

PPTY  
CB2/PL/AJLS

12 December 2002

**BY FAX (25099055) AND BY POST**

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

Dear Mrs. Ma,

**PANEL ON ADMINISTRATION OF JUSTICE AND LEGAL SERVICES**  
**Meeting on 13 December 2002 at 8:30 a.m.**

I refer to Part II of the Law Amendment and Reform (Miscellaneous Provisions) Bill regarding the proposed amendments to the Conveyancing and Property Ordinance to deal with the problem relating to proof of due execution of conveyancing documents by corporation, which the AJLS Panel will consider under Agenda Item IV at tomorrow's meeting.

As requested by the LegCo AJLS Panel at the 28 October 2002 meeting, the Society has conducted a survey among its members on the extent of the stated problem as well as the instances of companies seeking to recover properties from subsequent purchasers because of invalid executions. I attach the survey (**Appendix A**), which has been sent to the Senior Partners/Administrative Partner of all firms and a schedule outlining the survey results (**Appendix B**) for your kind information.

The survey results, we believe, are self-explanatory. You will see that about one-third of all firms as well as the total membership of the Society have responded to the survey, which, given the short time span, accounts as very good response rate according to our experience. This, we believe, reveals the extent of the problem. We are, however, surprised to note that one firm has, in answer to query 1(c), opted for the "*too numerous to mention*" answer.

We are pleased to note that after the joint meeting as convened by the Department of Justice on 27 November 2002, the Administration has agreed to drop their proposed subsection (3) to the proposed Section 23A of the Conveyancing & Property Ordinance. We believe that what is now being proposed under the Bill represents the proper way forward to solve the stated problem and strikes a good balance among the interests of all concerned.

Yours sincerely,

Christine W. S. Chu  
Assistant Director of Practitioners Affairs

Encl.

c.c. Mr. Ip Shing Hing, the President  
Ms. Wendy Chow, chairman of the Property Committee  
Mr. Vincent Liang  
Mr. Peter Aherne  
Mr. Patrick Moss, Secretary General

**Appendix A**

PPTY

**BY POST**

13 November 2002

To: All Senior Partners/Administrative Partner

Dear Sir/Madam,

**Law Society Survey - Proposed Legislation on the Problem associated with Execution of Documents by Corporations**

The Law Society has, together with the Hong Kong Bar Association and the Hong Kong Conveyancing and Property Law Association Limited, jointly proposed a new Section 23A to the Conveyancing and Property Ordinance (“CPO”) in view of the existing problem in relation to proof of due execution of conveyancing documents by corporations.

***The Problem***

Problems may arise in the “*proof of title*” in the conveyancing context as a result of a line of recent decisions giving rise to doubts on what was once believed to be sufficient proof of due execution of documents by corporations. The effect of these decisions is that notwithstanding sections 20 and 23 of the CPO, the capacities of the signatories have to be described in the document and correspond with the required capacities in the sealing provision in the Articles of Association or a copy of the board resolution has to be produced in appropriate cases before due execution of title documents by corporations can be proved.

***The New Section 23A***

The proposed section 23A is in the following terms:

“23A(1) *For the purpose of proof of title, a deed purporting to be executed prior to the commencement of this section 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.”*

***The Administration’s concern***

The Administration is generally in support of the proposed section 23A but was concerned that the new section 23A(1) does not offer sufficient protection to purchasers. It takes the view that as some executions cured by the section may in fact be unauthorized, there is the risk that the corporation concerned may subsequently bring an action against the purchaser and successfully set aside the transaction.

***The Administration’s Proposal***

The Administration has proposed to insert a subsection (3) to the new Section 23A to the effect that “*a bona fide purchaser for value without notice of any defect in execution, his successors in title and persons deriving title under or through him or them will not be liable for the claims of the corporation concerned if the presumption in subsection (1) is subsequently rebutted*”.

The proposed subsection (3) will, in effect, deny the corporation concerned the right to recover the property in question from the bona fide purchaser but the corporation will retain the right to claim against the persons who executed the deed without authority.

***The Society's stance***

The Law Society does not support the proposed subsection (3). We doubt whether as between the two innocent parties and given the general approach of the common law is to favour the *Nemo Dat Rule*, the law should favour the purchaser as against the company. There is also no apparent reason why the presumption in the new section 23A should protect the purchaser any more than the other rebuttable presumptions provided for in the CPO. The Society also believes that the cases of companies seeking to recover properties against the purchasers on the ground of improper execution or lack of authority are very rare and almost unheard of.

