

# Conveyancing and Companies: The Single Director and the Company Seal (Part 3)

*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 3*

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 dealt with the major cases on the s 23 presumption and identified a clear principle that governs the way in which a single corporate officer should sign in order to bring that presumption into operation. Part 3 pays particular emphasis to the fact that, even where an assignment has not complied with the articles, a vendor may still prevail where the assignment in question has gone unchallenged for several years and there is no real risk to the purchaser's title.

## 'Deeming' Provisions in the Articles

Until the decision in *Lo Wing Wah v Chung Kam Wah* [2000] 1 HKC 479 the courts interpreted the articles as laying down mandatory requirements as to attestation. In

other words, the articles were treated as requiring that the seal should only be affixed with the authority of the board of directors and that all instruments to which the seal is attached *shall* be signed by two directors, or by the chairman, or by such other person or persons as the board may from time to time determine (or whatever other provision might be made in a particular company's articles).

However, in *Lo Wing Wah* a fundamentally different approach to the interpretation of the articles was taken. In *Lo Wing Wah* the plaintiff (vendor) had entered into a sale and purchase agreement with the defendant. The defendant raised a requisition in relation to an assignment in 1987 by the owner, Great Leader Properties Ltd (the company), to the plaintiff. The 1987 assignment had been sealed with the company's seal and was signed by one Wong Chung Chuen (Wong). Wong was identified on the assignment as one of the company's

directors. The company's articles (art 19) stated that the seal could not be used except with the authority of the board and: '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 singly or by any two directors jointly' (art 20; emphasis added).

As Wong was not described in the assignment as the chairman, the single signature did not comply with art 20. This was accepted by Yuen J. However, the learned judge noted that art 20 did not state that use of the seal had to be accompanied by the signature of the chairman or two directors. Article 20 was a deeming provision; it deemed signature by the chairman or two directors to be valid, but did not deem invalid any other signature. The judge stated:

Some articles no doubt do expressly provide that the common seal *shall not be*

affixed to any instrument except in the presence of say, two directors, or the secretary and a director. In those cases, even the act of affixing the seal would itself not be valid unless it was done in the presence of the required number of company officers.

In the present case, however, art 19 provides for the use of the seal with the authority of the directors, but that is all. Article 20 is a deeming provision which deems a deed to be properly executed if sealed with the seal of the company and signed by the chairman singly, or by two directors jointly.

So I take the view that the sealing of the deed in this case is not, in any case, invalidated, even if the signature part of art 20 is not complied with. The legal estate of the property passed by the sealing (see *Peking Fur Store Ltd v Bank of Communications* [1993] 1 HKC 625) (at p 481; original emphasis).

Yuen J then held, somewhat opaquely it is submitted, that because Wong's signature did not in fact comply with art 20, the 1987 assignment did not appear to be duly executed and, accordingly, the presumption of due execution in s 23 of the CPO did not arise. It may be noted that Yuen J did not seek to explain the impact of the absence of the operation of the s 23 presumption in light of her earlier finding that art 20 was not mandatory and that the legal estate had in fact passed in 1987. (In any event, Yuen J then went on to hold

that, as the assignment in question was executed as long ago as 1987 and the company had been wound up in 1993, there was no blot on the title. See discussion of *MEPC v Christian Edwards*, below.)

In subsequent cases vendors seized upon the judgment of Yuen J as establishing that, where deeming language is used in the articles, the failure to follow the specified procedure did not matter so long as the seal has actually been affixed (see *Grand Trade Development Ltd v Bonance International Ltd* [2000] 4 HKC 57 (Chung J); *Chan Sai Hung v Well Develop Ltd* [2000] 4 HKC 50 (Deputy Judge Wong); and *HISBC v Ho Sin Yin*, unreported, 1 February 2001 (Deputy Judge Gill)). The judges were not seemingly concerned by the fact that, other than *Lo Wing Wah*, there was no prior authority for their view or that similar deeming language had been present in a number of earlier Hong Kong decisions where the 'normal rules' had been applied (see *Qualihold Investments Ltd v Bylax Investments Ltd* [1991] 2 HKC 589 (Keith J); *Li Ying Ching v Air-Sprung (HK) Ltd* [1996] 4 HKC 419 (Cheung J); and *Ho So Yung v Lei Chon Un* [1998] 2 HKC 697 (Suffiad J)). As Chung J put it in *Grand Trade Development Ltd* in relation to deeming provisions:

[W]hen a document of these companies is sealed and signed by the requisite officer(s), the document is deemed to have been properly executed. There is however no reason to conclude that the articles provide for 'reverse deeming', that is, the document is deemed not to be properly executed

when it has not been signed in the manner provided for (at p 64).

