

THE LAW COMMISSION

**Report on a reference to the Law Commission under section 3(1)(e) of
the Law Commissions Act 1965**

THE EXECUTION OF DEEDS AND DOCUMENTS BY OR ON BEHALF OF BODIES CORPORATE

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

PART 1 INTRODUCTION

Background

- 1.1 Following a joint reference from the Lord Chancellor and the President of the Board of Trade in October 1994, we published a consultation document entitled “The Execution of Deeds and Documents by and on behalf of Bodies Corporate” in November 1996. Our terms of reference were as follows:

To review the law on the execution of deeds and documents by or on behalf of all bodies corporate and to make recommendations.

- 1.2 The background to the paper lay in the changes to the law governing deeds and their execution made by the Law of Property (Miscellaneous Provisions) Act 1989 and the Companies Act 1989, although some of the difficulties with the law were longer standing.¹
- 1.3 The Companies Act 1989 introduced a new section 36A into the Companies Act 1985. This abolished the requirement that every company must keep a common seal and, for the first time, permitted companies to execute deeds by the signature of their officers alone. It also sought to reflect changes which had been introduced for deeds generally by the Law of Property (Miscellaneous Provisions) Act 1989, in particular the requirement that to be a deed, an instrument must make it clear on its face that the parties to it intend it to be a deed (“the face-value requirement”).
- 1.4 However, although the ability for a company to execute deeds without a seal was generally welcomed, the detailed drafting of section 36A was criticised by a number of practitioners. Not only was it regarded as complicated and uncertain, it was also difficult to reconcile with other overlapping statutory provisions, particularly section 74 of the Law of Property Act 1925 and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.

¹ The difficulties are highlighted in paras 1.4-1.7 below. They are also summarised in paras 1.18-1.28 below.

The consultation paper

- 1.5 In the consultation paper we therefore examined the provisions of section 36A of the Companies Act 1985 and considered ways in which the various overlapping statutory provisions could be brought into line. This involved consideration of, amongst other things, the categories of permitted signatories, the face-value requirement, presumptions of due execution, and presumptions of delivery. Although the focus of this examination was on the requirements for the execution of deeds, section 36A also covers the execution of other documents.
- 1.6 There are, however, many other types of corporation to which the provisions of the Companies Act do not apply and which are subject to very different execution regimes. We also considered in the consultation paper whether it may be possible to achieve greater uniformity between different types of corporations in the rules applying to the execution of deeds and documents, and to make those rules more accessible. This involved considering not only other corporations aggregate within England and Wales, but also foreign corporations and corporations sole.
- 1.7 Finally, the reforms introduced in 1989 concerned, for the most part, the execution of deeds or documents *by* a company. However, deeds and documents may also be executed *on behalf of* a company, and some practitioners had indicated that the 1989 reforms failed to pay sufficient regard to this. In the consultation paper we therefore examined whether any changes were needed to the rules for executing deeds and documents on behalf of a company.

Our provisional proposals

- 1.8 In the consultation paper, we found that not only was there a lack of consistency and uniformity in the present law, but also that there were serious technical uncertainties and problems of statutory interpretation which seemed quite disproportionate to the area of law under review.
- 1.9 We made a number of detailed proposals for reform in the consultation paper to tackle the technical difficulties and uncertainties. However, we also made a number of more general proposals for reform, and in particular suggested that the provisions applicable to companies incorporated under the Companies Acts should, to a large extent, be extended to corporations generally. This would enable such corporations to execute documents without a seal, and permit persons who deal with such corporations to rely on the presumptions of due execution and delivery which currently apply to companies.

Response to the consultation paper

- 1.10 There was very clear support from respondents for legislative reform in this area, particularly from practising solicitors. One respondent, whose views were echoed by many others, commented as follows:

We support the Commission's view that there is a need for reform of the law to introduce greater certainty and uniformity in this area. It is plainly absurd that there can be doubt over such a basic matter as whether a document has been properly executed

1.11 There was also considerable support for many of our detailed provisional recommendations. However, although there was also support from a majority of respondents for changes to achieve greater uniformity in relation to execution of deeds and documents by different types of corporations, there were also objections raised by some respondents. Several respondents were very firmly of the view that the ability to execute otherwise than by affixing the seal should not be extended to particular types of corporation; the view was also expressed by others that it would not be right to attempt to achieve greater uniformity with one over-arching piece of legislation.

Our approach to reform

1.12 In the light of the responses, we consider that a more limited reform exercise would be appropriate. We consider that the uncertainties and anomalies which we identified in the consultation paper should be eliminated so far as possible, but we do not consider that a wider reform which seeks to apply a (more or less) uniform approach to execution of deeds by corporations generally is feasible or desirable at this stage. Nor do we consider that a more limited “codification” of the existing provisions (with the additional changes which we recommend in this paper) should be undertaken.

1.13 Our views on this are reinforced by other factors. The European Commission is currently working on a draft directive on digital signatures.² The scope of the European Commission’s work is currently fairly limited, extending simply to the recognition of digital signatures. However, the work of the European Commission forms part of a wider debate on the use of electronic communication and its compatibility with the requirements of form and procedure imposed by national laws.³ In this country, the Land Registry is considering the use of electronic conveyancing to facilitate the elimination of the “registration gap” (between a disposition having effect between the parties and its registration). Among the issues which will need to be considered is the current requirement that a paper document is needed to effect a disposition of land.⁴ We understand from the Land Registry that even before the introduction of any fully electronic system there is a possibility that there may be an interim stage which would involve standard form documents that could then be scanned into a computer; those documents might

² See *Proposal for a European Parliament and Council Directive on a common framework for electronic signatures* Com (1998) 297 Final. For an earlier discussion paper published by the European Commission, see *Communication on Ensuring Security and Trust in Electronic Communications: Towards a European Framework for Digital Signatures and Encryption* Com (97) 503 Final.

³ For example, the Society for Computers and Law Legislative Working Party also produced a report for the Department of Trade and Industry in December 1996 on “Digital Information and Requirements of Form”. In April this year, the DTI published proposals for a secure electronic commerce bill which include measures to promote the legal recognition of electronic signatures in electronic commerce, and the introduction of a voluntary licensing regime for Certification Authorities, Trusted Third Parties, and other providers of cryptographic services PN/98/320. The United Nations Commission on International Trade Law (UNCITRAL) has also been working on Draft Uniform Rules on Electronic Signatures (discussed at Thirty-second session, Vienna, 19-30 January 1998). See also para 2.9, n 19 below.

⁴ The Land Registry is currently piloting the discharge of mortgages electronically.

not need to be first executed as deeds. These issues will be explained more fully in a forthcoming joint report on land registration from the Law Commission and the Land Registry which is due to be published on 2 September.⁵

- 1.14 This raises the question of the extent to which the current distinction between deeds and other documents will continue to be relevant; conveyances of land (or an interest in land) are, of course, the most common situations where a deed is currently required. As indicated in the consultation paper,⁶ we have not considered in this project any possible change in the situations when the law requires a deed to be used, or invited views on whether the distinction between deeds and other instruments should be maintained since we regarded this as beyond our terms of reference. In due course it may be necessary to address these issues. But such a review would go beyond the scope of our remit in this project since it would involve looking at the position of individuals as well as corporations, and would be concerned not simply with *execution* of deeds and documents, but with whether deeds should continue to exist in their current form. It may well be that in the light of technological advances other types of “formalities” are considered appropriate for particular types of transaction. Such considerations would form the basis of a very different review from that which we were asked to undertake in this project.
- 1.15 Accordingly, we consider that there are very good reasons for addressing the detailed difficulties identified in the consultation paper without delay. But we consider that any more comprehensive exercise seeking to achieve greater uniformity, or to “codify” the existing provisions, would not constitute the best use of resources at this stage. There is a risk that any such “codification” may be relatively short lived in the light of the technological and international developments noted above.

Matters not covered in the consultation paper or report

- 1.16 As indicated above,⁷ we have not considered when a deed should be required or if the distinction between deeds and documents should be maintained.⁸ Nor have we considered pre-incorporation contracts.
- 1.17 We have not dealt directly with the execution of documents by individuals, which had been the subject of previous Law Commission papers.⁹ However, in the consultation paper we did raise a limited number of issues which were relevant to deeds generally, and this is reflected in our final recommendations where we have

⁵ Land Registration for the Twenty First Century: A Consultative Document (1998) Law Com No 254.

⁶ Consultation Paper No 143, paras 1.11 and 2.15.

⁷ See para 1.14.

⁸ Although a small number of respondents did comment on this point.

⁹ Transfer of Land: Formalities for Deeds and Escrows (1985) Working Paper No 93; Deeds and Escrows (1987) Law Com No 163.

felt that changes are needed in the rules applying to corporations which cannot be satisfactorily addressed without also considering the rules relating to individuals.¹⁰

Overview and structure of report

- 1.18 Although the structure of this report follows broadly the order in which matters were dealt with in the consultation paper, we have made some changes to bring together issues where the recommendations we are putting forward (or rejecting) can usefully be discussed together. We have also included a section setting out our approach to the implementation of the proposals in legislation.
- 1.19 In Part 2 we consider the distinction between deeds and other documents. We consider, in particular, the problems which have arisen following the abolition of the requirement for deeds to be sealed and the introduction of the face-value requirement. Our main concern in the consultation paper was with the status of contracts made by corporations under seal, and the related question of whether the face-value requirement of a deed, introduced in 1989, is working adequately in practice.
- 1.20 In Part 3 we examine the way in which companies execute an instrument as a deed. We consider whether the current “dual system” should be retained under which companies can execute deeds either under their common seal or by the signature of two officers, and we consider whether there should be changes in the provisions relating to execution both with and without a seal. We also consider the position of corporate officers, and the use by companies of facsimile seals and signatures.
- 1.21 In Part 4 we look at execution by other corporations. We drew attention in the consultation paper to the considerable variety in the manner of execution by such corporations and suggested ways in which it may be possible to introduce greater uniformity into the law. We look in turn at corporations aggregate incorporated within England and Wales to which the provisions of the Companies Act do not apply, foreign corporations, and corporations sole.
- 1.22 In Part 5 we consider the position of third parties dealing with a corporation and in particular the presumptions of due execution set out in section 36A(6) of the Companies Act 1985 and in section 74(1) of the Law of Property Act 1925. We identified a number of potentially serious inconsistencies between the two sections and also certain difficulties of construction, and we consider how far it is possible to achieve greater coherence and consistency in the application of these presumptions.
- 1.23 In Part 6 we deal with delivery of deeds. We consider whether the concept still serves a useful purpose, and examine the difficulties of construction and application which arise in respect of the presumptions of delivery contained in section 36A(5) and (6) of the Companies Act 1985.

¹⁰ This is the case, in particular, in respect of the relationship between deeds, contracts under seal and specialties (see paras 2.34 and 2.44) and in respect of execution by attorneys (see para 7.44).

- 1.24 In Part 7 we look at execution *on behalf of* corporations. This is primarily directed at the position where a corporation executes a deed by means of an attorney. There are difficulties in applying the underlying law to current practice, and the 1989 reforms relating to the execution of deeds made no provision for execution by an attorney. However, we also consider the execution of deeds by liquidators, administrators, administrative receivers, and other types of receiver, in respect of which there also appeared to be a number of technical difficulties or uncertainties.
- 1.25 In Part 8 we consider the execution of contracts by and on behalf of corporations. Special provision is made in respect of contracts by section 36 of the Companies Act 1985, the Foreign Companies (Execution of Documents) Regulations 1994, and the Corporate Bodies Contracts Act 1960. We consider ways of updating and rationalising these provisions.
- 1.26 Part 9 explains the approach which we have adopted in drafting the legislation to implement the reforms we have recommended. As indicated above,¹¹ there were calls from some consultees for a general rationalisation and codification of the rules applying to the execution of deeds and documents by and on behalf of corporations. However, for the reasons given, we have not adopted such an approach at this stage.
- 1.27 Part 10 contains a summary of our final recommendations.
- 1.28 Appendix A contains a draft bill to implement our recommendations. In Appendix B we have shown how the current provisions would look with the amendments set out in the draft bill inserted into them. Extracts of relevant statutory provisions (as they stand at present) are contained in Appendix C. Appendix D contains a list of respondents to the consultation paper.

Summary of our final recommendations

- 1.29 The main recommendations for change which we make in this report are as follows:¹²
- (1) the relationship between deeds, contracts under seal and “specialties” should be clarified by legislative provision;
 - (2) the presumptions of due execution contained in section 74(1) of the Law of Property Act 1925 and section 36A(6) of the Companies Act 1985 should be brought into line. In particular, section 74(1) should be extended to cover situations where the affixing of a corporation’s seal is attested by two directors or members of the council or governing body (at present it only covers execution by one such person and the secretary (or other permanent officer));
 - (3) the irrebuttable presumption of delivery upon execution in favour of a purchaser in good faith which is currently contained in section 36A(6) should be removed;

¹¹ See para 1.11. See also 9.3-9.4 below.

¹² A more detailed summary of all our final recommendations is set out in Part 10.

(4) section 1 of the Law of Property (Miscellaneous Provisions) Act 1989, section 36A of the Companies Act 1985 and section 74 of the Law of Property Act 1925 should be amended to make specific provision for execution by an attorney;

(5) the powers of a liquidator should be clarified by confirming that the power to execute deeds and documents in the company's name and on its behalf is separate from the power to affix the company's seal.

PART 2

THE DISTINCTION BETWEEN DEEDS AND OTHER DOCUMENTS

Introduction

- 2.1 In this part we consider our provisional recommendations relating to the distinction between deeds and other documents, and in particular the relationship between deeds, contracts under seal and specialties. Problems have arisen following the abolition of the requirement for deeds to be sealed and the introduction of the face-value requirement. Our main concern in the consultation paper was with the status of contracts made by corporations under seal, and the related question of whether the face-value requirement of a deed, introduced in 1989, is working adequately in practice.
- 2.2 Although difficulties in this context have been discussed largely in relation to corporations, the issues raised are also relevant where the maker of the deed is an individual. The recommendations discussed in this part therefore relate to the execution of deeds generally, and are not limited to execution by corporations.
- 2.3 We begin by setting out the definition of a deed, explaining the legal formalities required for a deed, and considering in particular the face-value requirement; we then summarise the relationship between deeds, contracts under seal and specialties; next we consider the main proposals for reform which we raised for consideration in the consultation paper, namely making the face-value requirement more specific, clarifying the relationship between deeds and contracts under seal, and clarifying the term “specialty”, and set out our final views on these recommendations in the light of the responses received; finally we consider a number of other issues which we raised for consideration in the consultation paper relating to the distinction between deeds and documents.

Definition of a deed

- 2.4 In the consultation paper, we gave the following definition of a deed: “A deed may be defined as a written instrument which is executed with the necessary formality, and by which an interest, right, or property passes or is confirmed, or an obligation binding on some person is created or confirmed.”¹
- 2.5 The principal features of a deed are that:

¹ Consultation Paper No 143, para 2.6. This definition is adapted from that given in *Norton on Deeds* (2nd ed 1928) p 3. Norton does not include an instrument which confirms (as opposed to creates) an existing obligation, but it seems appropriate to extend the definition to do so, at least in the case of a document which contains an express or implied covenant to observe or perform the existing obligation. Norton notes that it is, in fact, “very difficult” to give a definition which is completely satisfactory. It should also be noted that the original function of a deed in many cases appears to have been probative, rather than dispositive: see Graham Virgo and Charles Harpum, “Breaking the seal: the new law on deeds” (1991) 11 LMCLQ 209, 210, n 7.

- (a) it must comply with certain formalities;²
- (b) it must also perform one of the functions mentioned in paragraph 2.4 above;³
- (c) certain transactions are only fully effective if carried out by deed;⁴
- (d) quite apart from this, a deed has certain effects which distinguish it from an instrument entered “under hand”.⁵

2.6 On this last point, two main differences arise between a deed and an instrument under hand. The first is that as a general rule a promise made without valuable consideration is not enforceable. However, when a promise is made by deed, it is known as a “specialty”,⁶ and may generally be enforced despite any lack of consideration.⁷ The second is that the limitation period within which proceedings may be brought differs. In the case of an action brought on a simple contract the period is six years from the date on which the cause of action accrued.⁸ However, in the case of a specialty the equivalent period is twelve years.⁹

² These are set out in para 2.8 below.

³ A share certificate, for example, is not a deed, even if sealed by a company, as it is no more than evidence of ownership of the relevant shares; *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496, 503. See also *Chitty on Contracts* (27th ed 1994) vol 1 p 22: “At common law, all deeds were documents under seal, but not all documents under seal were and are deeds”.

⁴ With certain exceptions, all conveyances, transfers, mortgages, charges, leases and surrenders of legal estate or interest in land must be by deed. The grant of a power of attorney must also be by deed. A deed is also necessary at common law in certain other cases (eg a release or discharge of a debt or liability, a gift or voluntary assignment of tangible goods not accompanied by delivery of possession). See further, Consultation Paper No 143, paras 2.12-2.15.

⁵ By the term “instrument” we simply mean a formal legal document in writing. For a fuller definition see *Halsbury’s Laws of England* (4th ed 1975) vol 12 paras 1436-7.

⁶ For the meaning of “specialty”, see n 26 below.

⁷ *Sharlington v Strotton*, 1 Plowd 308; 75 ER 469; *Cannon v Hartley* [1949] Ch 213, 217. See also *Morley v Boothby* (1825) 3 Bing 107; 130 ER 455, 456, *per Best CJ*. The courts will not, however, usually order specific performance of a voluntary covenant (as opposed to damages for breach), even if it is made by deed. That is because equity will not assist a volunteer. See *Re Ellenborough Towry Law v Burne* [1903] 1 Ch 697, and *Jeffreys v Jeffreys* (1841) Cr & Ph 138, 141; 41 ER 443, 444.

⁸ Limitation Act 1980, s 5.

⁹ *Ibid*, s 8. Further differences between deeds and other documents include the following: As a general rule the maker of a deed is estopped from claiming that the contents of a deed did not correctly express the maker’s intentions, or that there are reasons why the deed should not take effect; there is a general rule of interpretation that where a doubt arises on the construction of a deed, it should be construed most strongly against its maker, and in favour of the grantee or covenantee; the use of a deed may also trigger certain statutory consequences, for example the appointment or retirement of a trustee by deed will give effect to the provisions set out in s 40 of the Trustee Act 1925, including the vesting of the trust property in the new trustee without the need for a separate conveyance. See further, Consultation Paper No 143, para 2.11.

Formalities required for a deed

- 2.7 As indicated above,¹⁰ a deed must comply with certain formalities. The need for such additional formalities explains why a deed is regarded as being in “solemn form”.
- 2.8 At common law the only formal requirements for a deed were writing on paper or parchment, sealing and delivery. Following the Law of Property (Miscellaneous Provisions) Act 1989, there are now four formal requirements for a deed (whether executed by a corporation or an individual). These are a combination of common law and statute, and were summarised in the consultation paper as follows:¹¹
- (a) First, a deed must be in writing, but may be on any substance. This is a common law requirement, although modified by statute.¹²
 - (b) Secondly, section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 provides that an instrument is not a deed unless it makes it clear on the face of the instrument that the person making it or, as the case may be, the parties to it intend it to be a deed (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise).¹³ This “face-value” requirement was new in 1989.
 - (c) Thirdly, section 1(2)(b) of the 1989 Act provides that the instrument must be validly executed as a deed by the person making it or, as the case may be, by one or more of the parties to it.¹⁴
 - (d) Fourthly, a deed must be delivered.¹⁵ This is again a common law requirement.
- 2.9 The need for sealing was abolished when the 1989 Act was brought into force. Instead an instrument must be validly executed as a deed and must make it clear on its face that it is intended to be a deed. For an individual “execution as a deed” is by signing in the presence of a witness, who attests the signature, and by delivery

¹⁰ Para 2.5(a).

¹¹ Consultation Paper No 143, para 3.2.

¹² Law of Property (Miscellaneous Provisions) Act 1989, s 1(1)(a), abolishing any rule of law restricting the substances on which a deed may be written. When used in any statute which does not itself define it, the word “writing” includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form; Interpretation Act 1978, s 5, Sched 1. It will be noted, however, that the requirement for writing derives from the common law, not the 1989 Act. See also n 27 below.

¹³ See also Companies Act 1985, s 36A(5).

¹⁴ A party to a deed may, however, be estopped from denying that the deed has been executed where there is a representation of execution which is intended to be relied on; *TCB Ltd v Gray* [1986] Ch 621, 634 (power of attorney given by an individual was signed but not sealed, but stated that it had been “signed sealed and delivered”).

¹⁵ We raised in the consultation paper the question of whether it is correct to treat (c) and (d) as separate requirements where the maker of the deed is a corporation; Consultation Paper No 143, para 6.4. This is considered below; see paras 3.6-3.13.

of the instrument as a deed.¹⁶ For companies and some other types of corporation this is by affixing the corporation's seal or by the signature of two officers.¹⁷ This is considered in detail in the following parts.¹⁸ What we concentrate on in this part is the face-value requirement.¹⁹

The face-value requirement

- 2.10 In the consultation paper, we pointed out that the purpose of the face-value requirement is to make a clear distinction between deeds and other instruments now that deeds may be executed without the use of a seal.²⁰ However, there appears to be some uncertainty as to what is necessary to fulfil this requirement. There will be no problem if the document is headed with words such as "this deed", or states that it is "executed as a deed". But what is the position if the document merely describes itself as a type of document which must be in the form of a deed (for example, it commences "this lease"), or is executed under seal without otherwise describing itself as a deed?
- 2.11 We deal below with the position where a document is sealed, but there is no other indication that it was intended to be a deed.²¹ So far as the first situation is concerned, we pointed out in the consultation paper that the Land Registry's stated practice was that a document which described itself as being a type of instrument which, by its nature, was required by law to be by deed was sufficient for the purpose of section 1(2)(a).²² However, we expressed reservations about this practice. Not only might it be considered tantamount to abolishing the particular formality altogether;²³ it is also difficult to reconcile with the principle that a

¹⁶ Law of Property (Miscellaneous Provisions) Act 1989, s 1(3). As an alternative, the instrument may be signed at the maker's direction and in his presence, and in the presence of two witnesses who each attest the signature: *ibid*, s 1(3)(a)(ii). An individual may still seal a deed, in addition to signing and having this witnessed, but it is generally considered that the addition of the seal has no additional effect; see para 2.20 below.

¹⁷ As we shall discuss further below, s 36A of the Companies Act 1985 does not in fact use the expression "executed as a deed" which gives rise to some confusion. See paras 3.6-3.10 below.

¹⁸ Parts 2 and 3.

¹⁹ We did not discuss in any detail in the consultation paper the requirement for writing, and we do not consider it any further in this report. As indicated above (para 1.13, n 3), the Society for Computers and Law Legislative Working Party produced a report for the Department of Trade and Industry in December 1996 on "Digital Information and Requirements of Form". This recommends, inter alia, that a new definition of "writing" should be inserted in Sched 1 to the Interpretation Act 1978 to apply to future legislation which would take full account of digital communications technology. The extent to which any such reform should affect the formal requirements for a deed would, of course, have to be considered carefully. We consider the question of delivery in Part 6.

²⁰ Consultation Paper No 143, para 3.3.

²¹ See paras 2.17-2.20.

²² See Practice Leaflet No 17 (April 1991), para 3.2. This leaflet has now been replaced by Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998) which is in slightly different terms; see para C1.

²³ We have previously rejected the suggestion that the mere use of words like "lease" or "mortgage" would suffice. "It seems essential to avoid a situation where a document is held to be a deed simply because it was used in a transaction where a deed is required. This

purported lease which fails to meet the necessary formalities may nonetheless take effect as an equitable lease.²⁴ In the light of these comments, we invited views from consultees on whether the face-value requirement adequately serves its purpose of distinguishing between deeds and other documents in its present form.

Deeds, contracts under seal and “specialties”

- 2.12 As indicated above,²⁵ English law makes an important distinction between instruments which are executed in “solemn form” as deeds, and other instruments which are generally referred to as being in “simple form” under hand. Where the instrument is a contract, this is recognised by the distinction made between a contract executed as a deed, which is a “specialty”,²⁶ and an instrument under hand, which is a simple contract.²⁷ We have explained above that this distinction can have important consequences so far as the need for consideration and the length of any applicable limitation period are concerned.²⁸
- 2.13 Before the changes to the law on deeds were introduced in 1989, the position was relatively simple. For the most part a contract entered into under seal would be both a specialty and a deed. There was no room for deeds which were not under seal, and hence both deeds and specialties would be instruments executed under seal. Specialties were often described as “contracts under seal”.²⁹ However, the reforms introduced in 1989 made two important changes. They permitted deeds to be executed without the use of a seal (by both individuals and companies); and they introduced a new requirement that the intention to create a deed must be clear from the face of the instrument. They made no specific reference to specialties.
- 2.14 These changes led some to question the continuing relationship between deeds, contracts under seal and specialties. Two related questions were raised in particular which we examined in the consultation paper: the first was whether, in order to be a specialty, it continued to be necessary for an instrument to be executed under seal; the second was whether a contract executed under seal would, without more, still be a deed and/or a specialty.

would amount to abolishing formalities for deeds altogether”: Transfer of Land: formalities for deeds and escrows (1985) Law Com No 93, para 8.3(ii).

²⁴ Consultation Paper No 143, para 14.13.

²⁵ See para 2.6.

²⁶ As we explained in the consultation paper, the word “specialty” has been used in a number of different senses. Sometimes it has been taken to mean an obligation under seal securing a debt, or a debt due from the Crown or arising from statute. In practice it has more frequently been taken to include “any contract entered into under seal”, or “any obligation entered into by deed under seal”. See Consultation Paper No 143, para 2.10. See also the Law Reform Committee’s Twenty-First Report (Final Report on Limitations of Actions) (1977) Cmnd 6923 p 22: “For practical purposes, a specialty may be treated as an obligation entered into by deed under seal...”.

²⁷ A contract made orally and not reduced to writing (also known as a parol contract) is also, of course, a type of simple contract.

²⁸ See para 2.6.

²⁹ See Consultation Paper No 143, para 2.10.

- 2.15 So far as the first question was concerned, we drew attention to doubts which had been raised about whether, in the case of an individual, a document which is not executed under seal will still be a specialty.³⁰ Put simply, the argument is that a specialty is required to be a “contract under seal”; what gives such a document its distinctive status is a seal. So far as companies are concerned, section 36A(4) which permits companies to execute otherwise than by affixing the company seal, expressly states that a document executed in the manner prescribed “has the same effect as if executed under the common seal of the company”. This would appear to remove any doubt about the effect of a document executed in accordance with that section and confirm that a company seal is not necessary to ensure that a document is a specialty.³¹
- 2.16 Our provisional view was that the argument in relation to individuals was also misconceived. An instrument³² is a specialty because it is in solemn form; it is a type of deed. Before 1989 execution in solemn form required the use of a seal. Since 1989, the rules for execution in solemn form (namely as a deed) have changed. For an individual, they are now set out in section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989. But in other respects the position remains the same. Accordingly, a contract which is executed by an individual as a deed (that is by attested signature), and which makes it clear on its face that it is intended to be a deed, will be both a deed and a specialty. The absence of any seal is immaterial.³³
- 2.17 This reasoning also goes some way to answering the second question, although it needs to be taken a little further. An instrument will not be regarded as executed in solemn form (and hence will be neither a deed nor a specialty) if the intention to make it a deed is not clear on the face of the instrument. But will the mere fact that a contract is executed under seal (whether by an individual or a corporation) be sufficient to make it clear that it is intended to be a deed? Although it had been recently held to have exactly this effect,³⁴ our provisional view was that this seemed wrong in principle.
- 2.18 We drew attention in particular to the provisions applying to companies. Sections 36A(2) and 36A(4) set out two alternative methods of execution by a company (by affixing the seal and by the signature of two officers respectively). Section 36A(5) sets out the additional requirement³⁵ that a document executed by a company

³⁰ Eg, Philip J Horn, “To seal or not to seal” LSG 9 September 1992 at p 25, and correspondence in LSG 30 September 1992 at p 17, and 28 October 1992 at p 15.

³¹ Provided it is executed in accordance with section 36A(4), and otherwise complies with the requirements for a deed; see para 2.33 below. Some other corporations may execute under provisions similar to section 36A(4) (eg Friendly Societies incorporated under the Friendly Societies Act 1992); others are still required to execute by affixing their seal.

³² Or, depending on how the term “specialty” is used, any obligation contained in the instrument; see n 26 above.

³³ Consultation Paper No 143, para 11.6.

³⁴ *Johnsey Estates (1990) Limited v Newport Marketworld Limited and Others* 10 May 1996 (unreported, Judge Moseley QC).

³⁵ Derived from s 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989, which applies to deeds generally.

must also make the intention to create a deed clear on its face if it is to take effect as a deed. If the mere fact of affixing a seal was sufficient to show the intention to create a deed, then where a deed was executed under seal in accordance with section 36A(2), the additional requirement in section 36A(5) would be meaningless. This would mean that the mere manner of execution was sufficient to show an intention to create a deed for one of these methods (where execution was under seal), but not, presumably, for the other (where execution was by the signature of two officers).

2.19 Our provisional view was that a contract made by a corporation under seal which is not a deed (because the intention to create a deed was not clear from the face of the instrument) has no special status. It cannot be a specialty, because it has not been executed in solemn form.³⁶ The term “contract under seal”, continues to be referred to in discussing a specialty,³⁷ and this can obviously lead to confusion. However, a contract made by a company by affixing its seal which did not satisfy the face-value requirement would not be a “contract under seal” in this sense.

2.20 We did not specifically address this issue in respect of individuals in the consultation paper. In practice it is much less likely to arise since there is no prescribed or established method of execution which involves the use of a seal (unlike in the case of companies and other corporations). Indeed, it could be argued, therefore, that where an individual affixes a seal to an instrument this *would* be sufficient to make it clear that the instrument was intended to be a deed - there would be no other reason for the individual to affix the seal.³⁸ However, we did point out that that the use of seals by individuals had become wholly artificial by 1989, and any suggestion that a document executed under seal by an individual should acquire a special status by virtue of being sealed would conflict with the thinking behind section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.³⁹

2.21 In short, our provisional view was that the position following the 1989 reforms was as follows:

(a) to be a specialty, an instrument must be a deed, but need not be executed under seal;⁴⁰

(b) the mere fact of affixing a seal to an instrument is not sufficient in itself to show the intention to create a deed;

(c) a contract made by a corporation by affixing its seal has no special status. It can either be a deed and a specialty (if the intention to create

³⁶ See para 2.12 above.

³⁷ See *Aiken v Stewart Wrightson Members Ltd* [1995] 1 WLR 1281.

³⁸ See *Chitty on Contracts* (27th ed 1994) p 22, discussing execution by individuals: “It is questionable whether, while no longer required, the affixing of a seal to an instrument would in itself be considered sufficient to ‘make clear on its face’ that it was intended to be a deed”.

³⁹ Consultation Paper No 143, para 13.9.

⁴⁰ Or the specialty must be contained in an instrument which is a deed, depending on the meaning given to the word “specialty”; see n 26 above.

a deed is apparent elsewhere from the instrument), or it can be a simple contract (if the intention to create a deed is not apparent elsewhere from the instrument).

