

THE CONTINUING SAGA OF DEFECTIVE EXECUTION OF CONVEYANCING DOCUMENTS: STATUTORY INTERVENTION



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Execution of conveyancing documentation by companies has given rise to considerable anxiety to vendors, purchasers and their solicitors. Only gradually have the courts construed and applied the straightforward Section 20(1) and the enigmatic Section 23 of the Conveyancing and Property Ordinance, leaving in their wake a host of defective titles. Now the Hong Kong Legislature has come to our aid by enacting a new Section 23A. The purpose of this article is to examine the meaning of this section and to explore the extent of its curative effect.

Introduction

Execution of deeds by corporations has given rise to considerable litigation over the past few years and it has become clear, through a number of complex judicial decisions, that many titles have been rendered defective as a result of improper execution of conveyancing documents both in the chain of title period and beyond. This, of course, affects the saleability of the property and the price that can be obtained by vendors. It also makes obtaining mortgage loans more difficult.

Legislation has now been enacted to remedy the situation.¹ The purpose of this paper is to consider the extent to which title problems have been resolved by the legislation.

The Scope and Meaning of the New Legislation

Section 23A provides:

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¹ The new Section 23A of the *Conveyancing and Property Ordinance* was enacted by Section 10 of the *Law Amendment and Reform (Miscellaneous Provisions) Ordinance 2003*. The legislation came into effect in May 2003.

“23A. *Proof of title and presumptions of due execution of deed by corporation*

- (1) A deed purporting to be –
 - (a) executed prior to the commencement of this section by or on behalf of a corporation aggregate; and
 - (b) attested by a signatory or more than one signatory where the signatory or each of the signatory, if more than one, is a person who could have been authorised under the articles of association or other instruments of the corporation,shall, until the contrary is proved, be presumed for the purposes of proof of title to any land to have been duly executed by the purported signatory or signatories, as the case may be, with the authority conferred by the articles of association or other instruments of the corporation, whether or not the source of the authority or the means by which such authority was purportedly conferred is apparent from the deed.

- (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 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.

- (3) This section affects only the rights and obligations of the parties to a contract for the sale of land entered into on or after the commencement of this section.”

In this paper the presumptions in Section 23A of the Ordinance are referred to as the “new” presumptions. In relation to the meaning of this section, several points arise.

(a) Scope of Section 23A

The first point to note is that the new presumption in Section 23A(1) of the Ordinance applies only to *prior* defects in title and does not extend to documents to be executed after the commencement date of the amending legislation. This means that, in respect of the *future* execution of title documents, solicitors must take care to ensure that the mode of execution provided for in the articles of association is meticulously observed and execution is effected in compliance with the present unamended law. The

effect of the amending legislation is, therefore, to create three different regimes:

- (i) The first regime applies to defects in the execution of title documents that are more than 15 years old. These defects are conclusively presumed by Section 23A(2) to be remedied as between the parties to the contract of sale and as between the purchaser and the whole world.
- (ii) The second regime applies to defects in the execution of title documents which are less than 15 years old; in respect of these titles there is, in the appropriate circumstances discussed below, a rebuttable presumption under Section 23A(1) that the document has been validly executed.
- (iii) The third regime relates to the future execution of title documents. Section 23A(1) of the amending legislation has no effect here and the legal requirements governing the future execution of conveyancing documents remain unchanged. A document which is executed defectively, for example, in 2004 will, however, receive the benefit of the conclusive presumption of validity in Section 23A(2) 15 years after the date of its execution, ie in 2019, since Section 23A(2), unlike Section 23A(1), is not restricted in its application to deeds executed prior to the commencement of Section 23A.

(b) *“Person who could have been authorised”*

The first issue of construction is whether Section 23A(1) of the Ordinance requires the inspection of the company's articles of association by the purchaser at the time of the transaction before the presumption will become applicable. The sub-section is clearly intended to have a curative effect. It does not specifically require the inspection of the company's articles. However, it provides that the presumption will apply to attestation by a person “who could have been authorised under the articles of association or other instruments of the corporation”. The words “could have been authorised under the articles” are amenable to two different interpretations. A broad interpretation suggests that they could refer to anyone at all since, in theory, a company's articles could authorise anyone (including, say, the office cleaner) to attest the affixing of the corporate seal. Given this broad construction, which assumes no obligation to check the relevant articles, provided there is an attesting signature of any person in the world, there will be a rebuttable presumption that the deed has been validly executed. Further, if the words “or other instruments of the corporation” include a board resolution, clearly anyone could be authorised by a board resolution. The broader interpretation would, in essence, mean that all conveyancing documents were presumed (albeit rebuttably) to have been validly executed.

The narrower interpretation gives rise to a substantially different outcome. If the words “could have been authorised under the articles” mean “could have been authorised *after checking the articles*” a purchaser must first call for or secure a copy of the articles in force at the date of the execution in question before he can be sure whether or not the remedial effect of Section 23A(1) will apply. If the articles, for example, provide for attestation by any person authorised by the board, then the signature of any person in the world will give rise to the rebuttable presumption, because the board could authorise any person to attest. If, however, the articles provide for attestation by, say, two directors and there is only one signatory, the rebuttable presumption in Section 23A(1) will not apply since only one signatory could not “have been authorised under the articles” to attest.

