

INSTRUCTIONS TO COUNSEL

EXECUTION OF DOCUMENT BY CORPORATION

1. Instructing Solicitors act for The Law Society of Hong Kong ("the Law Society"), who wish to clarify a point on the execution of conveyancing documents by a corporation. By 'conveyancing documents', we mean deeds of assignments, legal charges and the like.

2. Section 20 of the Conveyancing and Property Ordinance provides :-

"(1) In favour of a person dealing with a corporation aggregate in good faith, his successors in title and persons deriving title under or through him or them, a deed shall be deemed to have been duly executed by the corporation if the deed purports to bear the seal of the corporation affixed in the presence of and attested by its secretary or other permanent officer of the corporation and a member of the corporation's board of directors or other governing body or by 2 members of that board or body."

(2)

(3) Where a corporation aggregate is empowered to execute a deed by another person, an officer appointed for that purpose by the board of directors or other governing body of the corporation may execute the deed in the name of such other person; and where a deed purports to be so executed then the deed shall, in favour of a person dealing with the corporation in good faith, be deemed to have been executed by an officer duly authorized.

(4) This section applies to transactions wherever effected, but only to deeds executed after the commencement of this section; except that, in the case of powers of appointment of an officer, they apply whether the power was conferred or the appointment was made before

or after the commencement of this section."

Section 23 provides :-

"An instrument appearing to be duly executed shall be presumed, until the contrary is proved, to have been duly executed."

3. The Articles of Association of a corporation normally contain the following typical article relating to the execution of a deed by the corporation :-

"All deeds or instruments requiring the Seal of the Company shall be signed by the secretary and a director or by 2 directors or such (other) person or persons as may be authorised by the directors for the purpose."

4. The point raised for clarification is this : is a vendor of land required to produce proof of authorisation by the board of directors of a corporation (e.g. a board resolution or appointment) in order to prove title to that land where a conveyancing document was executed by a corporation -

- (a) in accordance with section 20(1) before the coming into operation of the Ordinance ?
- (b) in accordance with section 20(1) after the coming into operation of the Ordinance ?
- (c) otherwise than in accordance with section 20(1), e.g. by a person or persons authorised by the board of directors for the purpose pursuant to

an article along the lines of paragraph 3 above ?

- (d) in accordance with section 20(3) before the coming into operation of the Ordinance ?
- (e) in accordance with section 20(3) after the coming into operation of the Ordinance ?

Put in another way, can one rely on the rule in *Turquands* case or the *Maxim Omnia Praesumuntur Rite Et Esse Acta* or section 23 in any of the above cases in order to dispense with proof of authorisation by the board of directors ?

5. It is recognised that in Hong Kong there are a large number of cases where board resolutions or powers of appointment authorising the execution of conveyancing documents by corporations are missing from the relative title deeds and some of those corporations are no longer in existence. It follows that in such cases it is impossible for a vendor of land to obtain the necessary resolution or power of appointment. In the event of your answer(s) to any of the questions raised in paragraph 4 (a), (b), (c), (d) and (e) above being in the affirmative, would Counsel please advise what remedial measures, if any, should be taken to rectify the situation.

Dated the 20th day of January 1990.

EDMUND CHEUNG & CO.
Solicitors for The Law
Society of Hong Kong.

2 May 1990

Execution of document by Corporation

Opinion

1. In my considered opinion any difficulty which might arise, in the sort of circumstances referred to in my Instructions, if the only relevant statutory provision had been s.20 of the Conveyancing and Property Ordinance (which is modelled - although not exactly - on s.74 of the English Law of Property Act 1925) is avoided by having recourse to s.23.

2. I will consider in turn each of the situations mentioned in my Instructions.

3. It is convenient to take, first of all, the situation - Instructions paragraph 4(b) - where the vendor's title depends

The corporation was party to an earlier - perhaps very much earlier - transaction. So, according to the ordinary use of language, the purchaser in the current transaction is not "a person dealing with" that corporation.

5. S.74(1) in the English statute avoids this point altogether because it is expressed as operating, simply, "in favour of a purchaser" and "purchaser" as defined in s.205(1)(xxi) is not restricted to someone dealing directly as purchaser with the corporation : a subsequent "purchaser" of the property is plainly within the benefit and protection of s.74(1).