However, we considered that it was deeply unsatisfactory that there should be any possible uncertainty on such fundamental issues and put forward a number of options for clarifying the position.⁴¹

- 2.22 We now turn to the proposals for reform canvassed in the consultation paper and set out our final views on them in the light of the responses received.

Making the face-value requirement more specific

- 2.23 As indicated above,⁴² we raised for consideration whether the face-value requirement set out in section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 adequately serves its purpose, in its present form, of distinguishing between deeds and other documents. We did not reach a firm view on this point in the consultation paper. We pointed out that the present formulation has the advantage of flexibility, so that the intention to create a deed is not thwarted by the accidental omission of particular wording in a document which is otherwise clearly intended to be a deed. On the other hand, there is a degree of uncertainty as to what is sufficient to satisfy the requirement in practice.⁴³
- 2.24 We invited views from consultees on whether the face-value requirement should be made specific. We suggested two ways of doing this: the first was to have a requirement that an instrument must expressly describe itself as a deed; the second was to have a prescribed form of attestation clause.
- 2.25 A majority of respondents who addressed this question were against making the face-value requirement more specific. The main point made was that the flexibility afforded by the current wording was helpful, since it allowed for the possibility of rescuing documents clearly intended to be deeds but accidentally not expressly described as such.
- 2.26 One respondent, the Society of Public Notaries, also made an additional point which we had not considered in the consultation paper. They pointed out that it is very common to have instruments worded in a foreign language which are intended to be deeds, particularly powers of attorney. These may not have the word “deed” in English on the instrument, nor an appropriate attestation clause in English. But the current flexibility of the words “or otherwise” in the face-value requirement enables notaries to confirm that the requirement has been satisfied from the evidence of the instrument’s wording as a whole.

⁴¹ These are discussed in paras 2.29-2.36 below.

⁴² See para 2.10.

⁴³ Two examples are given above. The first is whether the necessary intention to create a deed is shown if the document merely calls itself by a description of instrument for which a deed is required; the second is whether the mere fact that a seal is affixed is sufficient. See paras 2.10-2.11 above.

- 2.27 There were, however, a significant number of respondents who considered that the face-value requirement should be made more specific. The view taken by those respondents was that any small risk of hardship is heavily outweighed by the advantages of clarity. A clear preference was expressed by those respondents for the first option for achieving this which we canvassed, namely requiring the instrument to describe itself expressly as a deed.
- 2.28 We acknowledge that this is a difficult issue. Strong opinions were expressed on both sides. However, we are persuaded that the advantages of flexibility outweigh the desirability of greater certainty in this case. We were particularly impressed by the point put forward by the Society of Public Notaries which demonstrates the potential problems which could arise if the face-value requirement were made too specific. Our view was also supported by the majority of respondents who addressed this point. **Accordingly we recommend against making the face-value requirement more specific.**

Clarifying the relationship between deeds and contracts under seal

- 2.29 As indicated above,⁴⁴ we considered that the relationship between deeds and contracts under seal needs to be clarified. We put forward two options for doing this. The first was to make all contracts executed under seal by a corporation deeds. This could be done, for example, by amending section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 to provide that the intention to create a deed is sufficiently shown in the case of a company or other corporation by execution under seal.⁴⁵ The second option was to make it clear that the face-value requirement is not satisfied merely because an instrument is executed under seal.
- 2.30 We provisionally favoured the second option. In particular we drew attention to three objections to the first option.⁴⁶ First, it would attach an importance to the seal which is at variance with the reforms made to the law of deeds in 1989, and undermine the “face-value” requirement. Secondly, whatever the position before 1989, some companies - particularly small ones - may find it convenient to affix the seal to all manner of documents, without wishing to make them deeds. Thirdly, it would reduce the degree of uniformity between corporations and individuals in the creation of a deed.⁴⁷
- 2.31 There was virtually unanimous support from respondents for our provisional view that the relationship between contracts under seal and deeds needs to be clarified.

⁴⁴ See para 2.21.

⁴⁵ We went on to suggest that such an amendment should also provide that execution without a seal in accordance with s 36A(4) would also be sufficient to demonstrate the intention to create a deed.

⁴⁶ Consultation Paper No 143, para 13.9.

⁴⁷ Any change along the lines of the first option would have to be limited to corporations since the use of seals by individuals had become wholly artificial by 1989, and any suggestion that a document executed under seal by an individual should acquire a special status by virtue of being sealed would conflict with the thinking behind s 1 of the Law of Property (Miscellaneous Provisions) Act 1989. Any change would therefore have to be limited to corporations.

There was also a clear preference for our favoured option for achieving this. The main reason given by respondents was that it should be possible for a corporation to execute a document under seal without it having any particular significance. Some companies prefer to use a seal for reasons of convenience, ceremony or otherwise.⁴⁸ It should be possible for them to do so without the document being treated as a deed and a specialty.⁴⁹

- 2.32 We agree. A provision which made all documents executed under seal deeds (and specialties) would reduce the current flexibility. As we pointed out in the consultation paper,⁵⁰ it would also be at odds with the reforms made to the law of deeds in 1989 and undermine the face value requirement.
- 2.33 As indicated above,⁵¹ the particular problem arises at present in relation to companies and other corporations where execution by affixing the common or corporate seal is very common. It is much less likely that an instrument will be executed by an individual under seal. However, in order to achieve consistency we consider that the provision we are proposing should apply generally and not draw any distinction between execution by individuals or corporations. This is also consistent with the approach taken by the Law of Property (Miscellaneous Provisions) Act 1989 which removed the relevance of sealing by individuals.
- 2.34 **We recommend that there should be a statutory provision making it clear that the face-value requirement is not satisfied merely because an instrument is executed under seal.** (Draft bill, clause 7)

Clarifying the term “specialty”

- 2.35 As indicated above,⁵² we also expressed the provisional view that the term “specialty” needed to be clarified in the context of deeds and other documents. Again, two options were put forward to achieve this. The first was a provision that no instrument (or obligation created or confirmed in an instrument) is a specialty unless it is a deed. The second was that a specialty should include all deeds and any contract made by a corporation under seal (or in accordance with section 36A(4) of the Companies Act 1985) whether or not a deed. We provisionally favoured option (i). We considered that this accorded with the principle that the particular status of a specialty derives from, and is justified by, the fact that it is an instrument executed in solemn form. This solution also avoided the complications which might arise in determining the status and attributes of a “new” category of instrument which would be a specialty but not a deed.
- 2.36 Again there was widespread support on consultation both for the need for clarification and for our preferred option to achieve this. As with the last question, several respondents pointed out that some companies prefer to use a seal to

⁴⁸ See para 2.36 and paras 3.14-3.17 below.

⁴⁹ On the question of specialties, see paras 2.35-2.45 below.

⁵⁰ See paras 2.29 above.

⁵¹ See para 2.15.

⁵² See para 2.21.

execute simple contracts for reasons of convenience.⁵³ A provision which made all documents executed under seal specialties would reduce the current flexibility enjoyed by such organisations.

- 2.37 There is an additional general point which we consider should be taken into account. It relates to the provisional proposals we have made in another project on limitation periods.⁵⁴ If those proposals are pursued, the question of whether a contract is a specialty or not would have less importance. A contract would not automatically benefit from a longer limitation period just because it was a specialty; but it would be possible for the parties to stipulate a period of their choice in any contract (whether a specialty or not).⁵⁵ However, our provisional proposals in that project, even if confirmed in the final report, may take some time to be implemented. Moreover, they are not concerned to abolish specialties. Insofar as there continues to be doubt as to whether an instrument executed by a corporation is or is not a specialty, then we consider that the position should be clarified.
- 2.38 The provision which has been drafted to implement this proposal is contained in clause 9 of the draft bill at Appendix A. In drafting this provision we found it necessary to address two other more detailed matters which we explain below.

Execution as a deed is both necessary and sufficient

- 2.39 It is our intention that the new provision should make it clear that in order to be a specialty an instrument must be executed as a deed and satisfy the other requirements of a deed (in particular, the face-value requirement). But it should also be clear that there is no need for the instrument to be executed under seal to be a specialty where the instrument can be validly executed as a deed without using a seal. The solution proposed in the consultation was a provision that “no instrument ... is a specialty unless it is a deed”. One respondent questioned whether this was adequate to make it clear that sealing was not a requirement for a specialty. They argued that the particular status of a specialty derived from the use of the seal (rather than the fact that it was a deed). This had not been changed by the 1989 reforms so that a seal was still required for a specialty. The solution proposed in the consultation paper would not remove this requirement; it would simply add the additional requirement that the instrument must also be a deed.
- 2.40 We have already indicated that it is our view that the current law does not require an instrument to be sealed in order to be a specialty, and that the particular status of a specialty derives from the fact that it complies with the formalities of a deed. It is our view that, taken together, this recommendation and the previous recommendation set out at paragraph 2.34 above, confirm this position. They make it clear that the use of a seal has no particular significance, and that, to be a specialty, the instrument must be a deed. The status of the specialty is clearly

⁵³ See para 2.31 above, and paras 3.14-3.17 below.

⁵⁴ Limitation of Actions (1998) Law Com No 151.

⁵⁵ It may already be the position under the current law that parties to a contract may agree to a longer limitation period; see *ibid* at para 13.6. Our provisional view was that the new regime proposed in the consultation paper should permit parties to agree to reduce or extend the limitation period; *ibid*, at para 14.6.

identified as deriving from the fact that it is a deed rather than from the use of a seal. We considered whether it would be helpful to state expressly in the statutory provision that a specialty need not be executed under seal, but decided that this was not necessary and would confuse the drafting. However, we did consider that it would be clearer if the recommendation were recast as a positive proposition.⁵⁶

Specialties which are not deeds (or obligations contained in deeds)

- 2.41 As indicated above,⁵⁷ specialties are not confined to deeds (or obligations contained in deeds). There is a line of authority that an obligation contained in a statute is also to be treated as a specialty. In *Collin v Duke of Westminster*,⁵⁸ a case concerning a claim by a lessee to be entitled to acquire the freehold of the building where he lived under the provisions of the Leasehold Reform Act 1967, the court rejected the argument that “specialties” were limited to deeds or contracts under seal,⁵⁹ and held that that the relevant limitation period was the 12 year period applicable to specialties. The court made it clear that this was only the case where the cause of action is derived from statute and from the statute alone.⁶⁰ It also seems to be clear that this is only the case where the plaintiff is seeking to assert a non-pecuniary right, since section 9 of the Limitation Act 1980 imposes a six-year limitation period in respect of actions to recover a sum of money due under a statute.
- 2.42 We do not consider that it is necessary to make any express provision in respect of such obligations. This is because our proposed provision clearly only concerns instruments which are capable of being deeds. It will not therefore affect obligations contained in statutes. If an obligation contained in a statute is regarded as a specialty under the current law, it will continue to be so regarded. Our new provision will have no effect on it.
- 2.43 There is one situation, however, which we do consider needs to be taken into account in the drafting of the provision. This is where an obligation is specifically stated by statute to take effect as a specialty. So, for example, section 14(2) of the Companies Act 1985 states that: “Money payable by a member of the company under the memorandum or articles is a debt due from him to the company, and in England and Wales is of the nature of a specialty debt”. The obligation to pay money is created by the relevant instrument (the memorandum or articles); the statutory provision simply provides what the nature of that obligation is (that is, it is to be regarded as a specialty debt, even though the memorandum and/or the articles will not satisfy the requirements of a deed). Our new provision might be regarded as inconsistent with this section if it simply stated that for an obligation created by an instrument to be a specialty, the instrument must be a deed. We therefore consider that the new provision should make it clear that it applies except as otherwise provided by statute.

⁵⁶ See para 2.46 below, and clause 9 of the draft bill.

⁵⁷ See para 2.12, n 26.

⁵⁸ [1985] QB 581.

⁵⁹ See, in particular *ibid* at p 603.

⁶⁰ *Ibid*, at p 602.

- 2.44 **Accordingly, we recommend that there should be a statutory provision that except as otherwise provided by statute, an instrument, or an obligation created or confirmed in an instrument, shall be a specialty only if the instrument is a deed.** (Draft bill, clause 9)

Other issues raised for consideration

Defective deeds

- 2.45 In the consultation paper, we raised the question of whether a document which is expressed to be a deed but which is not executed with the necessary formality can nonetheless take effect as a simple contract.⁶¹ We saw no reason in principle why such a document should not be enforceable as a simple contract, assuming that all the other elements required for such a contract were present (such as consideration), that the document had been signed by a person or persons with authority to bind the company to such a contract, and that the transaction was not one for which a deed was required.
- 2.46 However, it had been suggested to us that a specific rule might be introduced to this effect. Our provisional view was against recommending that there should be such a rule. We considered that it would not be appropriate to specify that an instrument which was intended to be a deed (but which failed to take effect as a deed) should have effect as an instrument under hand in every case. An instrument may fail to take effect as a deed for a number of reasons, and in a variety of circumstances. Each of these may have different legal consequences, and we considered that it should be left to the present law to determine the position in each case.
- 2.47 This view was supported by a large majority of respondents. The reasons given echoed our own. Courts should be able to deal with each case on its own facts. Any rule of law would have to be very sophisticated which might make it too complicated, and a general rule could have unforeseen consequences, and/or lead to uncertainty and injustice.
- 2.48 One respondent gave a practical example of potential difficulties which might arise from a new rule along the lines we had rejected. Suppose a share sale agreement including a power of attorney in favour of the buyer is invalidly executed as a deed. To be effective, a power of attorney has to be executed as a deed;⁶² an agreement to sell shares, on the other hand, does not. If the agreement has effect as a contract, the buyer is prejudiced because he does not have the power of attorney which he may need (for example, to execute certain documents in the seller's name). There should therefore be no automatic rule laid down by statute; each case should turn on its particular facts.
- 2.49 In the light of the responses received, we remain of the view expressed in the consultation paper. **Accordingly, we recommend against a rule of law that an instrument which fails to take effect as a deed nonetheless automatically has effect as a contract or other instrument under hand.**

⁶¹ Consultation Paper No 143, para 2.16.

⁶² See para 7.3 below.

Achieving consistency between section 1(2)(a) and sections 36A(5) and (6)

- 2.50 We also drew attention to a small inconsistency in the wording of the statutory provisions relating to the face-value requirement. Section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989, which sets out the face-value requirement for deeds generally, is reflected in sections 36A(5) and (6) of the Companies Act 1985 which apply specifically to companies.⁶³ However, the wording is slightly different in that the Companies Act provisions omit the words “(whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise)” which follow in section 1(2)(a).⁶⁴
- 2.51 We considered that this created unnecessary uncertainty and provisionally recommended that the wording of section 1(2)(a) and 36A should be brought into line, assuming no other changes were made to the face value-requirement. We invited consultees to consider whether the additional wording in section 1(2)(a) should be omitted from that section, or, alternatively, added to the provisions in section 36A.⁶⁵
- 2.52 There was unanimous support from respondents for harmonising the two sections. There was also a clear preference for the second alternative mentioned above, namely adding the extra wording to section 36A. Some respondents who took a different view drew a link between this question and the discussion in paragraphs 2.23-2.28 above; they preferred to omit the additional wording from both sections because the deletion of the words “or otherwise” might go some way to making face-value requirement more specific.
- 2.53 We have expressed the view above that we do not consider that the face value requirement should be made more specific. We consider that the wording in section 1(2)(a) gives essential flexibility and should remain as it is. However, we have recommended a number of other changes to the wording of section 36A, and drafted a new section 36AA to make it clear what a company needs to do to execute a document as a deed for the purposes of section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989.⁶⁶ In the light of these other changes, it is not necessary to repeat the face-value requirement in section 36A; it is set out in section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 which applies to all deeds (whether executed by individuals or corporations). Instead of altering the wording of the face-value requirement in section 36A(5), our draft bill simply repeals that subsection;⁶⁷ the rebuttable presumption of

⁶³ And unregistered companies; see para 3.4 below.

⁶⁴ See para 2.8(b) above.

⁶⁵ The additional wording proposed to be included in s 36A(5) was: “(whether by describing itself as a deed or expressing it to be executed as a deed or otherwise)”. We omitted the words “or signed”, which appear in s 1(2)(a) because they seemed inappropriate given that a deed executed under s 36A is expressed to be executed “by the company”, even when s 36A(4) is used. We proposed elsewhere that the second part of s 36A(6) should be repealed, and so there would be no need to make any amendment to the description of the face-value requirement in that section. See paras 6.37-6.43 below.

⁶⁶ See paras 3.6-3.12 below, and clause 4 of the draft bill.

⁶⁷ See clause 10(2) and Schedule 2 to the draft bill.

delivery upon execution which is contained in section 36A(5)⁶⁸ is redrafted as section 36AA(2).⁶⁹ Our draft bill also repeals section 36A(6) in line with our provisional recommendation.⁷⁰

- 2.54 **Accordingly, we recommend that the discrepancy in the description of the face-value requirement between section 36A of the Companies Act 1985 and section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 should be resolved by removing the reference to the face-value requirement from section 36A.** (Draft bill, clauses 3, 10(2) & Schedule 2)

Summary

- 2.55 To summarise, we recommend that both the relationship between contracts under seal and deeds, and the term “specialty” need to be clarified. On the first of these, we recommend that it should be made clear that the face-value requirement is not satisfied merely because an instrument is executed under seal; on the second, we consider that it should be provided that, except as provided otherwise by statute, an instrument shall be a specialty only if it is a deed. We consider that the effect of these changes will be to confirm that it is possible for documents to be executed under seal without being deeds, but that they have no special significance if they are not deeds; on the other hand, a contract which is executed as a deed and satisfies the other requirements of a deed will be a specialty even though it is not executed under seal.
- 2.56 We do not consider that it is necessary or appropriate to make the face-value requirement more specific, and, in particular, recommend against a requirement that an instrument is not a deed unless it expressly describes itself as a deed or contains a prescribed attestation clause.
- 2.57 We are also against having a rule of law that an instrument which fails to take effect as a deed nonetheless automatically has effect as a contract or other instrument under hand.
- 2.58 We consider that the discrepancy between the wording of the face-value requirement in section 36A and section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 can best be dealt with by removing the reference to the face-value requirement in section 36A in the context of other changes proposed to that section as a whole.

⁶⁸ See paras 6.31-6.37 below.

⁶⁹ See clause 4 of the draft bill.

⁷⁰ See clauses 3, 10(2) and Sched 2 to the draft bill; see also paras 6.37-6.43 below.

PART 3

EXECUTION BY COMPANIES

Introduction

- 3.1 In this part we consider our provisional views on the way in which companies execute an instrument as a deed. This is governed by section 36A of the Companies Act 1985.¹ In the following part we consider execution of deeds by other types of corporation.
- 3.2 Execution *by* a corporation must be distinguished from execution *on behalf of* a corporation. Although corporations must inevitably act through individuals (for example, the seal may be affixed on a document by the company's secretary who signs along with one of the directors) the methods of execution discussed in this and the following part are regarded in law as execution *by* the corporation. As an alternative, a deed (or other document) may in certain circumstances be executed by a person (whether an officer of the company or some other person) *on the company's behalf*. We consider the position in respect of execution on behalf of corporations in Part 7 below. As we shall see, where a corporation gives authority to a person to execute a deed on its behalf, the authority is a power of attorney and the instrument creating the power of attorney must itself be executed as a deed.²
- 3.3 A company incorporated under the Companies Act may execute a document as a deed in one of two ways: by affixing its common seal, or by signature of two officers. We considered whether this "dual system" should be retained, and whether there should be changes in the method of execution both with and without a seal. We also considered the position of directors or secretaries which are themselves corporations, and the use by companies of facsimile seals and signatures.
- 3.4 As in the consultation paper, by "company", we mean a company which is incorporated under the Companies Acts.³ However, as explained in the consultation paper,⁴ a number of the provisions of the Companies Act 1985 apply to unregistered companies.⁵ These include section 36A.⁶ The discussion in this

¹ Section 36A of the Companies Act 1985 is not limited to the execution of deeds, but refers to execution of "documents". However, the focus of the consultation paper was mainly on the execution of deeds.

² See para 7.4 below.

³ "Company" is defined by Companies Act 1985, s 735 as a company formed and registered under the Companies Act 1985, or under the former Companies Acts, other than a company formed in what is now the Republic of Ireland. The definition applies unless the contrary intention appears; *ibid*, s 735(4). See further Jeremy Whiteson, "Receivership and the quasi company" (1993) 9(3) *Insolvency Law and Practice*, p 77. See also Companies Act 1985, s 680 (companies not formed under the Companies Acts but capable of being registered under the 1985 Act), and Sched 21, para 6 (application of the 1985 Act to such companies).

⁴ Consultation Paper No 143, para 4.18.

⁵ Companies (Unregistered Companies) Regulations 1985, SI 1985 No 680, as amended, made under Companies Act 1985, s 718 and Sched 22. An "unregistered company" is

part is, for the most part, relevant to both companies and unregistered companies, although for brevity we simply refer to companies. However, section 350, which sets out the requirement for a company to have an engraved seal and is discussed below⁷ does not apply to unregistered companies.

- 3.5 We begin by examining what is meant by “execution”, as the expression appears to be used in different ways in some of the relevant statutory provisions; we then consider whether the current “dual regime” should be retained under which a company may execute deeds either under its common seal or by the signature of two officers; next, we examine in more detail the manner in which companies execute documents without a seal and the various suggestions for legislative change raised in the consultation paper; this is followed by consideration of whether any changes are needed to the provisions dealing with execution under seal; we then examine the position of directors and secretaries of companies which are themselves corporations; finally, we consider the question of facsimile seals and signatures.

Meaning of “execution”

- 3.6 We pointed out in the consultation paper that there appeared to be some confusion over the use of the term “executed” in section 36A of the Companies Act 1985, section 74 of the Law of Property Act 1925, and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.⁸ The particular issue was the extent to which “execution” included “delivery”.⁹
- 3.7 It seems clear that in section 36A execution excludes delivery. Section 36A(5), for example, states that a document which is “executed by a company” has effect “upon delivery” as a deed.¹⁰ The implication is that it may be executed but not delivered until a later date. By contrast in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989, the execution of a deed by an individual requires both attested signature *and* delivery.¹¹ However, the term used in section 1 is not simply “executed”, but “executed as a deed”. It is relevant *only* to the execution of documents *as deeds* (by individuals), and makes it clear that delivery is an essential requirement. Section 36A, on the other hand, applies to the execution

defined by s 718 of the Companies Act 1985 as any body corporate incorporated in and having a principal place of business in Great Britain other than: any body incorporated by or registered under any public general Act of Parliament; any body not formed for the purpose of carrying on a business which has for its object the acquisition of gain by the body or its members; any body for the time being exempted by the Secretary of State.

⁶ They also include s 40 (official seal for share certificates), s 35 (on a company’s capacity and the power of directors to bind it) and s 36 (contracts).

⁷ See para 3.50 below.

⁸ Consultation Paper No 143, paras 11.21-11.24.

⁹ Delivery is discussed in Part 6 below where we recommend retention of the concept of delivery.

¹⁰ We drew attention elsewhere to potential uncertainties caused by the expression “has effect ... as a deed” in relation to the concept of delivery in escrow. This is discussed below at paras 6.45-6.46.

¹¹ See para 2.9 above.

(by companies) of documents which *may or may not be deeds*, but goes on to make it clear that to have effect as a deed, delivery is also required.

- 3.8 The two provisions are therefore consistent, but the terminology used can be confusing. We considered that the position would be made much clearer if the concepts of “execution” and “execution as a deed” were separated out in section 36A. Our provisional view was that section 36A should be amended to make it clear that a document is validly executed as provided by the section, but that such a document is *executed as a deed* only if it is (a) executed in either of the ways permitted by section 36A,¹² and (b) delivered.¹³
- 3.9 So far as section 74(1) of the Law of Property Act 1925 is concerned,¹⁴ we pointed out that there had been uncertainty as to whether a deed “executed” by a corporation in accordance with the section must be taken to have been delivered, but it now seemed to be established that the word excluded delivery in that context.¹⁵ Nevertheless, we noted that, if that was correct, it was not clear what meaning was to be given to the words at the end of section 74(1) that a deed executed as prescribed by the section “shall be deemed ... to have taken effect accordingly”. However, we did not propose any changes to section 74(1) in this respect in the consultation paper.¹⁶
- 3.10 There was very strong support from respondents for the Commission’s provisional suggestion that section 36A should be amended to provide that execution “as a deed” is by execution and delivery. The few who disagreed were generally of the view that delivery served no useful purpose and should be abolished. This is discussed below.¹⁷
- 3.11 The point was made, however, that there should also be amendment to section 74(1) of the Law of Property Act 1925 to ensure consistency with our approach in respect of section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 36A of the Companies Act 1985. As indicated above, we did draw attention in the consultation paper to the words at the end of section 74(1) which

¹² Ie by affixing the seal in accordance with section 36A(2) or by the signature of two officers in accordance with section 36A(4). See para 3.14 below.

¹³ We accepted that the term “executed” was likely to continue to be used as a shorthand for both situations; eg practitioners would continue to send documents to their clients “for execution” (excluding delivery), and after completion to the other side “duly executed” (including delivery). See Consultation Paper No 143, para 11.24. However, this does not detract from the desirability of ensuring the relevant statutory provisions are clear and consistent.

¹⁴ Section 74(1) sets out a presumption of due execution where a deed is sealed by a corporation in accordance with the provisions of the section. It is discussed in detail in Part 5 below.

¹⁵ Consultation Paper No 143, para 11.21. See *Longman v Viscount Chelsea* (1989) 58 P & CR 189, 199, *per* Nourse LJ (his remarks were, however, made obiter), and *Johnsey Estates (1990) Limited v Newport Marketworld Limited and Others* 10 May 1996 (unreported, Judge Moseley QC), transcript, para D(II) 9.

¹⁶ For the other changes proposed in respect of section 74(1), see paras 3.13, 3.47, and 5.33 below.

¹⁷ See paras 6.16-6.22.

appeared to be somewhat confusing. On further reflection, we consider that it would be helpful to clarify the terminology used in section 74(1) in a similar manner to that proposed for section 36A. We have made a number of other recommendations in relation to section 74(1),¹⁸ and in redrafting the provision we have taken the opportunity to remove the words “and to have taken effect accordingly”. We have also included a new section 74A(1)¹⁹ which makes it clear that “executed as a deed” for the purposes of section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 means, in relation to corporations, execution *and* delivery.

3.12 **Accordingly, we recommend that section 36A of the Companies Act 1985 should be amended to provide that execution “as a deed” for the purposes of section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 is by execution *and* delivery.** (Draft bill, clause 4)

3.13 **We also recommend that a similar provision should be included in section 74 of the Law of Property Act 1925 in relation to corporations generally.** (Draft bill, clause 2)

The “dual regime”

3.14 We explained in the consultation paper²⁰ that section 36A now provides two ways for a company to execute a document.

(a) First, a document may be executed by a company by affixing its common seal, as provided by section 36A(2). This preserves the method of execution by corporations under common law.

(b) Secondly, whether or not a company has a seal, section 36A(4) provides that a document may be executed by being signed by a director and the secretary of a company, or by two directors, and expressed (in whatever form of words) to be executed by the company.²¹ Such a document has the same effect as if executed under the common seal of the company. There is no requirement that the signatures of such officers should be attested.²²

3.15 Our provisional view was that this “dual” system should be retained. We set out at some length the advantages of execution under seal and of execution without sealing.²³ We accepted that the existence of two methods of execution (namely

¹⁸ See paras 3.13, 3.47, and 5.33 below.

¹⁹ See clause 2 of the draft bill.

²⁰ Consultation Paper No 143, paras 4.5-4.7.

²¹ Execution by the single signature of a person who was both director and secretary would not suffice; *Johnsey Estates (1990) Limited v Newport Marketworld Limited and Others* 10 May 1996 (unreported, Judge Moseley QC), transcript, para D(III) 11.

²² When an individual executes a deed, his or her signature must be attested: Law of Property (Miscellaneous Provisions) Act 1989, s 1(3). This does not apply here, since execution is “by the company”, not by the officers.

²³ Consultation Paper No 143, paras 14.2-14.3. We listed the following advantages of execution under seal: it may offer a greater guarantee of authenticity than execution by the signature of two officers alone; a company can make arrangements for the custody and use

with or without a seal) has the potential to cause confusion, and was to a certain extent, an uneasy compromise between two approaches.²⁴ However, we considered that, in view of the arguments in favour of both methods of execution, it would be inappropriate to recommend the abolition of either without first establishing that there was very strong support for such a course.

- 3.16 In fact, there was virtually unanimous support from those who commented for the retention of the current “dual” system of execution. It was acknowledged by most respondents that a significant number of companies continue to use seals, although there seemed to be differing views on just how frequent this was and what the reasons for it were. Two reasons given by respondents who were very much in favour of the continued use of seals were that it provides greater flexibility as to signatories and that it permits better internal control. On the other hand other respondents suggested that companies continue to use seals as a result of habit rather than for any other reason. So far as execution without a seal was concerned, this was widely (although by no means universally) regarded as a useful reform. Only one respondent seriously questioned its retention, although it did not itself propose abolition. Accordingly, we consider that both methods of execution should continue to be available to companies.
- 3.17 **We recommend that the present “dual system” should be retained, so that companies may continue to execute deeds either under the common seal or by the signature of relevant persons.**

Execution without a seal

- 3.18 We went on to consider whether there should be any change in the method of execution by a company without using its common seal set out in section 36A(4) of the Companies Act 1985. In particular we considered whether this method of execution should be further “liberalised”. Broadly, the options we canvassed were:
- (a) no change, so that execution without using the seal will continue to be by the unattested signature of two directors or of the secretary and a director;
 - (b) widening the range of those eligible to sign beyond directors and the secretary;

of the common seal which assist in controlling the obligations which it enters into by deed; it may assist where documents are to be used abroad in a jurisdiction which still requires execution under seal; and it can be more flexible than execution by the signature of two officers since the company may extend the range of persons authorised to attest the sealing (or dispense with attestation entirely). We listed the following advantages of execution without sealing: sealing may be regarded by some as an administrative burden; sealing no longer serves any particular function since the introduction of the face-value requirement; execution without sealing brings the rules for companies closer in line with those for individuals, and also with other jurisdictions where the concepts of a deed and execution under seal are not recognised; many companies are now incorporated without having a common seal; execution by signature may permit officers of more than one company to sign only once where the deed is being executed by more than one of those companies (but see paras 3.30-3.33 below).

²⁴ Ie that of the common law and civil law jurisdictions.

- (c) allowing execution by a single signatory.

Before considering respondents' views, we look a little more closely at the second and third options.

Extending the range of those authorised to sign

- 3.19 We pointed out that it may be convenient for certain companies to permit execution by the signature of officers or employees other than the secretary and directors, for example by extending this to "authorised signatories".²⁵ However, our provisional view was that this would produce too much uncertainty as to the identity of those authorised to sign, and the potential for greater forgery of deeds, unless accompanied by additional safeguards (such as a registration system) which would lead to inconvenience and extra cost. Additional investigations into the authority of the signatories to execute might also introduce unwanted steps into standard transactions.²⁶ Accordingly, our provisional view was against this option. If, however, consultees were in favour of such an extension, we asked for views on what, if any, additional safeguards should be introduced.

Two signatures or one?

