THE LAW SOCIETY'S RESPONSE ON THE CONSULTATION PAPER ON "*PROPOSED AMENDMENTS TO THE CONVEYANCING AND PROPERTY ORDINANCE (CAP. 219) – EXECUTION OF CONVEYANCING DOCUMENTS BY CORPORATION*"

Background of the Law Society's proposal

1. The Law Society has proposed legislative amendment to the Conveyancing and Property Ordinance in the interest of the public. Legislative proposal was made because title to properties (which would otherwise have been good and valid) has been rendered defective on technical legal grounds where there was no evidence of fraud or illegality. In some cases, the deeds in questions were dated 10 or more years before the date of the relevant transaction before the courts.

2. The Law Society first approached the Department of Justice in the year 2000 for legislative amendment after the judgment in the case of *Wong Yuet Wah Mandy v. Lam Tsam Yee & ors 1998 M. P. No. 4998* was handed down in 1999 so that the public would not be put to costly litigation. In the meantime, there was a whole line of conflicting decisions of the High Court relating to execution of deeds by companies. The court has found good title on some of these cases and bad title on the others. After the Court of Appeal Judgment in the *Grand Trade* case was handed down in July 2001, the Law Society repeated its request to the Administration for legislative amendment. At the request of the Administration, a submission paper (which was settled by Leading Counsel in England) was made to the Administration.

3. Whilst it may be argued that each case must be decided on its own facts, it is apparent that there was difference in opinion even by judges of the High Court on the law relating to execution of deeds by companies and the interpretation of section 23 of the Conveyancing and Property Ordinance.

4. It was unfortunate that the Law Society's submission paper was extracted and, on certain parts, paraphrased in the Annex to the Consultation Paper. Certain clarification has to be made at the outset. The Law Society did not consider the Judgment in the *Grand Trade* case to be incorrect. The Law Society only considers the judgment to be inadequate for the reasons set out in the original submission paper. This is because certain aspects of the law, for example, the issue of estoppel, the ostensible authority of directors, the delegated power of directors and the rules governing its application were not considered or discussed in the case. There may be a variety of reasons

for these principles not being discussed or mentioned but a person wishing to invoke any of these principles of law to validate a deed executed in a manner similar to that in the *Grand Trade* case could be put to expenses. It is most likely that he would have to argue his case before a court of law and possibly the Court of Appeal, in view of the fact that the *Grand Trade* case being a Court of Appeal decision, is binding on all the lower courts. The Law Society therefore urged for legislative amendment to the Conveyancing and Property Ordinance in the interest of the public.

The Administration's Comments on the Law Society's Legislative Proposal

Paragraph 23

5. The Law Society noted that in recent months, there is one insurance company which offers title insurance amongst its other products and services. However, there is not as yet an established market of title insurance in Hong Kong.

Title insurance is a commercial product and is not without risks. It is only an option and should not be regarded as the cure for the problems addressed in the Law Society paper.

It is important to note that title insurance cannot be forced on an unwilling purchaser or persons having an interest in the property. One of the concerns could be the insolvency or liquidation of insurance companies. This is a legitimate concern as one of the leading and world-renowned insurance companies has gone into liquidation in recent years. Moreover, insurance companies are not obliged to accept any title for insurance. Since title insurance is a commercial product, it could be withdrawn from the market at any time at the discretion of the insurance companies. The terms of the insurance policy are set by the insurance companies and could be subject to change and exclusions.

Further, as between a vendor who has title insurance and a purchaser who is unwilling to accept title insurance, the unwilling purchaser could be put in a disadvantageous position. One of the advantages proclaimed in advertising materials of title insurance companies is that they will defend the title and bear the costs of litigation. The financial capability of an ordinary purchaser is of no comparison to that of an insurance company. As a result and in order to avoid costly litigation, the unwilling purchaser may be forced to accept the title and the title insurance of the vendor. The Law Society believes that this should not be the stance to be taken by a responsible Administration.