6. Does this difference of language make Hong Kong's s.20(1) as originally enacted less beneficial and protective than s.74(1)? I would argue strongly - and it is my opinion - that for purposes of s.20(1) a subsequent purchaser of the property stands in the shoes of the person originally dealing with the corporation and is to be regarded as for this purpose "dealing with the corporation". After all the risk which is removed by the protective provision in s.20(1) is the risk that, in spite of what appears in the document, it was not properly executed and never bound the corporation, with the consequent risk that the legal estate remained with the corporation. The subsequent purchaser is, by reference to that risk, in potential conflict with the corporation; and, if his predecessor in title was protected by s.20(1), it would be a serious defect in

conveyancing procedure if the subsequent purchaser - assuming that he is "in good faith" - were not also protected. That does, however, depend on an interpretation of s.20(1) which, arguably, puts a "gloss" on the simple words there used "in favour of a person dealing with ..." the corporation; and it can be said against my view that the subsequent purchaser is not a person dealing with the corporation but is only dealing with his immediate vendor.

7. But s.20(1) has not remained in its original form. By amendment, the opening words -

"In favour of a person dealing with a corporation aggregate in good faith ..."

have become -

"In favour of a person dealing with a corporation aggregate in good faith, his successors in title and persons deriving title under or through him or them ..."

The amendment was obviously intended to deal with the point discussed above, and to protect successors in title without any need for the argument canvassed in paragraph 6 above. In the situation contemplated by Instructions paragraph 4(b), the amended form of s.20(1) provides the current purchaser of the property with full protection. As mentioned in paragraph 22

below, the amendment leaves the words "in good faith" in a position which is not quite satisfactory; but fortunately this does not matter because of the operation of s.23 with s.20(1) in its original, and in its amended, form.

8. At that point in the debate s.23 comes into play. The deed which the immediate vendor produces in support of his title, showing on its face an earlier transaction with the property by a corporation, is "an instrument appearing to be duly executed" and s.23 therefore raises the presumption, unless and "until the contrary is proved", that it was duly executed. I have not been able to find any flaw or defect in the logic of that; and it may be that s.23 was introduced by the draftsman of the Ordinance because he appreciated that s.20(1) as originally enacted might be interpreted as failing to provide protection for subsequent purchasers.

9. The curiosity, if reliance has to be placed on s.23, is that s.20(1) as originally enacted is thereby shown as having really very little useful effect; but this cannot detract from the wide and forceful operation of s.23 as drafted.

10. The amendment of s.20(1) leaves less apparent need for recourse to s.23; but it is clear to me that, after as well as before the amendment, s.23 provides a forceful and complete presumption of due execution unless and "until the contrary is

proved".

11. Instructions paragraph 4(a) deal with a similar situation; but the conveyancing document was executed by the corporation (a predecessor in title of the current vendor) before the coming into operation of the Ordinance. S.20(1) is of no assistance in this case. But the presumption introduced by s.23 is a presumption which is itself to be made by the authority of that section of the Ordinance. At a time after the coming into operation of the Ordinance, the question whether a conveyancing document (an "instrument") whenever made was duly executed is a question which arises at that time and the Ordinance applies to that question the presumption specified in s.23. The relevant time is when the question arises, i.e. as between the current vendor and purchasers, and not the date (which may itself be before the Ordinance came into operation) of the instrument itself.

12. In my considered and definite opinion, therefore, s.23 provides the protection required in situation 4(a).

13. Instructions paragraph 4(c) is also a situation covered by s.23. The deed in this case does not comply with s.20(1) because the attesting signatories are not stated to be, i.e. do not purport to be, persons described in s.20(1). Of course the seal itself purports to be the seal of the company and to have

been affixed; and the signatories appear on the face of the document to have signed for the purpose of attesting the due sealing of the document : their signatures purport to be for that purpose; and the document therefore purports to be duly executed.

