The University of Hong Kong

- 9.1 There is scope for limited intervention by the legislature.
- 9.2 Firmly opposes the proposed s23A, as it is fundamentally misconceived:
 - 9.2.1 The Law Society's proposal fails to recognise that there has been any lack of proper checking of documents and/or record keeping on the part of the practitioners.
 - 9.2.2 The proposed s23A(2) appears to prevent a solicitor from checking the authenticity of a document. It is not framed as a presumption at all.
 - 9.2.3 He has several reservations about the accuracy of various statements in the Law Society's paper e.g. whether the judgment of *Grand Trade* case has deprived s23 of its legal effect for deeds executed by a corporation.
 - 9.2.4 The doctrine of deemed notice of a company's constitution was abolished (s5C of the Companies Ordinance) in February 1997. Different arguments would arise for post-February 1997

assignments. The case law should be allowed to develop in this area without such fundamental and radical reforms as proposed by the Law Society.

9.3 Consideration should be given to a statutory presumption of due execution, specifically in relation to what look like “stale” claims. The presumption would need to be drawn up in a very specific way so as to avoid the need of litigation. Mr Smart proposes to add a new s20A (see Annex D). The proposed s20A will not prevent development of the law in respect of post-February 1997 assignments or in any way suggest, or risk giving the impression, that solicitors do not need to check thoroughly on the question of authenticity when dealing with current transactions.

10 Mr Chan Sze Hung of Messrs. Chan, Lau & Wai

10.1 Submits that a director has the usual authority and in fact has the actual authority conferred on him by the standard Article 82 of Table A (if the same is not excluded by the articles of association of the relevant company) to conduct and manage the business of the company.

10.2 Suggests that s23 be amended by adding a provision to the effect that if the sealing provision of the company requires the signature of a chairman or any person from time to time authorised by the Board, a director executing the assignment on behalf of the company (not as chairman but simply as a director) would be deemed to be properly authorised albeit that no wording to such effect is set out in the execution clause in the deed of assignment.

11 Mr Ho Fu Wah of Messrs. Joseph C.T. Lee & Co.

11.1 Agrees that legislation is needed.

- 11.2 Supports the proposed s23A
- 11.3 Supports the Administration's proposal as an addition to s23A. Suggests inclusion of the circumstances where the company has been struck out under section 291 of the Companies Ordinance.

12 Messrs. Chu & Lau

- 12.1 Agrees that legislation is needed.
- 12.2 Supports a narrower version of the proposed s23A as shown at Annex D;
- 12.3 Supports the Administration's proposal as an addition to s23A.

13 Ms Cheung Tsang Wah, Polly

- 13.1 Agrees that legislation is needed.
- 13.2 Supports both the proposed s23A(1) and a narrower version. If it is considered too wide, Ms Cheung proposes to divide the presumption into 2 limbs:
 - 13.2.1 A time limit can be set that execution of those ancient title deeds should be conclusively presumed to be valid (similar to s13(4A)); and
 - 13.2.2 A stricter presumption is adopted for title deeds executed within the time limit.
- 13.3 Supports the proposed s23A(2).
- 13.4 Supports the Administration's proposal as an addition to s23A provided such presumption is clearly worded and precise.

14 Mr Nathan S.K. Au of Messrs. C.M. Li, Chow, Pang & Others

- 14.1 Agrees that legislation is needed.
- 14.2 Supports the proposed s23A(1). Does not mind having a narrower

version as suggested in paragraph 26 of the consultation paper.

14.3 Supports the proposed s23A(2).

14.4 Submits that it is possible to limit the application of s23A to conveyancing documents executed in the past.

14.5 Supports the Administration's proposal as an addition to s23A.

15 Messrs. T.C. Foo & Co.

15.1 Agrees that legislation is needed.

15.2 Supports a narrower version of the proposed s23A, as shown in Annex D.

15.3 Supports the Administration's proposal as an addition to s23A.

16 Mr Chris C.L. Ling and Mr Chan Lap Chung

16.1 Agree that legislation is needed. Due execution should be presumed for documents executed before the *Grand Trade* case. For execution after the *Grand Trade* case, the court's current decision should be followed.

16.2 Support a narrower version of the proposed s23A(1).

16.3 Do not support the proposed s23A(2) and the Administration's proposal.

16.4 Submit a draft s23 for consideration (see Annex D).

17 Messrs. Deacons

17.1 Agree that legislation is needed.

17.2 Support the proposed s23A(1). Suggest redrafting to the effect that where the purported execution of the deed or instrument falls within the ambit of the s23A(2), such deed or instrument shall be deemed to have been duly executed.