In the same case Chung J even went so far as to rule (departing from Yuen J's earlier view) that, despite the fact that the deeming provision had plainly not been complied with, the s 23 presumption was activated (at p 65).

*Grand Trade Development Ltd* was, however, reversed on appeal ([2001] 3 HKC 137). The Court of Appeal decisively rejected the sort of reasoning that had found favour in *Lo Wing Wah* and the subsequent cases. In *Grand Trade Development Ltd* the company's articles (art 23) stated:

- (a) The Seal of the Company shall be kept by the Board of Directors and shall not be used except with their authority.
- (b) 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, or such person or persons as the Board may from time to time authorise for such purpose.

The seal was, in two instances in 1995 and 1996 respectively, affixed to an assignment and signed by one person who was described as a director, not as the chairman. In the lower court, Chung J took the view that the deeming language in art 23 meant that the provision was not mandatory (see above) and held in favour of the vendor. The purchaser's appeal was allowed. Le Pichon JA (Rogers VP and ►

Sakhrani J agreeing) carefully reviewed the existing authorities and arrived at the conclusion that, where a company has express provisions in its articles as to execution and those provisions have not been complied with, the mere affixation of the company's seal is not by itself sufficient for legal title to pass. (This must be so since otherwise compliance with the articles – the contents of which everyone was deemed at common law to know – would become irrelevant.)

In addition, when interpreting the company's articles, it was held that the deeming provision (art 23) had to be viewed in the context of Table A of the Companies Ordinance. Table A, of course, lays down standard or default provisions for a company's articles. And the provisions in Table A will apply except and to the extent that they are modified or excluded (see Companies Ordinance, s 11(2)).

Le Pichon JA accepted the argument advanced by the purchaser that the standard requirement as to attestation set out in Table A, reg 114 (generally two directors or one director and the company secretary) was not excluded by the deeming provision (art 23) in the company's articles. Table A was merely modified by the deeming provision as the deeming provision was intended to provide a simpler method of satisfying the requirements laid down in reg 114 of Table A. In other words, where the deeming provision was not satisfied (as on the facts in *Grand Trade Development Ltd*), rather than there being no requirements whatsoever as to attestation, the default provision in Table A would

operate (and one director's signature would, of course, be insufficient).

In practical terms, the judgment of Le Pichon JA makes it clear that if the signature of a single director does not on the face of it comply with the company's articles then, regardless of whether or not the articles use deeming language, the vendor will be required to produce appropriate evidence to establish that the signature was authorised. Deeming language does not create an exception to the generally applicable rules.

Moreover, even if Table A were expressly excluded by a deeming provision in a company's articles, there is every reason to suppose that the deeming provision would not, except where there was the clearest of language, be interpreted as allowing the legal estate to pass regardless of non-compliance with the deeming provision.

### Theory, Practice and *Turquand's Case*

As has already been noted in Part 2 of this article, in *Wong Yuet Wah, Mandy* it was held that where, as in *Hillier* itself, the articles leave it open to the board to decide who may attest (and 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 before the s 23 presumption may operate. (*Grand Trade Development Ltd*, above, also supports this proposition.)

Yet, until very recently, the cases have scarcely touched on the question of why the rule in *Turquand's Case* (as opposed to

s 23) may not apply in such circumstances. After all, it might be argued, the board did have power under the articles to authorise signature by a single director (or any other person) and might well have done so when conducting the internal affairs of the company. Further, an outsider would have no means of knowing whether the board had done so and, as Godfrey J stated in *Hillier*, a purchaser cannot investigate the internal management of a company. Rather, 'it is enough for him to satisfy himself that the power to do what has been done did exist' (judgment at p 9).

In *Grand Trade Development Ltd* it will be recalled that the company's articles allowed signature by the chairman or 'such person or persons as the Board may from time to time authorise for such purpose'. The assignment was signed by one person who was merely described in the instrument as a 'director' (not as chairman). In the Court of Appeal Le Pichon JA held that the s 23 presumption did not operate, nor did the rule in *Turquand's Case* because the instrument was not regular on its face:

If the person appending the signature had been described as a person 'duly authorised by the board', *Turquand's* rule would have applied. But that was not the case. Any person, whether or not a director, could have been authorised by the board but as far as I am aware, there is no presumption that if the signatory is a director, he must have been duly authorised by the board. What the position would have been had there simply been a

signature without the description 'director' is a question that does not arise for decision (judgment, para 35).

Although *Grand Trade Development Ltd* makes it clear that *Turquand's Case* will not apply in these circumstances, this commentator would respectfully suggest that a more elaborate analysis may be found.