In the event that the insurance company offering title insurance should be insolvent or in liquidation, the problems caused by title defect would simply re-surface, as the owner may no longer claim protection under the insurance policy.

The New Section 23A

6. The Administration has put forward an analysis of the new section 23A proposed by the Law Society under head (3) of Part III of the Consultation Paper (paragraphs 25 to 36 inclusive). The Law Society could see from many of the Administration's comments that the intent of the proposed section 23A was misconceived. For the convenience of readers, the Law Society will, in the subsequent paragraphs, set out its comments on the various points made by the Administration by reference to the paragraphs in which they appear in the Consultation Paper.

Is the presumption too broad?

Paragraph 26

7. The Administration objects to section 23A as being unnecessarily wide in that it is not limited to cure the situation of execution by a single signatory where the articles allow such execution either directly or indirectly. In fact, the Administration is correct to the extent that section 23A is not intended by the Law Society to confine to single signatory cases. The current problem in this area extends well beyond this type of situation. Requisitions are frequently raised 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. Consequently *"indirect"* authorisation needs to be established. In all these cases, the Law Society's proposed presumption would assist in proving title.

Paragraph 27

8. The Administration's criticism in paragraph 27 is fanciful. As a matter of fact, the articles of association of Hong Kong companies are registered and kept with the Companies Registry. They are readily available from the Companies Registry. Articles of Association of Hong Kong companies not being available in the Companies Registry is the exception rather than the norm. The proposition of the Administration that a vendor with a problematic title would commit such act (which is implicitly fraudulent) as intentionally losing the articles, or that section 23A will in effect be converted into an irrebuttable presumption – are hypothetical rather than real.

Paragraph 28

9. The Administration argues that the proposed presumption may cover cases where a conveyance was executed by someone described as a clerk. In most of the cases, the signatory was simply described as a director or without any description of the signatory's title. Even assuming that a conveyance document was executed by a signatory describing himself as a clerk, he may still be a person duly authorized by the board of directors and there is no reason why a conveyance document executed by a clerk must necessarily be defective. The current status of the law as decided by the courts is that a conveyance executed by "*a clerk*" will be presumed valid (unless the contrary is proved) if the Articles of Association allow for a single signatory (who need not be a director) for as long as the words "*duly authorised by the Board of Directors*" or wordings having a similar effect are stated in the document.

The proposed amendment is in line with the law, as pronounced by the courts. The proposed section 23A(2) is just to address situations where the words "*duly authorised*" or wordings to that effect are omitted from the document thereby denying vendors of the presumption which they should otherwise be entitled under section 23. Moreover, the proposed amendments would not validate a fraudulent transaction. The proposed amendments under section 23A(2) will not prevent the purchasers from producing contrary evidence to rebut the presumption in section 23A(1). Section 23A(2) is purely mechanical to facilitate proof of title and is intended to deal with review of title by subsequent parties rather than to govern the situation of the parties to the current transaction.

Paragraph 29

10. The Administration is of the view that there are limits to the application of the proposed presumption under the new section 23A. It argues that the new section 23A will not cover cases where there is a formal defect in execution in cases where the Articles required two directors and the conveyance document was only executed by one person. Indeed, the new section 23A does not purport to rectify such cases. These cases should be dealt with individually according to the present law, such as, the production of the relevant Board Minutes or proof that the relevant company has been in liquidation for a long time. The major problems regarding the current practice arise because the capacity of the signatory is not described in the attestation clause or the signatory is simply described as "*a director*" when the sealing provision required signing by "*the Chairman of the Board*" or such person or person(s) as may be authorised by the Board. The new

Section 23A is proposed with the intention to cure these defects but not strict non-compliance with the sealing provisions.