Whether the broader or narrower interpretation is to be applied is of fundamental significance. Clearly the broader interpretation would afford the widest remedial effect on titles. If, however, such broader interpretation were intended, so that the execution of a document attested by any person at all would be presumed valid, it is suggested that there would be no need for the inclusion of the words “who could have been authorised by the articles”, since it is apparent to all that everyone could be so authorised. The words would be redundant. The conclusion, therefore, is that the narrower interpretation is the correct one. This means that, in every case, the vendor must supply a copy of the articles to the purchaser and, where appropriate, the mortgagee, if he wishes to rely upon the presumption in Section 23A(1). Provided those articles, once produced, show that the signatory could have been authorised under the articles, the presumption in Section 23A(1) will apply. For example, if the articles provide that the seal may be affixed in the presence of any person attesting in accordance with due authorisation by the board of directors, the presumption of validity will apply without the need for any proof of such authorisation and without the need for the words “authorised by the board of directors” to appear under the attesting signature. The author is aware that this interpretation severely limits the curative effect of the new presumptions since it will provide no remedy, at least in respect of the chain of title period,² where the vendor is unable to produce the articles in force at the date of execution of the document in question.³ Despite this limitation, the curative effect of Section 23A(1) is to be welcomed.

² If the defect appears in a document which is more than 15 years old, it will be cured by Section 23A(2) (see below).

³ In a case where the articles cannot be found, it seems probable that the courts would accept secondary evidence of the contents of the missing articles. See, for example, *Leung Kwai Lin Cindy v Wu Wing Kuen* [2001] 1 HKLRD 212, [2001] 1 HKC 567, CFA; *Goldenfix Properties Ltd v Cheer Hope Investments Ltd* (1993) MP No 2940 of 1992.

The second significant issue of construction is the meaning of the word “authorised” under the articles or other instruments of the corporation. Clearly, if the articles permit attestation by any person “authorised by the board of directors”, any person could fall within such authority. If, however, the articles permit attestation only by a designated officer, such as a director or the managing director, can it be said that a person attesting the deed without his office being expressly designated on the deed or without proof that the signatory actually holds the office is a person who could be *authorised* by the articles or other instruments of the corporation? “Authorised” must mean “receive his authority” to be a director or managing director and, therefore, attest deeds in that capacity. Articles do not generally “authorise” persons to be directors or managing directors as such – they merely prescribe the manner in which such appointments are to be made. The authority, in the sense of the appointment as director etc, comes from a resolution passed at a general or special meeting of the company. This resolution would appear to fall within the words “or other instruments of the corporation” and, if this interpretation is correct, any person attesting is a person who could, in theory, be authorised by resolution of a general meeting. The section would, accordingly, have remedial effect in any case where attestation is required by a designated officer of the company even though the office of the signatory is not stated on the deed. The presumption is, of course, rebuttable upon proof that the signatory was not, in fact, a director or managing director.

“Source of authority or the means by which such authority was purportedly conferred”

Section 23A(1) further says that, provided the necessary pre-conditions are fulfilled, the deed shall be presumed to have been duly executed with the authority conferred by the articles of association or other instruments of the corporation whether or not the source of the authority or the means by which such authority was purportedly conferred is apparent from the deed. The source of the authority would usually be the board of directors, since the board usually has the authority to authorise the manner of execution of a deed. The means by which such authority was conferred will, it is suggested, usually be a board resolution. The apparent effect of Section 23A(1) is, therefore, that the rebuttable presumption will apply in an appropriate case without the need for the vendor to produce either the minutes of any board meeting or the text of any board resolution.

Defective Manner of Execution of Deeds by Corporations

(a) Compliance With the Company's Articles of Association

Not only must the deed be executed by the affixing of the company's common seal, but that seal must be affixed in the authorised manner so as to comply with the company's articles of association. The company's due sealing requirements are, of course, a matter of choice for each company and express provision should be made for this in the company's articles. In the absence of any express exclusion or modification, however, Section 11(2) of the *Companies Ordinance* provides that the regulations laid down in Table A of the *Companies Ordinance* will apply. Article 114 of Table A provides that every instrument to which the seal must be affixed must be signed by a director and must be countersigned by the secretary or by a second director or by some other person appointed by the directors for the purpose (in other words two designated signatories are required).

It is suggested that the following principles apply:

- (i) Where the company's articles provide for an express mode of execution and expressly exclude Table A, that express mode of execution must be complied with.
- (ii) Even in the absence of such express exclusion of Table A, Table A will be excluded by necessary inference where the company's articles expressly provide the required mode of execution of deeds.
- (iii) Where the articles make no express provision for the mode of due execution and do not expressly exclude Table A, Table A will apply.
- (iv) Where the articles do not provide for a required mode of execution, but contain only a deeming provision such as "every document requiring the seal of the company shall be deemed to be duly executed if sealed with the common seal of the company and signed by the managing director or any two directors or by such other person as the directors shall from time to time specify", the Court of Appeal in *Grand Trade Development Ltd v Bonance International Ltd* [2001] 2 HKLRD 759 has concluded that the deeming provision will not have the effect of excluding the provisions of Table A by inference. This means that proper execution can either be effected by complying with the deeming provision or with the requirements of Table A.
- (v) Finally, in what one would expect to be an almost inconceivable case, where the articles do not contain any express provision for execution but Table A has been expressly excluded, the common law as to execution of deeds by corporations will apply. At common law a deed is

duly executed by a company when the common seal is affixed and there is no requirement of signature or attestation.⁴

(b) *Sections 20(1) and 23 of the Conveyancing and Property Ordinance: the "old" presumptions*

Prior to the amending legislation, certain rules governing the execution of deeds by corporations had been enacted in the *Conveyancing and Property Ordinance*, which had to be read in conjunction with the relevant common law rules. The object of these rules was to maintain a difficult balance; they aimed at facilitating proof of title whilst at the same time affording adequate protection to shareholders by preventing directors from abusing the restrictions on their powers laid down in the articles. As will be seen, this balance has now somewhat been shifted in favour of facilitating proof of title. It must be borne in mind, however, that these old presumptions continue in force.

First, Section 20(1) of the Ordinance provides:

"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 two members of that board or body."

It is important to note that Section 20(1) only applies to deeds executed after 1 November 1984.

