(5)

5 June 1990

Re: Execution of documents by corporation
Re: Conveyancing & Property Ordinance s.23

## Opinion

1. My Instructing Solicitors' faxed letter of 31 May asks a question which is supplementary to those discussed and answered in my Opinion of 2 May 1990.

2. A Company's Articles of Association may, not untypically, contain provisions about execution of documents which do not follow the pattern of s.20(1) of the Conveyancing & Property Ordinance. S.20(1) refers to the Company's seal being affixed in the presence of, and attested by, 2 persons : either the secretary or other permanent officer and one director or 2 directors.

3. In the Articles of Association to which I am now referred, the typical provision is in one of 2 alternative forms :

A. "The Seal shall not be affixed to any instrument ~~except by the express authority~~ of the Board of Directors; and one Director shall sign every document to which the Seal is affixed".

B. "The Seal shall not be affixed to any document except in the presence of one Director or such other person as the Board of Directors shall from time to time appoint".

4. Typical provision A would be satisfied with a single signature. Typical provision B does not in terms require any signature, but the signature of the person referred to is likely to appear on the sealed document.

5. The supplementary question, not previously considered or answered by me, is whether a document on which appears the corporation's seal attested by a single signature is to be deemed duly executed by virtue of s.23 although the sealing does not purport or appear to have been as stated in s.20(1).

6. The answer to this supplementary question depends on whether, in the language of s.23, the instrument "appears" to be

duly executed, and in my opinion the answer to this question is that, taken by itself, the instrument does not "appear" to be duly executed.

7. S.23 appears in the same statute as s.20(1). The legislature has, therefore, set in s.20(1) a general standard or model for execution by a corporation : the document is acceptable if it bears what purports to be the company's seal, supported by what purport to be 2 attesting signatures. If the document follows that general standard or model, difficulty as to whether the signatures purport to be those of the persons specified in s.20(1) are resolved by recourse to s.23. That is explained in my Opinion of 2 May 1990.

8. But, if the document bears what purports to be the seal of the Company and only one attesting signature that document does not "appear" to be duly executed according to the general standard or model; and, without more, s.23 will not help.

9. If, however, the Articles of the company, as they were at the date of the document, are produced and establish - because the relevant Article is in Form A or Form B - that more than one signature was not required, the operation of s.23 would be to make it unnecessary to establish that the signatory was truly a Director of the company (Form A) or either a Director or a person appointed by the Board (Form B). With one attesting

signature shown to be all that was required for that particular company, s.23 would make it unnecessary to go further into the question of due execution.

10. That does, nevertheless, require production of the company's Articles of Association (as they were at the date of the document); so that where a document of title is sealed by a company and carries only one signature it will be sensible to keep with the documents of title a copy of the company's Articles of Association. Where that precaution has not been taken, there may perhaps be some slight difficulty in obtaining a copy of the Articles as they were at the relevant date.

11. A vendor's solicitors in a case where title depends on a document sealed by a company and bearing only one attesting signature might usefully consider imposing a special condition of sale e.g. one requiring the purchaser to assume, without production of that company's articles of association, that only one attesting signature was required for the execution of the document by that company.

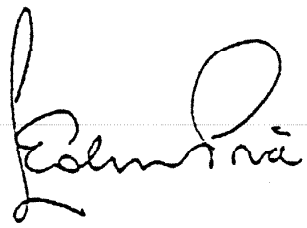
12. I do not think that the rule in Turquands case will help in such a situation.

13. It would be possible to argue against my opinion on this supplementary question : that as the particular document carries

what appears to be the company's seal, it is a document "appearing to be duly executed" for purposes of s.23 although carrying only one attesting signature; but I do not recognise that argument as having a worthwhile chance of success. The document may appear to be "executed" because it bears the seal and one signature; but in view of the general standard or model set out in the same Ordinance in s.20(1), it does not appear to be duly executed; and it appears to be duly executed only if and when it is shown that the particular Company's articles authorised sealing of documents with only a single attesting signature.

14. The general provision in the English Table A (now S.I. 1985 no. 805) Article 101 provides for 2 attesting signatures unless the directors otherwise determine. Although Forms A and B above may be widely used, I do not understand them to be in any sense in standard or general use.