- 3.20 We put forward a number of arguments for removing the requirement of two signatories for a deed. We pointed out that foreign companies may now execute a deed by a single signatory,²⁷ and that a company may enter into a simple *contract* under hand committing it to massive obligations by the signature of a single director.²⁸ Moreover, in so far as a specific formality is necessary to distinguish a document as a deed, this purpose is now served by the face-value requirement.²⁹
- 3.21 However, we also suggested that these points might better be directed to the question of whether it remains appropriate for the law to distinguish between deeds and documents under hand, which is beyond the scope of this project. So long as there is such a distinction there remains a case for requiring a method of execution which differs from that used for execution of a simple contract, and one which provides a check on the ability of a single director to bind the company to a deed. We did not reach a provisional view on this point but invited views from consultees.

²⁵ We consider below the possibility of extending the categories of permitted signatories to include a deputy secretary in the context of removing the inconsistencies between the presumptions of due execution contained in section 36A(6) and section 74(1) of the Law of Property Act 1925. See paras 5.19-5.23 below.

²⁶ Although this may be alleviated by expanding the presumptions of due execution to include such signatories.

²⁷ See para 4.29 below.

²⁸ We pointed out that a simple contract may, in certain circumstances, be just as effective as a deed. It may, it seems, specify a limitation period longer than six years, and problems stemming from any lack of consideration can usually be overcome by inserting nominal consideration. See Consultation Paper No 143, para 14.9.

²⁹ The document must, of course, also be "executed as a deed". For individuals this requires signature in the presence of a witness who attests. We raised for consideration whether a similar requirement should be introduced if companies were to be permitted to execute by way of signature of a single officer; see paras 3.24 below.

- 3.22 We also asked whether, as an alternative, the signature of a single director should be permitted in the limited case of a single member company with a sole director.³⁰

Respondents' views

- 3.23 A majority of respondents who considered this issue were in fact against any change in the method of execution by a company without using its seal. Reasons were not generally given by those who were against change, although some respondents commented that additional safeguards would be required which would be unworkable or undesirable. Those in favour of change were generally of the view that companies should have much greater flexibility to choose the manner in which documents were to be executed.
- 3.24 All those who favoured change supported an expansion of the categories of permitted signatories. The point was made by some respondents that this would simply reflect the flexibility which companies already enjoy where a seal is used when (if permitted by their articles) any duly authorised person may affix the seal and attest it. There was less support amongst those who favoured change for execution by the signature of a single officer, although the same comparison was drawn by some respondents with the position where the company's seal is used.³¹ Depending on the company's articles, it may be open to a single individual to affix and attest the seal; why should it not be open to a single officer to sign by way of execution? Only two respondents appeared to favour execution by a single director in the limited case of a single member company with a sole director. The point was made by a number of respondents that it would create difficulty in ascertaining when such a company was involved.³²
- 3.25 Views were mixed on whether there should be any additional safeguards if the categories of signatories were extended. About half of those in favour of change were against additional safeguards, indicating that they would be administratively burdensome and expensive.³³

³⁰ We also asked two other questions on execution by the signature of a single officer. See n 33 below.

³¹ Three respondents expressly proposed that the distinction between execution "by" and "on behalf of" a company should be abolished. The result would be that any document (including a deed) could be executed by or on behalf of a company (there no longer being any distinction) by the sole signature of any person authorised by the company for that purpose. See also para 7.22 below.

³² One respondent also drew attention to the fact that many private companies with two or more members have a sole director and there did not appear to be a valid reason for singling out single-member companies.

³³ We also asked for views on two additional matters if consultees considered that execution by the signature of a single officer should be permitted: should there be any additional requirement, for example attestation; and should execution by a secretary alone be permitted? Most respondents in favour of execution by a single signature considered that there should *not* be any additional requirement, such as attestation. All respondents in favour considered that the sole signature of any person authorised by the company should be sufficient for a document to be validly executed. In other words, the fact that the person is a secretary should not be sufficient in itself; what is important is if the person is *authorised by the company* to execute.

3.26 The arguments outlined above raise a more general issue which was identified by several respondents. The point was made that the categories of person permitted to sign for the purposes of section 36A(4) need not be the same as those who may sign for the purposes of the presumption of due execution contained in section 36A(6).³⁴ In other words, it may be possible to permit companies to execute by the signature of “authorised signatories” (or a *single* authorised signatory) but to limit the presumption of due execution to those cases where execution is by two directors or a director and the secretary. This is in effect the position where the company’s seal is affixed, since the articles may authorise anyone to attest the seal, but the presumption of due execution contained in section 74(1) only applies where the sealing is attested by specified officers. This would mean that it would not in fact be necessary to have any additional safeguards such as registration of authorised signatories.

Our final view

3.27 We can see some force in this last point. However, section 36A was clearly drafted on the basis that the presumption of due execution in section 36A(6) should match the “permitted” method of execution laid down in section 36A(4). We would be reluctant to propose any change to this without strong support from respondents. This was not a point on which we specifically consulted, but it was clear from responses to the consultation paper that a majority of respondents were against any change to section 36A(4).

3.28 We tend to agree with the point made above that so long as the law continues to differentiate between deeds and documents under hand, there remains a case for preserving a special method of execution for deeds which is both “distinctive” and provides a certain element of “control”. These are features which are present where execution is under seal because of the need to apply a (single) physical seal, even if the categories of person who may actually attest the affixing of the seal are drawn very widely in a company’s constitution. We consider that the wording of section 36A(4) achieves a similar function as currently drafted and should not be relaxed either by extending the range of those authorised to sign or by permitting execution under a single signature. As indicated above, this was also the view of the majority of respondents who addressed this issue.

3.29 **Accordingly, we recommend that there should be no relaxation in the requirements for execution by a company without using a seal under section 36A(4) of the Companies Act 1985.**

Officers who sign in their capacity as director or secretary of more than one company

3.30 In addition we consulted on a slightly different point relating to execution without a seal. We asked if it should be permissible for a person who is a director or secretary of more than one company to sign a deed once only, in their capacity as director or secretary of each relevant company, when more than one such company is a party to the deed. Although this practice might be considered incompatible with the concept of the deed being the “act” of each company, we

³⁴ See Part 5 below.

noted that it did appear permissible on the wording of section 36A(4). We pointed out that it would require careful drafting to make it clear that the deed is executed by each company, and that those signing have the requisite capacity for each company. However, we noted that there could be considerable administrative convenience in permitting each director to sign once only where there are many companies with common directors (for example where a parent and its subsidiary companies are all required to execute a single mortgage debenture).

- 3.31 Views of respondents were fairly evenly split on this question, with just a small majority in favour of permitting the practice. Most respondents acknowledged the need for careful drafting in such cases. For those who disagreed, the main reason appeared to be the risk that there could be disputes as to the intention that each company should be bound. One respondent concluded that despite administrative inconvenience in the relatively rare cases where a very large number of associated companies are executing one document under seal, “there is much to be said for focusing the attention of the signatories on the fact that they are signing for a number of companies by requiring separate signatures for each.”
- 3.32 The Land Registry commented at some length on this point. It had considerable misgivings about the desirability of this practice, whilst appreciating its convenience. It did not sit happily with the concept of a deed being the act of the parties in solemn form; it might be easy to overlook the fact that, for example, a director of them all has not in fact been properly appointed as such in relation to one or more of them; moreover, there may be transactions where companies within a group are dealing with property between themselves, so that they are, in effect, on opposite sides. It seemed undesirable that common signatures should be available in this case. The Land Registry conceded, however, that if the weight of opinion was in favour of such a change, it would prefer it if the acceptability of common signatures was made clear, so that it and other persons encountering such deeds could be confident that there was no need to look beyond the appropriate acceptable method of execution.³⁵
- 3.33 We agree with the need for clarity on this practice one way or another. We are concerned by the argument that errors in the drafting may lead to disputes as to the enforceability of a deed against particular companies which are intended to be parties to it. We are also sympathetic to the view that for clarity and management control purposes, the execution on behalf of each company party to a deed should be complete and self-contained. None of the responses received suggested that the practice was so widespread or indispensable that it would cause problems if it were no longer to be permissible, and we consider that the administrative inconvenience in the relatively small number of cases where the practice might be regarded as useful is outweighed by the desirability of simple and clear rule which sits more neatly with the concept of a deed and the underlying purpose of the formalities. Accordingly **we recommend that there should be a provision to make it clear that a director or secretary of more than one company must sign**

³⁵ The Land Registry’s current practice on this point is set out at paras E5.1-E5.2 of its Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998) where it states: “The words [of section 36A(4)] are sufficiently wide to encompass the combined execution of deeds although these clauses clearly represent an unusual and un contemplated use of s 36A”.

separately for each company which is a party to the deed. (Draft bill, clause 10(1) & para 3(2) of Schedule 1)

Execution under seal

- 3.34 We now turn to consider execution by a company under seal under section 36A(2) of the Companies Act 1985. We explained in the consultation paper that at common law, sealing had to be accompanied by any necessary formalities prescribed by the company's constitution.³⁶ In practice, the use of the seal will generally be governed by the articles of association, and traditionally these have required, in addition to the affixing of the seal, the signature of a director and secretary or of two directors.³⁷
- 3.35 Section 36A(2) simply states that a document may be executed by a company "by affixing its common seal" without making any reference to the company's constitution. Our provisional view was that it seemed unlikely that this overrode the need for a company to comply with its articles, for example by dispensing with the signature of two of its officers if that was required by the articles.³⁸ However, we sought views on whether this point required clarification. In particular, we asked whether section 36A(2) should be amended by adding that execution is by affixing the common seal "in accordance with the articles".
- 3.36 We drew attention to a potential disadvantage of this wording in that it might cast doubt on the ability of a person dealing with a company to rely on sections 35A and 35B of the Companies Act,³⁹ and might create an apparent inconsistency with section 74(1) of the Law of Property Act 1925 which currently prevails if it is inconsistent with the articles.⁴⁰ We therefore asked whether any such amendment should be made expressly without prejudice to sections 35A and 35B, and to the presumptions of due execution in section 36A(6)⁴¹ and section 74(1) of the Law of Property Act 1925.
- 3.37 Views of respondents on this issue were fairly evenly balanced between those who considered that section 36A(2) should be amended as suggested in paragraph 3.35

³⁶ Consultation Paper No 143, paras 4.3 and 4.8.

³⁷ In the consultation paper we pointed out that when an instrument is executed in this way it is probably incorrect - though a convenient shorthand - to say that the directors and secretary are signing by way of attesting the seal; see Consultation Paper No 143, para 4.8.

³⁸ Consultation Paper No 143, para 4.9.

³⁹ See para 5.5 below. These sections provide protection to a person dealing with a company in good faith against certain irregularities, and may in certain circumstances permit such a person to rely on a document which is not executed in accordance with the articles.

⁴⁰ See paras 5.7 below. This section sets out a presumption of due execution in favour of a purchaser where a company's seal has been affixed in the presence of and attested by a director and the secretary of the company, even if execution in this way is not permitted by the articles of association.

⁴¹ As indicated below, the view was taken in *Johnsey Estates* that the presumption of due execution contained in s 36A(6) would apply where two officers of the company sign by way of attestation of the affixing of the seal. Our view was that the wording of s 36A(6) suggests that it only applies when a company takes advantage of s 36A(4) to execute without using a common seal. See para 6.12 below.

above, and those who considered that it should not. There were also a number of respondents who had no firm view or were unsure. Where reasons were given by those in favour of change, it was generally the desirability of greater clarity. Two main reasons were given by those who did not consider that the section should be amended. The first was that it was unnecessary, as it represented the current position in any event; the second was that any change was likely to create more uncertainty rather than less. The point was made in particular about the possible (undesired) impact any such change may have on the position of third parties.

- 3.38 Turning to the second part of the question, most of the respondents who considered that there should be an amendment to the section, also considered that it should be made expressly without prejudice to sections 35A and 35B of the Companies Act 1985, and to the presumptions of due execution.
- 3.39 In view of the mixed views of respondents to this question, and the potential difficulties which we highlighted in respect of any change, we do not consider that section 36A(2) should be amended. No respondent seriously suggested that the section should be taken to override the articles, and those in favour of change were simply in favour of clarification of what they considered to be the current position. We agree that, in this case, any amendment may in fact cause additional uncertainty. **Accordingly, we do not recommend any change to section 36A(2) of the Companies Act 1985 (execution by affixing the common seal).**

Corporate officers

- 3.40 We pointed out that there is no obvious provision in section 36A(4)⁴² for execution by a company when the relevant directors or secretary of the company are themselves other companies or corporations.⁴³ The section seems to envisage personal signature by the secretary or director(s) in question. We noted that a similar point was sometimes made in respect of section 74(1) of the Law of Property Act 1925 which requires the affixing of the common seal to be “attested” by a director and secretary, although in the past the practice had been for the seal to be attested by a person authorised to sign on behalf of each relevant corporate officer.
- 3.41 We invited views on whether any clarification was needed in this respect. We asked, in particular, whether there should be a specific provision that a corporate director or secretary may “sign” or “attest” by the signature of a person authorised to do so on its behalf.
- 3.42 A fairly large majority of the respondents who addressed this question considered that there was a need to clarify the application of section 36A(4) of the Companies Act 1985 and section 74(1) of the Law of Property Act 1925 where corporate officers are involved. A number of respondents commented on the uncertainty which was frequently encountered in practice. The Land Registry in particular noted that the increasing use of corporate directors and secretaries had “produced

⁴² Or indeed s 36A(6) which sets out presumptions of due execution and delivery; see paras 5.7-5.10 and 6.37-6.44 below.

⁴³ Consultation Paper No 143, para 11.46.

something of a conundrum”.⁴⁴ This view was by no means universally held, however. The General Council of the Bar, in particular, was of the view that no change was necessary. The issue was simply a matter of agency; the signature of any person acting under authority would be sufficient.

- 3.43 This is clearly a matter which is not without difficulty. We accept, as we did in the consultation paper, that there is authority that where a statute requires a personal signature, a contract signed on behalf of a company by an authorised signatory will suffice.⁴⁵ But there is as yet no authority to confirm that this extends to section 36A(4). Nor is there any authority on what is required for the affixing of the seal to be “attested” for the purposes of section 74(1). It was clear from the responses to the consultation paper that practitioners do experience problems in practice and that there was strong support for clarification. No respondents pointed to any *disadvantages* of this amendment. Accordingly, our view is that the application of the provisions in the case of corporate officers should be clarified.
- 3.44 Most respondents who addressed the question also agreed with our suggestion on how this could be done. Some respondents, however, suggested that there should in addition be a presumption to avoid purchasers having to investigate the authority of the signatory to sign or attest for the officer company. Few further details were given, although one respondent suggested that there should be a rebuttable presumption that a body corporate which appoints a corporate officer to sign on its behalf should be taken to have authorised that corporate officer to sign in accordance with its own applicable internal rules. There should, however, be a limit on the list of persons that a corporate officer may authorise to sign in this context in the interests of certainty; this should comprise the directors, secretary or any person listed in section 74(1).
- 3.45 However, other respondents suggested that such a presumption was not necessary, and that a person dealing with the company which is executing the deed could rely on existing rules and presumptions. The Society of Public Notaries, for example, explained that currently where deeds are signed before a notary by an individual acting on behalf of a corporate officer, its members issue a certificate of due execution on the basis of a board resolution.⁴⁶
- 3.46 In our view, an additional presumption is not necessary and would simply serve to complicate matters. Taking the example of A Ltd having a corporate director (D Ltd) and a corporate secretary (S Ltd). A Ltd wishes to execute a deed in favour of X. The proposed amendment to section 36A(4) will make it clear that a person who is duly authorised by D Ltd and a person who is duly authorised by S Ltd

⁴⁴ The Land Registry’s current practice on this point is set out at paragraphs E4.1-E4.3 of its Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998). Unless or until the matter is considered by the courts it is prepared to accept that a corporate officer may “sign” or “attest” for the purposes of s 74(1) of the Law of Property Act 1925 and s 36A of the Companies Act 1985 by a person authorised to do so on its behalf. This is consistent with our recommendation at para 3.47 below.

⁴⁵ *Re British Games* [1938] Ch 240.

⁴⁶ We had drawn attention to this practice in the consultation paper; Consultation Paper No 143, para 11.46.

may sign the deed by way of execution by A Ltd under the section.⁴⁷ To determine whether the individuals who sign on behalf of D Ltd and S Ltd are duly authorised is a simple matter of agency, and not something which is specific to the creation of a deed. No particular presumption is necessary. X could, if necessary, rely on the internal management rule and general agency principles, reinforced (where applicable) by sections 35A and 35B of the Companies Act 1985.⁴⁸ So far as A Ltd is concerned, X can rely on the presumption contained in section 36A(6) to confirm that the deed is duly executed; it purports to be signed by a director and the secretary since it will henceforth be clear that “signed”, in the context of a corporate officer, means signed by someone authorised on its behalf.

- 3.47 **Accordingly, we recommend that section 36A of the Companies Act 1985 and section 74 of the Law of Property Act 1925 should be amended to provide that a director or secretary of a company which is itself a company or corporation may “sign” for the purposes of section 36A(4) and (6), or “attest” for the purposes of section 74(1), by the signature of a person authorised to do so on its behalf.** (Draft bill, clause 10(1), paras 1(2) & 3(3) of Schedule 1)

Facsimile seals and signatures

- 3.48 Another matter which we considered in the consultation paper was the extent to which documents can (or should be able to) be executed by companies by means of duplicate seals and facsimile signatures. As we pointed out, this has obvious practical importance for companies which have a large number of documents to execute under seal or as deeds (for example deeds of release, or share certificates).⁴⁹
- 3.49 We considered three issues in particular: whether it should continue to be a requirement for the common seal of the company to be engraved; the extent to which the use of duplicate seals should be permitted; and how far there should continue to be a requirement for personal signature in relation to the execution of deeds.

Requirement for engraved seal

- 3.50 As we explained in the consultation paper,⁵⁰ the power to possess, use and change a seal is incidental to a corporation,⁵¹ and in the absence of any special provision a corporation may use any seal so long as the seal which is used is applied as the seal

⁴⁷ The position will be comparable where the individuals attest the affixing of the seal for the purposes of s 74(1).

⁴⁸ See paras 3.36 above and 5.5 below.

⁴⁹ A share certificate need not be sealed (Companies Act 1985, s 185) but if given under the common seal, the certificate is prima facie evidence of title to the relevant shares (Companies Act 1985, s 186). The articles will often require every share certificate to be sealed; eg Companies Act 1985, Table A, SI 1985 No 805, para 6.

⁵⁰ Consultation Paper No 143, paras 4.13-4.14.

⁵¹ *Sutton's Hospital Case* (1612) 10 Co Rep 23a, 30b; 77 ER 960, 970.

of the corporation for the time being.⁵² However, in the case of a company registered under the Companies Acts, section 350(1) of the Companies Act 1985 provides that the company's name must be engraved in legible characters on the seal (if it has one).⁵³ Both the company and any officer or person using or authorising the use of a seal which does not have the name engraved upon it in this way are liable to a fine, although it is uncertain whether this in itself would make the execution ineffective.⁵⁴

- 3.51 Our provisional view was that so long as corporations are permitted to execute under seal the requirement for an engraved seal serves a useful purpose. A physical imprint bearing the company's name would often be a clearer and more permanent record than, for example, a print made in ink which may fade or fudge. Perhaps more importantly to some companies was the degree of control given by having a single engraved seal. Nevertheless, we were conscious that companies which have to execute large number of documents may find the need to affix an engraved seal cumbersome and invited views on whether other options should be considered, such as laser printers which can print a seal which leaves a physical impression on the document.
- 3.52 A fairly large majority of respondents agreed with our provisional view that the requirement for a company's seal to be engraved should be retained. Where reasons were given, they echoed our own. Those who disagreed with the retention of the requirement for engraving were generally in favour of abolishing sealing altogether.⁵⁵
- 3.53 In the light of the responses received, we maintain our provisional view expressed in the consultation paper. Accordingly, **we recommend that the requirement in section 350(1) of the Companies Act 1985 that the name of a company must be engraved on its seal should not be abolished**

Duplicate seals

- 3.54 We also raised for consideration (without expressing any provisional view) whether companies would find it helpful to have freedom to have duplicate seals. At present there are express provisions for a company to have duplicate seals for specified purposes: in particular, a company may have an official seal for use outside the

⁵² *Yarmouth Corpn and Cowper's Case* (1630) Godb 439; 78 ER 258; *Cooch v Goodman* (1842) 2 QB 580; 114 ER 228. See further *Halsbury's Laws of England* (4th ed reissue 1998) vol 9(2), para 1019.

⁵³ Companies Act 1985, s 350(1). This section does not apply to unregistered companies; Companies (Unregistered Companies) Regulations 1985, SI 1985 No 680, as amended.

⁵⁴ See Consultation Paper No 143, para 4.14, n 32.

⁵⁵ We also asked whether, if the requirement for an engraved seal were to be abolished, it should be replaced by a requirement that any method of sealing used by a company must leave a physical impression. The view of those in favour of abolishing the requirement for an engraved seal was that it should not.

UK,⁵⁶ and for sealing share certificates.⁵⁷ But, the implication seems to be that a company may otherwise have only one original seal.⁵⁸

- 3.55 There appeared to be differing views from respondents on the extent to which companies can at present have more than one seal. One respondent considered that the better and stricter view at present is that English registered companies cannot have a duplicate seal except so far as the statute specifically envisages that for securities or for use abroad; another respondent considered that the position was uncertain, pointing out that one leading Counsel whom they had consulted in recent years had previously opined against the proposition but, on further reflection, concluded that there was nothing in the 1985 Act which precluded a company having more than one common seal; another respondent still expressed the view that existing legislation allows a company to provide in its Articles that it could have a number of common seals for use as prescribed in the Act *or pursuant to its articles of association*.
- 3.56 There were also mixed views on whether there should be a new statutory provision, with only a half of the relatively small number commenting being clearly in favour. Some of these emphasised the desirability of clarifying the present uncertainty; others, considered that it would ease administration in large groups or larger companies, or where a large number of documents needs to be executed. A number of respondents stressed the need for “proper controls”, and/or a means to differentiate between different seals. Few reasons were given by those who were against a new provision, but two respondents expressed the view that now there is an alternative method of a company executing a deed without using the common seal, no change was necessary.
- 3.57 In the light of the mixed response to this question (and the small number of respondents overall in favour of a new provision), we are not in favour of recommending any change to the current law. We are not persuaded of the need for duplicate seals in cases other than those already set out in the companies legislation. We acknowledge that any provision for additional duplicate seals may require controls to be put in place. We consider that it would not be appropriate to propose detailed provisions on this at a time when the general direction of recent legislation has been to move away from the need to use seals, and when there was only very limited support from respondents for any such change. We acknowledge that there may be some doubt as to the current position, but consider that the better view is that a registered company may only have one common seal, except as expressly provided otherwise. **Accordingly, we recommend against a statutory provision for a company to have one or more duplicate seals.**

⁵⁶ If it is a company which has a common seal, whose objects require or comprise the transaction of business in foreign countries, and whose articles authorise it to have such a seal; Companies Act 1985, s 39. The official seal must be a facsimile of the common seal, with the addition on its face of the name of every territory, district or place where it is to be used. It may be affixed by any person authorised to do so under the common seal, and such person must certify in writing on the deed or other instrument the date on which and the place at which it is affixed (ss 39(3) and (5)).

⁵⁷ Again, if the company has a common seal. The seal must be a facsimile of the common seal, with the addition of the word “Securities” on its face; Companies Act 1985, s 40.

⁵⁸ Section 350 of the Companies Act 1985 refers to “the seal” of the company.

Requirement for personal signature

- 3.58 The issue here is whether the signatures of officers attesting the sealing of a document, or executing a document under section 36A(4), can be added to the document “automatically” (eg by use of a stamp or laser printer). We drew attention in the consultation paper to authorities which suggested that in certain cases a stamp bearing the facsimile signature⁵⁹ of an individual might be sufficient where statute required a document to be signed.⁶⁰ However, we pointed out that what was required would be a matter of construction of the relevant statute.⁶¹
- 3.59 In the case of deeds executed by individuals, we considered that it was clear that whatever may be effective to constitute a signature, it must be the personal act of the maker. This is because section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 requires signature *by* the maker, but makes specific provision for execution at the direction and in the presence of the maker. By the same token we found it difficult to see how the mere reproduction of the signature of a director and secretary (for example by a laser printer, or by a stamp applied by some other person) could amount to attestation of the affixing of the seal,⁶² or to signature *by them*, as required by section 36A(4). On the other hand, as mentioned above, section 36(2) merely requires execution by affixing the common seal, and leaves the company free to determine by its articles what additional formalities (such as attestation) are required.⁶³
- 3.60 We noted that the purpose of requiring a deed to be signed by an individual, or by two directors, is to have some personal authentication of the document. The same could be said about the affixing of a corporation’s seal. The personal signature of two officers, or the attestation of the seal by two officers, also gives a corporation a

⁵⁹ We used the expression “facsimile signature” to connote any signature which is reproduced other than by being written out by the signatory. However, the same question can arise in a situation where a signed document is required, and the document has been *transmitted* by being faxed, since the signature may be said to have been made by the machine receiving and printing out the faxed document. See Consultation Paper No 143, para 9.7, n 10.

⁶⁰ Eg *Bennet v Brumfitt* (1867) LR 3 CP 28 in the case of a notice; *R v Brentford Justices ex p Catlin* [1975] QB 455 in the case of a summons. We also drew attention to the numerous decisions on what constitutes a sufficient signature for a will, or for the purpose of the Law of Property Act 1925, s 40, and now the Law of Property (Miscellaneous Provisions) Act 1989, s 2.

⁶¹ For a recent example, see *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567, where the court held that “signed” in s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 did not include the mere typing on a letter of a company’s name by the company’s director. Peter Gibson LJ expressly declined to accept that authorities on what was a sufficient signature for the purposes of the Statute of Frauds 1677 and s 40 of the Law of Property Act 1925 should continue to govern the interpretation of the word “signed” in section 2 of the 1989 Act; *ibid*, at p 1575.

⁶² We had previously drawn attention to the argument that such officers do not attest the affixing of the seal, but sign as part of the process required for execution; see Consultation Paper No 143, para 4.8.

⁶³ We pointed out that the Land Registry requires any person signing a transfer (whether as an individual party, as a witness, or in the capacity of director or secretary of a company), to sign manually and not in facsimile, save where signature in facsimile is authorised by any statute or statutory instrument having the force of law in England and Wales; see now, r 74(4) of the Land Registration Rules 1925 as substituted by the Land Registration Rules 1997, but see para 3.66 below in relation to Form 53.

measure of control over the obligations which it enters into by deed. We were inclined to think that personal signature should continue to be a requirement, although we invited consultees views on this point.⁶⁴

- 3.61 Most respondents who addressed this question agreed with our provisional view that there should be no relaxation in the requirement for personal signature in the case of companies. The main reason put forward by these respondents was the risk of fraud and loss of control. The Society of Public Notaries said that its members would oppose the relaxation of the personal signature requirement because it would be difficult to attest documents bearing facsimile signatures, and any certificate issued in such a case would have to state that the facsimile signature was no more than that, with the result that it would carry little weight abroad.
- 3.62 Another respondent drew attention to a different potential difficulty raised by facsimile signatures, namely that of agency. The issue was not only whether the person whose signature was appended was authorised to sign, or deemed to be so authorised, but also whether the facsimile had been used with authority. If facsimile signatures were to be allowed, there would need to be strong presumptions that their use had been authorised.
- 3.63 In the light of the strong response received on consultation, we maintain our provisional view that personal signature should continue to be a requirement for the execution of deeds by companies. We have drawn attention above to the continuing developments in electronic communication and to a number of initiatives aimed at removing legal obstacles to its use in commercial transactions.⁶⁵ Deeds are a special type of document for which particular formalities are necessary. These include, at present, personal signature by the maker of the deed (or, where the maker is a company, by the directors or secretary of the company). So far as we are aware, none of the current initiatives seeks to alter these requirements for deeds. As long as the use of deeds continues to be required for certain transactions or to achieve a certain result, then there will still need to be formalities to distinguish them, and we consider that personal signature should continue to be necessary. As indicated above,⁶⁶ there may be other methods of achieving the functions which a deed currently fulfils which can make better use of technological developments. But consideration of such matters goes beyond the scope of this project. Accordingly, **we recommend that there should be no relaxation in the requirement for personal signature in the case of companies.**

Relaxation for particular classes of instrument

- 3.64 We noted that it might be considered appropriate to relax the rules on the use of facsimile seals and signatures for certain categories of instruments which are required to be executed in large numbers. We gave the example of share certificates and deeds of discharge. We indicated that we were reluctant to see different rules for different types of instruments, but invited views on this point.

⁶⁴ We also invited views on whether any such change should be extended to individuals.

⁶⁵ See para 1.13.

⁶⁶ *Ibid.*

- 3.65 Although a number of respondents thought that there should be relaxation in the requirements for execution of particular classes of documents, most took the opposing view. The main reason given by many respondents was that different rules for different types of documents was likely to increase rather than reduce confusion. Where respondents considered that there was a case for relaxation of the rules, the examples most commonly quoted were those which we had given in the consultation paper, namely share certificates and deeds of discharge. Several respondents drew attention to the desirability of registrars of companies being able to carry out mechanical execution of share certificates.
- 3.66 In our view it would be undesirable to relax the rules on the use of facsimile seals and signatures for particular types of document. We agree that this is likely to complicate matters and lead to confusion. As we indicated in the consultation paper, one common situation where “bulk execution” of documents might be regarded as particularly helpful is in relation to discharges of registered charges (notably by banks and building societies who lend against charges over land). In this case, however, the Land Registry already permits particular institutional lenders to use facsimile signatures under certain conditions by prior arrangement. The justification here is that the Land Registration Rules give the Registrar power to accept other evidence of satisfaction of a charge than a duly executed Form 53.⁶⁷ In other words, the practice does not mean that the Form 53 is duly executed as a deed; it simply means that the form executed in the agreed manner constitutes sufficient evidence of discharge for the Land Registry’s purposes.⁶⁸
- 3.67 So far as share certificates are concerned, it was pointed out by several respondents that companies are not *bound* to seal share certificates.⁶⁹ Section 186 of the Companies Act 1985 provides that a share certificate under the common seal of the company is prima facie evidence of title. But it does not require a share certificate to be under seal; nor does it provide that a sealed certificate is the only evidence of title. Accordingly, it is open to registrars of companies to carry out mechanical execution of share certificates where permitted by the company’s articles. It would appear, therefore, that the “bulk execution” of share certificates may not, in fact, pose a major problem in practice.
- 3.68 **Accordingly, we do not consider that there should be a relaxation in the requirement for execution of particular classes of documents.**

Summary

- 3.69 To summarise, we consider that section 36A and section 74(1) should be amended to draw a clear distinction between “execution” (which does not include delivery) and “execution as a deed” (which requires both execution *and* delivery).

⁶⁷ See the Land Registration Rules 1925, r 151 as substituted by the Land Registration Rules 1997.

⁶⁸ As indicated above, the Land Registry is also piloting a scheme for electronic discharge of mortgages.

⁶⁹ Until recently, listed companies used to be required to seal share certificates; Section 9, Chapter 4, para 1.3 of the Listing Rules (1984). This requirement was abolished in December 1993.