Instruments executed by corporation in the future

Paragraphs 30 & 31

11. The Administration also considers that the new section 23A attempts to cure execution of instruments, both executed in the past and in future. The Administration is of the view that the new section 23A should not cover future cases. With respect, the Law Society does not agree that there is good reason to distinguish documents executed in the past and in future. The Administration considers that future cases can be executed in accordance with the court's recent decisions. However, the present difficult situation is partly caused by conflicting decision made by the courts in the past. There is no guarantee that by following the most recent court's decision in dealing with corporate execution will be fool proof. It is always possible that a later higher court will reverse the present court's decision on corporate execution, thus causing another chaotic situation in the future. The Law Society believes that the new section 23A should apply to past cases as well as future cases.

Will Purchasers' Rights be lost?

Paragraphs 32 & 33

12. The Administration argues that the proposed presumption will provide benefits to the vendors at the expense of the purchasers in that the purchaser's right to refuse to complete if a good title has not been proved or presumed will be taken away. The Law Society believes that the Administration has approached the subject from the wrong perspective and misunderstands the intent of section 23A.

13. The presumption in section 23A(1) is subject to the overriding qualification "*unless the contrary is proved*". If the purchaser has evidence that shows that there has been invalid execution, he can always raise objection to the relevant title and his right in this regard is never lost. The presumption in section 23A(1) will indeed facilitate him in the title approval process without the unnecessary trouble and expense of going into the internal affairs of the company.

14. Section 23A(2) is added to deal specifically with the problems highlighted by the recent cases so as to make it plain beyond doubt that the limitations inherent in those cases are reversed. What section 23A(2) in fact says is that having checked the relevant articles and having seen that the

conveyance document has been executed in a way that could have been authorised by the articles, a purchaser will not need nor is he entitled to make any further inquiry on whether the signatory is actually authorised. It is to be noted that the vendor will still be required to produce the relevant articles to prove that the document is signed in the manner, which could have been authorised by the articles of association. Having produced the relevant articles, a purchaser will only be precluded under section 23A(2) from making any more inquiries if the document could have been executed in that way according to the articles. Otherwise, the vendor will still be obliged to prove the valid execution of the document. A purchaser is not bound by the presumption under section 23A(1) if he has evidence to prove to the contrary.

15. The proposed section 23A(1) does not deviate from the existing practice. The presumption in section 23A(1) is subject to contrary evidence and the vendor is not released from the obligation of proving title under section 23A(2) but is still required to produce the articles before he can set up the statutory presumption against the purchaser.

The common law

Paragraphs 34 & 35

16. The Administration alleges that the Law Society's proposal for doing away with the requirement of an appearance of due execution is an attempt to derogate from the duty of care and diligence incumbent on solicitors. The Law Society reiterates that the whole idea of the proposed amendments is to facilitate the conduct of conveyancing and to ensure that the title to properties will not be unnecessarily affected by technical defects. Indeed, the original idea of introducing statutory presumptions under the Conveyancing and Property Ordinance is not to make life easier for lawyers but to make dealings with properties easier and less costly through reliance on these statutory presumptions. It is not a question of whether the new section 23A will absolve its members from its duty as it will be relatively easy for conveyancing solicitors to insert a description of the signatory to the title document and keep a copy of the board resolution with the title deeds in future cases. The real concern is to make sure that transactions will not be affected by purely technical defects.

The Law Society also wants to point out that the word "*appearing*" in section 23 has caused much discussion in the Court of Final Appeal in the case of *Leung Kwai Lin Cindy v. Wu Wing Kuen FACV No. 14 of 2000*. There was divergence in opinion on the meaning of the word "*appearing*" in the Court of Appeal. Even when the case was heard in the Court of Final

Appeal, the Court of Final Appeal Judges were not of unanimous view on the meaning of "*appearing*". In the words of Sir Anthony Mason (one of the Court of Final Appeal judges): "*the language of the section does not point in one direction rather than the other*". The possibility of the meaning of the word "*appearing*" being interpreted otherwise by the Court of Final Appeal having a different composition cannot be ruled out. The question is: - should the public be put to such uncertainty when there is already doubt and divergence in opinion on the meaning of "*appearing*" in section 23 as is currently drafted?