14. I imagine that in most cases such a document will have described the signatories in some such manner as "duly authorised by the company"; and, if a statement of that kind appears, no-one could argue that the instrument does not appear and purport to be duly executed. But what if no such statement appears and inspection of the document merely reveals the affixing of the seal attested by signatures without any identification of the signatories' capacities in the company and without any statement of authorisation by the company? Even in this case my considered and definite opinion is that s.23 imposes the presumption of due execution. The seal is on the document and there are signatures which purport to be those of attesting signatories. The instrument therefore appears to be executed by the company and duly executed by the company. Unless the contrary is proved, the instrument must be taken to be duly executed.

15. In Situations 4(a) (b) and (c) s.23 is sufficient protection without recourse to the rule in Turquands case and without recourse to the maxim omnia praesumuntur rite ac

solemniter esse acta (the presumption that every formality has been correctly satisfied). S.23 makes such recourse unnecessary; and I add that if the rule or maxim had operated satisfactorily there would have been no need to introduce in England s.74 or in Hong Kong s.20 or s.23. So, while I am satisfied that s.23 operates as indicated above, I do not regard the rule in Turquands case or the maxim as providing safe alternative protection.

16. Instructions paragraph 4(d) refers to a deed (an earlier step in the current vendor's title) which appears to have been executed as indicated in s.20(3) and to have been so executed at a time before the Ordinance came into operation. Section 20(3) is expressed as operating "in favour of a person dealing with the corporation in good faith"; so paragraphs 6 and 8 of this Opinion are relevant here as well; and all arguable difficulty is overcome by the application of the presumption imposed by s.23. The instrument, on its face, appears and purports to be both executed and duly executed; and, in the absence of any words in s.23 to restrict the operation of the statutory presumption, the instrument is presumed to have been duly executed unless and "until" the contrary is proved.

17. Instructions paragraph 4(e) falls within the same principle. The instrument appears and purports to have been duly executed. The question whether it is presumed by s.23 to

have been duly executed arises after the Ordinance came into operation although the date of the instrument may have been before the Ordinance came into operation; and the statutory presumption therefore applies : see paragraphs 11 and 12 of this Opinion.

18. I do not know whether s.20(3) has been amended in the same manner as s.20(1), i.e. to insert the words referring to successors in title etc. If that amendment has been made there is less need in Situations 4(d) and 4(e) for recourse to s.23; but s.23 remains there as an overall safeguard against difficulty.

19. The effect of this Opinion is that all arguable difficulties are in fact overcome by the simple and comprehensive statutory presumption in s.23; and (which is something of an oddity) would be so overcome if s.20 had not been enacted. But the oddity cannot itself undermine or restrict the operation of straightforward and simple language of s.23.

20. I have, therefore, no doubt that the conveyancing problems canvassed in my Instructions are all solved by s.23 and that no remedial action is called for.

21. Nevertheless if s.20(1) had not been amended as mentioned

above I would have been inclined to suggest that in s.20(1) and (subject to paragraph 22 below) s.20(3) the words "in favour of a person dealing with a corporation [aggregate] in good faith" might usefully be extended by adding words to refer to a subsequent purchaser, e.g. by adding "or of any subsequent purchaser" and by introducing a definition of "purchaser" modelled on s.205(1)(xxi) of the English Law of Property Act 1925.

22. But s.20(1) has been amended as mentioned above; and my only criticism of the amendment is that it leaves the words "in good faith" in a slightly unsatisfactory position. In the amended version of s.20(1) it might be said that the words "his successors in title" refer to successors in title of a person who has dealt with the corporation in good faith; and, on that footing, it might be argued that a person relying on s.20(1) has to establish that the original dealing with the corporation was "in good faith" : otherwise (the argument would be) he does not establish himself as a successor in title of a person who had dealt with the corporation in good faith. In this sort of context acting in good faith probably means acting honestly, whether or not negligent : see in 1 Wolstenholme & Cherry Conveyancing Precedents 13th ed. at p. 340 the footnote to LPA 1925 s.205(1)(xxi). It will be noted that the English LPA 1925 s.74(1) operates in favour of "a purchaser" and by s.205(1)(xxi) that is "a purchaser in good faith", so that in that English

formulation the person who relies on s.74(1), i.e. the purchaser in the current transaction, has to be "in good faith" but the good faith of parties to earlier steps in the title does not have to be shown. Without unduly disturbing the structure of s.20(1) as amended, the opening words of that subsection could be further amended to read -

"In favour of a person dealing with a corporation aggregate, his successors in title and persons deriving title under or through him or them (but only in favour of a person acting in good faith), a deed shall be deemed "

23. Such an amendment, if desired, would remove the difficulty canvassed above in relation to s.20(1); but would, of course, do nothing for s.20(3). It would also leave untouched the overriding protection given by s.23; and, because s.23 provides such protection, those instructing me may well consider that there is no real point in pursuing my suggested further amendment of the amended s.20(1).