It was clearly established at common law that, although everyone dealing with a company was deemed to know the contents of its memorandum and articles of association, the doctrine of constructive notice did not have a positive effect (see *Freeman & Lockyer v Buckhurst Park Properties Ltd* [1964] 2 QB 480 at 504). So that even though an unusual act might have been authorised by the board in accordance with the articles (eg the delegation of authority to the type of agent who would not normally have that sort of authority), a third party could not set up the relevant provision in the articles against the company. (The exception was where the third party had, prior to the transaction, in fact read and relied upon the provision in the articles.) As Professor Gower stated (*Principles of Modern Company Law*, 6th Ed (1997) at p 227, footnotes omitted) in relation to a delegation of authority:

The fact that ... the third party was deemed to have notice of the contents of the memorandum and articles did not mean that he could rely on something in those documents to estop the company from denying the authority of an

officer of the company who would not usually have had authority. Constructive notice was a negative doctrine curtailing what might otherwise be the apparent scope of the authority and not a positive doctrine increasing it.

Although Professor Gower was here speaking of a delegation of (contractual) authority, the same reasoning can be applied where the board could have exercised its power under the articles to authorise a single individual (who might be a director, but could be the office messenger or anyone else) to attest the affixation of the seal. Once it is understood that the doctrine of constructive notice was merely negative, it would be wrong to take the statement of Godfrey J (above) as suggesting that the articles

generally constituted some form of potential authority that could bind the company even though the third party had not read and relied on them prior to entering into the relevant transaction. If, as this commentator would suggest, this is the reason why *Turquand's Case* does not apply in the circumstances described, it will not matter if the individual has signed either with or without the description 'director', and the question left open by *Le Pichon JA* (above) may be answered in favour of the purchaser.

#### No Real Risk to Purchaser Despite Non-Compliance with the Company's Articles

As readers will have noted, many of the Hong Kong cases have concerned quite old assignments that have never been challenged by the

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companies that entered into them. In *Ho So Yung v Lei Chon Un*, above, judgment was given in 1998 in relation to an assignment in 1977. In *Perfectime Ltd v Ko Min Bor* [1994] 3 HKC 507 the assignment in question had been signed by a single director some 30 years previously. In *Lim Sui Chun* the interval between the assignment and judgment was 13 years, and in *Wong Yuet Wah, Mandy* it was more than 20 years. It is perhaps a little surprising therefore that vendors, when faced with requisitions, have not raised the question more often of whether any alleged failure to strictly comply with the company's articles has created a real risk to the purchaser's title.

As Lord Russell of Killowen put it in *MEPC v Christian Edwards* [1981] AC 205 at 220: 'In my opinion, if the facts and circumstances of the case are so compelling to the mind of the court that the court concludes beyond reasonable doubt that the purchaser will not be at risk of a successful assertion against him ... the court should declare in favour of a good title shown'.

This commentator does not intend to go over matters already raised by Peter Lo in his recent article in the *Hong Kong Lawyer* (June 2001) but readers may wish to note that there is in fact some recent Hong Kong authority on the application of the principle in *MEPC* to assignments signed by single directors. In *Lo Wing Wah* (which, as a 'deeming' provision case, is discussed above) it will be recalled that an assignment signed by a single director in 1987 was called into question. The company concerned

had gone into members' voluntary liquidation in 1993 and neither the shareholders nor the liquidator had challenged the validity of the 1987 assignment. Yuen J ruled in favour of the vendor on the ground, *inter alia*, that there was on the facts no real risk of the purchaser's title being successfully challenged by the company. (This aspect of the judgment of Yuen J is not affected by anything that fell from the Court of Appeal in *Grand Trade Development Ltd*, above.) In *Hui Yuk Chun v Tang Wai Hang, Henry* [1998] 1 HKLRD E34 Hartmann J made a similar determination in relation to an assignment in 1973 by a company that was wound up in 1977 and thereafter dissolved.

It is virtually inevitable that every relevant fact situation will fall into one of two categories: either (i) the facts will concern a company that is still in business, or (ii) the company will already have been wound up. If the company is still in business there is every chance not only of easily obtaining a copy of its articles but also of uncovering relevant information about the assignment in question. A complete lack of interest on the part of the current management of the company may well speak volumes. A total lack of information (and of avenues for obtaining information) is much more likely to be encountered where the assignment took place several years ago and the company has since gone out of business and been wound up. Yet it is in this latter situation that the principle in *MEPC* will most obviously be relevant. (It would also, of course, make no difference that the company's articles could no longer be found.)