15. I will be happy to advise further if those instructing me have questions arising out of this Opinion.



LEOLIN PRICE

10 Old Square
Lincoln's Inn

5 June 1990

5 June 1990

Re: Execution of documents by corporation
Re: Conveyancing & Property Ordinance s.23

Opinion

S.H. Leung & Co.
Hong Kong

27 June 1990

Re: Execution of documents by corporations

Opinion

1. My Instructing Solicitors' faxed message of 22 June 1990 raises a further question which is supplementary to those discussed and answered in my Opinion of 2 May 1990; and it is concerned with the matter considered in my Opinion (for Messrs. S.H. Leung & Co.) of 5 June 1990.

2. On the basis of the reasoning set out in my Opinion of 5 June 1990, section 23 cannot be invoked and relied upon in the circumstances now postulated; viz, that the relevant conveyancing document bears the seal of the company and only one attesting signature (which might or might not be that of a director or officer and might or might not describe the single signatory's capacity).

3. Paragraph 8 of my Opinion of 5 June 1990 summarises my opinion on this point :

> "8. .... if the document bears what purports to be the seal of the Company and only one attesting signature that document does not "appear" to be duly

executed according to the general standard or model; and, <u>without more</u>, s.23 will not help".

4. The "general standard or model" there referred to is set by s.20(1). A document apparently sealed by the company and bearing 2 signatures conforms with that standard or model; and any doubt or difficulty about the capacity or authority of the signatories to be signatories is resolved by recourse to s.23. But if there is only one signatory that recourse is not sufficient.

5. So, where there is only one signature on the document :

(1) production of the company's Articles, in the form current at the date of the document, may show that only one signature was needed; and in that case s.23 will help by making it unnecessary to produce evidence of authorisation by the board of that signatory;

(2) that will be so if the capacity of the signatory is stated in the document and is the relevant capacity (if any) indicated in the Articles; because the document will "appear" to have been duly signed by the relevant person;

(3) (1) above will also apply if the document does not state the capacity of the sole signatory, because production of the Articles will establish that only one signatory is needed and the document will "appear" to be duly sealed and signed.

6. If the Articles of Association (relevant extract showing the particular article) cannot be produced, I agree that production of an authorising board resolution may be necessary, subject to what is said in para. 7 below.

7. I draw attention to paragraphs 10 and 11 of my Opinion of 5 June 1990. Where there is a document of title executed by a company and carrying only one attesting signature, a copy extract from the Company's Articles of Association should be kept with the title deeds of the property; and in any such case potential difficulty for a vendor could be overcome by a special condition of sale as indicated in paragraph 11 of the Opinion of 5 June.

LEOLIN PRICE

10 Old Square
Lincoln's Inn

27 June 1990

27 June 1990

Re: Execution of documents by corporation

Opinion

Edmund Cheung & Co.
Hong Kong

2 August 1990

Re: Execution of documents by corporations

Opinion

1. My Opinion of 27 June 1990 answered the question raised in my Instructing Solicitors' faxed instructions of 22 June 1990, but did not directly address the additional question asked in the fax of 26 June 1990.

2. The Opinion of 27 June 1990 indicated that generally section 23 of the Conveyancing and Property Ordinance cannot be invoked where in the relevant document the seal of the executing corporation is supported by only one attesting signature. It is convenient to repeat here that, where there is only one attesting signature on the document :

(1) production of the company's Articles in the form current at the date of the document, may show that only one signature was needed;

and in that case s.23 will help by making it unnecessary to produce evidence of authorisation by the board of that signatory;

(2) that will be so if the capacity of the signatory is stated in the document and is the relevant capacity (if any) indicated in the Articles; because the document will "appear" to have been duly signed by the relevant person;

(3) and (1) above will also apply if the document does not state the capacity of the sole signatory, because production of the Articles will establish that only one signature is needed and the document will "appear" to be duly sealed and signed.