24. The choice for those instructing me is, therefore, as I suggest, between the following 3 alternative courses :

- (1) to rely wholly on this Opinion and the overriding protection of s.23, and make no changes in s.20; or

- (2) if s.20 is to be changed, to restrict the change to the further amendment indicated in paragraph 22 above; or
- (3) to make the quite different amendment canvassed in paragraph 21 above.

25. If alternative (3) were preferred I would be happy to provide appropriate drafting for the change in s.20 which that would involve; but I have not done so in this Opinion because :

- (1) I think quite likely that those instructing me will prefer alternative (1) in paragraph 24 above, and make no changes in s.20, but
- (2) if alternative (3) were to be preferred the amendments referring to "purchaser" as in the English model, the definition of "purchaser" to be incorporated need not be as elaborate as in the English LPA 1925 s.205(1)(xxi).

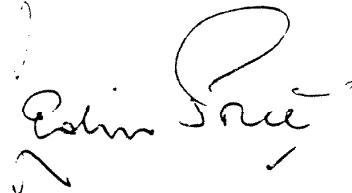
26. I add one further comment. S.20(3) must I think be intended to refer to execution of a deed in circumstances like those referred to in the English s.74(4); but, in s.20(3), the simple reference to the corporation as "empowered to execute a

deed by another person" and the subsequent protective words are "in favour of a person dealing with the corporation in good faith". The subsequent purchaser, even if treated as standing in the shoes of the person who earlier dealt with the corporation, surely wants protection against the risk that the deed purportedly executed by the officer of the corporation was not effective against the "other person". The English s.74(4) by protecting a subsequent purchaser is more obviously and directly helpful; and s.20(3) can be so amended if those instructing me so wish; but Hong Kong's s.23 fortunately provides a blanket of protection.

27. Those instructing me may be aware that in England s.1 of the Law of Property (Miscellaneous Provisions) Act 1989 which is to come into force shortly (I think from a date in July 1990 recently appointed by the Lord Chancellor) makes some general changes in the law about the form and execution of deeds. This section is intended to implement proposals made by our Law Commission in its Report "Deeds and Escrows" (Law Com No 163 : HC1 : June 1989). This does not touch directly on the subject matter of this Opinion; but, if those instructing me should be inclined to make similar changes in the Law of Hong Kong, I think they should be warned that there are considerable misgivings about the application of s.1 in some circumstances which do not appear to have been considered by the Law Commission or Parliament; and a similar change in Hong Kong law,

if desired, might usefully be drafted so as to overcome those misgivings.

28. No other general or particular point occurs. I will be happy to advise further on any point which occurs to those instructing me.

A handwritten signature in cursive script, appearing to read "Leolin Price". The signature is written in dark ink on a white background.

LEOLIN PRICE

10 Old Square
Lincoln's Inn

2 May 1990

on a deed executed by a corporation after the Ordinance came into operation; and that deed purports :

- (1) to bear the seal of the corporation affixed in the presence of and attested by -
- (2) its secretary or other permanent officer of the corporation and
- (3) a member of the corporation's board of directors or other governing body or by 2 members of that board or body.

4. On its face that deed appears to fall very precisely within s.20(1); but I note that s.20(1) as originally enacted is expressed as operating -

"In favour of a person dealing with a corporation aggregate in good faith"

and I will, first of all, consider the position as if s.20(1) had remained as originally enacted. In the typical conveyancing transaction with which I am concerned the question will have arisen in a current transaction to which the corporation is not a party. The conveyancing document executed by the corporation is one which the vendor in the current transaction produces to his purchaser in order to prove his title to the property sold.

2 May 1990

Execution of document
by Corporation

Opinion

Messrs. Edmund Cheung & Co
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