Secondly, the rather more enigmatic Section 23 of the Ordinance provides:

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

The Court of Final Appeal considered the meaning and effect of Section 23 of the Ordinance and its relationship with the common law presumption "*omnia praesumuntur rite esse acta*" in *Leung Kwai Lin Cindy v Wu Wing Kuen* [2001] 1 HKLRD 212, [2001] 1 HKC 567, CFA. Although

⁴ See, for example, *Agar v Athenaeum Life Assurance Society* (1858) 3 CB (NS) 725, per Willis J at 756, cited with approval in *Peking Fur Store Ltd v Bank of Communications* [1993] 1 HKC 625; *Grand Trade Development Ltd v Bonance International Ltd* [2000] 3 HKLRD 217, [2000] 4 HKC 57, CA.

the decision was made in the context of proof of due execution of *missing* title documents by secondary evidence and not in the context of proof of due execution of documents which are before the court, the statements of the judges would seem to be equally applicable to the latter situation. The Court agreed with the view as to the effect of Section 23 expressed by Sir Anthony Mason, Litton PJ expressing a different view. Sir Anthony Mason pointed out that the word “appearing” in Section 23 could either mean “appearing to the court on production to the court” or “appearing at any time on its face whilst it was or is in existence”. Giving the section a beneficial and liberal construction, the learned judge concluded that the second meaning was correct. Such a construction meant that a rebuttable presumption arose when the evidence established that the instrument *appeared at any time on its face* to have been duly executed. It was this fact alone that attracted the statutory presumption, although other circumstances might serve to reinforce the presumption or to rebut it. By contrast the common law maxim “*omnia praesumuntur rite esse acta*” had to be applied in the light of *all the circumstances of the case* (see *Knight v Harris* (1890) 15 PD 170, 179, 183–4). Sir Anthony Mason concluded that, although the statutory presumption and common law maxim operated in slightly different ways, it was unlikely that they would generate different results.

(c) *Application of the “old” and “new” statutory presumptions*

This is the main part of this paper. The various scenarios that may arise in the context of attestation of conveyancing documents are examined and firstly the “old” presumptions in Sections 20(1) and 23 of the Ordinance and then the “new” presumptions in Section 23A of the Ordinance are applied to demonstrate the relationship between the old and new presumptions.

(i) Scenario 1: execution by two attesting signatories

A. Application of Section 20(1)

Where a document executed after 1 November 1984 purports to bear the seal of the company affixed in the presence of and attested by its secretary or other permanent officer of the company and a member of the board of directors or two directors, the position falls within the deeming provision in Section 20(1) of the Ordinance and the deed is deemed to have been validly executed. Since, however, Section 20(1) is only a deeming provision and does not give rise to an irrebuttable presumption, it may be inferred that, where a person dealing with a company *actually knows* that execution by a different mode (eg three signatories) is required by the articles, the deeming provision will be

inapplicable since the person dealing with the corporation will not be “dealing in good faith”.⁵ It is suggested, therefore, that, in any case where the solicitor acting for the purchaser has actual knowledge of a defect in the mode of execution, notwithstanding the deeming provision in Section 20(1), he should raise a requisition insisting upon proper execution in compliance with the articles. Conclusive judicial authority on this point is, however, awaited.

Similarly, the new Section 23A(1) only raises a rebuttable presumption which would be rebutted if the purchaser has actual knowledge of non-compliance with the company’s articles. Under Section 23A(2), however, in respect of documents that are more than 15 years old, the deed would be conclusively deemed to be valid. To this extent the new provision has a curative effect.

B. Failure to comply with Section 20(1): application of Section 23

Where the document fails to comply with the requirements of Section 20(1) either because it has been executed before 1 November 1984 or because the signatories are not stated to be directors etc, but there are two signatories and it is stated on the face of the deed that the two signatories are “duly authorised” to execute the document, the document will fall within the presumption in Section 23 of the Ordinance and will be presumed to have been duly executed, since it gives the appearance of being duly executed. This must follow from the decision in *Tread East Ltd v Hillier Development Ltd* (1992) HCA No A907 of 1991 (see below).

If, however, it is not stated on the face of the deed that the two signatories are “duly authorised”, Section 23 will not apply.⁶ This is where Section 23A might be applicable.

C. Application of Section 23A

The article now considers the case where the deed has been attested by two signatories, but their status within the company has not been stated on the deed nor has it been stated on the deed that they have been authorised to attest the execution of deed. As submitted earlier, in order for the new presumptions to apply, the company’s articles must first be produced. Two different

⁵ Philip Smart takes a different view in “Conveyancing and Companies: The Single Director and the Company Seal (Part 1)”, *Hong Kong Lawyer*, Sept 2001. He concludes that Section 20(1) provides not merely a rebuttable presumption; its effect is that a purchaser will receive a good title unless he has acted in bad faith and mere knowledge of failure to comply with the company’s articles will not constitute bad faith.

⁶ See, for example, *Whole Year Development Ltd v Lung Chiu Yee Julia* (1993) MP No 966 of 1993, where the company’s articles required execution by one director with the countersignature of another director or the company secretary, but an assignment had been attested by two persons neither of whom held the post of director or company secretary. The court held that the title was accordingly defective.

possibilities then arise depending upon the content of the articles, but Section 23A provides a rebuttable presumption of validity in both cases.

If the articles provide for attestation by two persons authorised by the board, then the deed will be presumed valid under the new Section 23A(1) without the need for the vendor to produce such authorisation from the board. This is because the person attesting “could have been authorised under the articles” in accordance with Section 23A(1) of the Ordinance. The presumption will, of course, be rebuttable.

The second possibility is that the articles, when produced, require attestation only by designated office holders such as two directors or one director and the company secretary. As shown above, it is suggested that Section 23A(1) of the Ordinance will apply and remedy the defective execution subject to contrary evidence.

Where, of course, the deed is more than 15 years old, Section 23A(2) of the Ordinance will apply and the deed will be conclusively presumed to have been validly executed (see below).