3. The Opinion went on to say (paragraph 6) that if the Articles of Association (relevant extract showing the particular Article in the form current at the date of the document) cannot be produced, production of a board resolution authorising the sealing of the document with a single attesting signature may be needed; and paragraph 7 of the Opinion contained some observations which have a bearing on the question asked in the

fax of 26 June. In that paragraph 7 I made two points :

(1) Where there is a document of title executed by a company and carrying only one attesting signature, a relevant copy extract from the company's Articles of Association should be kept with the title deeds of the property.

(2) In any such case potential difficulty for a vendor could be overcome by a special condition of sale in any contract for the sale of the property.

4. In any case where the relevant copy extract from the company's Articles of Association has been kept with the title deeds, the special condition can simply be to require the purchaser to accept, without any further evidence than production of that the copy extract, that the document, as sealed with only one attesting signature, was duly executed by the company.

5. In any case where the copy extract from the company's Articles (in the form current at the date of the document) has not been kept with the title deeds, it may nevertheless be possible to obtain - e.g. from the Companies Registry or from the registered office of the Company - a new copy (or extract)

from the Company's Articles, and, if so, the special condition of sale - as in paragraph 4 above - can require the purchaser to accept, without any further evidence than production of a copy of the relevant Article, that only one attesting signature was required and the document, as sealed with only one attesting signature, was duly executed by the company.

6. But suppose that a copy extract from the Articles has <u>not</u> been kept with the title deeds and it is now impossible or impractical to find or obtain a copy of the Articles (or of the Articles as in force at the relevant date). In that case :

(1) It may be possible to find and produce a board minute authorising the execution of the document and doing so in terms which make it clear that what was authorised was the sealing of the document with only one attesting signature. If so, a special condition could require the purchaser to accept, without any further evidence than production of a certified copy of that minute, that the document as sealed with only one attesting signature was duly executed by the company.

(2) If such a board minute cannot be found, the

special condition would simply require the purchaser to assume that only one attesting signature was required for the sealing of the document and that the document, as sealed with only one attesting signature, was duly executed by the company.

7. Would such special conditions be depreciatory and adversely affect the market price of the property? I would not expect there to be any such adverse effect. It is not uncommon to have an article which permits sealing with only one attesting signature; and inability to produce the Article ought not to have any practical effect at all.

8. My Instructing Solicitors' fax of 26 June 1990 asked what additional measures might be taken to rectify the vendor's title, in such a case, where neither a board resolution of the company nor a copy of its Articles of Association is available; but in those circumstances I do not think there is any measure that can usefully be taken except to protect the sale by special condition as indicated above. An application to the court could not itself, by any order or declaration of the court, fill the gap left by the inability to produce board resolution or Articles; and the special condition of sale appears to me to be the only useful "remedy" - defeating any attempt by the purchaser, on this ground, to refuse to complete the purchase;

and, at the same time, providing practical protection for the marketability and market price of the property.

9. An alternative course would be to legislate that a document of title purporting to be sealed by a company and bearing what purport to be one or more attesting signatures (with or without express designation of the office or status of the signatory or signatories) shall, without any further evidence and unless the contrary is proved, be deemed to have been duly executed by the company. But, as the point can be neatly protected by special condition of sale, that sort of legislative intervention will probably be thought appropriate only if other significant legislative changes are being made in the same amending Ordinance.

10. My Instructing Solicitors' fax of 26 July 1990 refers to a document executed by a company whose Articles of Association provide that -

> "All documents requiring the seal of the company shall be signed by the Permanent Chairman or by such person or persons as the Permanent Chairman shall from time to time appoint".

The question asked is whether s.23 can be relied upon so that it is not necessary to produce evidence of appointment by the Permanent Chairman in order to prove title to the land, the

subject matter of the document. In such a case s.23 can be relied upon. Paragraph 14 of my Opinion of 2 May 1990 applies.

11. The same fax of 26 July also refers to a case where the company's Articles provide that -

> "All documents requiring the seal of the company shall be signed by the Permanent Chairman or by 3 directors".