***Request for Survey***

Whilst the Society is pushing hard for legislation to be enacted, the LegCo Panel on Administration of Justice and Legal Services ("AJLS Panel") has, at its recent meeting, requested the Society to conduct a survey among its general membership on the extent of the problem and the likelihood of companies seeking to recover properties against purchasers on the ground of improper execution or lack of authority of the relevant conveyancing documents.

***The Survey***

To comply with the request of the AJLS Panel, we attach a survey on which information is sought on the following:

- (a) the number of conveyancing transactions that you have encountered which have been *affected* by this problem of execution of documents by corporations over the past 3 years;

[N.B. This refers to situations where the original transactions have been changed or delayed in whatever manner, other than fallen through, as a result of the stated problem. Examples are where problems have arisen in the negotiation process or that there has been resultant delay in completion,

reduction in purchase price, institution of litigation such as the Vendors and Purchasers summons, etc.]

(b) the number of conveyancing transactions that you have come across that have *fallen through* as a result of the stated problem over the past 3 years;

[N. B. This includes cases where transactions have been rescinded or cancelled by the mutual agreements of the parties]

(c) the number of cases that you have come across where companies (excluding mortgagee) have sought to recover properties against purchasers on the ground of improper execution or lack of authority over the past 3 years.

You will appreciate that to ensure a smooth passage of the relevant legislation, cooperation on your part is highly essential. **Please can you discuss the issue with your colleagues and spare a couple of minutes to complete and return the attached reply slip to me by 23 November 2002.** We appreciate that you may not have kept statistics on the information sought and would confirm that a rough estimate of the number of cases requested will be sufficient.

Yours faithfully,

Christine W. S. Chu  
Assistant Director of Practitioners Affairs

**REPLY SLIP**

**Law Society Survey - Proposed Legislation on the Problem associated with Execution of Documents by Corporations**

To: Ms. Christine W.S. Chu  
Assistant Director of Practitioners Affairs  
The Law Society of Hong Kong

Fax No:28450387

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1. I/my firm has/have come across the following number of transaction(s) as *affected* by the subject problem of execution of documents by corporation over the past 3 years:
  - none
  - less than 5
  - 5 to 10
  - too numerous to mention.
  
2. I/my firm has/have come across the following number of transaction(s) that have *fallen through* as a result of the stated problem over the past 3 years:
  - none
  - less than 5
  - 5 to 10
  - too numerous to mention.
  
3. I/my firm has/have come across the following number of case(s) where companies have sought to recover properties against purchasers on the ground of improper execution or lack of authority over the last 3 years:
  - none
  - less than 5
  - 5 to 10
  - too numerous to mention.
  
- I/my firm does not keep any statistics with regard to any of the questions above but consider the stated problem to be a prevalent one which warrants urgent rectification.

\_\_\_\_\_  
Name of Firm:

Date: \_\_\_\_\_





**Appendix B**

**Law Society Survey Results – Proposed Legislation on the Problem associated with Execution of Documents by Corporations (up to 12.12.2002)**

<b>No. of response received:</b>	205
<b>Total No. of members in these firms:</b>	1874
<b>Total No. of member firms:</b>	633
<b>Percentage of firms responding:</b>	32%
<b>Total No. of members of the Society:</b>	5158
<b>Percentage of members responding:</b>	36%

**Results of the Survey:-**

1(a) I/my firm has/have come across the following number of transaction(s) as *affected* by the subject problem of execution of documents by corporation over the past 3 years:

none	9	(4.4%)
less than 5	14	(6.8%)
5 to 10	34	(16.6%)
too numerous to mention.	132	(64.4%)
no answer given	16	(7.8%)

(b) I/my firm has/have come across the following number of transaction(s) that have *fallen through* as a result of the stated problem over the past 3 years:

none	71	(34.6%)
less than 5	75	(36.6%)
5 to 10	32	(15.6%)
too numerous to mention.	12	(5.8%)
no answer given	15	(7.3%)

(c) I/my firm has/have come across the following number of case(s) where companies have sought to recover properties against purchasers on the ground of improper execution or lack of authority over the last 3 years:

none	187	(91%)
less than 5	0	(0%)
5 to 10	0	(0%)
too numerous to mention.	1	(0.48%)
no answer given	16	(7.8%)

2. 114 firms have indicated that they do not keep any statistics with regard to any of the questions above but consider the stated problem to be a prevalent one which warrants urgent rectification. 55.6%