Conveyancing and Companies: The Single Director and the Company Seal (Part 2)

Although it is a basic principle of both corporate and conveyancing practice that the affixation of a company's seal to an instrument should generally be carried out in the presence of, and attested by, two directors of the company, in recent years there has been a series of reported cases in Hong Kong concerning the validity of an assignment attested by a single company director. In a three-part article, Philip Smart tackles this unsettled area of the law. This is Part 2

Part 1 set out the fundamental elements of the rule in *Turquand's Case* and introduced the operation of ss 20 and 23 of the Conveyancing and Property Ordinance (Cap 219) (CPO). Part 2 deals with the major cases on the s 23 presumption and identifies a clear principle that governs the way in which a single corporate officer should sign in order to bring that presumption into operation.

Tread East Ltd v Hillier Development Ltd

Tread East Ltd v Hillier Development Ltd [1993] 1 HKC 285 as a leading authority in this area requires particular attention. In *Hillier* the parties had in April 1990 entered into an agreement for the purchase of certain premises. The purchaser raised a requisition in relation to an assignment in 1984 (the 1984 assignment) by the then owner, Oliver Paris (HK) Ltd (the company), to Chan Bing Fai (Chan). Chan was at the relevant time a director of the company. The company's seal was affixed and signed by Chan, with the description 'one of its directors as directed and authorised by the board of directors to sign'. The purchase price paid by Chan ($125,000) appeared to be surprisingly low, particularly in light of the fact that Chan resold the premises shortly afterwards for $450,000.

The purchaser's solicitors (in 1990) conducted a company search and discovered that the company's articles required all documents to which its seal was affixed to be 'signed by two of its directors or in such manner as the directors shall from time to time by resolution determine'. There was no evidence that the board had resolved that a single director or other officer or individual could sign on his/her own.

The requisitions raised by the purchaser were two-fold: firstly, as to the validity of the signature of a single director and second, in respect of what appeared to be a sale at an undervalue to one of the company's own directors. Godfrey J (see HCA 907/91) ruled in favour of the vendor on the first point but upheld the validity of the purchaser's requisition on the second.

In relation to the first issue, Godfrey J held that under its articles the company could have authorised one of its directors to sign the 1984 assignment and, on the face of the 1984 assignment, it appeared that Chan had been so authorised by the board:

> [I]n these circumstances, the presumption of due execution referred to in s 23 of the Conveyancing and Property Ordinance (Cap 219) applies, and the purchaser was not entitled to call for sight of a resolution authorising the assignment to be signed in this way. A purchaser is not entitled to enquire into matters of internal management of a limited company; it is enough for him to satisfy himself that

the power to do what has been done did exist (judgment p 9).

But, in relation to the second (undervalue) issue, Godfrey J decided in favour of the purchaser:

> A vendor who offers to the purchaser title depending on an assignment by a limited company to one of its directors, signed by no other director, and being at what may be an undervalue, must ... be prepared if asked to do so to satisfy the purchaser that the assignment is not liable to be set aside at the suit of the company (judgment p 10).

The vendor appealed. The Court of Appeal agreed with Godfrey J that s 23 operated to presume due execution by the single director, Chan. But the court went further (reversing Godfrey J) to hold that it followed from the presumption of due execution that the board had also resolved to sell the premises to Chan at the stated price. Penlington JA, after citing from *Morris v Kanssen* [1946] AC 459 (a leading authority on the rule in *Turquand's Case*), stated:

> Here the sale was to a director who was himself the person authorised to execute on behalf of the company but I do not consider that fact is enough to remove the presumption. It must be presumed that the board of directors of [the company] did have the power to sell the property to Chan and did so without fraud on their part (at p 293).

The remarkable thing about *Hillier*, it is respectfully submitted, is that it does not seem to have been pointed out that the rule in *Turquand's Case* – which appears to have been at the forefront of the minds' of the judges – could not on the facts have applied to the 1984 assignment. The assignment was to Chan, one of the company's own directors and the only person signing on behalf of the company. Chan was, therefore, the ultimate 'insider'. Yet the rule in *Turquand's Case* is to protect 'outsiders' – those dealing, as Lord Hatherley put it, 'externally' with the company.

No authority should be necessary for such an obvious point, but reference may be made to the opinion of Viscount Haldane in the Privy Council in *Pacific Coast Coal Mines Ltd v Arbuthnot* [1917] AC 607 at 616 (emphasis added): '[T]he mere failure to comply with a formality, such as a proper appointment or the presence of the quorum of directors, will not affect a person *dealing with the company from outside* and without knowledge of the irregularity'.