(ii) Scenario 2: execution with only one attesting signatory where articles provide for attestation by one person authorised by the board

A. Application of Sections 20(1) and 23 of the Ordinance

The article now considers the position where the seal has been affixed on a deed to which there is only one signatory attesting on behalf of the company. It is clear that the deeming provision in Section 20(1) has no application, since two attesting witnesses are required under this section. Will the presumption in Section 23 apply? It seems reasonably clear that, where a particular signatory is not stated in the execution clause to be authorised by the board of directors to sign, Section 23 is inapplicable since there is no “appearance” of due execution. Where that signatory is stated in the execution clause to be duly authorised by the board of directors to sign, the position would seem to be that a vendor cannot rely upon the Section 23 presumption in the absence of confirmation by the purchaser from his perusal of the company’s articles that one signatory will suffice. Provided, however, that the articles, when produced to the purchaser, do authorise one signatory to sign on behalf of the company *and* it is stated in the execution clause that the signatory has been duly authorised by the board of directors to sign, the execution is effective and it is not necessary, in view of Section 23, to establish additionally that the signatory was in fact a director or a person actually authorised by the board of directors to sign.

There would seem to be ample authority for this conclusion. The seminal decision is *Tread East Ltd v Hillier Development Ltd* (1992) HCA No A907 of 1991, where a company had assigned property to a purchaser, the assignment

being signed by one director only, Mr Chan. Under his signature it was stated that the director was “authorised by the board of directors to sign”. The company’s articles, which were obtained by the purchasers, provided that deeds requiring the seal of company directors had to be signed by two of its directors or in such manner as the directors should from time to time by resolution determine. The purchasers raised a requisition as to whether the assignment had been properly executed since there was no proof that the company had in fact resolved that one director, Mr Chan, was empowered to sign the assignment. Godfrey J, noting that it was within the powers of the company to authorise one director only to sign the assignment and that a purchaser was not entitled to inquire into matters of internal management of the company, concluded that the presumption in Section 23 applied and the title was not defective on that ground. The learned judge said:

“In my judgment, in these circumstances, the presumption of due execution referred to in s 23 of the *Conveyancing and Property Ordinance* ... 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 inquire 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.”

The decision was reversed by the Court of Appeal (see [1993] 1 HKC 285, CA), but on other grounds relating to waiver of the requisition and acceptance of the title, and the decision was upheld on the execution point.

What is the position where there is one attesting signatory to the execution and it has not been stated on the deed that that signatory has been authorised to attest but the articles, when produced, provide for attestation by one signatory authorised by the board? When Section 23 of the Ordinance is applied, the courts have concluded that execution is defective unless the vendor can produce proof of the authorisation by the board. In other words the board resolution must be produced.

It is clear from the judgment of Le Pichon J in *Lee Chat v China Roll Industries Ltd* [1998] 1 HKC 269 that the vendor must produce the relevant articles. Here, an assignment by a company had been sealed with the common seal and signed by a Mr Cheung as director, although it was not stated on the assignment that he had been authorised by the board of directors to sign. The company’s articles, which were only produced at the trial, provided that “all deeds shall be signed by two directors or in such manner as the directors shall from time to time by resolution determine”. The vendor contended that the execution was effective by reason of Section 23 and by the rule in *Royal British Bank v Turquand* (1856) 6 El & Bl 327, 119 ER 886. Le Pichon J held that

good title had not been shown. The learned judge first distinguished *Tread East Ltd v Hillier Development Ltd* (above) on the grounds that, in that case, the purchaser had been provided with a copy of the articles, whereas in the present case no such production had been made despite a request for their production. It was only when the purchaser had been provided with a copy of the articles and those articles verified that it was within the powers of the company to authorise one director to sign that Section 23 was potentially triggered. By refusing to supply a copy of the articles by way of showing title the vendors were barred from relying on the presumption in Section 23. The learned judge went on to say that, even had the articles been provided, it was not certain that Section 23 would apply since there was absence of the words showing that the director was “authorised by the board to sign” (as was the case in *Tread East Ltd v Hillier Development Ltd*). Nor was the rule in *Turquand's case* a sufficient answer.

The approach of Godfrey J in *Tread East Ltd v Hillier Development Ltd* (above) was applied in *Wong Yuet Wah Mandy v Lam Tsam Yee* [1999] 3 HKC 268. An assignment had been sealed on behalf of a company under the signature of Mr Lau Wai Ken as director, but there was no statement below his signature that he had been duly authorised by the board of directors to sign. The Articles of the company provided that all instruments requiring the seal of the company should be signed by two directors or in such manner as the directors should by resolution determine. The purchasers requested a copy of the resolution to confirm that Mr Lau had been properly authorised to execute the assignment, but the vendors refused to supply a copy of the resolution of the board of directors saying that the presumption of due execution in Section 23 applied. Deputy Judge Chung held that there was an obligation upon the vendors to supply a copy of the resolution so that the purchaser could satisfy himself that the mode of execution fell within the terms of the company's articles. The learned judge expressed the view, however, that, in the light of what was required in the articles, had it been stated below the signature that the director had been so authorised by the board of directors, the presumption in Section 23 would have applied.

The same approach was followed by Deputy Judge Chu in *Lim Sui Chun v Billion Light Investment Ltd* [2000] 2 HKC 621. A company called Cheson Ltd had executed an assignment under seal by way of the signature of its director Mr Chan Chak Yee but there was no statement that he had been duly authorised by the board to sign. Cheson's articles provided that the company seal had to be affixed “by the authority of a resolution of the Board of Directors ... and in the presence of a Director”. Since there was no indication that Mr Chan Chak Yee had been authorised by a resolution of the board of directors, the learned judge concluded that due execution had not been shown.