The proposal in section 23A does not absolve a solicitor from his duty to his client to ensure that the parties to a transaction have validly executed the conveyance in question. Section 23A(2) is not intended to cover the parties to a current transaction. If required, the section could be amended to make the intention clear.

The formal requirements of execution and the public interest

Paragraph 36

17. The Administration raises the question of whether it would be in the public's interest to introduce a new section 23A, which will relax the *"established formal requirements"* of corporate execution. The Administration argues that it is an *"established formal requirements"* of corporate execution that documents have to be executed by two directors. With due respect, the Law Society does not agree. In fact, it is not unusual for corporate document to be executed by one single director.

The Administration's Alternative Approach

Paragraphs 37, 38, 39 & 40

18. The Administration proposes an alternative provision under which good title shall be presumed, until the contrary is proved, under an assignment notwithstanding a formal defect in its execution where, it appears beyond reasonable doubt that (i) the vendor intends to vest title in the purchaser and (ii) that there was no real risk that the assignment would be set aside in future proceedings.

19. The alternative approach proposed under paragraphs 37 and 38 of the consultation paper is unclear. The draftsman has not thought to supply any language for the proposed amendments. However, it is plain from paragraph 38 that any amendment along the lines proposed would not solve the problem. It requires the proof of:

(a) formal defects in execution;
(b) (proof *beyond reasonable doubt* of) the intention of vendor to vest title; and
(c) (proof *beyond reasonable doubt* of) no real risk that the assignment would be set aside in future proceedings.

The meaning of *"formal defect in execution"* is not clear, and even if it can be defined precisely, the vendor is still required to prove items (b) and (c).

20. The Law Society is of the view that this alternative provision proposed by the Administration will lead to more litigation than the present situation. The Law Society does not agree with the Administration's view that it would be relatively easy to prove *"beyond reasonable doubt"* that the vendor intended to vest title in the purchaser. What amounts to *"beyond reasonable doubt"* will be different from case to case and different lawyers will take different views. If a practitioner is faced with determining whether *"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",* it is unlikely that a prudent solicitor acting for the 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. *"Beyond reasonable doubt"* is a very high standard of proof but even *"on a balance of probability"* would not solve the problem. What is required is a crystal clear test to prove good title and not for practitioners to be required to make *"judgment calls"*. Moreover, the proving of the intention of the vendor in the manner suggested by the Administration will in reality and in practice require 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.

21. It will also be difficult to convince a purchaser that there is no *"real risk"* that the conveyance documents will be set aside in future proceedings. This limb only sets out the present law under the cases *MEPC Limited v. Christian-Edwards*. This case has been cited in a number of previous decisions but, unfortunately, different courts have different views on what amount to *"real risk"*.

22. The Legal Policy Division's suggested alternative approach would simply exacerbate the existing difficulties in proving title, clog up the courts with Vendor and Purchaser summons and other litigation and put the public to unnecessary costs and expenses.

Conclusion:

23. The Law Society is of the view that the proposed new section 23A will be sufficient to deal with the problems of execution of conveyancing documents by corporations and is not as wide in scope as the Administration has alleged. It is also in the public's interests, to cure such problems. The Administration's proposed alternative approach will create confusion and litigation in future and is not a viable solution to such problems.

24. Finally, the Law Society observes that the law of England has actually dispensed with the need for a common seal to be affixed to the deed in the case of execution by a corporation. This would be much more progressive and take account of the fact that a multitude of conveyancing deeds in Hong Kong are executed by overseas corporations and banks which do not have corporate seals under their domestic law. Perhaps the Legal Policy Division should also consider updating the law in this regard.

The Law Society of Hong Kong
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