- 3.70 We consider that the current “dual” system of execution under which companies can execute deeds either under their common seal or by signature of two officers should be retained. We do not consider that there should be any change to the provisions for execution without a seal under section 36A(4) of the Companies Act 1985, other than to make it clear that a director or secretary of more than one company must sign separately for each company which is a party to the deed.
- 3.71 We do not consider that any change is needed to section 36A(2) regarding the affixing of the seal.
- 3.72 We consider that there should be a specific provision that a corporate director or secretary may “sign” or “attest” for the purposes of section 36A(4) and (6) of the Companies Act 1985 and section 74(1) of the Law of Property Act 1925 by the signature of a person authorised to do so on its behalf.
- 3.73 We consider that the requirement that the name of a company must be engraved on its seal should be retained, and are not in favour of a new statutory provision for a company to have one or more duplicate seals. We do not recommend any relaxation in the requirement for personal signature in the case of companies.

PART 4

EXECUTION BY OTHER CORPORATIONS

Introduction

- 4.1 In this part we consider the execution of deeds by corporations to which section 36A does not apply. In the consultation paper we drew attention to the considerable variety in the manner of execution by such corporations and considered whether it was possible to introduce greater uniformity into the law and to make the rules more accessible. We look first at corporations aggregate incorporated within England and Wales to which the provisions of the Companies Act do not apply; we then examine the position of corporations sole; finally we look at foreign corporations.
- 4.2 In the consultation paper we looked at the possibility of achieving greater uniformity not only in the methods of execution open to corporations, but also in the presumptions of due execution and delivery which would apply. We include some discussion on this issue at paragraphs 4.20-4.22 below, although the main consideration of the presumptions of due execution and delivery is contained in Parts 5 and 6 respectively.

Corporations aggregate incorporated in England and Wales

- 4.3 There are many different types of corporation aggregate¹ to which the provisions of the Companies Act do not apply. The great majority are created under other public general Acts of Parliament, such as the Building Societies Act 1986, the Friendly Societies 1992, the Industrial and Provident Societies 1965, the Charities Act 1993, and the Local Government Act 1972. There are, however, corporations which are incorporated by private Act² or royal charter,³ or which owe their existence to prescription, custom or presumed lost charter.⁴
- 4.4 Many of these corporations are subject to specific statutory provisions which govern the execution of deeds, or the use of the corporate seal.⁵ Some of these reflect section 36A of the Companies Act 1985 and set out a dual regime of execution by affixing the seal or by signature of relevant persons;⁶ others, provide only for execution under seal and either set out the categories of persons who may

¹ A corporation aggregate may be defined as a body of persons which is recognised by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder of the office in question for the time being. For a fuller definition of a corporation aggregate, see *Halsbury's Laws of England* (4th ed reissue 1998) vol 9(2), para 1005. See also Consultation Paper No 143, para 2.2, n 3.

² Eg the Port of London Authority, created by the Port of London Authority Act 1969.

³ Eg the Bank of England (1694); and the Peninsular and Oriental Steam Navigation Company (1840).

⁴ See further *Halsbury's Laws of England* (4th ed reissue 1998) vol 9(2), para 1034 et seq.

⁵ For some examples, see Consultation Paper No 143, paras 4.21-4.23.

⁶ Eg Friendly Societies Act 1992, Sched 6, para 2, and Charities Act 1993, s 60.

authenticate the fixing of the seal,⁷ or require the corporation to make rules for the use of the seal.⁸ Where there is no such provision, execution is governed by the common law, under which a document is executed by affixing the corporation's seal, accompanied by the formalities, if any, prescribed by its constitution (for example by its statute, charter or articles),⁹ and by delivery.¹⁰

4.5 In the consultation paper, we pointed out that the existence of these separate regimes for different types of corporation causes potential difficulty to persons dealing with a corporation, and to bodies such as the Land Registry. At the very least, it is inconvenient that persons dealing with a corporation may have to make specific enquiries in order to satisfy themselves how the corporation executes a deed.

4.6 We recognised that the variety of different types of corporation, and the differences in their constitutions and procedure made it inappropriate simply to extend section 36A of the Companies Act 1985 to all corporations. However, given that both individuals and companies registered under the Companies Acts may now execute deeds without using a seal, we were provisionally in favour of extending this ability to other types of corporations.¹¹ We accepted that there was a difficulty in identifying a formula which would be appropriate to every form of corporation (or to as many as possible) given the very different management structures which existed, but suggested that the new provision could be based on the wording of section 74(1).¹² This would permit a document to be executed by any corporation aggregate (including a registered company) either:

(a) by the corporation affixing its common or other authorised seal; or

(b) by being signed by two directors or members of the council or other governing body, or by one such officer and the secretary, clerk or other permanent officer or his deputy, and being expressed to be executed by the corporation.

⁷ Eg Post Office Act 1969, Sched 1, para 13.

⁸ Eg Industrial and Provident Societies Act 1965, Sched 1, para 13, and Building Societies Act 1986, Sched 2, para 3.

⁹ *Clarke v The Imperial Gas Light and Coke Co* (1832) 4 B & Ad 315, 324-326; 110 ER 473, 477-478. See further *Halsbury's Laws of England* (4th ed 1975) vol 12, paras 1335-1336. It seems that any deed of a non-statutory corporation (ie, one created other than by the authority of Parliament) must, in the absence of any special and legally binding regulations to the contrary, be sealed at a duly constituted meeting of the corporation and in pursuance of a resolution of a majority of the members then present. The position is similar as regards delivery of the deed by the corporation: *Mayor, Constables and Company of Merchants of the Staple of England v The Governor and Company of the Bank of England* (1887) 21 QBD 160, 165-166. If it is a trading corporation, however, then in the absence of specific provision under its constitution, the seal may be affixed by those managing its affairs, in the performance of acts within their authority: *Re Barned's Banking Co, ex parte Contract Corporation* (1867) LR 3 Ch App 105.

¹⁰ We deal with delivery separately in Part 6.

¹¹ As indicated above, the general rule is that a corporation must execute a deed under its seal in the absence of specific authority to do otherwise; see para 4.4 above.

¹² This sets out a presumption of due execution, and is expressed to apply to all corporations aggregate. See paras 5.7-5.10 below.

- 4.7 We proposed that this formula would be applicable in addition to any other mode of execution authorised by law, practice, statute or other instruments constituting the corporation or regulating its affairs.
- 4.8 However, we recognised that there may be difficulties in deciding how the formula might fit in with existing statutory provisions governing execution by particular types of corporation. In some cases this may be relatively simple, for example where there is simply provision in the relevant statute or charter for the corporation to have an official seal.¹³ In other cases, however, there may be a conflict between a specific statutory provision and the proposed general formula. We gave the example of section 60 of the Charities Act 1993 which sets out the method of execution for charities incorporated under that Act. It requires, as an alternative to affixing the common seal, the signature of a majority of the trustees or of two or more trustees to whom the power to execute has been expressly delegated. The common formula which we proposed would replace these requirements with a simple requirement of two signatures.
- 4.9 In the light of these potential difficulties, we invited views on whether there are any categories of corporation for which special provision would be appropriate. We also invited views on whether there should be any other changes in the rules for the execution of deeds and other documents in order to achieve greater uniformity or consistency for different types of corporation.¹⁴
- 4.10 There was widespread support from respondents for changes to achieve greater uniformity between different types of corporation in the rules governing the execution of deeds and other documents, and to make those rules more accessible. A large majority of those who commented also considered that the ability to execute without using a seal should be extended to corporations to which section 36A(4) does not currently apply,¹⁵ and that there should be a common formula for execution by all corporations aggregate.
- 4.11 However, support for these changes was by no means unanimous. Several respondents questioned just how serious the problem was and whether any legislative changes were really necessary. Another respondent considered that it would not be right to attempt to achieve greater uniformity “with one over-arching piece of legislation”. The matter should be considered individually in respect of different types of corporation.
- 4.12 This last point was picked up by several other respondents. The Ecclesiastical Law Association, for example, questioned whether any general rule for corporations would fit in with the new structure of government for cathedrals, in the light of

¹³ Schedule 1, para 13 of the Industrial and Provident Societies Act 1965 states that the society’s rules must make provision as to the custody and use of the common seal.

¹⁴ We also invited views on whether the statutory presumptions of due execution and delivery which are applicable to registered companies should also apply to other types of corporation.

¹⁵ Certain corporations to which the Companies Act provisions do not apply can of course already execute without using a seal, eg incorporated Friendly Societies and charities incorporated under the Charities Act 1993. There is no “uniform” procedure or set of rules for such corporations, however.

proposed changes to the rules on Deans and Chapters. While the Co-operative Union Ltd, the representative body of the consumer Co-operative Movement in the UK, urged that the ability to execute without using a seal should not be extended to industrial and provident societies registered under the Industrial & Provident Societies Act 1965. It was felt that the formality attached to the affixing of a seal afforded a useful means of control for such societies.¹⁶

- 4.13 There was generally a fairly limited response to this question from corporations (or representative bodies of corporations) to which the provisions of the Companies Act do *not* apply. Where responses were received, they tended to be against change (such as the response of the Co-operative Union Ltd referred to above) or to indicate that the relevant corporations did not consider that there was any particular problem or need for change.
- 4.14 Despite the general support for a common formula for execution by all corporations aggregate, which would include the ability to execute without a seal, we take the view on further reflection that such a provision should *not* be introduced at this stage. There are a number of reasons for this.
- 4.15 First, there were objections raised by some respondents. As indicated above, the Co-operative Union Limited urged that special provisions should continue to apply to Industrial and Provident Societies. We had already drawn attention in the consultation paper to the position of local authorities.¹⁷ The danger is that in making exceptions for certain types of corporation, the advantages of a general rule would be eroded. If, on the other hand, no exceptions were to be made, there would have to be very strong grounds for overriding the objections expressed. We are not convinced that the general desirability of greater uniformity would, in itself, be sufficient.
- 4.16 Secondly, apart from the respondent referred to in the previous paragraph, there was a fairly limited response to these questions in the consultation paper from “non-Companies Act” corporations or those who might be said to represent their views. We would be reluctant to recommend changes which would affect a large number of corporations operating in very different contexts without a much clearer indication that there were no major objections from any particular type of corporation.
- 4.17 Thirdly, as indicated above, there may be difficulties with existing statutory provisions governing execution by particular types of corporation. Such provisions cover not only the method of execution, but also, in certain cases, presumptions of

¹⁶ A response was also received from the Co-operative Law Association whose members are mostly legal practitioners who advise Industrial and Provident Societies. The response indicated that the members were split equally between the larger retail societies who felt that the use of a seal acted as a protection against wrongdoing, and the smaller societies who were of the opinion that Industrial and Provident Societies should have a discretion as to whether to use a seal or not.

¹⁷ We indicated that we were aware of views that the present practice by which the sealing of a deed by a local authority is attested by both an elected member and an officer of the authority provides a valuable safeguard which should be retained; see Consultation Paper No 143, para 16.10.

due execution.¹⁸ If a uniform provision for execution were to be introduced, there would almost certainly need to be a new statutory presumption of due execution.¹⁹ A detailed investigation of all the current statutory provisions would be necessary to ensure consistency with the new provisions.

4.18 Fourthly, and perhaps most importantly, we have drawn attention above to the increasing use of electronic communication and to some of the national and international initiatives which are directed at facilitating its use. We have suggested that it may in due course be necessary to re-consider the current distinction between deeds and documents in the light of these developments. For the reasons given in the preceding paragraphs, we are not convinced that introducing a uniform set of provisions for the execution of deeds and documents by all corporations aggregate would necessarily be a straightforward exercise. We are not persuaded that it would constitute the best use of resources to seek to carry out such an exercise at this stage, when it may be necessary in the not too distant future to look again at the wider question of deeds and their continuing relevance in the light of technological advances.

4.19 In short, whilst we remain of the view that it is generally desirable to try to achieve greater uniformity between different types of corporation in the rules governing execution of deeds and documents, we are concerned that a single over-arching provision may not be appropriate, and that the time and cost which would be involved in pursuing a proposal for a uniform provision may not be justified at this stage in the light of the wider developments which may in due course have an impact on deeds and their use. Section 74(1) already gives a measure of uniformity to the extent that it sets out a common irrebutable presumption of due execution for all corporations where execution is under seal in accordance with the requirements of that section. We recommend elsewhere in this report extending the wording of this section and amending it to tie in more closely to the wording of section 36A which applies to companies.²⁰ We do not consider that there should be any more comprehensive reform applicable to execution by corporations generally at this stage. **Accordingly, we do not recommend the introduction of a formula for execution by all corporations aggregate.**

Presumptions of due execution and delivery

4.20 The presumptions governing due execution and delivery also vary between different types of corporation.²¹ In the consultation paper we asked for consultees views on whether any statutory presumptions of due execution and delivery which are applicable to registered companies should also apply to other types of corporation aggregate.

4.21 As we shall see, section 74 of the Law of Property Act 1925 sets out a presumption of due execution in relation to deeds executed under seal which applies to *all*

¹⁸ See Consultation Paper No 143, para 4.21.

¹⁹ See paras 4.20-4.21 below.

²⁰ See paras 5.15-5.33 below. See also paras 3.9-3.11 above, and para 7.51 below.

²¹ And, possibly, depending on the method by which a company chooses to execute; see paras 5.14 and 6.14 below.

corporations aggregate.²² If we had recommended the introduction of a uniform provision for execution along the lines proposed in the consultation paper, we consider that a new statutory presumption of due execution would have been required to reflect the fact that corporations could in future execute without using a seal. However, since we are not recommending a new provision on execution, there is no need for a new statutory presumption of due execution applicable to corporations generally.²³ There are improvements that can be made in respect of the current provisions, however, and they are considered in the next part (Part 5).

- 4.22 So far as delivery is concerned, there is currently no common provision applicable to all corporations aggregate. We consider the case for introducing such a provision in Part 6.²⁴

Corporations sole

- 4.23 In the consultation paper we described a corporation sole as consisting of one person and his or her successors in some particular office or station, who are incorporated by law in order to give them certain legal capacities and advantages which they would not have in their natural person.²⁵ Examples include Government ministers, the Public Trustee, and bishops within the Church of England.²⁶
- 4.24 As we pointed out in the consultation paper,²⁷ neither the provisions for execution of a deed by an individual,²⁸ nor the provisions of section 36A of the Companies Act 1985, apply to a corporation sole. Execution is therefore normally as required by the common law, by sealing and delivery. Not all corporations sole have their own seal, however, and where there is no corporate seal it seems that a person executing in his or her capacity as a corporation sole should continue to use a wafer seal, as was common practice for execution by an individual before 1989.²⁹
- 4.25 We suggested (without making any provisional recommendation) that there should be a permissive statutory provision (namely, one which is available in addition to

²² See paras 5.7-5.10 below.

²³ Some corporations can execute without a seal under specific statutory provisions. Some of these contain statutory presumptions of due execution, eg s 60(8) of the Charities Act 1993 (for charities incorporated under the 1993 Act), and Sched 6, para 6 to the Friendly Societies Act 1992 (for friendly societies incorporated under the 1992 Act). These presumptions reflect the wording of the individual execution provisions, and in the absence of a uniform execution provision for corporations generally, we do not consider that any change should be made to these presumptions of due execution.

²⁴ Paras 6.50-6.54.

²⁵ Consultation Paper No 143, para 4.25.

²⁶ See further, *Halsbury's Laws of England* (4th ed reissue 1998) vol 9(2), para 1007.

²⁷ Consultation Paper No 143, para 4.26.

²⁸ Law of Property (Miscellaneous Provisions) Act 1989, s 1(10).

²⁹ We suggested in the consultation paper that this seemed to follow from the fact that the Law of Property (Miscellaneous Provisions) Act 1989 is inapplicable, and execution must be under seal to comply with the common law rule. We were told that it is standard practice for corporations sole such as an archdeacon to execute using a wafer seal. See Consultation Paper No 143, para 4.26, n 60.

any existing method of execution) allowing execution either under the corporation's seal or by the attested signature of the holder of the office for the time being.

- 4.26 There was a fairly small response to this question overall, although almost all those who did address the question considered that there should be a statutory provision for execution by corporations sole along the lines suggested in the consultation paper. No respondents drew attention to particular difficulties to which such a reform might give rise.³⁰
- 4.27 In our view permitting corporations sole to execute deeds without using a seal could be useful in certain circumstances, and would be consistent with the reforms introduced in 1989. We consider that a provision along the lines suggested in the consultation paper would not suffer from the objections relating to loss of control raised in respect of the formula suggested for corporations aggregate. This is because a corporation sole consists, by definition, of a single person. The provision would permit that person, as an alternative to sealing the document, to execute by attested signature. There is not the same risk that other persons within the corporation might execute a document without authority.
- 4.28 On the other hand, there are a number of statutory provisions which govern the execution by corporations sole.³¹ As with corporations aggregate, it would be necessary to investigate those provisions thoroughly to ensure consistency with the new provision, and we are not convinced that such an exercise is justified at this stage. The responses did not indicate a strong view that reform was really essential. In the light of the limited number of responses, and the lack of evidence that this is a matter which is causing significant problems in practice, we are against making any recommendation for legislative reform on this point. **Accordingly, we recommend against having a statutory provision for execution by all corporations sole.**

Foreign corporations

- 4.29 We pointed out that the position in respect of foreign corporations had been greatly simplified by the Foreign Companies (Execution of Documents) Regulations 1994, which had adapted section 36A of the Companies Act 1985 to the execution of documents (in accordance with the law of England and Wales) by foreign companies.

³⁰ The Ecclesiastical Law Association did point out that the affixing of the seal "provides a check upon an Episcopal Act or proposed Episcopal Act of the Bishop. The seal is normally in the custody of the Diocesan Registrar who maintains the Bishop's Act Book and other registers and records." The Act Book provided an official record of documents executed as an Act of the Bishop. However, it also noted on this second point that the seal was in many cases required not because the instrument was a deed, but to signify an Episcopal Act of the Bishop; providing an alternative means whereby corporations sole could execute deeds would not, therefore, greatly affect the execution of documents by Archbishops and Bishops.

³¹ Eg Employment Act 1989, s 2; Ministers of the Crown Act 1975, s 3 and Sched 1; Duchy of Lancaster Act 1920, s 3; Treasury Solicitor Act 1876, s 1.

4.30 Under the regulations a foreign company may execute a document in one of the following ways:

(a) by affixing its common seal, or in any manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company;³²

(b) by the signature of any person or persons who, in accordance with the laws of the territory in which the company is incorporated, is or are acting under the authority (express or implied) of the company, so long as the document is expressed, in whatever form of words, to be executed by the company. Such a document has the same effect as if executed under the common seal of a company incorporated in England or Wales.³³

4.31 As we pointed out, the Regulations recognise the fact that it may be impossible for a foreign company to execute documents in the same manner as English companies. They therefore allow flexibility so that companies with a seal may execute under seal, while companies which do not have seals may execute by signature alone.

4.32 However, we drew attention to two related difficulties. These stem from the fact that the regulations apply to “*companies* incorporated outside Great Britain”. The first was that the meaning of companies in this context was not entirely clear. It is not defined in the regulations, and there is no definition of “company” in the Companies Act 1985 which is applicable to a foreign company.³⁴

4.33 The second difficulty was that it seemed to leave open the possibility that there were other foreign corporations which did not come within the Regulations. Section 740 of the Companies Act 1985 provides that the terms “body corporate” and “corporation” include a company incorporated elsewhere than in Great Britain. We suggested that the inference could be drawn from this that not every corporation incorporated outside Great Britain would necessarily be a company, and so within the Regulations. Foreign corporations outside the regulations executing under English law would have to follow the procedures which were current before the Regulations came into force. These did give rise to difficulties and practice appeared to vary, although it seemed that for such a corporation to execute a deed in accordance with English law it could do so under its seal (if it had one), by the device of a wafer seal,³⁵ or by the grant of a power of attorney.³⁶

³² Companies Act 1985, s 36A(2) as applied and amended by para 5(a) of the Regulations.

³³ *Ibid*, s 36A(4) as applied and adapted by para 5(b) of the Regulations. Since execution in this way is “by the company” it does not appear that s 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 is applicable, so that the signature need not be witnessed.

³⁴ See para 3.2, n 3 above.

³⁵ On the basis of the common law rule that a deed must be in writing, sealed, and delivered: *Goddard's Case* (1584) 2 Co Rep 4b, 5a; 76 ER 396, 397-399, and that a corporation may adopt any seal for use. We were not aware of any judicial authority for this in the case of a foreign corporation, but considered that in principle it should be effective. Land Registration Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998) recognises the

- 4.34 We sought views on whether it would be helpful to define what is a “company” for the purpose of the Regulations, or whether the Regulations should be extended to all foreign “corporations”. Our provisional view was that it might be difficult to find a definition of “company” in this context which offered sufficient clarity, and that it would be better to extend the Regulations to apply to all foreign corporations.
- 4.35 On consultation, the vast majority of those who addressed this issue agreed with our provisional view that the Regulations should be extended so that they are applicable to all corporations incorporated outside Great Britain. Some of these did not necessarily agree with the view expressed in the consultation paper that not all bodies corporate are companies for these purposes, but nevertheless considered that the position should be clarified.
- 4.36 The responses did, however, throw up some discussion as to exactly what was meant by “corporation” and what should be included. For example, how far should governmental and quasi-governmental bodies (eg treasury or investment departments of overseas governments) and supra-national organisations such as treaty bodies be included?
- 4.37 In contrast to the views of most respondents, the Society of Public Notaries did not appear to have particular difficulties with the current position. It pointed out that much of the work of its members concerned the attestation of documents executed by foreign corporations. Most of these were executed by bodies clearly recognisable as companies, in which case members found no difficulty applying the Regulations. Where bodies were clearly not companies or doubt existed their members tended to rely on the old common law rules.
- 4.38 Despite the strong support expressed for extending the Regulations to all foreign corporations, we are not in favour of any change to the Regulations in this respect. We are influenced by three points in particular. First, the responses did not indicate that there was a particular problem with the Regulations which needs to be addressed by legislation. This was the view, in particular, of the Society of Public Notaries, whose members frequently have to attest documents executed by foreign corporations. Although other respondents considered the present distinction to be “unhelpful”, none in fact pointed to any significant problems which they had experienced in practice.³⁷
- 4.39 Secondly, we are concerned that there did appear to be some confusion about what types of organisation would come within the meaning of “corporation”. The proposed amendment might not, in fact, make the Regulations any clearer than they are at present. Moreover, the extension might bring in bodies of a nature quite different from those for which the Regulations were originally conceived.

possibility of a foreign corporation adopting any form of seal for the purpose of executing deeds in relation to property in England and Wales; see paras H2.61-H2.6.2.

³⁶ See paras 7.3 -7.51 below on execution by attorneys generally.

³⁷ One respondent did comment, however, that the extension proposed by the Commission would avoid the need to obtain legal opinions for relatively small transactions.

- 4.40 Thirdly, the Regulations are made under a power conferred by section 130(6) of the Companies Act 1989. That section refers to “*companies* incorporated outside Great Britain”. The Regulations could not be amended to extend to *corporations* without also amending section 130(6). However, the 1989 Act as a whole deals with companies, not corporations generally. It would be odd and misleading to have one provision about corporations in an act which in all other respects is concerned with companies. It would be necessary, therefore, to have a new provision somewhere else and to repeal section 130(6). Amended regulations could then be made on the basis of the new provision.
- 4.41 For the reasons discussed above,³⁸ and to which we also return later,³⁹ we are not recommending in this paper any general “codification” of the provisions relating to execution of deeds and documents by bodies corporate. There will therefore be no natural “home” for such a new provision and it would probably have to be free-standing. Rather than rationalising the position, a new free-standing provision might in fact tend to complicate matters.

Other changes to the Regulations

- 4.42 We also invited views on whether there should be any other changes to the Regulations. We highlighted two particular points for comment. First, would it assist if the Regulations were amended to provide that they are without prejudice to any additional requirements for execution imposed by the law of incorporation of the company?⁴⁰ Our provisional view was that this might introduce potential difficulty and uncertainty into what is essentially an English law formality requirement, particularly in situations where the relevant formalities are clearly governed by English law, for example in the case of a conveyance of real property.⁴¹
- 4.43 Secondly, is there any need to confirm that authority to execute a deed for a foreign corporation need not itself be given by deed, or to make any other change in the Regulations in order to clarify what constitutes sufficient authority to enable a person to execute a deed under the authority of a foreign corporation in accordance with the Regulations?⁴² Again, our provisional view was that no change was necessary.
- 4.44 On both points, a large majority of respondents agreed with our provisional views. In relation to the first point, the Land Registry, in particular, indicated that an

³⁸ See paras 1.12-1.15 above.

³⁹ See paras 9.6-9.10 below.

⁴⁰ This suggestion had been made by a working party of the Law Society’s Standing Committee on Company Law at the time of preparation of the Regulations.

⁴¹ Consultation Paper No 143, para 11.49.

⁴² This issue stems from the fact that English law requires authority to execute a deed on behalf of another person to be given by deed; see para 2.5(c), n 4 above. The regulations effectively override this requirement so far as foreign companies are concerned since they permit *any person* (ie not just an officer of the company) acting under the authority of the foreign company to sign by way of execution by the company. Such a person can therefore be authorised to execute a document in such a way as to bind the company without the need for a deed. It has been questioned whether the common law rule can be abolished in this way; see Consultation Paper No 143, para 11.51.

amendment along the lines suggested would mean that it would have to ascertain, via the corporation's advisers, what the relevant provisions of local law were in each case. In addition there might well be real difficulties in applying the local rules where that law had no understanding of, or direct equivalent to, deeds or instruments in solemn form - would there need to be observance of the local formalities (if any) for entering into contracts instead (or would this apply only to those deeds which were also contracts)? These uncertainties should be avoided if possible.

- 4.45 So far as the second point was concerned, the view was expressed that there was great difficulty in trying by statute to clarify or impose conditions on what constituted sufficient authority to execute a deed by different entities in different territories. In general, the issue of authority could be dealt with by legal opinions in a reasonably acceptable way.
- 4.46 In the light of the views expressed by the majority of respondents, we maintain our provisional view on both these points.

Consequential amendments

- 4.47 Although we do not consider that any of the substantive changes to the Regulations raised in the consultation paper should be pursued, we do consider that in so far as changes are to be made to section 36A in relation to English companies, these should be reflected, where relevant, in the Regulations applying those provisions to foreign companies. This is discussed briefly at paragraph 9.13 below. The amendments to section 36A are discussed in Part 3 above and Parts 6 and 7 below.
- 4.48 **Accordingly, we recommend against any changes to the Foreign Companies (Execution of Documents) Regulations 1994 other than to reflect (where relevant) the changes to be made to section 36A of the Companies Act 1985 in relation to English companies.**

Summary

- 4.49 To summarise, we do not consider that it would be appropriate to have a single provision dealing with execution by all corporations aggregate. Although greater uniformity is clearly desirable in principle, and although there is a case for extending the ability to execute without a seal to such corporations, we are not convinced that a single over-arching provision is appropriate. We are also concerned that the time and cost which would be involved in pursuing proposals for more uniform provisions may not be justified at this stage in the light of wider commercial and legal developments affecting the manner in which corporations transact business.
- 4.50 We do not consider that there should be any change to the law relating to execution by corporations sole. Nor do we consider that the Foreign Companies (Execution of Documents) Regulations 1994 should be extended to all foreign corporations, or amended in any other way at this stage, other than to reflect (where relevant) the changes to be made to section 36A of the Companies Act 1985 in relation to English companies.

PART 5

DUE EXECUTION

Introduction

- 5.1 In Parts 3 and 4 we considered the proposals for reform which we had put forward in the consultation paper in respect of the way in which corporations can validly execute documents. In this part we consider the position of third parties dealing with a corporation and how far they are affected by any irregularity or fraud. In particular we examine the presumptions of due execution set out in section 36A(6) of the Companies Act 1985 and in section 74(1) of the Law of Property Act 1925.
- 5.2 As we explained in the consultation paper, the presumptions of due execution which apply in favour of a person dealing with a corporation vary depending on the method of execution, and the type of corporation. Our provisional proposals were directed at achieving greater coherence and consistency in the application of these presumptions.

Position at common law

- 5.3 In the consultation paper we drew attention to the existence of certain common law rules and presumptions which may give a person dealing with a corporation protection against irregularities in the execution of documents by the corporation.¹
- 5.4 In particular there was a common law presumption that where a person seeking to rely on a deed could show that the seal of a corporation had been affixed by those with legal custody of the seal, the onus of proving that it had not been affixed with the necessary authority lay with the other party.²
- 5.5 This had, however, been largely superseded by the internal management rule³ and general agency principles.⁴ The effect of these was that if on the face of it an

¹ Consultation Paper No 143, paras 5.22-5.23. For an overview of the issues of corporate capacity and authority to enter transactions, see *ibid*, at paras 5.4-5.21. We did not propose any reform of the law in respect of those issues which would have gone beyond our terms of reference; *ibid*, at para 5.3.

² *Clarke v The Imperial Gas Light and Coke Co* (1832) 4 B & Ad 315, 110 ER 473 (Seal affixed by directors. Under the statute of incorporation, the directors were given custody of the seal and the power to use it for the affairs of the company. Authority of the members in general meeting required for the contract in question, but no evidence before the court to show that the forms prescribed by the statute had not been complied with. Contract held to be valid). See also: *Hill v Manchester and Salford Water Works Co* (1833) 5 B & Ad 866, 872-874; 110 ER 1011, 1014; and *Re Barned's Banking Co, ex parte The Contract Corporation* (1867) LR 3 Ch App 105 (no provisions in the constitutional documents governing sealing; directors of trading company held to have authority to affix seal; no need to enquire further into the practices of the company). These cases may reflect a wider principle that where a deed is regular on its face, the court will start from a presumption of due execution, and it is for the person disputing its validity to prove their case: eg, *Campbell v Campbell* [1996] NPC 27 (deed of gift by individual; plaintiff failed to prove that maker did not sign in the presence of the attesting witness).

³ Often referred to as the rule in *Turquand's case*; *Royal British Bank v Turquand* (1856) 6 E&B 327; 119 ER 886. The essence of this rule is that where any act appears to have been done in accordance with the articles or other constitutional documents, persons dealing

instrument is regular (in other words it appears to have been executed in accordance with the articles), a person dealing with a corporation in good faith is entitled to presume that the seal has been duly affixed and that the directors were duly appointed and their signatures were duly made. So long as the requirements of the articles have been complied with, then so far as formal validity is concerned, that person need not prove that there was actual authority to execute the document.⁵ We also pointed out that sections 35A⁶ and 35B⁷ of the Companies Act 1985 might save a deed which had not been executed in accordance with the articles, in favour of a person dealing with a company in good faith, though this might be limited to cases where the execution of the relevant document had been approved by the board of directors.⁸

- 5.6 However, it was in respect of the statutory presumptions contained in section 36A(6) of the Companies Act 1985 and section 74(1) of the Law of Property Act 1925 that we identified particular difficulties and inconsistencies and provisionally recommended reform.

Statutory presumptions

- 5.7 Section 74(1) provides that, in favour of a purchaser, a deed shall be deemed to have been duly executed by a corporation aggregate if its seal has been affixed to the deed in the presence of and attested by its clerk, secretary, or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation. Where a seal purporting to be the seal of the corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices, the deed shall be deemed to have been executed in accordance with the requirements of the section, and to have taken effect accordingly. The section applies to all corporations aggregate,⁹ but only in favour

with a corporation are entitled to assume that the internal procedures of the corporation have been regularly conducted.