B. Application of Section 23A(1)

The new presumption in Section 23A(1) of the Ordinance will now remedy the problem arising where the vendor is unable to produce the board resolution. Once the articles have been produced showing that one person can be authorised by the board to attest, any attesting signatory “could have been authorised under the articles” and the deed will be presumed to have been duly executed with the authority conferred by the articles, without the need to produce the board resolution or to state on the deed that the person attesting was duly authorised. The defects in title revealed in *Lee Chat v China Roll Industries Ltd*, *Wong Yuet Wah Mandy v Lam Tsam Yee* and *Lim Sui Chun v Billion Light Investment Ltd* will now be cured and the titles will be good. The presumption of validity is, however, rebuttable.

Of course, if the defective document is more than 15 years old, the conclusive presumption laid down in Section 23A(2) of the Ordinance will apply (see below).

(iii) Scenario 3: execution by one attesting signatory where articles require attestation only by designated office bearer

A. Application of Sections 20(1) and 23

The article now considers the case where there is one attesting signatory, whose status has not been identified on the deed, and the articles, when produced, require a special manner of execution such as attestation by the managing director or the company secretary. The deeming provision in Section 20(1) is clearly inapplicable. It would appear that the presumption in Section 23 will apply only where the signatory has been expressly stated on the deed to be the managing director or company secretary, as the case may be.

In *Li Ying Ching v Air-Sprung (Hong Kong) Ltd* [1996] 4 HKC 418 an assignment had been executed by a corporate confirmor by affixing its common seal under the signature of Ms Judy Hsu as director. The company’s articles deemed every deed to be duly executed by the company if sealed with the company’s seal and signed by the chairman of the board or two directors. The purchaser raised a requisition as to the execution of the deed. The vendor contended that Section 23 applied, since the document appeared to have been duly executed. Cheung J held that the execution was invalid since the requirements of the articles had not been observed. Distinguishing *Tread East Ltd v Hillier Development Ltd* (above), the learned judge ruled that Section 23 was inapplicable since Ms Judy Hsu had not been described in the assignment as chairman of the board and it would be stretching the ambit of Section 23 to an unacceptable width to presume that the signatory was actually the chairman of the board. The same conclusion was reached by Suffiad J in *Ho So Yung v Lei Chon Un* [1998] 2 HKC 697. The vendor had agreed to sell property to the purchaser and to give good title. Twenty years previously a

company had assigned the property by way of an assignment signed by one person as director. The articles of association of the company at the time deemed execution to be valid if the document were sealed with the company seal and signed by the managing director or any two directors of the company. Since the signatory director had not been described in the assignment as the managing director, the purchaser raised a requisition as to its due execution. The vendor argued that, as the assignment had been executed more than 15 years before the present assignment it must be deemed to have been properly executed. Further, it had to be assumed that the company had clothed the director with authority to execute the assignment on behalf of the company and the execution fell within the ambit of Section 23 as “appearing to have been properly executed”. Suffiad J held that the word “appearing” in Section 23 indicated that, on the face of the document, it must be shown that the document appeared to be duly executed. In the present case the description in the assignment of the signatory as director did not, in the light of the articles of association, make the assignment appear to have been duly executed. If anything it made it appear that the assignment had not been duly executed. The defendant was obliged to show by adducing proper evidence that the director had indeed signed the instrument as managing director. Since this had not been done, good title had not been shown.⁷

B. Application of Section 23A

As shown above, it is suggested that the new presumption in Section 23A(1) will also remedy this situation since the signatory could have been authorised by a resolution made at a general meeting of the company to hold the designated office and attest company deeds in that capacity. A rebuttable presumption of validity will, therefore, apply. The defects identified in *Li Ying Ching v Air-Sprung (Hong Kong) Ltd* and *Ho So Yung v Lei Chon Un* will now be cured.

⁷ For further illustrations of the application of this principle see *Chung Ka Leung v Secretary for Justice* (1999) HCMP No 4129 of 1999 (confirmatory assignment executed by one signatory where company's articles required the signature of either the chairman of the board or two directors; court held execution defective; however, since company had been dissolved in 1996 and since the Secretary for Justice had confirmed that the Government did not make any claim to any interest in the property as bona vacantia, a vesting order was made that the confirmor had no beneficial interest in the property); and *Lo Wing Wah v Chung Kam Wah* [2000] 1 HKLRD 227, [2000] 1 HKC 479 (company's articles provided that “every document required to be sealed with the seal of the company shall be deemed to be properly executed if sealed with the seal of the company and signed by the chairman of the board of directors or any two directors jointly”; assignment executed by company in 1987 had been sealed with the company's common seal and had been signed by one director. Yuen J held that the execution was defective since there was no proof that the signatory was chairman of the board of directors; however, since the company had been wound up voluntarily in 1993 and there had been only two members of the company who had been the joint liquidators, it was clear that the company had no intention of asserting any claim to the property and there was no risk that it would institute legal proceedings in the future to have the assignment declared invalid).

Of course, if the defect is contained in a document which is more than 15 years old, the defect will be cured by the conclusive presumption laid down in Section 23A(2) (see below).

(iv) Other situations where the articles require execution in a particular manner, but the requisite mode has not been adopted

Next, the article considers what is the position where the articles, when produced, stipulate that execution is to be effected in a particular manner, other than those dealt with above, but some apparently inconsistent mode of execution has been adopted. For example, the deed might have been attested by only one director where the articles, when produced, require attestation by two or more directors. Alternatively, the articles might require the attesting directors to hold a specified number of shares in the company but there is no proof that the attesting directors in fact hold the required number of shares.

A. Application of Sections 20(1) and 23

There are many cases illustrating defects of this nature. For example in *Au Hon Kwong v Sure Woollen Yarns Co Ltd* (1993) MP No 3979 of 1992 a mortgage had been executed by one director of the mortgagor company and, upon production of the articles, it was found that they provided that at least half of the board of directors was required to join together to execute any deed. It was common ground that, at the time the mortgage was executed, the company had four directors. The property was subsequently sold to the vendor by the mortgagee upon default by the mortgagor. The court ruled that the title was defective by reason of the improper execution of the mortgage. In *Qualihold Investments Ltd v Bylax Investments Ltd* [1991] 2 HKC 589 the company's articles provided that a deed was deemed to be duly executed if sealed with common seal and signed by any two directors or the managing director, but there was a further requirement that every director had to hold at least 10 shares. An assignment had been executed by one director as signatory who was not the managing director nor did she hold the 10 required shares. The court held the execution to be defective.