This is so, of course, because, although an outsider was presumed at common law to know the contents of the company's memorandum and articles of association, he could not be expected to know 'what may or may not have taken place within doors that are closed to him' (at 616). Whilst in certain (highly unusual) fact situations it may be a fine question whether a person dealing with a company is an insider or an outsider (see, eg, *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549), in *Hillier* there can be no doubt whatsoever. Unless the court was intending not to follow the established case law, which would involve departing from both House of Lords and Privy Council authority, the only possible conclusion is that the outsider point was simply overlooked.

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This makes it very difficult to know the precise status of *Hillier* as an authority. Would Penlington JA have decided in favour of the vendor on the undervalue issue (reversing Godfrey J) if it had been pointed out that the rule in *Turquand's Case* could not apply and could not cure any potential defect? Would Godfrey J have modified his view that the 'purchaser is not entitled to enquire into matters of internal management of a limited company' if it had been pointed out that Chan was an insider and could not, therefore, invoke the indoor management rule? This commentator's guess is that *Hillier* would have been decided the same way even if no one had raised the indoor management issue and the case had been decided solely on the basis of the s 23 presumption.

Nevertheless, whatever the difficulties with *Hillier* in terms of ➤

the insider/outsider issue, if one ignores the fact that Chan was an insider the case demonstrates that there will be fact situations in which due execution by a single director can be presumed (in favour of a subsequent vendor).

The Limits of *Hillier*

In subsequent cases the judges have highlighted the fact that in *Hillier* (i) the company's articles allowed the board by resolution to authorise, *inter alios*, a single director to sign; and (ii) the assignment on its face expressly stated that Chan had been so authorised. Hence it has been held that where one officer has signed a vendor will be required to produce the company's articles (see *Lee Chat v China Roll Industries Ltd* [1998] 1 HKC 269).

In addition, where, as in *Hillier* itself, the articles leave it open to the board to decide who may attest (this might include a single director or indeed any other person authorised by the board) the assignment must recite that the person signing has been so authorised by the board (see *Wong Yuet Wah, Mandy v Lam Tsam Yee* [1999] 3 HKC 268; and *Grand Trade Development Ltd v Bonance International Ltd* [2001] 3 HKC 137). It will not be enough to show merely that, under the articles, the board might possibly have resolved that the person in question could sign.

Hillier will also be of no help to a vendor where the articles require the signature of two directors or the chairman (or the managing director, permanent director, etc) and the one person signing was merely a director, rather than the chairman (see *Li Ying Ching v Air-Sprung (HK) Ltd* [1996] 4 HKC 418 (chairman) and *Ho So Yung v Lei Chon Un* [1998] 2 HKC 697 (managing director)). In other words, if the person signing is simply described or identified as a director (or not described at all) the court will not assume that he/she is in fact the chairman; but if he/she is identified on the instrument as the chairman then there will be no need to prove that he/she was actually appointed to that office – the assignment will appear to be duly executed (see *Li Ying Ching*, above, at p 420).

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From this it would seem to follow that if the articles (in addition to the consent of the board to the use of the seal) expressly permitted the signature of only one director (rather than specifying the chairman) and the person signing was identified as a director in the assignment then, on the face of it, there would appear to be due execution.

Lim Sui Chun v Billion Light Investment

However, a different approach was taken in *Lim Sui Chun v Billion Light Investment Ltd* [2000] 2 HKC 621. In *Lim Sui Chun* a large number of requisitions had been made by the purchaser but the relevant ones for present purposes are Requisition No 6 and Requisition No 9. Requisition No 9 (which, it is submitted, is not controversial) in fact involved three separate companies, but the facts involving Carcase Co Ltd (Carcase) serve as an adequate illustration. The articles of Carcase required the affixation of the company's seal to be attested by the signature of either (i) the chairman or (ii) any other person authorised by the board. The person actually executing the deed was described merely as a director. There was no evidence that he was in fact the chairman nor did the deed recite that he had been authorised by the board (as was the case in *Hillier*). Deputy Judge Chu (applying *Li Ying Ching*, above) held that there had not been due execution.

Requisition No 6 was very different. This requisition concerned an assignment in 1987 by Cheson Union (1978) Ltd (Cheson) signed by one person who was described as a director. Cheson's articles required (i) the company's seal to be affixed with the authority of a resolution of the board (as is standard) and (ii) affixation 'in the presence of a director'. In other words, one director's presence (and presumably

signature) was expressly all that was required in respect of the mechanics of attestation. The Deputy Judge held that the description of the person signing as merely a director, without any additional 'indication of his being authorised by the board', meant that there had not been due execution (at p 626). In reaching this conclusion the Deputy Judge purported to apply *Wong Yuet Wah, Mandy v Lam Tsam Yee* (above).