⁴ A person dealing with the company may rely, for example, on principles of ostensible authority. The rule in *Turquand's* case is also sometimes referred to as encompassing general agency principles as they operate in the context of corporate authority; see *Palmer's Company Law* (25th ed 1992), vol 1 para 3.312, and see Consultation Paper No 143, para 5.15.

⁵ Consultation Paper No 143, para 5.23.

⁶ Section 35A(1) provides that: "In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitation under the company's constitution". See Consultation Paper No 143, paras 5.8-5.9.

⁷ Which provides that: "A party to a transaction with a company is not bound to enquire as to whether it is permitted by the company's memorandum or as to any limitation on the powers of the board of directors to bind the company or authorise others to do so". See Consultation Paper No 143, para 5.9.

⁸ *Ibid* at, paras 5.15 and 5.23.

⁹ This excludes a corporation sole, which is distinguished from a corporation aggregate in s 74(3). The Land Registry treats s 74(1) as applicable to a foreign corporation when it executes under seal, attested by two officers falling within the wording of the section; see Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998), paras H2.2-H2.3.

of a purchaser, which for this purpose is a purchaser in good faith for valuable consideration.¹⁰

- 5.8 By contrast, section 36A(6) does not apply to all corporations, but only to those to which section 36A of the Companies Act applies.¹¹ It provides that, in favour of a purchaser, a document shall be deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company.¹²
- 5.9 As we pointed out in the consultation paper, the apparent intention of section 36A(6) was to extend the protection available for a purchaser under section 74(1) of the Law of Property Act to the situation where a company takes advantage of section 36A(4) of the Companies Act to execute without using a seal. However, we identified a number of potentially serious inconsistencies between the two sections and recommended changes to bring them into line. We also drew attention to a problem in the construction of section 36A(6) relating to its scope, and considered the application of the presumptions to cases where a document is a forgery.
- 5.10 We consider first whether a statutory presumption of due execution is still required. We then examine the problem of construction of section 36A(6) to which we drew attention in the consultation paper. Next, we consider the proposals which we put forward in the consultation paper for resolving the inconsistencies which identified between section 36A and section 74(1). Finally we consider the question of fraud and forgery.

Is a presumption of due execution still required?

- 5.11 Our provisional view was that the presumption (or deeming) of due execution in favour of a purchaser in section 36A(6) and section 74 of the Law of Property Act 1925 continues to serve a useful purpose and should be retained. It protects purchasers in situations where the internal management rule and sections 35A and 35B of the companies Act 1985 may not assist. The presumptions mean that a purchaser in good faith can rely on a document executed as mentioned in those sections without further enquiry.
- 5.12 There was unanimous agreement from the respondents who addressed this question with our provisional view that the presumptions of due execution contained in section 36A(6) of the Companies Act and section 74(1) of the Law of Property Act should be retained. A significant number of respondents were in fact in favour of extending the presumptions of due execution so that they applied not

¹⁰ Law of Property Act 1925, s 205(1)(xxi). The definition includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property. Where the context so requires, this includes an intending purchaser.

¹¹ Ie companies (see para 3.4 above), unregistered companies (see para 3.4, n 5 above) and, as modified by the Foreign companies (Execution of Documents) Regulations 1994, foreign companies (see paras 4.29-4.47 above).

¹² Section 36A(6) also includes a presumption of delivery. This is discussed at paras 6.12-6.13 and 6.37 below.

just to purchasers in good faith but to others relying on the deed or document. This is discussed below.¹³

- 5.13 **We recommend that the presumptions of due execution in favour of a purchaser in good faith contained in section 36A(6) of the Companies Act 1985 and section 74(1) of the Law of Property Act 1925 should be retained.**

Construction of section 36A(6)

- 5.14 Section 36A(6) refers simply to a document “signed” by two directors or by a director and secretary. This clearly covers execution in accordance with section 36A(4). However, we drew attention to the case of *Johnsey Estates (1990) v Newport Marketworld Limited and Others*,¹⁴ where it had been held, albeit “with some hesitation”, that the presumption also arose if the document was signed by two officers merely for the purposes of authenticating the affixing of the seal where execution is under section 36A(2).¹⁵ We doubted that this construction was correct,¹⁶ but considered that the point should be clarified.¹⁷ However, since execution under seal attracts the presumption in section 74 of the Law of Property Act 1925, we were of the view that little turned on this¹⁸ provided sections 36A(6) and 74 were brought into line. It was therefore primarily at achieving consistency between the two sections that our proposals were directed.

Inconsistencies between section 74(1) and section 36A(6)

- 5.15 We drew attention to the following inconsistencies between sections 74(1) and 36A, and suggested changes to deal with them.¹⁹

Identity of officers signing

- 5.16 There is a difference in the terminology used in the two provisions which reflects the fact that section 74(1) applies to corporations aggregate generally (and not just to companies). Hence it refers to “a member of the board of directors, council or other governing body”, rather than simply to “a director”.²⁰ However, there is a more fundamental difference in that section 74(1) requires one of those attesting the seal to be the secretary or his deputy, while section 36A(6) applies where two directors sign. Accordingly, there is a statutory presumption of due execution when

¹³ Para 5.26 below.

¹⁴ 10 May 1996, unreported (Chancery Division (Cardiff) Judge Moseley QC).

¹⁵ *Ibid*, transcript at paras D(III) 1-18.

¹⁶ Consultation Paper No 143, paras 5.26 and 11.31.

¹⁷ Consultation Paper No 143, para 15.11.

¹⁸ So far as due execution is concerned. As discussed below, we have recommended that the irrebuttable presumption of delivery contained in section 36A(6) should be repealed; see para 6.43 below.

¹⁹ The inconsistencies listed below relate to the presumptions of due execution. We also drew attention to a serious inconsistency between the two sections in relation to delivery; see para 6.14 below.

²⁰ The difference in terminology may also partly be explained by the passage of time between the two provisions.

two directors of a company execute by signing a document, but there may be no similar statutory presumption where two directors of a company affix and attest the company's seal.²¹ There will certainly be no such presumption where two directors of a corporation to which section 36A does not apply affix and attest the common seal.

- 5.17 Our provisional view was that section 74(1) should be amended so that it applies where the seal is attested by two directors as well as by the secretary and a director. There was almost unanimous support for this view from respondents. The Land Registry, in particular, commented that it was a very common situation where, strictly, it currently needs to call for evidence that the articles provide for execution by two directors (which given the wording of Table A, they almost always do). Another respondent suspected that many lawyers think that section 74(1) already covers signature by two directors.
- 5.18 As indicated above, section 74(1) applies to corporations aggregate generally and so the amendment needs to reflect the current wording and not simply refer to directors. We therefore maintain our provisional view that section 74(1) should be amended so that due execution will be deemed in favour of a purchaser in good faith when the seal has been attested by two directors or members of the council or governing body as well as by one such person and the secretary, clerk or other permanent officer or his deputy.

Secretary or deputy secretary

- 5.19 One of those attesting the seal may be the deputy secretary for the purpose of section 74(1), but the reference to "the secretary" is quite specific in sections 36A(4) and (6), and it is doubtful whether the deputy secretary would suffice for this purpose.²² We invited comments (without expressing any provisional view) on whether section 36A(4) and (6) should be extended to include a deputy or assistant secretary.²³
- 5.20 Although a majority of respondents who answered this question considered that the Companies Act provisions should be extended, there was some confusion over whether any other changes would also be required, and in particular whether there should be any requirement for deputy secretaries to be registered. One respondent considered that only a deputy or assistant secretary whose appointment had been filed with the Registrar of Companies should be entitled to sign. Another proposed a voluntary system of registration of authorised signatories; valid execution should be deemed in all cases of signing by registered signatories.

²¹ As indicated above, this depends on whether the interpretation in *Johnsey Estates* is correct; see para 5.14 above. See also para 6.12 below.

²² See further Companies Act 1985, s 283(3). The section makes reference to any deputy or assistant secretary, but this appears to be relevant only when the office of secretary is vacant or the secretary is incapable of acting. Cf *Brooke's Notary* (11th ed 1992) p 182 n 44. In contrast, there is a wide definition of the term "director" in *ibid*, s 741. At the least, it seems likely that signature by an alternate director would suffice.

²³ As discussed above, we are not in favour of any general extension of the categories of person who may sign for the purposes of section 36A(4); see para 3.19.

- 5.21 Other respondents, on the other hand, did not consider that registration should be a requirement. The Land Registry, for example, considered that the lack of record of deputy secretaries was likely to be of little concern as it doubted “whether most persons dealing with companies go to the trouble of checking the identity of signatories and their status as officers, in reliance on the presumptions which already apply.” It also pointed out that no difficulty has arisen in the operation of section 74(1) (which already permits deputy secretaries to attest the affixing of the company’s seal).
- 5.22 In addition, there were a significant number of respondents who indicated in response to our earlier more general question²⁴ that they did not favour any change to the method of execution without a seal, but who did not specifically address this question. Taking those respondents into account, the views on whether 36A(4) should be amended to include reference to deputy secretaries would appear to be rather more mixed.
- 5.23 In the light of these points, we are reluctant to recommend changes to section 36A(4) and 36A(6) so as to refer to a deputy or assistant secretary. We accept that there will continue to be a minor discrepancy between sections 74(1) and 36A(6) in this respect; however, since the majority of respondents did not appear to be in favour of any change to the method of execution without a seal in section 36A(4), and since our view is that section 36A(6) should continue to mirror the wording of section 36A(4),²⁵ we consider that the current position should be retained in this respect. Accordingly, we are not in favour of amending sections 36A(4) and (6) so that one of those signing a document by way of execution by the company may be a deputy or assistant secretary.

Intending purchasers

- 5.24 As defined in the Law of Property Act 1925 the term “purchaser” includes an intending purchaser, where the context so requires.²⁶ In contrast, there is no reference to an intending purchaser in the definition of a “purchaser” in section 36A. Our provisional view was that it was doubtful whether the context does “so require” in section 74(1) so that there may, in fact, be no practical difference between the two definitions. Nevertheless, we invited views on whether the definition of “purchaser” in either section should be amended.
- 5.25 We suggested that the distinction may be relevant in the case of a document which does not effect a transfer of the legal estate, for example when a contract to acquire property has been executed as a deed, or where there is some document which is collateral to the conveyance. There may be no “purchaser” in such a case. We specifically asked whether due execution should be deemed in favour of a purchaser or intending purchaser in situations such as these.
- 5.26 Although a majority of respondents indicated that they were in favour of amending the definition of “purchaser” applicable to sections 36A(6) and 74(1) there did not

²⁴ See para 3.23 above.

²⁵ See para 3.27 above.

²⁶ Section 205(1)(xxi).

appear to be a great deal of consensus on how this should be done. Many of those in favour of amendment considered that the presumption should in fact be available to a much wider group of persons dealing with the company or relying on the deed.²⁷ This is a rather different point which is discussed further below.²⁸

- 5.27 As indicated above, our provisional view was that it was doubtful whether there was any practical difference between the two definitions of purchaser. The definition in the Law of Property Act 1925 applies generally. We would be reluctant to recommend any change to it which might have wider implications. So far as section 36A is concerned, no respondent gave any examples of situations which had arisen in practice where the definition of “purchaser” had given rise to difficulty. In view of these points, and the lack of consensus for any particular change amongst respondents, we do not consider that the definition of “purchaser” applicable to either section 36A(6) or section 74(1) should be amended.

Purported signatories

- 5.28 Section 36A(6) refers to a document which “purports to be signed by a director and the secretary of the company, or by two directors of the company ...”, whilst section 74(1) refers to a seal “purporting to be the seal of the corporation” and “attested by persons purporting to be persons holding such offices as aforesaid...”. Our provisional view was that there was no particular significance in the difference in the wording, but that it was desirable to have similar wording in both sections. On balance we preferred the wording used in section 36A(6).²⁹
- 5.29 A majority of respondents who addressed this question agreed with our provisional view. Some respondents considered that the word “purports” was confusing and should be clarified. However, this raises the wider issue of the extent to which the relationship between the presumptions of due execution and the rules governing forged documents should be clarified. This is discussed below.³⁰
- 5.30 Our view following consultation is that there is no particular need to amend the wording of either provision. However, we remain of the view that the wording of section 36A is probably neater and therefore preferable.³¹ Since we are recommending other changes to section 74(1),³² the opportunity could usefully be taken to rationalise the wording of that section and to bring it into line with section 36A.

²⁷ It is not just to “purchasers”.

²⁸ See paras 5.38-5.39.

²⁹ We consider below the relationship between the deeming of due execution and the rules governing forged documents; see para 5.42.

³⁰ See paras 5.34-5.37 below.

³¹ We referred to the “brevity” of s 36A(6); Consultation Paper No 143, para 16.5. An amended s 74(1) could not of course mirror s 36A(6) completely since it has to refer to officers other than directors and secretaries (see para 5.16 above) and since it must refer to the affixing of the seal. See clause 1 of the draft bill.

³² See paras 3.9-3.11, 4.19 and 5.16-5.18 above and 5.31-5.32 below.

Restriction to deeds

- 5.31 Section 74(1) is expressly limited to deeds. It appears that section 36A(6) is capable of extending to any document which is executed in accordance with section 36A(4), whether or not a deed.³³ Prior to 1989 this issue would not have arisen in respect of section 74(1) since any document executed under seal would almost always have been a deed. Now that it is possible for a document to be executed under seal without being a deed, and now that there is a corresponding presumption in section 36A(6) which is not limited to deeds, our provisional view was that section 74(1) should be extended so as to include documents executed under seal which are not deeds.³⁴
- 5.32 A large majority of the respondents who addressed this question agreed with our provisional view. We have made one slight change to this recommendation, however, in drafting the relevant provision. On further reflection, we consider that section 74(1) should be amended to refer to *instruments* rather than documents, as this is more consistent with the terminology used in the rest of the section.
- 5.33 **We therefore recommend that section 74(1) of the Law of Property Act 1925 should be amended as follows:**

(i) so as to include the seal being affixed in the presence of and attested by “two members of the board of directors, council or other governing body”;

(ii) so that references to “purported” follow more closely the wording of section 36A(6) of the Companies Act 1985;

(iii) so as to refer to “instrument” instead of “deed”; (Draft bill, clause 1)

We recommend against amending sections 36A(4) and (6) of the Companies Act 1985 so as to include reference to a deputy or assistant secretary, and recommend against any change to the definition of “purchaser” in either section 36A(6) or section 74(1) of the Law of Property Act 1925.

Forgery and fraud

- 5.34 As we explained in the consultation paper,³⁵ a document which purports to be executed as a deed but which is in fact a forgery is a nullity.³⁶ Thus where the signatures of the corporation’s officers have been falsified, the document is of no

³³ In so far as it sets out a presumption of due execution. As indicated below, s 36A(6) also contains a presumption of delivery which is only relevant to deeds.

³⁴ We did point out, however, that most documents executed by a corporation on which a purchaser will need to rely will in fact be deeds, so the point may be of limited practical importance.

³⁵ Consultation Paper No 143, para 5.29.

³⁶ *Brook v Hook* (1871) LR 6 Exch 89; *Re Cooper* (1882) 20 Ch D 611 CA; *Gibbs v Messer* [1891] AC 248 PC; *Ahmed v Kendrick* (1988) 56 P & CR 120 CA; *Penn v Bristol and West Building Society* [1995] 2 FLR 938. The rule applies to deeds generally, and not merely to those of corporations.

effect. The internal management rule does not apply to such a deed.³⁷ There is some authority to suggest that the unauthorised affixing of the common seal itself amounts to forgery, even if no element of counterfeit is involved,³⁸ but we considered that this was inconsistent with the general rule that a principal is liable for the fraudulent acts of his agent when the agent acts within the scope of his ostensible authority.³⁹

- 5.35 We pointed out in the consultation paper that the relationship between the rules for forged documents and the presumptions of due execution was not spelt out in the relevant legislation. Our provisional view was that the presumptions contained in sections 74(1) and 36A(6) should (and probably did) protect a purchaser from any lack of authority to sign the document in question (that is where they are the genuine signatures of unauthorised officers). We were also of the view that the presumptions should (and probably did) apply where the document was attested or signed by persons who were no longer officer holders but notice of their resignation had not yet been filed with the Registrar of Companies, or where there was some defect in their appointment. However, we considered that the presumptions did not and should not give protection where the signature of the company's officers had been forged.⁴⁰ We invited views on this point and on whether there was any need for clarification.
- 5.36 All but one of those who commented agreed with our assessment of the situations which the presumptions should cover.⁴¹ However, a majority also appeared to be in favour of clarification.
- 5.37 Despite the views expressed on consultation, we do not consider that there should be any legislative amendments to clarify the relationship between the presumptions of due execution and the rules governing forged documents. There are several related reasons for this. First, only a relatively small proportion of the total number of respondents addressed this particular question. Secondly, although most of those who did respond were in favour of clarification, none gave any examples of situations which had given rise to particular difficulties in practice. Thirdly, section 74(1) has been in existence for over 70 years. It's wording is well known. We would be reluctant to recommend amended wording which may lead to greater uncertainty or risk giving rise to additional litigation in the absence of a very clear

³⁷ *Ruben v Great Fingall Consolidated* [1906] AC 439.

³⁸ *South London Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496. See also the observations in *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, 840; *Slingsby v District Bank Ltd* [1931] 2 KB 588, 605; and *Mahony v East Holyford Mining Co Ltd* (1875) LR 7 HL 869, 899.

³⁹ Consultation Paper No 143, para 5.31.

⁴⁰ In the sense of someone who is not an officer signing someone else's name who is. *Ibid*, at para 5.32.

⁴¹ The respondent who disagreed on this point considered that the presumptions should cover all circumstances where the signatures are not genuine, but the person relying is acting in good faith. We disagree. We consider that this goes too far and would be undesirable on general principles. It would also in effect reverse the decision of the House of Lords in *Ruben v Great Fingall Consolidated* [1906] AC 439; see Consultation Paper No 143, para 5.29.

indication that change is required.⁴² We do not believe that the results of the consultation are sufficiently compelling in this respect. **Accordingly, we do not recommend any amendment to clarify the relationship between the deeming of due execution in sections 36A(6) of the Companies Act 1985 and 74(1) of the Law of Property Act 1925 and the rules governing forged documents.**

Other changes

5.38 As indicated above, a number of respondents took the opportunity to suggest that the deeming of due execution should not just apply in favour of purchasers, but should be available to a much wider group of persons seeking to rely on a deed or document executed by a company. Several different formulations were put forward for this: one respondent suggested that the presumptions should apply in favour of anyone *dealing with the company* in good faith; another suggested they should apply in favour of any person *seeking to rely on the deed* in good faith; a third respondent suggested a combination of the two.

5.39 We are not persuaded that any such extension to the application of the presumptions is in fact necessary or desirable. We considered this briefly in the consultation paper and repeat the reasons we gave there for rejecting it.⁴³ Briefly, we are inclined to the view that extending the ambit of the presumption in this way might cause too great an overlap with sections 35A and 35B, and would push the balance too far in favour of a person dealing with a company, and against the interests of the company in ensuring that obligations which it undertakes are duly authorised by the company. In that respect we pointed out in the consultation paper that section 74(1) appears to operate despite the lack of any proper authorisation of execution by the board, whilst sections 35A and 35B may apply only to transactions or dealings decided on by the board or with its authority. We also drew attention to the more general argument for treating purchasers in good faith as a special case for the sake of ensuring that title in the relevant property passes to them.

Summary

5.40 To summarise, we consider that the presumptions of due execution contained in section 36A(6) of the Companies Act 1985 and section 74(1) of the Law of Property Act 1925 still serve a useful purpose and should be retained.

5.41 We consider that the inconsistencies between the two sections should be resolved by amending section 74(1) so as: (i) to include the seal being affixed in the presence of and attested by “two members of the board of directors, council or other governing body”; (ii) to follow the wording of section 36A(6) in its references to “purported” signatories; and (iii) to refer to “instrument” instead of “deed”. However, we do not consider that sections 36A(4) and (6) should be

⁴² The changes we have recommended above to bring ss 36A(6) and 74(1) into line are more limited and straightforward. They do not depart from the substance of the wording which has been in section 74(1) since the Law of Property Act 1925 was first enacted.

⁴³ Consultation Paper No 143, para 15.9.

extended to include a deputy or assistant secretary, nor do we consider that any change should be made to the definition of “purchaser” in either section.

- 5.42 We do not consider that there is any need to clarify the relationship between the deeming of due execution in sections 36A(6) and 74(1) and the rules governing forged documents, and do not consider that there should be any more general extension of the presumptions so as to apply in favour of persons other than purchasers.

PART 6

DELIVERY

Introduction

- 6.1 As indicated above, delivery is an essential formality for a deed to become effective.¹ We pointed out in the consultation paper that for a long time there were conflicting views as to whether a separate act of delivery was in fact required by corporations executing deeds, or whether the affixing of the corporate seal itself implied delivery by the corporation.² However, it now seems clear that delivery remains a distinct requirement in all cases,³ although at common law, the sealing of a deed raises a rebuttable presumption of delivery.⁴ We have recommended above changes to make this clearer in the context of section 74(1) of the Law of Property Act 1925.⁵
- 6.2 Originally delivery was the physical act of handing the deed over to the other party, or instructing him to take it up. But the matter is now essentially a question of the intention of the maker of the deed; a deed may be delivered even though the maker retains possession of it, provided it is clear that he intended the deed to become binding on him.⁶
- 6.3 In this part we consider whether the concept of delivery still serves a useful purpose, and also examine the difficulties of construction and application which we identified in respect of the two statutory presumptions of delivery contained in sections 36A(5) and (6) of the Companies Act 1985. We deal with these matters under the following heads: delivery in escrow and delayed delivery; the dating of a deed; problems with the presumptions of delivery; should the concept of delivery be retained; an alternative presumption of delivery upon dating; rebuttable presumption of delivery on execution (section 36A(5)); irrebuttable presumption of delivery on execution (section 36A(6)); and delivery by other corporations.

Delivery in escrow and delayed delivery

- 6.4 As we pointed out in the consultation paper, in practice, in the great majority of conveyancing and other transactions any necessary deeds will be executed prior to

¹ See para 2.8(d).

² Consultation Paper No 143, paras 6.4 and 11.21-11.24. There was also authority that there was no need for a separate act of delivery where a purchaser could rely on s 74(1) of the Law of Property Act 1925, since “execution” within the meaning of the section must be taken to include delivery; *Beesly v Hallwood Estates Ltd* [1960] 1 WLR 549, 562; *D’Silva v Lister House Development Ltd* [1971] 1 Ch 17, 29.

³ Consultation Paper No 143, paras 6.4 and 11.21-11.24.

⁴ *Mayor, Constables and Company of the Merchants of the Staple v The Governor and Company of the Bank of England* (1887) 21 QBD 160, 165-166 (*Per* Wills J at first instance: “Prima facie, putting the seal imports delivery”). See also *Palmer’s Company Law* (25th ed 1992) vol 1 para 3.104, and Consultation Paper No 143, para 6.4, n 8.

⁵ See para 3.13.

⁶ See *Xenos v Wickham* (1866) LR 2 HL 296, 312, *per* Blackburn J.

completion.⁷ The maker will not, therefore, want the deed to take effect immediately on execution. There are two ways in which this can be achieved. The first is to deliver the deed so that it does not take effect as a deed unless and until certain conditions are fulfilled. This is commonly referred to as execution or delivery of the deed “in escrow”.⁸ The second is to authorise a third party (such as the maker’s solicitor) to deliver the document on behalf of the maker at the appropriate time. It was formally the case that the appointment of an agent to deliver a deed on the maker’s behalf in this way had itself to be by deed, but this requirement has been abolished by statute.⁹

- 6.5 These two methods are legally quite distinct and have very different consequences. Where an instrument has been delivered in escrow it is irrevocable, and cannot be withdrawn or recalled by the maker.¹⁰ Once the relevant condition or conditions have been satisfied, the instrument becomes effective without any further delivery, and, for the purposes of title, relates back to the date of execution in escrow.¹¹ By contrast an instrument which is sealed or signed as a deed but not delivered can be withdrawn at any time. As we indicated in the consultation paper, however, it may not be obvious in practice which of these two methods has been used, and the significance is not always appreciated by practitioners and clients.¹²

The dating of a deed

- 6.6 The general rule is that a deed takes effect from the date upon which execution is completed by delivery.¹³ That delivery determines the date which the deed should bear. The fact that a date has not been inserted does not generally affect the validity of a deed.¹⁴ Assuming the deed is dated, there is a presumption that the

⁷ See Consultation Paper No 143, para 6.12.

⁸ Strictly speaking the instrument is not a deed, but is itself an “escrow”.

⁹ Law of Property (Miscellaneous Provisions) Act 1989, s 1(1)(c). This requirement was also ignored in a comparatively recent decision of the Court of Appeal prior to its abolition, *Longman v Viscount Chelsea* (1989) 58 P & CR 189; see Consultation Paper No 143, para 6.3 and paras 6.13-6.19.

¹⁰ *Beesly v Hallwood Estates Ltd* [1961] Ch 105; *Kingston v Ambrian Investment Co Ltd* [1975] 1 WLR 161, 166.

¹¹ The “relation-back” does not, however, affect any dealing by the person in whose favour the escrow is made with a third party. See Consultation Paper No 143, para 6.7, n 17.

¹² Consultation Paper No 143, paras 6.1 and 6.18.

¹³ *Universal Permanent Building Society v Cooke* [1952] 1 Ch 95, 101. In the case of registered land, the deed will be effective for certain purposes from dating even though the legal estate only passes when registration is completed; see Consultation Paper No 143, para 2.7 n 12. See also *Abbey National Building Society v Cann* [1991] 1 AC 56; but cf *Lever Finance Ltd v Needlemans Trustee* [1956] Ch 375.

¹⁴ *Morrell v Studd & Millington* [1913] 2 Ch 648, 658. See, eg, *Esberger & Son Ltd v Capital and Counties Bank* [1913] 2 Ch 366 (undated charge effective from date of delivery, but void for non-registration). It seems, however, that a transfer of registered land must be dated; see the forms of transfer prescribed by the Land Registration Rules 1925, r 98, as substituted by the Land Registration Rules 1997, Form TR1 and Form 20.

date appearing in the deed is the date it took effect, but this is readily rebutted by evidence to the contrary.¹⁵

Problems with the presumptions of delivery

- 6.7 We pointed out that the method of authorising a party's solicitor to deliver a deed on the party's behalf appeared to meet the needs of current conveyancing practice.¹⁶ A deed could be signed or sealed and returned to the maker's solicitors with authority for them to deliver it on completion. That authority itself no longer needed to be given by deed, by virtue of section 1(1)(c) of the Law of Property (Miscellaneous Provisions) Act 1989. The deed could be recalled by the maker before completion, because it had not yet been delivered.
- 6.8 We also drew attention to the conclusive presumption in favour of a purchaser contained in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989, that a solicitor or other legal adviser has authority to deliver a deed on his client's behalf. This presumption applies in relation to transactions involving the disposal or creation of an interest in land.¹⁷ The purchaser would not therefore need to establish delivery, because this would be conclusively presumed.
- 6.9 Accordingly, we pointed out that although the distinction between delayed delivery in this way and delivery in escrow may not always be entirely understood by practitioners and clients, taken alone, these provisions were consistent with current conveyancing procedure.
- 6.10 However, we explained that, in the case of companies to which section 36A of the Companies Act 1985 applies, the position was complicated by two other presumptions inserted by section 130 of the Companies Act 1989.¹⁸
- 6.11 First, section 36A(5) sets out a rebuttable presumption that a document executed by a company, which makes it clear on its face that it is intended by the person or persons making it to be a deed, is delivered on execution. This presumption applies whether execution is under the common seal or in accordance with section 36A(4),¹⁹ and arises "unless the contrary is proved". We pointed out that although this arguably did no more than spell out the common law presumption of delivery on execution,²⁰ a recent case appeared to suggest that it would not yield to merely

¹⁵ *Browne v Burton* (1847) 17 LJQB 49; 5 Dow & L 289, *per* Patteson J:

... a deed or other writing must be taken to speak from the time of the execution, and not from the date apparent on the face of it. ... That date is indeed to be taken prima facie as the true time of execution; but as soon as the contrary appears, the apparent date is to be utterly disregarded.

¹⁶ Consultation Paper No 143, para 6.20.

¹⁷ We discuss further below whether this presumption should be extended to apply to transactions not involving the disposal or creation of an interest in land; see paras 6.48-6.50.

¹⁸ Consultation Paper No 143, paras 6.21-6.24, 11.29-11.37, 11.61-11.68.

¹⁹ This was confirmed in *Johnsey Estates (1990) Limited v Newport Marketworld Limited and Others* 10 May 1996 (unreported, Judge Moseley QC), transcript, para D(III) 8.

²⁰ See para 6.1 above.

an *implied* contrary intention.²¹ This could cause difficulties in cases where delivery was intended to be delayed (until completion of the transaction) in accordance with common conveyancing practice, but this intention was not spelt out expressly by the person making the deed.

- 6.12 Secondly, the second part of section 36A(6) sets out an irrebuttable presumption in favour of a purchaser that a document which makes it clear on its face that it is intended by the person or persons making it to be a deed, is delivered upon execution. The presumption applies where an instrument purports to be signed by a director and the secretary of the company or by two directors. This suggests that it only applies when a company takes advantage of section 36A(4) to execute without using a common seal, although, as we noted, the court held otherwise in the *Johnsey Estates* case, and the point remains uncertain.
- 6.13 We pointed out that this irrebuttable presumption appeared to be even more difficult to reconcile with the concept of delayed delivery, and with section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989.²² On particular facts, there could be two conflicting, apparently irrebuttable, presumptions which applied: the first that a document was delivered when it was executed by the company prior to completion of the particular transaction; the second (in favour of a purchaser) that the document was delivered at a later stage when it was handed over on completion by the company's legal adviser.
- 6.14 We also drew attention to the obvious inconsistency between section 36A(6) and section 74(1) of the Law of Property Act 1925.²³ There is no presumption of delivery in section 74(1). Subject to the apparent uncertainty in respect of the scope of section 36A(6) discussed above,²⁴ it would appear that the position of a purchaser may vary²⁵ depending on the method of execution used by the company: the irrebuttable presumption of delivery on execution will apply where the company executes in accordance with section 36A(4); but there will be no such presumption where the company executes under seal in accordance with section 74(1). This anomaly appears to have arisen because section 36A(6) was drafted on

²¹ *Johnsey Estates (1990) Limited v Newport Marketworld Limited and Others* 10 May 1996 (unreported, Judge Moseley QC). In *Longman v Viscount Chelsea* (1989) 58 P & CR 189, the principle was laid down by Nourse LJ that where the parties to a conveyancing transaction are negotiating "subject to contract", they will not be bound unless and until there has been a formal exchange. However, in *Johnsey Estates* it was held that the presumption in s 36A(5) overrides this principle. See Consultation Paper No 143, para 6.22.

²² Which sets out a conclusive presumption that a party's legal adviser has authority to deliver in certain circumstances; see para 6.8 above.

²³ Consultation Paper No 143, para 11.38-11.44.

²⁴ See paragraph 6.12.