B. Application of Section 23A(1)

Will the new rebuttable presumption in Section 23A(1) apply to the above cases? Each situation must be considered on its own facts. Where the articles, when produced, stipulate for attestation by a fixed number of signatories but fewer signatures appear on the deed, it is suggested that Section 23A(1) will not apply. This is because a smaller number of signatories could not have been

properly authorised to attest in accordance with the company's articles.⁸ The manner of defective execution illustrated in *Au Hon Kwong v Sure Woollen Yarns Ltd* will not, therefore, be remedied.

The defect will, however, be cured by the conclusive presumption in Section 23A(2), where the defects are contained in any deed more than 15 years old.

Looking at the situation identified in *Qualihold Investments Ltd v Bylax Investments Ltd*, where the attesting directors were required by the articles to hold a specified number of shares, it is suggested that, since the signatories could have held the required number of shares (and could, therefore, have been authorised to attest), execution will be presumed valid, albeit rebuttably.

(v) Defective execution in the chain of title period or beyond may be cured by an appropriate resolution of the company

Notwithstanding the fact that there has been a failure to comply with the requirements of the company's articles, the courts have held that a prior resolution of the board of directors authorising the mode of execution actually adopted would cure the apparent defect. The leading authority is *Peking Fur Store Ltd v Bank of Communications* [1993] 1 HKC 625, where Godfrey J ruled that, where there had been defective execution of a deed by a company in the chain of title period, but there had been a prior resolution of the board of directors authorising the execution in the manner actually adopted, there would be no real risk of a successful assertion by the company against the title of the vendor's successors in title and the defect had accordingly been cured by such resolution.

It is suggested that this reasoning would apply to a resolution passed either before or after the defective execution had taken place since, in both cases, there would be no real risk of the assignment being set aside by the company.

Does this mean that a company can simply ignore its articles and override their requirements as to execution by the simple device of an ad hoc resolution of the board? The answer would seem to be "no". In *Ring View Ltd v Modern Thorns Co Ltd* (1997) HCA No A3626 of 1996 the vendor company had agreed in the sale and purchase agreement to execute a proper assignment to the purchaser. Although the company's articles required that deeds be executed by the affixing of the common seal in the presence of a director and the secretary or other person appointed by the board for the purpose, the

⁸ There is an argument, albeit ingenious, that might cure even this situation. As detailed below, it has been held in *Peking Fur Store Ltd v Bank of Communications* [1993] 1 HKC 625 that a prior (or perhaps even subsequent) resolution of the board of directors might cure a defect in execution falling within the chain of title period. Could it be said, therefore, that attestation by a "wrong" number of directors "could have been authorised under the articles" so as to fall within the ambit of the rebuttable presumption in Section 23A(1)?

assignment tendered by the vendor contained only the signature of one director, together with a board resolution authorising execution of the assignment by one director only. The reason for this was that the company secretary was not present in Hong Kong at the material date of execution. Deputy Judge Gill first distinguished *Peking Fur Store Ltd v Bank of Communications* (above) on the grounds that the case involved an objection which had been taken to the execution of a deed by a *predecessor* of the vendor – in other words the alleged defect had occurred *during the chain of title period*. In the instant case the question did not involve a defect in the chain of title period, but involved the question whether the vendor was *presently* complying with his contractual obligation to execute a valid assignment (ie in accordance with its articles). Pointing out that the vendor's articles did not permit the board to appoint one person to attest in place of both director and secretary, the learned judge concluded that, since the company had not complied with its articles and had failed to execute a valid assignment, the requisition raised by the purchaser had not been properly answered.

Even more generously the courts have held that, if no such board resolution can be found, the court may, in limited circumstances, permit secondary evidence to be admitted as to the existence and contents of the missing resolution: *Goldenfix Properties Ltd v Cheer Hope Investments Ltd* (1993) MP No 2940 of 1992.⁹

This principle is now largely redundant as a result of the new presumption in Section 23A(1), since there is no longer any need to produce the board resolution.

(vi) No real risk of company setting aside the deed

Finally, the vendor might argue that, although the execution of a deed was formally defective, there is now no real risk to the purchaser of a successful assertion against the title within the well-known principle of *MEPC v Christian Edwards* [1981] AC 205, HL. Such a result might arise where, for example, the company responsible for the defective execution has been wound up. In *Hui Yuk Chun v Tang Wai Hang Henry* (1998) MP No 1 of 1998 the property in question had been assigned in 1973 by a company whose articles required that the company's common seal be affixed in the presence of two authorised persons. Only one signature (of a director) appeared on the assignment and

⁹ In this case a statutory declaration made by the solicitor who acted for the vendor was provided asserting that the declarant remembered clearly that such a resolution had been passed by the board authorising the signatory to sign on behalf of the vendor company. Godfrey J rejected this secondary evidence in the particular circumstances of the case holding that, although it was in principle admissible, it was not sufficient on the facts. However, the learned judge went on obiter to say that, had the person who had made a search for the missing resolution made a statutory declaration to that effect, this might have been sufficient to justify the vendor in requiring the purchaser to accept the secondary evidence of due execution.

no resolution of the board could be found. The company had been wound up in 1977 and all the company's books had been destroyed. The intending purchaser raised a requisition contending that, by reason of the apparently defective execution of the assignment, the vendor had failed to show good title. Hartmann J ruled that, since the company had been wound up more than 20 years before, there could be no successful challenge by the company or its shareholders to the vendor's title. The vendor had, therefore, shown good title.