If the document is signed by 2 directors neither of whom is the Permanent Chairman, is that document satisfactory as a link in the title? As the fax puts the point : do the deeming provisions of s.20(1) prevail over the provisions of the Articles of Association? There are two alternative circumstances which require different answers to these questions:

(A) If the Articles of Association are not available or are not produced, the combination of s.20(1) and s.23 clearly "validates" this document as a sufficient and satisfactory document of title.

(B) If (as, I think, the questions assume) the Articles of Association are available, I am sorry to say that s.23 will not establish

> the sufficiency of execution of the document. S.23 applies a presumption "until the contrary is proved"; and reference to the available Articles of Association proves the contrary : i.e. establishes that signature by 2 people is not in accordance with Articles unless one of them is shown to have been the Permanent Chairman.

Of course if that is shown the second signature can be treated as merely surplus and the document will be acceptable. A single signature nor designating the signatory as Permanent Chairman would also attract the operation of s.23 because reference to the Article would show that a single signature could be sufficient, and as the document plainly relies on a single signature it "appears" to have been duly executed without proof that the sole signatory was in fact the Permanent Chairman.

But if the document bears 2 signatures, reference to the Articles indicates that no one was relying on a single signature; that, according to the Articles, 3 signatures were therefore necessary; and that, with only 2 signatures, the document does not "appear" to have been duly executed. In such a case s.23 does not help.

But in this last-mentioned case can s.20(1) over-ride the

provision in the Articles? I have hesitated over this; but the question whether s.20(1) saves the document does not arise unless the document states the capacity of the attesting signatories. That is because s.20(1) applies only if the deed purports to bear the seal affixed in the presence of and attested by 2 persons having the characters or offices specified in s.20(1). If the signatures are not accompanied by words identifying the character or office of each signatory there is no such "purporting" as is required for the operation of s.20(1) - a circumstance in which, in most cases (as advised by me), reliance is on the alternative, over-riding saving provision in s.23; but, as indicated above, s.23 will not help in this particular case.

If the character or office of each of the 2 signatories is stated and each signatory has the requisite character or office according to s.20(1), the statutory "deeming" operation of s.20(1) operates in favour of the document and over-rides what can be demonstrated by reference to the (available) Articles. S.20(1), unlike s.23, is not restricted in its operation by words "until the contrary is proved" or words to the like effect. It is a straight statutory deeming provision which operates if the prescribed conditions for deeming are satisfied. This makes sense. The legislators were anxious to create a simple "deeming" situation in which detailed reference to the potential varieties of differing Articles of Association would

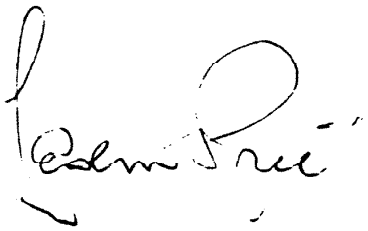
be avoided. So there is nothing odd about legislative "deeming" which contradicts or over-rides what would otherwise be the legal effect of a document.

There is, however, the question of "good faith". So s.20(1) operates

> "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 ..."

My Opinion of 2 May 1990 referred to this in paragraphs 7 and 22. I bear in mind the continuing inelegance of the reference to good faith, and its inappropriatness (because the relevant good faith ought to be that of the current purchaser and not that of some past purchaser whose state of mind, perhaps year ago, cannot easily be ascertained). I also bear in mind this: that "good faith" in this context refers to honesty. There is no failure of good faith if the relevant person was honest. Put in different words, good faith is assumed in the absence of dishonesty. Good faith is perfectly consistent with mistaken or negligent conduct. So, even if reference is made to the Articles and reliance on 2 signatures is incapable of explanation, that will not show more than a possible mistake or negligence e.g. a failure to check the requirements of the Articles. It will not show any absence of good faith. Moreover

in most cases the document, as a document of title, will show consideration moving from the then purchaser; and it is difficult to see how want of good faith can be shown. I am therefore wholly convinced, and I advise, that in such circumstances s.20(1) provides the requisite saving of the document as a document of title although, unusually, s.23 would not help.



LEOLIN PRICE

10 Old Square
Lincoln's Inn

2 August 1990

2 August 1990

Re: Execution of documents
by corporations

Opinion

Edmund Cheung & Co.
Hong Kong