²⁵ In respect of delivery; we have already noted the potential inconsistencies in respect of the presumptions of due execution, see paras 5.15-5.32 above.

the basis that section 74(1) itself imported delivery.²⁶ If that had been, or remained correct, there would have been no inconsistency between the two sections.²⁷

- 6.15 One final possible uncertainty which we noted in respect of the presumptions related to the wording of the first part of section 36A(5). This states that a document executed by a company which makes it clear on its face that it is intended to be a deed “*has effect*, upon delivery, as a deed”, before going on to state that the document is presumed to have been delivered, unless the contrary intention is proved, upon its being so executed. We questioned the use of the expression “has effect” in this context, and pointed out that it was not entirely clear how it related to the concept of delivery in escrow. However, our view was that the presumptions of delivery in both section 36A(5) and the second part of section 36A(6) should be construed as permitting delivery in escrow: in other words, that the presumed or deemed delivery may be delivery in escrow.²⁸ We did suggest, however, that the expression “*has effect* ... as a deed” in section 36A(5) could be removed or replaced.

Should the concept of delivery be retained?

- 6.16 In the consultation paper, we considered at some length whether the concept of delivery should be retained at all.²⁹ We drew attention to the practical difficulties which may arise in ascertaining the parties’ intentions as to delivery. As indicated above, it may not be clear whether a deed which has been sealed and returned to the maker’s solicitor has been delivered in escrow, or has not been delivered at all.³⁰ The need to establish intention may lead to disputed cases with conflicting oral evidence which is difficult to resolve.³¹
- 6.17 We also pointed out that the concept of delivery is unknown in many other jurisdictions and that it may be seen as creating an obstacle to international transactions, rather than assisting such transactions.

²⁶ See paras 3.10 and 6.1, n 2 above.

²⁷ We pointed out that even if *Johnsey Estates* was correct on the construction of s 36A(6) and it did operate when a company executes under seal, there still remained the anomaly that there seemed to be no such presumption of delivery by virtue of s 74(1) in the case of a corporation to which s 36A does not apply; see Consultation Paper No 143, para 11.39.

²⁸ In *Beesly v Hallwood Estates Ltd* [1960] 1 WLR 549, 562, Buckley J held that the Law of Property Act 1925, s 74(1) required him to treat the lease as having been “not only sealed but also delivered”. Nonetheless, this was held to be consistent with the delivery being in escrow. By analogy, it seems likely that the express presumptions of delivery in ss 36A(5) and (6) may be in escrow. This is confirmed by the *Johnsey Estates* case, where the deemed delivery was held to be in escrow. On the question of the extent to which s 74(1) imports delivery, see para 3.9 above; contrary to the views expressed by Buckley J in *Beesly*, it now appears that it does not.

²⁹ Consultation Paper No 143, paras 11.57-11.60.

³⁰ This has important consequences where completion does not take place as planned since in the first case the deed cannot be withdrawn by the maker, whereas in the second case it may be withdrawn at any time. See paras 6.4-6.5 above. See also *Longman v Viscount Chelsea* (1989) 58 P CR 189, and *Venetian Glass Gallery Ltd v Next Properties Ltd* [1989] 2 EGLR 42.

³¹ Eg in *Johnsey Estates*, the need to establish intention meant that considerable importance was attached to the judge’s assessment of the reliability of the individual witnesses.

- 6.18 However, our provisional view, in line with our earlier report on Deeds and Escrows,³² was that the concept of delivery continued to serve a useful purpose and should be retained. It fixed the date on which a deed takes effect; without such a concept a deed would take effect immediately on execution, unless express conditions were spelt out in the deed postponing its effect, which would be highly inconvenient, and possibly dangerous.³³
- 6.19 We also considered that the concepts of delivery in escrow and of delivery by a third party should continue side by side. We recognised that in some respects the position was unsatisfactory, particularly since it may not always be clear which “method” of delivery is intended in a particular case. However, our view was that such difficulties were inherent in the law of delivery, and that it was perfectly possible for practitioners to make it clear to the client on what basis the deed is sent to them for execution.³⁴
- 6.20 A large majority of the respondents who addressed this issue agreed with our provisional view that delivery still serves a useful purpose. Where reasons were given, they were generally in line with our provisional views summarised above,³⁵ namely that it is useful as a basis for fixing the date when a deed takes effect, and that it provides a convenient way of separating the signing or sealing of the deed from the actual completion of the transaction. On this second point one respondent commented:
- Property transactions, in particular, would be difficult and highly inconvenient to manage without the ability for a company to execute a lease or transfer in anticipation of completion, with the company’s solicitor controlling when the document takes effect.
- 6.21 For those respondents who disagreed with our provisional view, the main reasons given were that the concept of delivery is unnecessarily complicated, out of date (since physical delivery in the sense of handing over has not for some time been required) and misleading. It was suggested that this led to the requirements for delivery being widely misunderstood by the legal profession. However, even amongst those who considered that the concept should be abolished, there was a recognition that some system for determining when a deed comes into effect was necessary and some of the alternative schemes put forward did not appear to differ greatly from the current law on delivery.³⁶ It was also recognised by these respondents that delivery should not be abolished in relation to deeds executed by companies unless it was abolished in relation to all deeds.

³² (1987) Law Com No 163.

³³ We pointed out that it is possible to envisage the frequent need for last minute alterations to such conditions, and subsequent doubts as to their satisfaction.

³⁴ We suggested, for example, that a transfer might be sent under cover of a letter asking the client “to execute and return it to me for delivery on your behalf on completion”, which would make it clear that “delayed delivery” rather than delivery in escrow was intended.

³⁵ Para 6.16.

³⁶ Some considered that there should be a presumption that a deed takes effect on dating rather than, as at present, upon execution. This is considered in paras 6.24-6.30 below.

- 6.22 We remain convinced that the concept of delivery still serves a useful purpose for the reasons we gave in the consultation paper.³⁷ This was also the view of the majority of respondents. Even if it were abolished it would have to be replaced with a scheme which enabled deeds to be signed or sealed before they are intended to have effect, and in practice any such scheme may be little different from the current position (we do of course propose below some changes to the current law to deal with the difficulties which we highlighted in the consultation paper). Any new scheme would also have to be carried through with changes in the law applicable to individuals, and we consider that it would not be appropriate for the Commission to recommend such a fundamental change in the law applying to the execution of deeds by individuals in the context of the current project which is directed at execution by corporations.³⁸ For all these reasons, **we recommend that the concept of delivery should be retained.**
- 6.23 Before examining the more detailed proposals for changes to the existing presumptions of delivery, we consider an alternative suggestion which we floated in the consultation paper, namely to replace the statutory presumptions with a new presumption of delivery upon dating.

An alternative presumption of delivery upon dating

- 6.24 The suggestion which we put forward (without expressing any provisional view) was that the current statutory presumptions should be replaced with a statutory presumption that a deed which has been dated is deemed to have been delivered unconditionally upon the date inserted in the document, unless a contrary intention is proved.³⁹ Such a presumption could apply to all corporations and individuals, and would be consistent with the concept of delivery by an agent upon completion. It would not affect the rule that dating is not essential to a deed.⁴⁰ The effect of this would be to codify and strengthen the common law presumption.⁴¹
- 6.25 This suggestion found support amongst a significant number of respondents, although a slightly larger number appeared to favour retention of the current rebuttable presumption of delivery upon execution, which is discussed further below. Several respondents in favour of the suggestion pointed out that it was consistent with the current practice of solicitors; two of these noted that this is what they already achieved by the wording in their respective standard form deeds.⁴²

³⁷ And summarised above; para 6.16.

³⁸ We have of course recommended some changes which will apply to the execution of deeds by both corporations *and* individuals, but these are either of much less significance, or seek to clarify what we believe the current law to be.

³⁹ Consultation Paper No 143, para 15.25.

⁴⁰ See para 6.6 above.

⁴¹ See para 6.1 above.

⁴² The wording in one of these commenced: "Dated and delivered:"; the attestation clause read as follows: "Executed (but not delivered until the date hereof) as a deed by ...".

- 6.26 Some respondents put forward rather more elaborate proposals, such as a series of rebuttable and irrebuttable presumptions, while one respondent went further and considered that there should be a requirement for dating for a deed to be effective.
- 6.27 Few respondents who expressly opposed the suggestion put forward reasons, although one respondent did comment that it seemed odd to make delivery dependent upon the dating of the deed; rather it seemed better that the dating of the deed should depend on delivery.
- 6.28 We agree that in many circumstances the dating of the deed will coincide with delivery. However, we are not persuaded that it is necessary or desirable to have a new statutory presumption based on the dating of the deed. As indicated above, there were a number “variations” of such a scheme put forward by consultees, and there was no single model on which it could be said that there was general consensus.⁴³ There is a danger that a provision which put too much emphasis on the dating of the deed, would lead to difficulties if the deed was not in fact dated.
- 6.29 We consider that the starting point should continue to be the intention of the parties. If the deed is dated, then this may well indicate that the parties intended it to be delivered, but it should be open to the parties to rebut this without imposing too great an evidential burden on them. By contrast, the fact that the deed is not dated should not in itself give rise to a presumption that the deed has not been delivered. The current common law presumption appears to strike the right balance in this respect. We are not convinced, therefore, that a new statutory presumption is necessary, and we are concerned that it may, in fact, lead to greater, rather than less, uncertainty.
- 6.30 There remains, of course, the concern that a deed may be taken to be delivered before the transaction is completed (and before the deed is dated) contrary to the intention of the parties, because of the statutory presumptions of delivery upon execution contained in sections 36A(5) and (6). However, as we explain below, we consider that this can be dealt with by repealing the irrebuttable presumption of delivery contained in section 36A(6); we do not consider that the rebuttable presumption contained in section 36A(5) causes undue difficulty in this respect, and indeed consider that it continues to serve a useful purpose. **Accordingly, we do not recommend that the current statutory presumptions of delivery should be replaced by a presumption of delivery based on the date which is inserted in the deed.**

Rebuttable presumption of delivery on execution (section 36A(5))

- 6.31 Our provisional view was that the presumption of delivery in section 36A(5) causes no great difficulty in practice.⁴⁴ It restates a common law presumption

⁴³ It should also be noted that the question which we put in the consultation paper in fact referred to a presumption *in favour of a person dealing with a company*. The responses did not, for the most part, focus on this wording, but simply discussed the issue in terms of a general rule in respect of delivery.

⁴⁴ For a contrary view, see Howel Lewis, “Execution of Deeds” (1991) NLJ p 1122.

where execution is by a corporation, and can be rebutted by appropriate wording in the attestation clause if appropriate. It does not prevent delivery in escrow.⁴⁵

- 6.32 We accepted that it was possible that a party might be “caught out” by the section if he wished to reserve the right to withdraw from a transaction and withdraw the deed. The decision in *Johnsey Estates* suggested that he may need to take careful steps to ensure that execution is demonstrably on the basis that delivery will be on his behalf by a third party (for example, a solicitor) on completion.⁴⁶ However, we did not regard this as causing undue difficulty. On the whole, we thought it sensible to have the common law presumption spelt out in this way.⁴⁷
- 6.33 We did, however, draw attention to the lack of consistency in that there is no comparable *statutory* presumption of delivery in respect of corporations to which section 36A of the Companies Act does not apply. We also made suggestions for amending the wording of section 36A(5) slightly. These points are considered further below.⁴⁸
- 6.34 A majority of respondents agreed with our provisional view that the statutory presumption of delivery upon execution contained in section 36A(5) should be retained. The Society of Public Notaries, in particular, drew attention to the benefits that the presumption has for their work. It considered that it should be retained so as to relieve the authenticating notary of the need to make unnecessary enquiries on the point. They accepted that it was the duty of notaries to satisfy themselves that delivery had taken place, but pointed out that in their experience a question to this effect at the time of execution would usually meet with total incomprehension unless the client’s practitioner was on hand.
- 6.35 Most of those who disagreed with our provisional view considered either that the concept of delivery should be abolished, or that there should be a revised presumption based on the dating of the deed. These points have been considered above. In addition, one respondent questioned the need for retaining the presumption, and suggested that a regime which is in accordance with that applying to individuals may be appropriate.⁴⁹
- 6.36 As the majority of respondents agreed with our provisional view, and as no particular difficulties were highlighted with the current provision in practice, we consider that the presumption contained in section 36A(5) should be retained (subject to certain minor amendments discussed below).⁵⁰ Where the intention is to delay delivery of a deed (as opposed to having it delivered in escrow), practitioners should be encouraged to make it clear to their clients in

⁴⁵ See n 28 above.

⁴⁶ See para 6.11 above. See also Consultation Paper No 143, para 11.62, n 106.

⁴⁷ We suggested, for example, that it makes it easier for bodies such as the Land Registry to accept deeds for registration without asking for evidence of delivery; *ibid*, at para 15.21, n 26.

⁴⁸ See paras 6.51-6.54.

⁴⁹ See para 6.40 below.

⁵⁰ See para 6.45-6.46. In our draft bill we have repealed section 36A(5) and re-drafted the presumption as section 36AA(2); see clause 4 of the draft bill and para 6.46 below.

correspondence (or in any more general instructions which they obtain) the basis on which the deeds are being sent to the clients for execution, and the basis on which they are to be returned.⁵¹ However, we do not consider that any more significant changes are required to section 36A(5).⁵² **Accordingly, we recommend that the statutory rebuttable presumption of delivery upon execution contained in section 36A(5) of the Companies Act 1985 should be retained.**⁵³

Irrebuttable presumption of delivery on execution (section 36A(6))

- 6.37 We have highlighted above⁵⁴ some of the difficulties which arise in respect of the presumption of delivery contained in section 36A(6). It is inconsistent with the scheme of “delayed delivery” introduced by the Law of Property (Miscellaneous Provisions) Act 1989; and there is no comparable presumption contained in section 74(1) of the Law of Property Act 1925. Our provisional view was that these inconsistencies should be resolved by removing the presumption of delivery from section 36A(6). We also drew attention to a number of other factors which it considered supported this view.
- 6.38 First, where the deed is a transfer which is sent to the Land Registry,⁵⁵ the receipt of the dated transfer deed, accompanied by an application for registration of the dealing, should generally satisfy the Land Registry that the deed had been delivered without the need for further enquiry or reliance on any statutory deeming of delivery.
- 6.39 Secondly, where execution is in accordance with section 36A(6) there is already a rebuttable presumption of delivery by virtue of section 36A(5).
- 6.40 Thirdly, there is no statutory presumption of delivery equivalent to section 36A(6) where a deed is executed by an individual.
- 6.41 There was virtually unanimous support amongst those who addressed this question for our provisional view that there should not be an irrebuttable presumption of delivery upon execution in favour of a purchaser in good faith as currently contained in section 36A(6). Some respondents did not consider that the need for reform was as pressing we had suggested, arguing that a pragmatic interpretation of the provisions of section 36A(6) could overcome any difficulties

⁵¹ See n 34 above, for suggested wording.

⁵² In the consultation paper, we specifically asked whether there was any need to clarify the relationship between the presumption in s 36A(5) and the concept of “delayed delivery” on behalf of the maker of the deed. Only a very small number of respondents answered this question, a majority of which indicated that they did not consider that there was any need for clarification. We also raised the question of clarifying the relationship between the presumption and the concept of delivery in escrow. This is considered below; see paras 6.45-6.46.

⁵³ As explained above, our draft bill in fact repeals s 36A(5) and redrafts the presumption in a new s 36AA(2); see para 6.46 below.

⁵⁴ Paras 6.12-6.14.

⁵⁵ We pointed out that since the section operates in favour of a “purchaser”, many deeds to which it applies will be transfers.

which could arise from a strict interpretation of the provisions.⁵⁶ However, only one respondent appeared to be of the view that the irrebuttable presumption should be retained,⁵⁷ and most seemed to be of the view that it did cause significant problems.⁵⁸

- 6.42 In our view the difficulties with section 36A(6) are not simply “academic” or “theoretical”. In *Johnsey Estates* the court found that a counterpart lease was irrebuttably presumed to have been delivered (in escrow) by virtue of section 36A(6) when it was executed by a company and passed to the company’s solicitors in anticipation of completion. Had there not been blanks in it, the section would have enabled the landlord to enforce the counterpart lease once the conditions attached to its execution in escrow had been satisfied. The presumption would have prevented the tenant⁵⁹ from withdrawing from the transaction. On the facts of the case, this might have been a fair result, since all parties believed (wrongly) that there was a binding agreement for lease. But one can envisage situations where this would not be the result which was anticipated or desired by the parties.
- 6.43 If the presumption of delivery in section 36A(6) can be rebutted by a contrary intention, then it adds little to section 36A(5); if it cannot, then, strictly, it appears to rule out the possibility of “delayed” delivery.⁶⁰ As we have indicated above,⁶¹ the provision appears to have been based on the (now mistaken) premise that execution in accordance with section 74(1) imported delivery. We believe that it is essential to remove the uncertainty to which section 36A(6) gives rise. **Accordingly, we recommend that the irrebuttable presumption of delivery contained in section 36A(6) of the Companies Act 1985 should be repealed.** (Draft bill, clauses 3, 10(2) & Schedule 2)
- 6.44 We noted in the consultation paper that it would be wrong to make abolition retrospective, and that deeds executed in the period between 1989 and the date of abolition should remain subject to the presumption.⁶² We deal briefly with the

⁵⁶ One respondent suggested that “[b]usiness efficacy almost invariably requires that a deed should not be binding upon the company upon execution but only upon execution and delivery ...”. Another considered that s 36A(6) was in fact consistent with established conveyancing practice because it only applies after completion; the gist of the argument was that until there has been a purchase, there is no purchaser under the deed, and therefore the presumption does not come into effect.

⁵⁷ No reasons were given for this view.

⁵⁸ As an alternative, if consultees disagreed with our provisional view, we suggested that s 74(1) of the Law of Property Act 1925 should be amended to include a presumption of delivery in the same terms as s 36A(6). As we have indicated, only one respondent appeared to consider that there should be an irrebuttable presumption of delivery upon execution in the terms of s 36A(6). However, several others took the opportunity to confirm that if a presumption were to be retained, s 36A(6) and s 74(1) should be brought into line.

⁵⁹ And surety.

⁶⁰ We have indicated above that one respondent considered that s 36A(6) could be interpreted in a manner which is consistent with delayed delivery; see n 56 above. No direct consideration appears to have been given in the *Johnsey Estates* case to the possibility of delayed delivery.

⁶¹ See para 6.14.

⁶² See paras 15.22.

question of commencement of the provisions to implement our recommendations in paragraph 9.12 below.

Other proposals in respect of delivery

Delivery in escrow

- 6.45 We have indicated above that the concept of delivery in escrow sits a little uneasily with the wording in section 36A(5) that a deed “has effect” upon delivery.⁶³ We asked if there was any need to clarify the relationship between the presumption and the concept of delivery in escrow. Our provisional suggestion was that the wording “has effect upon delivery” should be removed.
- 6.46 Only a small number of respondents addressed this particular issue, and the views on whether clarification was needed were mixed. However, since we are proposing other changes to the wording of section 36A(5) (and indeed to section 36A generally),⁶⁴ we consider that the opportunity could usefully be taken to clear up any uncertainty caused by the words “has effect upon delivery”. The draft bill which is intended to implement our recommendations repeals section 36A(5) and re-drafts the rebuttable presumption of delivery in section 36AA(2) in a way which excludes these words.⁶⁵
- 6.47 **Accordingly, we recommend that the wording of the rebuttable presumption of delivery contained in section 36A(5) of the Companies Act 1985 should be changed so that it no longer refers to the fact that an instrument “has effect, upon delivery, as a deed”.** (Draft bill, clauses 4, 10(2) & Schedule 2)⁶⁶

Authority to deliver

- 6.48 We indicated that we would be sympathetic to an extension of the statutory presumption of authority to deliver on behalf of the maker of a deed contained in section 1(5) of the Law of Property Act 1925 to transactions other than those involving the creation or disposal of an interest in land.
- 6.49 A large majority of respondents also appeared to favour such a reform. The only substantive comments made against the proposal were by the General Council of the Bar. In its view, the presumption should not be “extended generally”.
- 6.50 That is not what was proposed in the consultation paper. The presumption will continue to apply only where delivery purports to be made by a solicitor, duly certificated notary public or licensed conveyancer (or an agent or employee of

⁶³ See para 6.15.

⁶⁴ See paras 3.12, 3.47, 6.43 above and 7.44 below.

⁶⁵ See clause 4 of the draft bill. As indicated above, repealing section 36A(5) also removes the discrepancy between the wording of the face-value requirement which was contained in that section and the wording of section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989.

⁶⁶ As indicated above, our draft bill in fact repeals section 36A(5) and redrafts the presumption in a new section 36AA(2); see paras 6.46 above.

such a person), and it will only operate in favour of a *purchaser*. We have already referred to the fact that, in considering the limits of the statutory presumptions of due execution, we had drawn attention to the general argument for treating purchasers in good faith as a special case for the sake of ensuring that title in the relevant property passes to them.⁶⁷ This argument is not restricted to property which comprises land or an interest in land. We consider that extending the presumption in respect of authority to deliver a deed in the manner suggested in the consultation paper is a sensible and useful reform which is consistent with the general approach of the legislation in this area. It was also supported by a large majority of the respondents who commented. **Accordingly, we recommend that the presumption of authority to deliver on behalf of the maker of a deed contained in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 should be extended to transactions other than those involving the creation or disposal of an interest in land.** (Draft bill, clause 8, 10(2) & Schedule 2)

Other corporations

- 6.51 Finally, we suggested that the statutory presumption of delivery contained in section 36A(5) might be extended to other corporations to which the section currently does not apply.⁶⁸ Only a relatively small number of respondents addressed this particular issue, although they all considered that the statutory presumption should be extended in this way.⁶⁹
- 6.52 We can see arguments both for and against such an extension. On the one hand, we have set out above our reasons for not recommending the extension of a general execution provision to all corporations at this stage.⁷⁰ We have also rejected a general “codification” of the statutory provisions relating to execution by and on behalf of bodies corporate.⁷¹ A general provision setting out a presumption of delivery which applied to all corporations might seem to be out of step with our approach in respect of these other matters.
- 6.53 On the other hand, section 74(1) of the Law of Property Act 1925 already sets out a presumption of due execution of general application,⁷² and there is no reason why there could not be a comparable presumption of delivery which applied to all corporations aggregate (albeit in rather different terms). A new provision setting out a statutory presumption of delivery would also complement the amendments we are proposing in respect of section 74(1) to make it clear that execution does not (in itself) import delivery.⁷³

⁶⁷ See para 5.39 above.

⁶⁸ See also paras 4.20-4.22 above.

⁶⁹ 12 respondents addressed this point of whom 3 would have preferred the abolition of delivery, but if it were to be retained, agreed with this reform.

⁷⁰ See para 4.14-4.19.

⁷¹ See paras 1.12-1.15 above and Part 9 below.

⁷² Ie applying to all corporations aggregate.

⁷³ See para 6.43 above.

- 6.54 On balance, we consider that it would be appropriate to recommend the extension of a presumption along the lines of section 36A(5) to all corporations aggregate. This would not constitute a major change in the law since, as we have indicated above, there is a rebuttable presumption of delivery upon execution by corporations at common law. However, it would help to bring the scheme and wording of section 74 (in so far as it relates to execution by corporations generally) into line with section 36A of the Companies Act and would complement the other changes we are making to the wording of these provisions. **We therefore recommend that there should be a new statutory provision extending the rebuttable presumption of delivery contained in section 36A(5) to all corporations aggregate.** (Draft bill, clause 2)

Summary

- 6.55 To summarise, we consider that the concept of delivery still serves a useful purpose and should be retained. We consider that the irrebuttable presumption of delivery upon execution in favour of a purchaser in good faith which is currently contained in section 36A(6) should be repealed. We consider that the rebuttable presumption of delivery on execution contained in section 36A(5) should be retained (although it should be re-worded in the context of other revisions to section 36A to make clearer its relationship with the concept of delivery in escrow).⁷⁴
- 6.56 We consider that the rebuttable presumption should also be extended to all corporations aggregate.
- 6.57 We consider that the statutory presumption that a solicitor or other legal adviser who purports to deliver a deed on behalf of their client has authority to do so should be extended to transactions other than those involving the creation or disposal of an interest in land.

⁷⁴ In the light of the other changes which we have recommended, in particular to achieve consistency with the face value requirement set out in s 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989, our draft bill in fact repeals s 36A(5) and re-casts the rebuttable presumption of delivery in a new s 36AA(2). See para 6.46 above.

PART 7

EXECUTION OF DEEDS ON BEHALF OF CORPORATIONS

Introduction

- 7.1 In Parts 3 and 4 we considered the manner in which deeds (and other documents) are executed by companies and other corporations. In this part we consider the difficulties which we highlighted in respect of the execution of deeds on behalf of corporations and the proposals for change put forward in the consultation paper.¹
- 7.2 Most of the discussion on this topic in the consultation paper centred on the position where a corporation executes a deed by means of an attorney.² We explained that there are difficulties in applying the underlying law to current practice, and drew attention to the fact that the 1989 reforms relating to the execution of deeds made no provision for execution by an attorney. However, we also considered the execution of deeds by liquidators, administrators, administrative receivers, and other types of receiver, in respect of which there also appeared to be a number of technical difficulties or uncertainties.

Execution by an attorney

- 7.3 We explained in the consultation paper that where a corporation gives authority to a person to execute a deed on its behalf, the authority is a power of attorney and the instrument creating the power of attorney must itself be executed as a deed.³ This is in contrast to the position where a person executes a contract on behalf of a corporation which is not a deed; anyone with authority may enter such a contract on behalf of a corporation and there is no need for the authority to be given in any particular form.⁴
- 7.4 The requirement in respect of deeds was, in general terms, the position at common law, but it is now governed by the Powers of Attorney Act 1971.⁵ We stressed that section 1(1)(c) of the Law of Property (Miscellaneous Provisions) Act 1989⁶ only abolished the rule that authority *to deliver* a deed on behalf of

¹ We consider the position in respect of execution of contracts both by and on behalf of corporations in Part 8 below.

² Although the discussion in the consultation paper was directed at execution on behalf of corporations, there may also be situations where a corporation executes a document as an attorney on behalf of an individual.

³ Consultation Paper No 143, para 8.3.

⁴ See Part 8 below.

⁵ Section 1(1) of the Act provides that an instrument creating a power of attorney must be executed as a deed. There is no statutory definition of what constitutes a power of attorney, but we described a power of attorney as “a document by which one person (the donor) gives another person (the attorney) the power to act on his behalf and in his name”; Consultation Paper No 143, para 8.3.

⁶ See para 6.7 above.

another must be given by deed; it did not abolish the requirement that authority *to execute* a deed on behalf of another must be given by deed.⁷

- 7.5 We examine first the power to appoint an attorney and the current methods of execution available to attorneys. We then consider the two main problems which we highlighted in the consultation paper: the fact that section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 requires a deed to be validly executed as a deed *by the person making it or the parties to it* and makes no reference to a deed being executed on behalf of such a person or parties; and the issue of whether the relevant formalities are those applicable to the donor or the attorney. We then go on to set out our approach for dealing with these difficulties and explain the provisions which we have drafted to implement our recommendations on this aspect. Next, we consider how the presumptions of due execution and delivery apply to execution by attorneys. We then consider a number of suggestions which we put forward for changes concerning the methods of execution by attorneys. Finally, we summarise the effect of our proposals in relation to execution by attorneys.

Power to appoint an attorney

- 7.6 We explained that the ability of a corporation to grant a power of attorney to execute deeds on its behalf is generally said to depend on whether it has power to do so under its constitution.⁸ In the case of companies formed and registered under the Companies Acts, there will generally be an express power in the articles of association to make such an appointment.⁹
- 7.7 However, by section 38 of the Companies Act 1985, a company may appoint an attorney under its common seal, either generally or in respect of specific matters, for the purpose of executing on its behalf *outside* the United Kingdom. We pointed out that the fact that the section (and its statutory predecessors) were enacted had raised doubts as to the ability of a company to grant a power of attorney to execute deeds *inside* the UK. If there was a general ability to grant a power of attorney, then why was section 38 necessary?
- 7.8 Our provisional view was that such doubts were unfounded. In our view, the purpose of section 38 was merely to put beyond doubt the ability of a company to grant a power to execute deeds outside the UK where there was no express power in the articles.¹⁰ Since a corporation must act through its agents, there seemed to be no reason in principle why it should not grant a power of attorney to execute deeds on its behalf in the UK, and particularly where there was an express power

⁷ See Consultation Paper No 143, para 8.3, n 4 where we dismiss views expressed to the contrary.

⁸ Consultation Paper No 143, para 8.5. For a discussion of whether an *express* power to appoint an attorney is required, see *ibid*, at para 8.5, nn 8 and 9.

⁹ Eg, Companies Act 1985, Table A, SI 1985 No 805, para 71, and Companies Act 1948, Table A, Part I, para 81.

¹⁰ We pointed out that this was also the view taken by the Irish Supreme Court on similarly worded legislation in *Industrial Development Authority v William T Morn* [1978] IR 159.

to appoint an attorney in the articles.¹¹ However we asked for consultees views on whether section 38 should be amended to clarify that it does not preclude a company from appointing an attorney to execute deeds in the UK, or in some other way.

- 7.9 Views of respondents were fairly evenly split on this question, with just over half agreeing with our provisional view that no amendment was necessary. In fact, even amongst those who considered that the section should be amended, a number of respondents indicated that they did not consider that the current position was causing particular problems. For example, one respondent thought that it would be “inconceivable that it would be held that a company could not appoint an attorney to act for it in England and Wales”, pointing out that the use and acceptance of such powers is widespread (not least in mortgages executed by companies to secure borrowing).
- 7.10 For those who agreed with our provisional view that no amendment was necessary, the point was made by several respondents that the drafting of any change might cause difficulties, for example because it might encourage narrow interpretation, or because it might resurrect the need to verify authority contrary to the policy of sections 35, 35A and 35B of the Companies Act 1985.
- 7.11 In our view, the responses received confirm our provisional view that section 38 does not cause undue difficulty in practice. **Accordingly, we recommend against any amendment to section 38 of the Companies Act 1985.**

Method of execution by attorney

- 7.12 In the consultation paper we set out the different methods of execution of a deed by an attorney appointed by a corporation which appeared to be acceptable in practice. These may be summarised as follows.

WHERE THE ATTORNEY IS AN INDIVIDUAL

Common law

- 7.13 It appears to be the case that an attorney can simply sign the name of the corporation, followed by his own name as attorney.¹² As we explain below,¹³ since the execution is by an individual, it may be necessary to have the signature witnessed and the deed delivered in order to comply with section 1(3) of the Law

¹¹ Consultation Paper No 143, para 8.9. Where there is no power for the directors to appoint an attorney then, unless there is a prohibition in the constitution, we considered that an attorney may be appointed by the company in general meeting; *ibid*, at para 8.5, n 9 and para 10.24.

¹² At common law an individual attorney had to execute in the name and on behalf of the donor; in other words he or she should sign the donor's name and use the donor's seal. The application of this rule to execution on behalf of a corporate donor is not entirely certain; whether an attorney may affix the company seal would appear to depend on the articles. However, in practice, execution by signing the corporations name, but without affixing the seal, appears to be widely accepted; see, eg, Land Registry Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998), para J8.1. See also Consultation Paper No 143, para 8.12, n 21.