17.3 Support the proposed s23A(2).

17.4 Support the Administration's proposal as an addition to s23A.

18 Messrs. Fred Kan & Co.

18.1 Agree that legislation is needed.

18.2 Support the proposed s23A(1). However, the presumption should be applied to documents executed prior to *Grand Trade* only.

18.3 Do not support the proposed s23A(2) as it is too wide.

18.4 Do not support the Administration's proposal. S23A(1) suffices to cure the existing problem.

19 Mr Arthur K.H. Chan of Messrs. Arthur K.H. Chan & Co

19.1 Agrees that legislation is needed.

19.2 No definite view on the proposed s23A.

19.3 Supports the Administration's proposal as an addition to s23A.

20 CLP Power Hong Kong Limited

20.1 Agrees that legislation is needed.

20.2 Does not support the proposed s23A(1) as it is unduly wide. However, is prepared to consider a narrower version.

20.3 Does not support the proposed s23A(2) as it is unduly wide.

20.4 Supports the Administration's proposal, either as an alternative or as an addition to s23A.

21 First American Title Insurance Company

21.1 Does not agree that legislation is needed.

21.2 Does not support the proposed s23A.

21.3 Supports the Administration's proposal.

22 Secretary for Planning and Lands

22.1 Does not support the proposed s23A.

22.2 Submits that it apparently helps to solve the problem from the perspective of the vendors but seemingly at the expense of the purchasers, not to mention other undesirable implications.

23 Director of Lands

23.1 Submits that it appears to be desirable to use legislative measures to put to rest the uncertainty created by *Grand Trade*.

23.2 Does not support the proposed s23A and submits that the proposed section would have drawbacks:

23.2.1 The proposed s23A(1) is unnecessarily wide. It applies to retrospective as well as prospective cases.

23.2.2 It may undermine the standard of due care and diligence currently required of practitioners.

23.2.3 The proposed s23A(1) will not assist in uncovering and may, on the contrary, encourage unauthorized transactions in future.

23.2.4 If the party to the transaction cannot be bound nor be entitled to enquire as to the authority of the signatory to the instrument, it would be difficult for a prospective purchaser to show that the presumption could be rebutted.

23.2.5 The new provisions may have the undesired effect of creating further uncertainty as to their interpretation and application.

23.3 Supports a narrower version, as envisaged in paragraph 31 of the consultation paper, to cure defects in the past documents.

23.4 The Administration's proposal is not a complete solution. The burden of showing all relevant circumstances should rest on the

vendor as it is in a better position to obtain supporting evidence than a purchaser. It is difficult to see how the standard “beyond reasonable doubt” could be translated to a commercial or conveyancing standard.

24 Standing Committee on Company Law Reform

24.1 Neither of the proposed solutions as set out in the consultation paper are workable.

24.2 Considers that the execution of company documents should be the same for all types of transactions requiring the fixing of the company’s seal without exceptions being made for conveyancing documents.

24.3 Considers that the matter can be best rectified by the adoption of a system of registered title and title insurance.

25 Judiciary Administrator

25.1 Submits that legislation is seemingly not needed. It would be highly undesirable that the validity of execution of documents should be subject to different legal rules depending on whether the document or deed relates to a conveyancing matter on the one hand or any commercial or other matter on the other hand.

25.2 The Judiciary considers that the points raised relating to the proposed s23A in paragraphs 26-28 and 30-36 of the consultation paper are all valid.

25.3 Regarding the proposed s23A(1) specifically, the Judiciary has the following observations:

25.3.1 The subsection applies not only to deeds, but also covers documents not under seal. The wide application requires justification.

- 25.3.2 It applies both retrospectively and prospectively. It is likely that future conveyancers will not be concerned to check the authority of a person who holds himself out to represent a corporation in the transaction.
- 25.3.3 A purchaser in most cases will have no knowledge of the corporation and will not be in a position to rebut the presumption. It will not be easy to rebut the presumption. The risk of fraudulent transactions is not fanciful.
- 25.4 For the proposed s23A(2), the observations are as follows:
- 25.4.1 It applies to documents not under seal too. The wide application requires justification.
- 25.4.2 The ambit of the limiting condition is unclear. If it is intended to apply in such a case that a purchaser cannot raise any requisition as to the authority of someone who is neither described in the document nor stated to be signing for the corporation, the subsection is unduly wide and the risk of fraudulent practice is obvious.
- 25.5 The Administration's proposal is almost certainly unworkable. It would seem that the difficulty has always been in agreeing on the circumstances for concluding that there is a formal defect. The parties involved would almost certainly never agree that a matter was "beyond reasonable doubt" without going to court. Without the statutory presumption proposed by the Administration, requisitions on formalities of execution can be satisfactorily answered and good title shown where there is evidence showing beyond reasonable doubt that there is no real risk that the assignment would be set aside in future litigation.
- 25.6 The matters raised would give rise to the conclusion that serious consideration should be given to the registration of title and title insurance.