Distinguishing Wong Yuet Wah, Mandy

It is this commentator's opinion that the Deputy Judge's conclusion in respect of Requisition No 6 is flawed and that *Wong Yuet Wah, Mandy* in no way supports that conclusion. In *Wong Yuet Wah, Mandy* the articles required the signature of two directors (or one director and the secretary) or signature 'in such manners (sic) as the Directors shall from time to time by resolution determine'; in other words, basically the same requirement as in *Hillier*. *Wong Yuet Wah, Mandy* was, accordingly, not a case where the articles specifically stated that one single director could sign. The instrument in question – an assignment in 1976 by Polyson Realty and Enterprises Ltd – had been signed by one Mr Lau, who was described as a director. There was no recitation that Lau had been authorised by the board of directors to sign, as there had been in *Hillier*. Deputy Judge Andrew Chung held that it was fatal that there was no evidence that Lau had been given authority to sign by the board of directors (as required by the articles).

Wong Yuet Wah, Mandy is about the mechanics of attestation – who could sign – not about whether or not the board authorised the use of the company seal in relation to the assignment in 1976. It is respectfully submitted that *Wong Yuet Wah, Mandy* is, therefore, of no relevance where the articles do specifically allow a single director to sign, as was the case in *Lim Sui Chun*. Anyone reading the type of provision in a company's articles as was found in *Lim Sui Chun* would understand that one single director could sign. Anyone reading the sort of articles found in *Hillier* or *Wong Yuet Wah, Mandy* would understand that a single director (or any other individual) could properly sign if the board of directors had previously resolved that such person was authorised to sign.

Re McCabe

Reference may be usefully made here to the decision of the Supreme Court in Ireland (Ireland's highest court) in *Re McCabe*, 7 May 1993, unreported (available on LEXIS). In *Re McCabe* the articles stated that the company's seal could only be affixed with the authority of the board of directors and that every instrument to which the company's seal was affixed had to be attested by a director or the secretary. In the light of this provision it was argued that a resolution of the board authorising affixation of the seal had to be produced. The Supreme Court rejected such an argument stating:

> The *Royal British Bank v Turquand* (1856) 6 E & B 327 case, contains a rule that is there to protect third parties ➤

dealing with a company: while the members of the public are presumed to have read the public documents, the memorandum and articles of association of a company, and to have ascertained that a transaction is not inconsistent with them, they are not required to do more. They need not inquire into the regularity of the internal proceedings – the 'indoor management' of the company as it was referred to all those years ago by Lord Hatherley in *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869. That is the statement of the rule. It still exists and ... [is] probably no more than an application of the well known principle of *omnia praesumuntur rite esse acta*. In matters like this it should be accepted that there is a presumption of validity if an instrument on the face of it is regular.

Summary – Direct v Indirect Attestation Routes

It is submitted that, having regard to the present state of the majority of the Hong Kong authorities (and leaving to one side for the moment the discussion of the 'deeming' provision cases, Part 3 of this article), a broad but important distinction may be drawn. The distinction is between articles which, in relation to the mechanics of attestation, provide for what may be called the 'direct' route or 'indirect' route.

A direct provision is one that specifically, or directly, identifies the persons or person who may attest the affixation of the seal. Examples would include the standard provision that two directors (or one director and the secretary) may sign. Also included would be a provision that the chairman or managing director may sign. In such cases a presumption of regularity will arise where the instrument contains two signatures of persons described as directors, or one signature of a person described as the chairman or managing director. Similarly, it must be no different if the articles specifically require not two directors but only one. In such a case if one signature appears, with the description of 'director', that will be sufficient to trigger the presumption under s 23.

By comparison, an indirect provision is one that does not specifically identify those individuals who may sign but leaves it open to the board to decide who may be allowed to sign. Examples would include the provisions found in *Hillier* or *Wong Yuet Wah, Mandy* giving complete discretion to the board and allowing the board to authorise anybody to sign (it would not even have to be a director). 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 in fact has signed. (Absent such recitation in the instrument, a resolution of the board or other appropriate evidence should be produced by a vendor.)

Of course a particular company's articles might well contain both direct and indirect provisions. For example:

> The seal shall only be used with the authority of the board and every instrument to which the seal is affixed shall be signed by two directors, or one director and the company secretary, or by the chairman or by the managing director [these are all direct], or in such a manner as the board may from time to time by resolution determine [this is indirect].

In such a case the facts will, of course, clearly indicate whether a vendor is relying on the direct or the indirect provision in the articles.

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Philip Smart
Associate Professor
Faculty of Law
University of Hong Kong

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