¹³ See paras 7.24-7.25.

of Property (Miscellaneous Provisions) Act 1989, although this is not entirely clear.¹⁴

Section 7(1) of the Powers of Attorney Act

- 7.14 Alternatively, the attorney may execute by signing his own name stated to be as attorney on behalf of the donor.¹⁵ Again, it appears that the safer course may be to have the signature witnessed and the deed delivered in order to comply with section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989.¹⁶

Section 74(3) of the Law of Property Act 1925

- 7.15 In the case of a conveyance of property owned by a corporation, an attorney may also execute it as a deed by signing the name of the corporation in the presence of a witness in reliance on section 74(3) of the Law of Property Act. The section expressly provides that such execution is as effective and valid as if the conveyance had been executed by the corporation.

WHERE THE ATTORNEY IS A CORPORATION

Generally

- 7.16 The generally accepted practice is that where the attorney is a corporation, it executes a deed in the manner appropriate to the attorney corporation. In other words, it will execute on behalf of the donor either under its common seal, or by the signature of two of its directors or of a director and secretary, in accordance with section 36A of the Companies Act 1985,¹⁷ or (where the corporation is not a company) in the normal form for the corporation.¹⁸

Section 74(4) of the Law of Property Act 1925

- 7.17 A corporation which has authority under a power of attorney, or by any statutory or other power, to convey an interest in property in the name or on behalf of another, may alternatively rely on section 74(4) under which the deed¹⁹ may be executed in the name of the owner by an officer appointed for that purpose by the board of directors, council, or other governing body of the attorney corporation.

¹⁴ This is expressly required by the Land Registry Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998), para J8.1.

¹⁵ Section 7(1) only applies to execution by an individual attorney. It does not deal specifically with execution on behalf of a corporate donor, although this is widely accepted in practice. This is considered further below; see para 7.53. See also n 14 above.

¹⁶ See para 7.24-7.25 below.

¹⁷ A foreign company may execute in accordance with section 36A as adapted by the Foreign Companies (Execution of Deeds and Documents) Regulations.

¹⁸ See Land Registry Practice Advice Leaflet No 6, *Execution of Deeds and Documents* (March 1998), para J8.3.

¹⁹ Or other instrument.

Section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989

- 7.18 We drew attention to the fact that section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 requires a deed to be validly executed as a deed *by the person making it or the parties to it*, as the case may be. There is no reference to a deed being executed on behalf of such a person or parties.
- 7.19 There is no difficulty where section 74(3) applies, since it provides that execution by the attorney is as effective as if the principal had itself executed.²⁰ But this is not the case in respect of the other methods of execution.²¹ We suggested that a deed executed by an attorney must therefore be taken to comply with section 1(2)(b), either because execution by an attorney is simply treated as being execution by the maker or relevant party to the deed for this purpose, or because the section is to be construed as allowing execution “by or on behalf of” the maker or relevant party.²² We regarded an alternative construction of section 1(2)(b), which would be to treat the attorney as the maker or a party to the deed for this purpose, as less satisfactory on general principles.
- 7.20 However, in view of the potential uncertainty, our provisional view was that section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 should be amended to make express provision for execution by an attorney. We suggested that it could provide that an instrument which is to be a deed must be “executed as a deed *by or on behalf of* that person or, as the case may be, *by or on behalf of* one or more of those persons”. We also suggested that a similar amendment could be made to section 36A(5) for the sake of consistency.²³
- 7.21 Most respondents who addressed this question considered that section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 needed to be amended to make specific provision for execution by an attorney. Although only a small number of respondents went on to consider the actual amendments suggested, almost all of them agreed with our proposals. The Society of Public Notaries, in particular, pointed out that execution of deeds by attorneys was widely employed in commercial practice and had long been concerned by the omission of any reference to it in the 1989 reforms.
- 7.22 Three respondents suggested a more radical approach. They considered that the distinction between execution “by” and execution “on behalf of” a company should be abandoned. A deed or document could then be executed in a way which would bind the company by any person authorised by the company for that

²⁰ See para 7.15 above.

²¹ Section 74(4) merely allows execution by an officer in the name of the donor, and s 7(1) of the Powers of Attorney Act 1971 states that execution by the attorney with his own name is merely as effective as if done by the attorney signing the donor’s signature.

²² There is authority against the implication of words allowing signature by an agent where statute requires a personal signature: *Re Prince Blücher* [1931] 2 Ch 70, and *Hyde v Johnson* (1836) 2 Bing NC 776, 132 ER 299, but this is a matter of construction of the statute in each case, and we did not consider that these decisions would prevent the court implying words such as “or on behalf of” in the context of s 1(2)(b) given the long-standing practice of execution by attorney. See Consultation Paper No 143, para 8.21, n 46.

²³ Section 36A(5) would therefore read: “A document executed *by or on behalf of* a company which makes it clear on its face ...”.

purpose (without the need for a specific power of attorney).²⁴ Whilst such an approach may have the attraction of simplicity, it would involve a fundamental change not just to the law on execution of deeds and documents, but to company law generally, and is beyond the scope of the current project.

- 7.23 Turning to the particular problem raised in the consultation paper, we remain of the view that the failure of the 1989 reforms to take full account of the practice of execution by attorneys should be rectified. Section 1(2)(b) does, therefore, need to be amended to deal with this, although we have adapted slightly the suggested wording put forward in the consultation paper so as to fit in more closely with the underlying analysis which we have adopted for our reforms in this respect. This is discussed further below.²⁵

Are the formalities those applicable to the donor or the attorney?

- 7.24 We also raised the question of whether the formalities for execution by an attorney should be those applicable to the donor or to the attorney. For example, where there is execution by an individual attorney for a corporate donor, must the individual attorney comply with section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989, by executing in the presence of a witness who attests? And where a company is acting as attorney, should it execute in accordance with section 36A of the Companies Act 1985? Again, neither section 1(3) nor section 36A refer to execution by an attorney.
- 7.25 Our provisional view was that, although it seemed wrong in principle to treat the attorney as a party to the deed, this appeared to be necessary for the purpose of establishing the relevant formalities to be observed. The relevant formalities should therefore be governed by the nature of the attorney.²⁶ However, we asked consultees if there should be statutory clarification on this point. We suggested that there might be a provision²⁷ that section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 and section 36A of the Companies Act 1985 govern execution by an individual or company respectively, in each case whether as maker or a party to the deed, or on behalf of such person.
- 7.26 Almost all the respondents who addressed this question considered that there should be statutory clarification of the formalities governing the execution by an attorney, and that the formalities should be governed by the identity of the attorney, rather than the donor. Only one respondent considered that the formalities governing execution should be the identity of the donor, although this view was not developed further.

²⁴ See also para 3.24, n 32 above.

²⁵ See para 7.30.

²⁶ Consultation Paper No 143, para 8.22. This is what is suggested by *Brooke's Notary* (11th ed 1992) p 186 and this is consistent with the approach taken by the Land Registry, see Practice Leaflet No 6, *Execution of Deeds* (March 1998) para J8.1-J8.3.

²⁷ Either in s 1 of the Law of Property (Miscellaneous Provisions) Act 1989, or in s 36A of the Companies Act 1985, or both.

- 7.27 Another respondent (who in fact agreed with the proposed change) drew attention to the effect that a provision along the lines proposed by the Commission would have on execution under section 74(3) of the Law of Property Act 1925.²⁸ In its view, a provision which made compliance with the formalities applicable to the attorney *necessary* (as well as sufficient), might make section 74(3) ineffective. It should therefore be ascertained first, whether section 74(3) is relied on in practice. Although not elaborated further, the point seems to be that the formalities for execution which are permitted under section 74(3) might be inconsistent with those which are set out in section 1(3) (and which would apply under the proposed new provision where execution was by an individual attorney).
- 7.28 Our view is that a provision which confirms that the formalities applicable to execution by an attorney are those of the attorney, rather than the donor, would be extremely useful. This was supported by the vast majority of respondents who addressed this issue. There are a number of technical difficulties which arise in drafting such a provision, however (including the question of section 74(3) which was raised in the previous paragraph). We explain some of these below and set out the final recommendations we have adopted to deal with them.

Approach to reform and draft provisions

- 7.29 We indicated above²⁹ that in the consultation paper we had suggested that it was necessary to treat the attorney as a party to the deed for the purpose of establishing the relevant formalities. In drafting the statutory provisions we have not adopted this analysis. Instead, we have drawn a distinction between the *maker* or *party* to the deed, and the person who *executes* it. Of course, these will usually be the same person. But where an attorney is appointed, they will not. The maker/party to the deed will be the donor; the person who executes it will be the attorney (although he will of course execute the deed on behalf of the donor). The formalities for execution can then be linked clearly to the person who physically executes the deed (in this case, the attorney), and this can be seen for the purposes of section 36A of the Companies Act 1985 and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 as another type of execution by a company or individual (as the case may be).

AMENDMENT TO SECTION 1(2)(B) OF THE 1989 ACT

- 7.30 The first step is to amend section 1(2)(b) of the 1989 Act which, as indicated above does not, as currently drafted, expressly contemplate execution by anyone other than the maker or a party to the deed. Given the new starting point that execution is *by* a person even if it is on behalf of another, we have adapted slightly the wording suggested in the consultation paper.³⁰ Accordingly, instead of simply amending the section to refer to an instrument executed “*by or on behalf of*” the maker as suggested in the consultation paper, we have expanded the wording so as

²⁸ See para 7.15 above.

²⁹ See para 7.25.

³⁰ See para 7.20 above.

to include reference to execution *by* a person who is authorised to execute in the name or on behalf of the maker.³¹

CONFIRMING THE APPLICATION OF THE RELEVANT FORMALITIES

- 7.31 The next step is to include provisions in section 1 of the 1989 Act and section 36A of the 1985 Act confirming that the relevant formalities apply when a person is executing a deed in the name or on behalf of another. These are contained in a new section 1(4A) of the 1989 Act³² and a new section 36A(7) of the 1985 Act³³ in the provisions we have drafted.
- 7.32 In the consultation paper we did not make any provisional recommendation for clarifying the position in respect of corporations other than companies which act as attorneys. It is not possible to include a provision comparable to those which we have recommended in the previous paragraph for individuals and companies because there is no statutory provision setting out how corporations may execute instruments on which such a new provision could be hung.³⁴ We deal below with the question of how the presumptions of due execution and delivery apply in relation to execution by attorneys.³⁵

WHAT IS MEANT BY “SIGN” IN SECTION 1(3) OF THE LAW OF PROPERTY (MISCELLANEOUS PROVISIONS) ACT 1989?

- 7.33 The provisions recommended above will require an individual who is executing as attorney for another to comply with the formalities set out in section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 and sign in the presence of a witness who attests. As explained above,³⁶ however, there are a number of different “methods” by which an attorney can execute. An individual attorney who executes a deed on behalf of a corporation can do so by signing *his own name* as attorney for the corporation under section 7(1) of the Powers of Attorney Act 1971, or by signing *the corporation’s name* under the common law or, in certain circumstances, in reliance on section 74(3) of the Law of Property Act 1925. Our recommendations are not intended to change these methods of execution.
- 7.34 As currently drafted, section 1(3) of the 1989 Act simply refers to an instrument being “signed by” the attorney. Section 1(4) goes on to state that “sign” includes “making one’s mark on the instrument”. It is not clear from this whether “signed by” the attorney would include signing the corporate donor’s name rather than the attorney’s. In order to deal with this, we consider that section 1(4) should be

³¹ See clause 5(4) of the draft bill.

³² See clause 5(5) of the draft bill.

³³ See clause 5(2) of the draft bill.

³⁴ We have rejected above the introduction of a formula for execution by all corporations aggregate. See para 4.19.

³⁵ See paras 7.45-7.51 below.

³⁶ See paras 7.12-17.

amended to provide expressly that “sign” includes an individual signing the name of the person or party on whose behalf he executes the instrument.³⁷

AMENDMENTS TO SECTION 74(3) OF THE LAW OF PROPERTY ACT 1925

- 7.35 We mentioned above that one respondent had suggested that changes along the lines which we have recommended might make section 74(3) ineffective. Our view is that the current methods of execution (including section 74(3) and (4)) should continue to be available and we do not consider that the provisions which we have recommended above will affect these. However, there is a minor inconsistency between section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 and section 74(3) of the Law of Property Act 1925.
- 7.36 Although section 74(3) requires the individual attorney to execute in the presence of a witness, unlike section 1(3), it does not expressly require the witness to attest the signature. In practice, it is unlikely that there would be any difference between the two provisions. A person taking delivery of a deed which has complied with section 74(3) would want evidence that the instrument has been signed in the presence of a witness, and would usually insist that the witness also signs it.³⁸ However, in order to remove any potential difficulties caused by this discrepancy we consider that a requirement for attestation should be inserted in section 74(3).

AMENDMENTS TO SECTION 74(4) OF THE LAW OF PROPERTY ACT 1925

- 7.37 Similarly, we do not consider that the new provisions we have recommended³⁹ will affect the application of section 74(4). This section effectively sets out an alternative method for a corporation to execute a conveyance as attorney for another, namely by appointing an officer to execute in the name of that other person.
- 7.38 One point does need to be clarified, however. That is the question of what formalities the authorised officer must comply with where the instrument he is executing is intended to be a deed.⁴⁰ We consider that it should be made clear that the authorised officer should sign in the presence of a witness who attests the signature. In other words, the authorised officer should comply with the same

³⁷ This will also deal with the position where a liquidator, administrator, administrative receiver or non-administrative receiver executes by signing the company’s name (rather than applying the corporate seal); see paras 7.65-7.97 below. For discussion of the position where a corporate attorney is executing by the signature of an authorised officer under s 74(4) of the Law of Property Act 1925, see paras 7.37-7.39 below.

³⁸ The execution clause contained in the Land Registry’s practice leaflet provides for attestation by the witness; see Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998), para J8.2.

³⁹ In particular, new s 36A(7) of the Companies Act 1985; see paras 7.31 above.

⁴⁰ Not all instruments executed under s 74(4) will need to be deeds. The section is concerned with conveying any interest in property. This may not be by deed. However, s 74(4) is most likely to be used in respect of conveyances of land which must (with very limited exceptions) be by deed; see s 52 of the Law of Property Act 1925. A similar point can be made in respect of s 74(3), but since it already requires that signature of the conveyance is in the presence of a witness, we consider that there is little point in limiting the attestation requirement to deeds.

requirements as those set out in section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989. At first sight, this may appear to be at odds with the policy of the new provision which is to link clearly the formalities to the identity of the attorney; in this case the attorney is the *corporation*, not an individual. However, if we were to require execution to be in accordance with the formalities applicable to the corporation, this would effectively mean that section 74(4) could not be relied on. Moreover, under section 74(4) it is an *individual* who is in fact signing the name of the maker of the deed, and so it may be regarded as entirely appropriate to require that individual to comply with the same formalities as those set out in section 1(3), just as an individual attorney would have to do when executing by signing the name of the donor. This also appears to be the current practice of the Land Registry.⁴¹

- 7.39 To make this clear, we consider that the wording of section 74(4) should be amended to provide that where an instrument being executed by an appointed officer in accordance with that section is to be a deed, it must be signed in the presence of a witness who attests.

LIQUIDATORS, ADMINISTRATIVE RECEIVERS ETC

- 7.40 Although our discussion has focused on the position of attorneys, the new provisions in respect of formalities will apply to any individual or company which executes a deed on behalf of another. So, for example, it will apply where a liquidator, administrator, or administrative receiver executes a deed by signing the company's name. The question of attestation was raised specifically in relation to liquidators in the consultation paper, and is discussed below.⁴² The point was not raised directly in respect of administrators and administrative receivers, but we consider the same rules should apply.⁴³ Execution in this way by a liquidator, administrator or administrative receiver is similar to the position of an attorney executing under section 74(3) of the Law of Property Act 1925 which we discussed in paragraph 7.36 above.
- 7.41 A liquidator, administrator or administrative receiver may, however, execute a deed by affixing the company's seal and signing to attest.⁴⁴ Our new provisions are not intended to affect the ability of liquidators, administrators and administrative receivers to execute deeds in this way. It is only where such persons are executing by *signing in the name and on behalf of* the company, that the requirements of section 1(3) (as modified) will apply. Where the seal is affixed, execution is effectively *by* the company (rather than "on behalf of" it); the liquidator, administrator or administrative receiver is simply acting as agent of the company in affixing the seal in just the same way as the secretary or a director may affix and

⁴¹ See Practice Advice Leaflet No 6, *Execution of Deeds* (May 1998), para J8.3 Form C.

⁴² See paras 7.69, 7.71 and 7.73 below. See also Consultation Paper No 143, paras 18.11.

⁴³ The powers of liquidators to execute deeds and documents in the name and on behalf of companies is expressed in slightly different terms to the comparable powers of administrators and administrative receivers. We propose changes to the Insolvency Act 1986 to clarify the powers of liquidators in this respect. See para 7.74 below.

⁴⁴ See paras 7.75-7.76 below. See also Consultation Paper No 143, paras 8.27-8.28 and 8.32.

attest it under the company's constitution. Accordingly, we do not consider that the proposed new provisions should cause any problems in this respect.

FOREIGN COMPANIES

- 7.42 As indicated above, the Foreign Companies (Execution of Documents) Regulations 1994 apply the provisions of section 36A (inter alia) of the Companies Act 1985 to foreign companies subject to certain adaptations and modifications. The modified section 36A(4) permits a foreign company to execute by the single signature of a person acting under the authority (express or implied) of that company.⁴⁵ However, the document must be expressed to be executed by the company. Where an individual signs by way of execution under this provision in the Regulations, we do not consider that the additional formalities set out in section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 should apply - even though there is effectively a single individual who signs. The provision in the Regulations is intended to replicate in a more liberal form the provision of section 36A(4) - that is, it sets out the formalities for execution *by* the company, and is not in fact dealing with execution by an individual *on behalf of the company*. Our new provisions applying the formalities of section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 will not therefore apply where an individual signs by way of execution under the modified section 36A(4).

SUMMARY OF RECOMMENDATIONS IN RESPECT OF FORMALITIES FOR EXECUTION BY ATTORNEYS

- 7.43 The overall result which our recommendations are intended to achieve is as follows: where an individual signs a deed by way of execution whether on his own behalf or on behalf of another, he must comply with the formalities contained in section 1(3) by signing in the presence of a witness who attests; where a company executes a deed whether on its own behalf or on behalf of another, it must execute in accordance with section 36A. We do not deal directly with the position of attorneys which are corporations to which section 36A does not apply.⁴⁶

- 7.44 **We therefore recommend that:**

(i) section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 should be amended so as to include reference to execution *by* a person who is authorised to execute in the name or on behalf of the maker or party to the deed;
(Draft bill, clause 5(4))

(ii) there should be statutory provisions that section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 and section 36A of the Companies Act 1985 apply in the case of an instrument executed by an individual and company respectively in the name or on behalf of another person whether or not that person is also an individual or company (as the case may be);
(Draft bill, clauses 5(5) & 5(2))

⁴⁵ See paras 4.29-4.30 above.

⁴⁶ Except in so far as they can rely on section 74(4) of the Law of Property Act 1925. See paras 7.37-7.39 above.

(iii) section 1(4) of the Law of Property (Miscellaneous Provisions) Act 1989 should be amended to provide expressly that “sign” includes an individual signing the name of the person or party on whose behalf he executes the instrument; (Draft bill, clause 10(1) & para 4(2) of Schedule 1)

(iv) section 74(3) of the Law of Property Act 1925 should be amended so as to provide that the person who witnesses the signature of an individual who executes a conveyance in accordance with that section must attest the individual’s signature; (Draft bill, clause 10(1) and para 1(3) of Schedule 1)

(v) section 74(4) of the Law of Property Act 1925 should be amended to provide that where an instrument being executed by an appointed officer in accordance with that section is to be a deed, it must be signed in the presence of a witness who attests. (Draft bill, clause 10(1) & para 1(4) of Schedule 1)

Application of presumptions of due execution and delivery

7.45 Another important issue to which we drew attention in this context was the extent to which the various presumptions as to execution and delivery contained in sections 36A(5) and (6) of the Companies Act 1985 and in section 74(1) of the Law of Property Act 1925 applied where execution is by an attorney.

7.46 Our view was that the wording of section 36A(6) is clearly inapplicable to execution on behalf of a company by an *individual* attorney: there is no signature by the relevant officers for the company. Similarly the requirements of section 74(1) will not be satisfied where execution is by an individual attorney.⁴⁷ We considered that the position was less clear with section 36A(5), although the fact that, as presently worded, it refers to execution of a document “by a company” rather than “by or on behalf of a company” suggested that execution *by an individual* on behalf of a company would not suffice.

7.47 So far as *corporate* attorneys are concerned, we pointed out that, as in respect of the applicable formalities,⁴⁸ the crucial question is whether execution is taken as being by the donor or the attorney for this purpose.⁴⁹ On the face of it, there was no reason why it should not be the latter. So, for example, where a company executes as attorney for another person⁵⁰ by the signature of two officers in accordance with section 36A(4), the irrebuttable presumption of due execution contained in the first part of section 36A(6) would apply. Similarly, the irrebuttable presumption of due execution contained in section 74(1) would apply where a company executed as attorney by affixing its seal in the presence of and attested by

⁴⁷ If the seal will not be affixed in the presence of and attested by the corporation’s clerk, secretary or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation.

⁴⁸ See paras 7.25-7.34 above.

⁴⁹ Consultation Paper No 143, paras 8.21-8.22 and 11.35.

⁵⁰ Whether an individual or corporate donor.

one of its directors and its secretary.⁵¹ In both cases, however, the presumptions would be to the effect that the execution by the corporate attorney was effective so far as its *own* constitution was concerned; it would still be necessary for the purchaser to show that the attorney had been properly appointed by the donor in respect of the particular transaction.

- 7.48 Our provisional view was that if the changes suggested in paragraphs 7.20 and 7.25 above were made, the application or otherwise of the various statutory presumptions should flow naturally from section 36A. The proposed amendments would make it clear that a deed may be executed by or on behalf of the maker, and that the relevant formalities are governed by the identity of the attorney. It would follow, therefore, that where the donor is a company, but the attorney an individual, there would nonetheless be a rebuttable presumption of delivery on execution by virtue of section 36A(5), since there would be a deed executed “by or on behalf of a company”. The presumptions in section 36A(6) and section 74(1) of the Law of Property Act 1925, however, would only apply where the attorney is itself a company or corporation (as the case may be).⁵² Nevertheless, we asked in the consultation paper if further clarification was required on this point.
- 7.49 Respondents views on this point were mixed, with a small majority considering that clarification was not necessary. Most respondents did not expand on their responses, although a number of those who considered that clarification was not necessary expressly agreed with our provisional view set out above, that if the other changes recommended in respect of execution by attorneys were made, then the application of the presumptions would follow naturally from section 36A.
- 7.50 As explained above, we have made some changes to the detail of our provisional recommendations in drafting the provisions to implement them. In particular, we have recommended that section 36A(5) should be repealed and that the rebuttable presumption of delivery should be re-cast in slightly different terms in a new section 36AA(2). We have also made other changes to reflect the fact that, in the case of execution using an attorney, it is the attorney (rather than the donor) who should be regarded as executing an instrument for the purposes of the relevant formalities. The effects of these changes is that a different result will be achieved in respect of the presumption of delivery from that set out in paragraph 7.48 above. The presumption will apply where a company executes an instrument as a deed, whether on its own behalf or on behalf of another. But it will not apply where an individual is executing on behalf of a company or other corporation. We consider that this is the simplest and most logical solution.
- 7.51 The position in respect of the presumption of due execution contained in section 36A(6) of the 1985 Act will remain as set out in paragraph 7.48 above, and this is in fact reinforced by the changes which we have recommended. This is because

⁵¹ Unlike s 36A(6), s 74(1) also extends to other corporations aggregate; see paras 5.7-5.10 above.

⁵² And only relate to the execution by the attorney. As indicated above, it will still be necessary to check that the attorney was validly appointed by the corporate donor. The presumptions may, of course, assist in confirming due execution of the instrument appointing the attorney.

the new section 36A(7)⁵³ makes it clear that the whole of section 36A (including section 36A(6)) applies in the case of an instrument executed (or which purports to be executed) by a company on behalf of another person whether or not that person is also a company. Whilst we consider that it does follow from our underlying analysis that section 74(1) also applies where a corporation is executing as attorney for another, in the light of the changes we have made to section 36A, we consider that it is also desirable to put beyond doubt the application of section 74(1) in such circumstances.⁵⁴ Accordingly, **we recommend that there should be a provision that section 74(1) of the Law of Property Act 1925 applies in the case of an instrument purporting to have been executed by a corporation aggregate in the name or on behalf of another person whether or not that person is also a corporation aggregate.** (Draft bill, clause 5(1))

Proposals for changes concerning the methods of execution by attorneys

- 7.52 Finally we raised for consideration a number of possible changes concerning the methods of execution by attorneys. These were to clarify the wording of section 7(1) of the Powers of Attorney Act 1971, to repeal section 7(3) of the 1971 Act, and to have a non-exhaustive list of methods of execution by attorneys. We consider these briefly in turn.

CLARIFYING WORDING OF SECTION 7(1) OF THE POWERS OF ATTORNEY ACT 1971

- 7.53 We pointed out that execution by an individual attorney in his or her own name on behalf of a corporation is widely accepted in practice.⁵⁵ However, the wording of section 7(1) of the Powers of Attorney Act 1971 is not entirely appropriate to cover execution in this way, since execution under it is said to be as effective as if done “with the signature of the donor”, and a corporation does not execute by its signature.⁵⁶ We therefore invited views on whether section 7 of the 1971 Act should be amended to make more appropriate provision for execution by an individual attorney in the name of a corporate donor.
- 7.54 All but one of the respondents who addressed this question considered that section 7 of the 1971 Act should be amended as suggested. The other respondent did not disagree, but indicated that it had no definite view.
- 7.55 We consider that this would be a useful reform. Taken together with the amendments recommended in paragraph 7.44 and above, and paragraph 7.60 below, the changes will set out clearly how individuals may execute deeds on behalf of corporations. The net result will be to make it clear that an individual

⁵³ See clause 5(2) of the draft bill.

⁵⁴ See clause 5(1) of the draft bill.

⁵⁵ Consultation Paper No 143, paras 8.13 and 11.78.

⁵⁶ We pointed out, however, that the application of s 7(1) where the donor is a corporation is confirmed by s 7(2), by which it is expressly made an alternative to s 74(3) of the Law of Property Act 1925, which is only relevant where the donor is a corporation. See further Consultation Paper No 143, para 8.14, n 28.

may validly execute as attorney for a corporation by signing his own name in the presence of a witness who attests the signature.⁵⁷

- 7.56 **Accordingly we recommend that section 7 of the Powers of Attorney Act 1971 should be amended to make more appropriate provision for execution by an individual attorney on behalf of a corporate donor.** (Draft bill, clause 10(1) & para 2 of Schedule 1)

CLARIFYING SECTION 7(3) OF THE POWERS OF ATTORNEY ACT 1971

- 7.57 We also drew attention to the potential difficulty caused by the fact that section 7(3) of the 1971 Act makes section 7(1) without prejudice to any statutory direction requiring execution in the name of the estate owner. This has led to doubts whether this method of execution is effective for a conveyance, on the basis that there *may* be such a statutory direction in section 7(4) of the Law of Property Act 1925.⁵⁸
- 7.58 Our view was that such doubts are unfounded, and they are disregarded in practice. However, we invited views on whether section 7(3) should be repealed.
- 7.59 The views expressed by the relatively small number of respondents who addressed this question suggested that section 7(3) is not causing difficulty in practice. However, a majority were still in favour of repealing it. One respondent went further and suggested that the subsection should be amended rather than repealed. If there was a case for repealing section 7(3), was there not a stronger case for instead amending section 7(3) so that it provided that section 7 applied *notwithstanding* any statutory direction requiring an instrument to be executed in the name of the estate owner?
- 7.60 We consider that, although section 7(3) may be ignored in practice, it does give rise to unnecessary uncertainty. As we are proposing other changes to the 1971 Act we consider that the opportunity could usefully be taken to repeal section 7(3). No respondent indicated any reason why it should not be repealed. We do not consider that it is necessary to go further and provide, in effect, that section 7(1) overrides any statutory direction requiring an instrument to be executed in the name of the estate holder, as appears to have been suggested by the respondent referred to in the previous paragraph. Ultimately, the effect of any particular statutory provision will depend on its particular terms, and we do not think that any general statutory direction to interpret provisions in a particular way, which could of course include future provisions, would be appropriate in this context. **Accordingly, we recommend that section 7(3) of the Powers of Attorney Act 1971 should be repealed.** (Draft bill, clause 10, para 2(4) of Schedule 1 & Schedule 2)

⁵⁷ There will continue to be other methods of execution available; see paras 7.13-7.15 above. We discuss below whether it would be helpful to “codify” these in a non-exhaustive list; see paras 7.61-7.63.

⁵⁸ Section 7(4) provides as follows: “Where any such power for disposing of or creating a legal estate is exercisable by a person who is not the estate owner, the power shall, when practicable, be exercised in the name and on behalf of the estate owner.” For further discussion on this point, see Consultation Paper No 143, para 8.14, n 30.

LISTING THE METHODS OF EXECUTION AVAILABLE

- 7.61 In view of the uncertainties described above, we suggested that it might be helpful to replace section 7(1) of the Powers of Attorney Act 1971 and section 74(3) and (4) of the Law of Property Act 1925 with a more comprehensive code setting out how an attorney may execute. This would set out a non-exhaustive list of methods of execution which are available. We were provisionally in favour of such codification. We suggested that such a provision might include an illustrative list of sample execution clauses for attorneys.
- 7.62 Most of those who addressed this question agreed with our provisional view that the present rules for execution by attorney should be codified, setting out a non-exhaustive list of methods of execution which are available. There were some dissenting views, however. One respondent indicated that it was not necessary and was “unlikely to be of any assistance if it is non-exhaustive”. Another noted that “experience suggests that this approach is likely to cause new doubts”.
- 7.63 On further reflection, our views on this point very much echo those we have expressed in relation to the issue of a more general codification of the provisions relating to execution of deeds and documents by and on behalf of corporations.⁵⁹ In principle, we consider that it would be helpful. However, we are not convinced that it is essential, or would constitute the best use of resources at this stage. We are particularly concerned that any codification, which may well be a considerable exercise even in this limited sphere, might only be relatively short-lived in the light of other commercial and legal developments affecting the execution of deeds and documents generally.⁶⁰ We believe that the particular difficulties highlighted in the consultation paper can be addressed by the more limited reforms we have suggested above. **Accordingly, we recommend against codifying the present rules for execution by attorney.**

Summary of effect of recommendations in relation to attorneys

- 7.64 We set out below what we consider will be the effect of our recommendations on the principal methods and formalities of execution by attorney. For the sake of completeness, we also set out how a liquidator, administrator or administrative receiver may execute when not using the company’s seal.

A EXECUTION BY AN INDIVIDUAL AS ATTORNEY FOR AN INDIVIDUAL

(i) An individual attorney may execute by signing his own name stated to be as attorney for the individual donor relying on section 7(1) of the Powers of Attorney Act. The provisions we have recommended⁶¹ will make it clear that the attorney must comply with section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 by signing in the presence of a witness who attests the signature. For example:

Signed as a deed by XY) Signature -

⁵⁹ See paras 1.12-1.15 above and 9.6-9.10 below.

⁶⁰ See paras 1.12-1.15 above.