Consumer Council

Suggested new section 23A

“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”.

Mr Chris C. L. Ng

Suggested new section 23

- s23(1) Subject to sub-section (2), an instrument appearing to be duly executed shall be presumed, until the contrary is proved, to have been duly executed.
- (2) Without prejudice to section 60 and section 61, where any document is or has been produced by a party in a transaction as proof of title to any land and that document was executed on or before 26th July 2001 by a corporation under the seal of the corporation affixed in the presence of or attested by a person or persons appearing to be one or more of the directors or members of other governing body or authorized signatories of the corporation and the articles of association of the corporation contains the power, directly or indirectly, for the corporation or its board of directors or its governing body to authorize or appoint one or more signatories to execute or attest documents or instruments executed under the seal of the corporation, it shall for the purposes of any question as to the title to that land be conclusively presumed in favour of any bona fide purchaser or mortgagee of the land in that transaction that -
- (a) the document was validly executed by the corporation; and

- (b) such person or persons appearing to be one or more of the directors or members or other governing body or authorized signatories who has or have executed or attested the execution of the document was or were duly authorized and appointed by the corporation or its board of directors or its governing body to affix the seal of the corporation to and execute and attest the document.

- Note:
1. The presumption is modeled on the presumption in Section 13(4A) of the Conveyancing and Property Ordinance, Cap.219 relating to Power of Attorney.
 2. The date of 26 July 2001 is the date on which the case of Grand Trade Development Ltd. v. Bonance International Ltd. [2001] 3 HKC 137 was decided.

Messrs. T. C. Foo & Co

Suggested new section 23A

S23 (1) A deed or other instrument (whenever executed) relating to conveyancing purporting to be executed by or on behalf of a corporation aggregate shall in favour of a person dealing with the land affected by such deed or instrument in good faith be presumed, until the contrary is proved, to have been duly executed.

- ~~(2) (a)~~ A party to a transaction relating to conveyancing acting in good faith 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 one of such signatories is (i) a secretary or other officer of the corporation or a member of the corporation's board of directors or other governing body and (ii) a person ~~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~~
- (b) Paragraph (a) applies 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.

Mr. Philip Smart of the University of Hong Kong

Suggested section 20A

S20A(1) Subject to sub-section (2), in favour of a person dealing with a corporation aggregate, his successors in title and persons deriving title under or through him or them, the affixation of the corporation's seal to a deed shall be presumed, until the contrary is proved, to have been duly authorized by the corporation and properly effected if the deed purports to bear the seal of the corporation affixed in the presence of and attested by its secretary, its deputy secretary or other permanent officer of the corporation, or one member of the corporation's board of directors or other governing body.

(2) The presumption in sub-section (1) shall only operate provided:

- (a) the deed was executed more than ten years prior to the relevant date;
or
- (b) the deed was executed more than five years prior to the relevant date and the corporation was dissolved more than three years prior to the relevant date; or
- (c) the deed was executed more than five years prior to the relevant date and the corporation was placed in liquidation more than four years prior to the relevant date.

(3) For the purposes of sub-section (2) :

- (a) 'relevant date' means the date on which any requisition is raised.
- (b) The expressions 'dissolved' and 'liquidation' refer to the appropriate procedures specified from time to time in the Companies Ordinance (Cap 32) or any equivalent procedures under the law of the place of incorporation of a corporation.

(4) In relation to the question of the authority of a single director or other officer of a corporation to attest the affixation of the seal of the corporation, the presumption referred to in sub-section (1) shall not be

considered rebutted unless and until it is established that such director or officer in fact had no such authority, or attestation by such director or officer could not at the time of attestation have been in conformity with the corporation's constitutional documents.

- (5) This section applies to deeds whether executed before or after the commencement of this section and wherever executed.
- (6) This section is in addition to any existing rule of common law or equity applicable to the issue of real risk to title and is without prejudice to the operation of sections 20 and 23.'

Messrs. Chu & Lau

Suggested new section 23A

23A (1) A deed or other instrument (~~whenever~~ executed) on or before the commencement of this section relating to conveyancing purporting to be executed by or on behalf of a corporation aggregate shall in favour of a person dealing with the land affected by such deed or instrument in good faith, be presumed, until the contrary is proved, to have been duly executed.

- (2) (a) Unless there are suspicious circumstances, a party to a transaction relating to conveyancing acting in good faith 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 one of such signatories is ~~or are (as the case may be)~~ a ~~person or persons~~ (i) a secretary or a manager or other permanent officer of the corporation or a member of the corporation's board of directors or other governing body and (ii) a person 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~~

- (b) Paragraph (a) applies 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.

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