A further illustration is provided by *Cheng Chun Chun v Chow Chung Tao* (2000) HCA No 12016 of 1999. A deed of mutual covenant had been executed by the developer company by the affixing of the common seal attested by signature of one director, but the company's articles required the attesting signature of the chairman of the board or such person as the board might, from time to time, authorise. Cheung J held that, even if the execution were defective, the developer had subsequently assigned the property to three purchasers and the recital to each assignment had stated that the property had been assigned subject to the deed of mutual covenant. The developer had clearly recognised the validity of the deed of mutual covenant and its binding effect. The title to the property was not defective on this ground.¹⁰

This principle has now been given statutory recognition by the new conclusive presumption of validity in Section 23A(2) and its application made more certain.

(vii) Conclusive presumption that deeds executed by corporations valid if more than 15 years old

As mentioned above, Section 23A(2), which is perhaps the most significant remedial provision in the amending legislation, provides that, where a deed purports to have been executed by a corporation not less than 15 years before the present contract for sale, it will, for the purposes of any question as to title to that land, be conclusively presumed (a) as between the parties to the contract and (b) in favour of the purchaser under the contract as against any other person, that the deed was validly executed.

This provision, in essence, gives statutory effect to the "no real risk" principle. Where the defect appears in a title document more than 15 years old (ie normally falling within the pre-intermediate root period), there is generally no real risk of the title being challenged subsequently. This principle is now enshrined in the irrebuttable presumption that the document was validly executed and there is no longer any need for the vendor to

¹⁰ For further illustrations see, for example, *Chung Ka Leung v Secretary for Justice* (1999) HCMP No 4129 of 1999 and *Lo Wing Wah v Chung Kam Wah* [2000] 1 HKLRD 227, [2000] 1 HKC 479.

produce evidence to show that there is no real risk of an assertion against the purchaser's title. Although the curative effect of this provision is substantial, it does, however, have its limitations. Section 23A(2) makes it clear that the presumption applies only between the parties to the contract and in favour of the purchaser as against the whole world. It does not remove any accrued right of a third person to seek redress against the vendor or his predecessors in title. Shareholders (or the liquidators of the company on their behalf) who have been defrauded will, therefore, still have a right of redress from the present vendor or his predecessors in title. This conclusion is reinforced by Section 23A(3) of the Ordinance, which makes it clear that the new legislation has no retrospective effect.

Execution of Title Documents Without Proper Common Seal

Although a corporation will normally be empowered by its articles to authorise one of its officers to execute *agreements* under hand on behalf of a corporation, where the corporation is required to execute a *deed*, it is required to affix its common seal to any deed executed in its name. In respect of deeds executed before 1 November 1984, Section 93(1) of the *Companies Ordinance* (Cap 32) (now repealed and replaced) provided that every company must have its name engraven in legible characters on its seal. There was no express requirement for a metallic seal and presumably an engravable rubber seal would suffice. For deeds executed after November 1984, however, the amended Section 93(1) provides that every company must have as its common seal a *metallic seal* on which it must have its *name engraven in legible characters*. No longer will a rubber common seal suffice. Since this is a statutory requirement this must be the case notwithstanding any contrary statement in the Articles of Association.

What then is the effect on title where there is no common seal at all or where the deed is not executed by way of using a metallic common seal? There is a saving provision in Section 19(2) of the *Conveyancing and Property Ordinance* which provides as follows:

“A document shall be presumed to have been sealed *by an individual* if the document signed by him describes itself as a deed or states that it has been sealed or bears any mark, impression or addition intended to be or to represent a seal or the position of a seal.” (emphasised in this article).

In the case of execution of a deed by an individual, therefore, the fact that no seal appears to have been affixed to the deed is of little consequence provided the execution clause states that the document has been “*Signed, Sealed and Delivered*”. This saving provision is, however, restricted to execution of

deeds by individuals and does not extend to corporations and there is, therefore, no saving provision extending to defective execution of deeds by corporations.

The effect of defective sealing by a corporation was considered by Recorder Robert Kotewall, SC, in *On Hong Trading Co Ltd v Bank of Communications* (2000) HCMP No 3099 of 1999. A mortgagor had executed a legal mortgage in favour of a bank to which there was no common seal attached but merely a rubber chop saying “for and on behalf of Perfect Venture Holdings Ltd”. Recorder Kotewall held that, since Section 93(1)(b) applied to all companies in Hong Kong, a deed could only be validly executed by a company if it used its common seal, which had to be a metallic seal. The rubber stamp was not adequate by way of execution of a deed. The mortgage had not, therefore, been properly executed and the bank did not have power to sell the property upon the mortgagor’s default.

A different conclusion was reached, albeit in a dissimilar context, by Judge Thornton, QC, in *OTV Birwelco v Technical and General Guarantee Co Ltd* [2002] 4 All ER 668. A sub-contractor entered into a contract with the claimant main contractor to carry out works on the construction of a new plant. The claimant required a surety to execute a performance bond obliging the surety to discharge any award of damages secured against the claimant by reason of the failure by the sub-contractor in the performance of the contract. Accordingly, a performance bond was executed by the sub-contractor and the defendant as surety. The defendant executed the bond in accordance with its articles, but the sub-contractor executed the bond in favour of the claimant by affixing its common seal on which was engraved its trading name rather than its registered name. When the defendant surety was subsequently sued upon the bond, it denied liability on the ground that the bond was a nullity and unenforceable because the common seal contained the sub-contracting company’s trading name rather than its registered name in breach of Section 350 of the Companies Act, 1985. The learned judge first pointed out that the law imposed the following sealing requirements by companies: (i) the seal should be the common seal of the company; (ii) the seal should be affixed to the document; (iii) the seal should have the company’s registered name on it; (iv) the company’s name should be engraved or embossed and not merely printed on the face of the seal in legible characters; and (v) the sealing process should comply with the requirements of the company’s articles. In respect of non-compliance with Section 350 of the Companies Act, there was no provision in the Act that such non-compliance would render an instrument a nullity or unenforceable by a third party beneficiary, although the Act did impose a financial penalty upon a party in breach.¹¹ A number of tests had been applied by the courts to determine