Moreover, although all the single director signature cases discussed in this article have concerned companies incorporated in Hong Kong, it may be noted that the Court of Appeal has applied *MEPC* in relation to a company incorporated in Bermuda. In *Excelling Profit Investments Ltd v Sera Ltd* [1992] 2 HKC 262, which on its facts actually concerned execution pursuant to a power of attorney, a Bermudan company had entered into the disputed assignment in December 1986 and the company had been dissolved in Bermuda in January 1989. The court on the facts applied *MEPC*, observing that 'the possibility of the ghost of [the company] rising some four years after its liquidation in Bermuda to bring a claim ... against the purchaser is utterly remote' (at p 268). Whilst the facts in *Excelling Profit* were quite different from the cases discussed above, there seems little doubt that the Court of Appeal took a realistic approach to the risk the purchaser actually faced.

### Section 23 Presumption or the Common Law Maxim: A Footnote

Finally, the reasoning of the majority of the Court of Final Appeal in *Leung Kwai Lin Cindy v Wu Wing Kuen* [2001] 1 HKC 567 raises a question as to whether the presumption in s 23 of the CPO can still be applied in single director signature cases. Although it must be stressed that even if s 23 is inapplicable the outcome of the cases would not be affected.

In the cases discussed above, where there is no direct evidence from the parties in relation to the

assignment in question, the courts have by and large approached the application of the s 23 presumption as follows. They have looked at the assignment, in particular how and by whom it was signed, examined the company's articles, and then proceeded to ask whether in light of the articles the assignment appeared to be duly executed. (It is quite clear that just looking at the assignment – with its single signature – would tell you virtually nothing.) This approach is perfectly consistent with the view of Litton NPJ in *Leung Kwai Lin Cindy* that s 23 was simply a statutory expression of the common law maxim *omnia praesumuntur rite esse acta* and that the court should ask itself: 'does it appear from all the circumstances of the case that the instrument was duly executed?' (at p 577; emphasis in original).

The majority view, however, drew a distinction between s 23 and the common law maxim – it was only in relation to the common law maxim that all the circumstances of the case should be considered. Sir Anthony Mason (Li CJ, Bokhary and Chan PJJ agreeing) stated:

[A] rebuttable presumption [under s 23] arises once evidence establishes that the instrument appears at any time on its face to have been duly executed. It is that fact and that fact alone which attracts the statutory presumption ...

On the other hand, the maxim *omnia praesumuntur rite esse acta* is applied ... in light of all the circumstances of the case (at p 578).

Whether the majority would have thought that if the court is required

to look at and interpret the company's articles it is considering all the circumstances of the case, is not clear. The facts in *Leung Kwai Lin Cindy* had nothing to do with an assignment by a company and the Court of Final Appeal was not referred to any of the cases discussed above. Yet, in practical terms, the disagreement between Litton NPJ and the majority as to the scope of s 23 will not affect the outcome of an actual case involving a single director's signature. Even if s 23 is not applicable there is no doubt that the common law maxim may apply and raise a like presumption. The majority acknowledged (at p 579) that, although the s 23 presumption and the common law maxim operated in slightly different ways, it was likely that they would produce the same result in any given case.

### Conclusion

Although there is an understandable tendency for practitioners (and judges) to regard the single director signature cases as each decided upon the narrow basis of its own particular facts, it is submitted that there is an important distinction between situations where a company's articles lay down (i) direct or (ii) indirect provisions in relation to signatures. This distinction has become all the more important now that the Court of Appeal has ruled that deeming language in the articles will not render signatures unnecessary.

It is only where a vendor is relying upon an indirect provision that the assignment must recite that the person signing has been authorised by the board. In direct cases the identification in the

assignment of the office held by the person signing – that office being specified in the company's articles – will suffice to activate the presumption. This means that, for example, if the articles state that the chairman singly may sign, then a signature accompanied by the word 'chairman' will activate the presumption. Likewise, where one director singly is specifically permitted under the articles and the word 'director' accompanies the signature this will activate the presumption.

Yet even where apparent compliance with the articles cannot be established, vendors should bear in mind that the courts have taken a realistic approach as to whether there is a real risk to the purchaser. This is particularly relevant where the company has already been wound up.

Nevertheless, prevention is obviously better than cure. Where there is uncertainty as to whether there has been compliance with the articles a vendor should (if possible) inoculate against the risks of litigation by the insertion of a special condition. This final point was emphasised in *Grand Trade Development Ltd* where the court also stressed the danger of seeking to rely upon leading counsel's opinion (now more than a decade old) set out in Law Society Circular 105/90.

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