¹¹ As does Section 93(4) of the Companies Ordinance.

whether a relevant statute, on its true construction, intended contracts, subject to a statutory prohibition, to be rendered a nullity and unenforceable: (i) whether there was any proportionality between the loss ensuing from non-enforcement and the breach of statute; (ii) whether non-enforcement would result in unjust enrichment to the party to the contract who had not performed his bargain but who otherwise would benefit from the non-enforcement; (iii) whether the breach of statute had been unwitting and innocent or deliberate and flagrant; and (iv) whether someone who was completely innocent and who had not participated in the breach of the statute would be deprived of a legal remedy to enforce rights that that person would otherwise be entitled to enforce. In this case the tests favoured the conclusion that the bond was enforceable. In particular, the claimant was an innocent party. The learned judge concluded that the bond could be enforced by the claimant notwithstanding that it had failed to comply with the statutory requirements.

Further, the bond had been properly executed by the surety against whom it was sought to be enforced. A contract properly sealed by one party and not the other was a "limping contract" which could be enforced as a deed against the party who had sealed it and as a simple contract against the party who had not sealed it or whose seal was ineffective.

It can readily be seen that there are several distinguishing features between the Hong Kong and the English decisions. First, the English authority involved a three-party situation where it was an innocent party who was at risk of loss. In the Hong Kong situation the party at risk was itself a party to the defective instrument. Secondly, the English case dealt with a deed which constituted a performance contract. The Hong Kong case deals with the very different situation of a deed which has the effect of assigning a legal estate. Thirdly, in the English situation, the deed was enforced against a party who did execute the deed properly; the defective execution was that of another party who was neither seeking to enforce the deed nor was in the position of having the deed enforced against him. This is very different from the Hong Kong situation where the deed was sought to be enforced against the party whose execution was defective.

Finally it should be noted that both these decisions involve the defective sealing of a deed by reason of a defect in the seal rather than its complete absence. It is suggested that the courts would be even less sympathetic to the total absence of a seal. Further judicial authority must be awaited with interest.

The consequences of defective sealing are serious. Since it is the act of sealing that passes the legal estate, defective sealing would render the assignment void and neither an assignee or his successors in title will receive a good title.

To what extent, if any, has a defect of this nature been remedied by the new Section 23A? Both Sections 23A(1) and (2) introduce presumptions of due execution in respect of "deeds purporting to be executed" by a corporation.

In the case of Section 23A(1), which applies to all prior¹² deeds of whatever date, the presumption is rebuttable; in the case of Section 23A(2), which applies only to deeds more than 15 years old, the presumption is conclusive. The question arises, however, as to whether a document calling itself a deed which has no common seal is, in fact, a deed so as to fall within the ambit of Section 23A. It has long been recognised by the common law that, to take effect as a deed, a document must be sealed.¹³ It is, therefore, arguable that a document which lacks a proper seal will not be saved by the amending legislation. If the amending section had been intended to achieve the result of validating such defective documents, it would surely have been drafted in such a manner that, instead of the use of the word “deed”, the word “document” would have been used with a further provision that such a document would, in the circumstances prescribed, be presumed to be a valid deed. Judicial determination of this issue is awaited with interest.

Conclusions

A number of conclusions can be drawn from the foregoing analysis:

- (a) The amending legislation is to be welcomed. It must be borne in mind, however, that its effect is limited and many titles are likely to remain, at least until the documents in question are more than 15 years old, defective.
- (b) The new presumption in Section 23A(1) of the Ordinance applies only to *prior* title defects and does not extend to documents to be executed in the future. The amendment has, therefore, created three different regimes.
- (c) Perhaps the most efficacious remedial provision in the legislation is Section 23A(2). This provision gives statutory form to the “no real risk” principle laid down by the House of Lords in *MEPC v Christian Edwards* [1981] AC 205. The presumption, however, only applies as between the parties to the contract and in favour of the purchaser as against the whole world. It does not, therefore, remove any accrued right of a third person to seek redress against the vendor or his predecessors in title.
- (d) The scope of Section 23A(1) is rather more limited. To take advantage of the remedial effect of the provision, it is necessary first for the vendor to supply a copy of the articles in force at the relevant date of execution to the purchaser.

¹² All deeds executed before the date of the commencement of the amending legislation.

¹³ See, for example, *Stromdale & Ball Ltd v Burden* [1952] 1 Ch 223.

- (e) A significant effect of Section 23A(1) is to cure defects in execution where the articles provide for the affixing of the corporate seal in the presence of one or more persons authorised to attest by the board of directors. The effect of the new rebuttable presumption in Section 23A(1) is that the deed will be presumed to be valid, since the signatory or signatories “could have been authorised under the articles” to attest.
- (f) Where the articles when produced require a special manner of execution, such as execution by one or two directors or a designated officer such as the company secretary or the managing director, but execution is defective in the absence of proof that the signatories actually were directors or held the offices in question, it seems likely that the new presumption in Section 23A(1) will remedy the defect on the grounds that any signatory could have been authorised to attest in his capacity as director etc by a company resolution.
- (g) The presumption in Section 23A(1) will not, however, apply where the articles require attestation by a stated number of signatories (for example attestation by two directors), but fewer signatures actually appear on the deed.
- (h) Finally, where a title is defective because the corporate seal is missing or because the seal fails to comply with the statutory requirements laid down in the *Companies Ordinance*, the title may well be and remain defective since Sections 23A(1) or (2) of the Ordinance only apply to “deeds” and a document without a proper seal is not a deed.