⁶¹ See para 7.44 above.

as attorney for AB) *XY as attorney for AB*
in the presence of)

(Signature name and address of witness)

(ii) An individual attorney may execute by signing the name of the individual donor followed by his own name as attorney for the individual donor under the common law. Again, the provisions we have recommended will make it clear that the attorney must comply with section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 by signing in the presence of a witness who attests the signature. Those provisions will also make clear that “signature” for the purposes of section 1(3) in this context includes signing the name of the individual donor.⁶² For example:

Signed as a deed by AB) Signature -
acting by his attorney XY) *AB by his attorney XY*
in the presence of)

(Signature name and address of witness)

The analysis which we have adopted in our amendments to the relevant provisions is that execution is *by* the attorney, acting on behalf of the donor. The wording of the execution clause given above, which is contained in the Land Registry practice leaflet⁶³ does not sit entirely happily with this because it says “signed as a deed *by*” the donor, albeit “acting by” his attorney. It would perhaps be more accurate if the execution clause stated “signed as a deed in the name and on behalf of [AB] by [XY] his attorney”. The practice leaflet could be updated to include a slightly amended execution clause if our reforms are implemented. However, what is important so far as the validity of the execution is concerned is the actual signing in the name of the donor in the presence of a witness who attests.

B EXECUTION BY AN INDIVIDUAL AS ATTORNEY FOR A CORPORATION

(i) An individual attorney may execute by signing his own name stated to be as attorney for the corporate donor relying on section 7 of the Powers of Attorney Act. Although this is common practice at present, the provisions we have recommended will also make it clearer that this is covered by section 7.⁶⁴ As above, our new provisions will also make it clear that the attorney must comply with section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 by signing in the presence of a witness who attests the signature.⁶⁵ For example:

⁶² *Ibid.*

⁶³ Practice Leaflet No 6, Execution of Deeds and Documents (March 1998), para J8.1 Form B.

⁶⁴ Para 7.56.

⁶⁵ See para 7.44.

Signed as a deed by XY) Signature -
as attorney for AB Ltd) *XY as attorney for AB Ltd*
in the presence of)

(Signature name and address of witness)

(ii) An individual attorney may execute by signing the name of the corporate donor followed by his own name as attorney for the corporate donor either under the common law or, in the case of a conveyance of property, under section 74(3) of the Law of Property Act 1925. The new provisions we have recommended⁶⁶ will make it clear that the attorney must comply with section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 by signing in the presence of a witness who attests the signature. They will also make clear that “signature” for the purposes of section 1(3) in this context includes signing the name of the corporate donor, and there will therefore be no inconsistency with the requirements set out in section 74(3).⁶⁷ For example:⁶⁸

Signed as a deed by AB Ltd) Signature -
acting by its attorney XY) *AB Ltd by its attorney XY*
in the presence of)

(Signature name and address of witness)

C EXECUTION BY A COMPANY AS ATTORNEY FOR AN INDIVIDUAL OR ANOTHER CORPORATION

(i) Subject to (ii) below, our new provision will require a company which executes as attorney for an individual or another corporation to comply with section 36A of the Companies Act 1985.⁶⁹ It will therefore execute as attorney by affixing its seal in accordance with its constitution, or by the signature of two officers. For example:⁷⁰

The common seal of XY Ltd) *Common Seal*
acting as attorney for AB) *of XY Ltd*
was affixed in the presence of)
Director of XY Ltd
Secretary⁷¹ of XY Ltd

⁶⁶ *Ibid.*

⁶⁷ We have also recommended that s 74(3) should be amended to include an express requirement for attestation so as to ensure consistency with s 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989. See para 7.44(iv) above.

⁶⁸ The wording of this clause is taken from the Land Registry Practice Leaflet No 6, *Execution of Deeds* (May 1998), para J8.2. As with example A(ii) discussed above, the wording does not sit entirely happily with the analysis we have adopted for our reforms, namely that execution is *by* the attorney acting on behalf of the donor. The practice leaflet could be updated to include a slightly amended execution clause if our reforms are implemented.

⁶⁹ See para 7.44 above.

⁷⁰ These examples are on the assumption that the donor, AB, is an individual. There would in fact be no difference if the donor was a corporation (AB Ltd).

⁷¹ Under our revised wording of s 74(1) of the Law of Property Act 1925, the seal may be attested by two directors as well by one director and the secretary; see paras 5.16-5.18.

or

Signed as deed by XY Ltd)	
acting by [a director and its)	Director of XY Ltd
secretary or two directors])	
as attorney for AB)	
		[Secretary or Director]
		of XY Ltd

(ii) In the case of a conveyance of property, a company may execute as attorney for an individual or corporate donor in the following way, relying on section 74(4) of the Law of Property Act 1925. The board of the attorney company may appoint one of its officers to execute by signing the name of the individual or corporate donor. The provisions we have recommended will make it clear that the signature of the officer must be witnessed and attested even though the attorney is, strictly, the company, and not the individual officer who signs.⁷² For example:⁷³

Signed as a deed in the name)	Signature -
and on behalf of AB by CD,)	<i>AB by his attorney XY Ltd</i>
an officer appointed for that)	<i>acting by CD</i>
purpose by the board of)	
directors of XY Ltd, his)	
attorney, in the presence of)	

(Signature name and address of witness)

D EXECUTION BY A CORPORATION AS ATTORNEY FOR AN INDIVIDUAL OR ANOTHER CORPORATION

(i) There will be no specific provision requiring corporations other than companies to execute in a particular manner or to comply with particular formalities.⁷⁴ However, the accepted practice is to execute in the manner appropriate to the attorney corporation. This will mean executing under the corporation's seal in accordance with its constitution unless the corporation is permitted to execute in some other manner. (See the first example in C(i) above).

(ii) Alternatively, in the case of a conveyance of property, a corporation may execute as attorney for an individual or corporate donor in accordance with section 74(4) of the Law of Property Act 1925 as in C(ii) above. As indicated above, the provisions we are recommending will make it clear that that the signature of the officer must be witnessed and attested.⁷⁵ (See example C(ii) above).

⁷² See para 7.44 above.

⁷³ Again, the example is on the assumption that the donor, AB, is an individual. There would be no change of substance if the donor was a corporation (AB Ltd).

⁷⁴ Unlike in the case of companies where our new provision will apply; see para 7.44 above.

⁷⁵ *Ibid.*

E EXECUTION BY SIGNATURE OF LIQUIDATOR, ADMINISTRATOR OR ADMINISTRATIVE RECEIVER⁷⁶

A liquidator, administrator or administrative receiver may execute by signing the name of the corporate donor followed by his own name as liquidator, administrator or administrative receiver as the case may be. The provisions we have recommended⁷⁷ will make it clear that the liquidator, administrator or administrative receiver must comply with section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 by signing in the presence of a witness who attests the signature. As indicated above, they will also make clear that “signature” for the purposes of section 1(3) in this context includes signing the name of the corporate donor. For example:⁷⁸

Signed as a deed by AB Ltd)	Signature -
(in liquidation) acting by XY,)	<i>AB Ltd by its liquidator XY</i>
its liquidator, under powers)	
conferred on him by Schedule)	
4 to the Insolvency Act 1986)	
in the presence of)	

(Signature, name and address of witness)

Execution by liquidators etc

- 7.65 In the consultation paper, we drew attention to a number of specific difficulties or uncertainties in relation to the execution of documents by liquidators, administrators and administrative receivers, and non-administrative receivers, and suggested a number of possible solutions. We consider these below.

Liquidators

- 7.66 A liquidator has power under the Insolvency Act 1986 to “do all acts, and to execute in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, the company's seal”.⁷⁹

⁷⁶ This is as an alternative to affixing the company's seal.

⁷⁷ See para 7.44 above.

⁷⁸ As we indicated in the consultation paper, we understand that in practice liquidators, administrators and administrative receivers sometimes execute simply by signing their own name with or without a witness. It is, however, difficult to see the legal basis for this (except, in the case of an administrative receiver, where there is a power of attorney) since the statutory power is to execute documents in the name of the company. See Consultation Paper No 143, para 8.31. This wording is taken from the Land Registry's Practice Advice Leaflet No 11, para E3. As discussed above in relation to execution by attorneys in the name of the donor (see the comments under example A(ii) and n 68 above) the wording does not sit entirely happily with the analysis underlying our reforms that execution is *by* the liquidator etc, acting on behalf of the company. It would perhaps be more accurate if the execution clause stated “signed as a deed in the name and on behalf of AB Ltd (in liquidation) by XY its liquidator, under powers conferred ...”.

⁷⁹ Insolvency Act 1986, ss 165 and 167, Sched 4, para 7.

Execution can therefore be by the liquidator affixing the company seal and signing to attest this.⁸⁰ However, we pointed out that if the company has no seal or the seal has been lost, then the manner of execution becomes less certain.

7.67 We drew attention in particular to the wording of the provision set out in the preceding paragraph which appeared to link the power to execute documents with the power to use the company seal (“*and for that purpose* to use, where necessary, the company seal”). This had caused doubt as to the ability of a liquidator to execute other than by affixing the company’s seal.⁸¹ It may be that the liquidator could execute by signing the deed in the name and on behalf of the company, having his signature attested, and delivering it,⁸² but the matter was not free from doubt.⁸³

7.68 Accordingly, we provisionally recommended that these doubts should be removed by amending Schedule 4 to the Insolvency Act 1986 to provide that the powers of a liquidator exercisable without sanction in any winding up include:

- (i) the power to do all acts and to execute in the name and on behalf of the company any deed receipt or document; and
- (ii) as a separate power, the power to use the company’s seal.

⁸⁰ Such execution will not be in accordance with the company’s articles, but there is no objection to this, because the power is conferred by statute, and because conflict with the normal running of the company in the manner laid down by the articles is inherent in the process of winding up; Consultation Paper No 143, para 8.28. We also considered that the authority extends to delivery of the deed either because the word “execute” includes delivery for this purpose, or under the words “to do all acts”, or under the sweep-up provision in Insolvency Act 1986, Sched 4, para 13, or by necessary implication; *ibid*, at para 8.27.

⁸¹ Eg, *The Encyclopaedia of Forms and Precedents* (5th ed 1991) vol 38, para 794, n 5. We pointed out that administrators and administrative receivers are given the power to use the company seal, and a separate power to execute documents, without any suggestion that the two are inter-dependent.

⁸² This is suggested in Brooke’s Notary (11th ed 1992), p 184. *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (1994) para 34-25 indicates that execution by the liquidator in the name and on behalf of the company is acceptable in the case of a transfer of property, but this may be in reliance on Law of Property Act 1925, s 74(3): see above, para 7.15.

⁸³ Other possibilities for dealing with the lack or loss of a company seal which we suggested included: the liquidator acquiring a new seal for the company; the liquidator executing in accordance with s 74(3) of the Law of Property Act 1925 where appropriate; officers of the company executing under s 36A(4) of the Companies Act 1985 with the liquidator signing to show his consent; the liquidator relying on the “statutory power of attorney” contained in s 7(4) of the Law of Property Act 1925. We also pointed out that in practice liquidators sometimes execute simply by signing their own name, with or without a witness, however it was difficult to see the legal basis for this, since the statutory power was to execute documents in the name of the company, and it appeared to carry an increased risk of personal liability on the deed; Consultation Paper No 143, para 8.31. The Land Registry has indicated that it will accept deeds executed by a liquidator by signing in the name of the company in the presence of a witness who attests; see Practice Advice Leaflet No 11, *Corporate Insolvency* (May 1997), para E3. But see also Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998) para I4.2.

- 7.69 As an additional point we asked if there should be any requirement for the signature of a liquidator to be attested where he executes a deed by signing it in the name of the company.
- 7.70 All the respondents who addressed this question agreed that the ability of a liquidator to execute deeds and other documents on behalf of the company either by affixing its seal, or by signing the deed in the name of the company should be confirmed and clarified. Some suggested alternative ways of clarifying the position, for example by amending section 36A of the Companies Act 1985 to refer to liquidators. The point was made by one respondent that confusion with the current law arises not so much among insolvency lawyers who in general know the areas of debate and difficulty, but among other lawyers, particularly those doing general property work. The respondent suggested that to deal with this, section 36A of the Companies Act 1985 should be amended to make it clear that a document would be deemed to be duly executed by a company if it purported to be signed by a liquidator or administrator.⁸⁴
- 7.71 So far as the additional point is concerned, a majority of respondents who addressed it considered that there should be a requirement for a liquidator's signature to be attested. Few reasons were given either way, although one respondent pointed out that a requirement for such a signature to be attested would add little in the way of cost and may provide a useful safeguard; another also commented that where the deed is not sealed, attestation is just as important for evidential purposes as it is in the case of a deed executed by an individual.
- 7.72 We remain of the view that the position should be clarified. Whilst we can see the attraction of having a provision in section 36A along the lines suggested above, we consider that the approach which we proposed in the consultation paper is preferable. The difficulty which we highlighted stems from the wording of the liquidator's powers contained in the Schedule to the Insolvency Act, and we take the view that any amendment should be directed at clarifying that wording.
- 7.73 We also agree with the majority view that, under English law, there should be a requirement for the liquidator's signature to be attested where he executes a deed by signing it in the company's name. We have indicated above how we consider that this should be dealt with in the general provisions we are proposing to clarify the formalities which apply where an individual or company executes on behalf of another.
- 7.74 **Accordingly, we recommend that, so far as English law is concerned,⁸⁵ Schedule 4 to the Insolvency Act 1986 should be amended to provide that the powers of a liquidator exercisable without sanction in any winding up include:**

(i) the power to do all acts and to execute in the name and on behalf of the company any deed receipt or document; and

⁸⁴ It was suggested that the amendment also should extend to an execution by a Receiver or Receiver and Manager.

⁸⁵ Schedule 4 to the Insolvency Act 1986 applies equally to Scotland. We are not in a position to recommend changes to the law applying to Scotland. But see para 9.11 below.

(ii) as a separate power, the power to use the company's seal.
(Draft bill, clause 6)

Administrators and administrative receivers

- 7.75 Administrators and administrative receivers have similar powers to liquidators to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document.⁸⁶ There is, however, a *separate* power to use the company's seal.⁸⁷ We therefore saw no reason why administrators and administrative receivers should not be able to execute, where no seal is available, simply by signing the company's name followed by their own, making it clear that execution is by the company.⁸⁸
- 7.76 However, we drew attention to a rather different uncertainty in the case of administrative receivers. This relates to the interpretation of section 42(1) of the Insolvency Act 1986 which provides that the powers conferred upon an administrative receiver by the debenture under which he was appointed automatically include those mentioned in the previous paragraph (and set out in Schedule 1 to the Act), except in so far as they are inconsistent with the other provisions of the debenture. On one interpretation, this could mean that the "Schedule 1 powers" are treated as conferred by the debenture, and therefore as being purely contractual.⁸⁹ This would have implications for whether the chargor company could authorise a person such as a receiver to use its seal in the absence of authority to do so in the articles,⁹⁰ and whether the power would survive the liquidation of the company.⁹¹
- 7.77 Our provisional view was that it was highly unlikely that the courts would give section 42(1) such a narrow effect, as this would defeat the clear statutory intention of enabling an administrative receiver to use the company seal and to execute documents in the name of the company unless this power is excluded by the debenture. However, we sought views from consultees on whether it was necessary or appropriate to clarify that the powers of an administrative receiver are statutory (although subject to modification in the debenture or appointment).

⁸⁶ Insolvency Act 1986, ss 14(1) and 42(1) respectively, applying the power in Sched 1, para 9.

⁸⁷ *Ibid*, Sched 1, para 8.

⁸⁸ Consultation Paper No 143, para 8.34. The new provision we have proposed will make it clear that the administrative receiver must sign in the presence of a witness who attests his signature; see para 7.44 above. The Land Registry has indicated that it will accept execution by an administrator and an administrative receiver by signing the name of the company in the presence of a witness who attests the signature. See Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998) paras I2.2 and I3.2.5, and Practice Advice Leaflet No 12, *Administration and Receivership* (May 1997), paras C6 and E4.

⁸⁹ This is suggested in Totty and Jordan, *Insolvency* (1995) para H29.02.

⁹⁰ But cf *Re Emmadart Ltd* [1979] Ch 540, 547, per Brightman J, holding that the powers of the board are not co-terminous with those of a receiver, who derives his powers from the power in the memorandum and articles to create charges, and the powers conferred by the charge. See further Consultation Paper No 143, para 8.33, n 74.

⁹¹ The agency of an administrative receiver for the chargor company ceases on its going into liquidation; Insolvency Act 1986, s 44(1)(a). For a discussion of this problem in relation to non-administrative receivers, see paras 7.84-7.96 below.

- 7.78 A majority of respondents who addressed this question considered that it should be clarified that the powers of an administrative receiver are statutory powers in the manner suggested by the Commission. Few of these expanded on their responses.
- 7.79 There were a number of respondents who disagreed, however. Most of these simply doubted that clarification was necessary. Two respondents, however, were firmly of the opinion that the powers conferred by Schedule 1 to the Insolvency Act 1986 are not “statutory powers”. The use of the words “deemed to include” in section 42(1) indicated that the powers were to be imported into the relevant debenture. Hence, the powers were deemed to be contractual in nature. The respondents pointed out that this appeared to be the view of the authors of *Lightman & Moss*.⁹² They were also concerned about the explanation in the consultation paper that the powers “are statutory and hence survive the winding up”. Liquidation terminated the agency of the receiver and this was expressly recognised in section 44(1) of the Act. The termination of the agency impacted on many areas of the law far outside those under consideration in the consultation paper, and had given rise to a substantial amount of case law. Accordingly, it was neither necessary nor appropriate to clarify the nature of the powers of an administrative receiver under Schedule 1.
- 7.80 There were also a number of respondents who suggested alternative approaches. One of these was concerned that merely clarifying that the powers of an administrative receiver were statutory would not be sufficient to empower the receiver to use the company’s seal to execute a deed “in the name of and on behalf of the company” following winding up. This may not in itself be sufficient to constitute an exception to the termination of the agency rule on liquidation. On the other hand, it did not consider that any new provision should allow a receiver to remain as agent of the company after a liquidator had been appointed. It suggested therefore, that the administrative receiver could retain the more limited power to execute a deed on behalf of the company to transfer property secured under the charge, to the extent that such dealings are permissible under and are required to satisfy the charge.
- 7.81 Another respondent suggested that the difficulty identified in the consultation paper was best met by a substantive enactment to the effect that even in the absence of a power in the articles to delegate the use of the seal, an administrative receiver could use the seal (if it had one), both before and after liquidation, unless the debenture specifically provided to the contrary.
- 7.82 Having considered the responses, our view is that it would not in fact be appropriate to recommend a provision along the lines which we suggested in the consultation paper. Such a provision would not be limited to clarifying *how* an administrative receiver executes a document on behalf of a company; it would go much wider, referring generally to the powers of administrative receivers, and we agree that it could impact on areas of law outside the scope of this project. It would not be appropriate, for example, to consider in the context of this paper,

⁹² Para 8-02, footnote 8.

what dealings by an administrative receiver are permissible in particular circumstances; the project is only directed at the mechanics of execution.

- 7.83 We remain of the view expressed in the consultation paper that it is highly unlikely that the courts would interpret section 42(1) in a way which would not permit an administrative receiver to use the company seal and execute documents in the name of the company, unless this power was excluded by the debenture. **Accordingly, we recommend against a provision to clarify that the powers of an administrative receiver are statutory (although subject to modification in the debenture or appointment).**

Non-administrative receivers

- 7.84 The position of non-administrative receivers⁹³ following the liquidation of the chargor company appears to be rather more uncertain. As we explained in the consultation paper, the ability of a non-administrative receiver to execute a deed on behalf of the mortgagee company depends on the terms of the mortgage or charge under which they are appointed, and also on the terms of the appointment.⁹⁴ Such a receiver is usually able to execute deeds on behalf of the company under a power of attorney conferred by the charge, or, it seems, where the charge contains a separate power for the receiver to execute deeds in the name and on behalf of the company.⁹⁵
- 7.85 A non-administrative receiver almost invariably acts as agent of the mortgagor in exercising his powers.⁹⁶ Upon liquidation of the company, that agency terminates.⁹⁷ Although the receivership continues, and most of the receiver's powers are unaffected, we pointed out that it is uncertain whether a power of attorney in

⁹³ As to the distinction between administrative receivers and other receivers, see Lightman and Moss, *The Law of Receivers of Companies* (2nd ed 1994) pp 3-6. A non-administrative receiver is usually appointed under a legal mortgage or fixed charge, and either by virtue of an express contractual power or by the power conferred by Law of Property Act 1925, s 101(1)(iii) where the mortgage is made by deed; hence the usual description of such receiver as a fixed charge or LPA receiver. But the powers given to such a receiver by Law of Property Act 1925, s 109 are very limited, and any well drawn charge will vary and extend the statutory powers.

⁹⁴ Consultation Paper No 143, para 8.36.

⁹⁵ Either of these should be sufficient to enable execution of a conveyance under section 74(3) of the Law of Property Act 1925. A power given by the charge is probably some "other power to convey" for the purpose of s 74(3). If the mortgage allows a receiver to be appointed under hand, then a receiver appointed in this way may nonetheless execute a deed on behalf of the mortgagor so long as the mortgage itself was made by deed, and conferred a power of attorney on the receiver; *Phoenix Properties Ltd v Wimpole Street Nominees Ltd* [1992] BCLC 737. The new provision we have proposed above would make it clear that the receiver must sign in the presence of a witness who attests his signature; see para 7.44 above.

⁹⁶ See Law of Property Act 1925, s 109(2). There is usually an express provision to the same effect in the charge, to avoid any doubt where the statutory power to appoint a receiver has been varied and extended by the charge (see *ibid*, ss 103(3) and (4), and *Deyes v Wood* [1911] 1 KB 806).

⁹⁷ Following liquidation of the company the receiver either acts as principal in his own right, or as agent for the chargee; *American Express International Banking Corp v Hurley* [1985] 3 All ER 564.

favour of a receiver contained in the charge survives the liquidation of the chargor. In *Barrows v Chief Land Registrar*,⁹⁸ it was held that such a power is revoked on liquidation, however the court went on to hold that a separate power (as opposed to a power of attorney) given to the receiver by the terms of the charge to dispose of the charged property and to do so in the name and on behalf of the company did survive the liquidation of the company.

- 7.86 The practical result of the *Barrows* case appears to be, therefore, that provided the charge is suitably worded, a non-administrative receiver can dispose of charged property after the chargor company has gone into liquidation. As we noted, execution in this way is accepted by the Land Registry and appears to be accepted by practitioners without question. However, we considered that the reasoning of the decision in *Barrows* was open to criticism, since it resulted in an apparent distinction between a power of attorney and a contractual power to convey which was somewhat difficult to justify. We considered that it was desirable to clarify the ability of a non-administrative receiver to continue to be able to dispose of assets over which security was validly created, in the name of the company, notwithstanding the liquidation of the chargor company.

PROPOSALS IN THE CONSULTATION PAPER

- 7.87 We suggested three alternative ways that this could be achieved. The first was to extend section 4 of the Powers of Attorney Act 1971 to powers of attorney granted to a receiver. By virtue of s 4(1), a power of attorney which is expressed to be irrevocable and is given to secure a proprietary interest of the attorney, or the performance of an obligation owed to the attorney, is not revoked by (among other things) the winding up of the donor, so long as the attorney retains such interest or is owed such obligation. In the *Barrows* case, it was held that section 4 was inapplicable, because the relevant interest was held by or obligation owed to the chargee rather than the receiver.
- 7.88 The second way which we suggested was to provide that a power of attorney or other power to convey in the name of the chargor is not terminated by the liquidation of the chargor, notwithstanding the termination at that point of the agency of the receiver for the chargor.
- 7.89 The third way was to provide that any such power of attorney or other power is a power coupled with an interest within the common law rule in *Smart v Sandars*.⁹⁹ Under this rule, when the grantee of a power has, in addition to his authority to act, an interest in the subject matter of the power apart from remuneration he is to receive for his services, the power is irrevocable.¹⁰⁰ In the *Barrows* case it was held that a power of attorney in favour of a receiver was not a power coupled with an interest for the purposes of this rule.

⁹⁸ *The Times*, 20 October 1977.

⁹⁹ (1848) 5 CB 895, 917; 136 ER 1132, 1140.

¹⁰⁰ Eg a power of attorney contained in a mortgage of land enabling a mortgagee to convey the legal estate.

- 7.90 We provisionally favoured the second option, perhaps as part of a general codification of execution by attorneys.¹⁰¹

RESPONSES ON CONSULTATION

- 7.91 All the respondents who considered this question agreed with our provisional view that it would be helpful to confirm and clarify the power of a non-administrative receiver to execute deeds in the company's name following the commencement of liquidation of the chargor company. The City of London Law Society, for example, regarded it as "most unsatisfactory that conveyancing practice over almost 20 years should have been based on such a weak foundation as *Barrows v Chief Land Registrar*". Another respondent had encountered a problem in practice where the Land Registry had refused to accept a deed executed in similar form to that in *Barrows*. The problem was solved by sending a copy of the *Barrows* decision to the Land Registry and asking it to reconsider. Alternatively, the liquidator could have ratified the sale. The receiver had had to seek legal advice, when none should have been necessary.
- 7.92 For its part, the Land Registry indicated that it was well aware of the implications of the *Barrows* decision, but considered that the power of a receiver should be placed on a firmer, statutory footing, for the avoidance of doubt.
- 7.93 The most popular option for clarifying the position for those who commented was the second option, that is by provision that a power of attorney or other power to convey in the name of the chargor is not terminated by the liquidation of the chargor. Several respondents favoured the first option (extending section 4 of the Powers of Attorney Act to powers of attorney granted to a receiver) on the ground that "in practice receivers are almost invariably given a power of attorney". No respondents were in favour of the third option (bringing the powers of receivers within the common law rule in *Smart v Sandars*).
- 7.94 Some respondents who favoured the second option, however, cautioned against extending the powers too widely. They stressed that any reform should be limited to removing the artificial difficulties in the execution of deeds and documents on behalf of a company by a non-administrative receiver, and should not have the effect of permitting the receiver to do anything which the mortgagee itself could not do under the terms of the charge.

OUR FINAL VIEW

- 7.95 On further reflection, we are concerned that, rather as above,¹⁰² the question which has been raised does not go to the question of *how* a non-administrative receiver executes documents, but rather to the question of what powers he has (or should have) after liquidation. As we have indicated above, a number of respondents were concerned that any reform in the context of this project should not deal with substantive issues of this kind. This is a project which is directed at

¹⁰¹ We considered that the first option alone would be insufficient, as it would not clarify the use of a power to convey which is not expressed to be a power of attorney. See Consultation Paper No 143, para 18.15.

¹⁰² See para 7.82.

the mechanics of execution, and we do not consider that it is appropriate to propose reforms in the context of this report which affect the substantive powers of non-administrative receivers and their status in exercising those powers.

7.96 Moreover, having given further consideration to how any reform might be implemented in this area, we can see considerable practical difficulties in a provision along the lines of our provisionally preferred option. The focus of the provisional proposal was on powers to convey or dispose of charged property. But the *Barrows* case refers to other powers, including taking possession of, collecting and getting in property and also to taking proceedings in the name of the company. In clarifying the position in relation to only some of these powers there may be a danger of casting doubt on the position of the remaining powers. It may be that legislative provision in this area would be desirable in due course, but we think that it would have to follow from a wider and more detailed consideration of the status and powers of non-administrative receivers. For the time being, it is clear that the Land Registry is aware of the decision in *Barrows*¹⁰³ and, although there was considerable support for clarification of the position, this does not appear to be an issue which is causing undue difficulty in practice.

7.97 **Accordingly, we consider that whilst clarification of the ability of a non-administrative receiver to execute deeds in the company's name following the commencement of liquidation of the chargor company is desirable, this would best be dealt with as part of a discrete exercise on the powers of non-administrative receivers generally.**

Summary

7.98 To summarise, we consider that amendments should be made to section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 36A of the Companies Act 1986 to make express provision for execution by an attorney.

7.99 We also consider that it should be clarified that the formalities governing execution by an attorney are those applicable to the attorney rather than the donor, and recommend that this should be done by new provisions confirming that section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 and section 36A of the Companies Act 1985 govern execution by an individual or company respectively, in each case whether as maker or a party to the deed, or on behalf of such person. This should not affect section 74(4) of the Law of Property Act 1925 which will continue to permit an individual officer authorised by a corporate attorney to execute in the name of the donor. It should be made clear that such an officer must himself sign in the presence of a witness who attests the signature where the instrument being executed is to be a deed.

7.100 We consider that there should be a provision that the presumption of due execution in section 74(1) of the Law of Property Act 1925 applies in the case of

¹⁰³ The *Barrows* case is expressly referred to in the Land Registry's Practice Advice Leaflet No 6, *Execution of Deeds* (March 1998), which sets out a form of execution by non-administrative receivers which is accepted by the Land Registry; see paras I3.2.3-I3.2.5 and para I3.3. See also Practice Advice Leaflet No 12, *Administration and Receivership* (May 1997), para E4.

an instrument purporting to have been executed by a corporation aggregate in the name or on behalf of another person (whether or not that person is also a corporation aggregate), but that in the light of the other changes we are proposing, no further clarification is needed on the application of the presumptions of due execution and delivery to execution by attorneys.

- 7.101 We recommend a number of other changes to the statutory provisions governing execution by attorneys, and in particular consider that section 7 of the Powers of Attorney Act 1971 should be amended to make more appropriate provision for execution by an individual attorney on behalf of a corporate donor, and that section 7(3) of the 1971 Act should be repealed. However, whilst we consider that a more general codification of the present rules for execution by attorneys would, in principle, be helpful, we are not convinced that it is essential, or would constitute the best use of resources at this stage.
- 7.102 We consider that Schedule 4 to the Insolvency Act should be amended to clarify that the power of a liquidator to execute a deed or other document in the name and on behalf of the company is quite separate from the power to use the company's seal. However, we do not consider that any changes are needed in relation to the statutory powers of administrative receivers, and whilst we consider that clarification of the powers of non-administrative receivers is desirable we consider that this should be dealt with as a discrete exercise.

PART 8

EXECUTION OF CONTRACTS BY AND ON BEHALF OF CORPORATIONS

- 8.1 In this part we consider the particular provisions which deal with the form in which contracts are made by corporations. As we explained in the consultation paper, at common law the general rule was that a corporation aggregate had to contract under its seal.¹ There were, however, numerous exceptions to this, and the rule has now effectively been abolished by statute.
- 8.2 For companies the position is now set out in section 36 of the Companies Act 1985. This provides two ways for a company to make a contract, namely:
- (a) *by* a company, by writing under its common seal; or
 - (b) *on behalf of* a company, by any person acting under its authority, express or implied.²
- 8.3 We noted that the normal form for written contracts³ (where a deed is not required) is for the company to be the named party to the contract, which is then signed on its behalf. A company may, however, choose to execute the contract under its common seal, and we have set out above⁴ our recommendation that it should be made clear that this would not, in itself, be sufficient to satisfy the face-value requirement thereby making the contract a deed (and a specialty).
- 8.4 For foreign companies, the Foreign Companies (Execution of Documents) Regulations 1994 apply a modified version of section 36.⁵
- 8.5 The position in respect of other corporations is dealt with by the Corporate Bodies Contracts Act 1960. Although expressed in rather different terms to section 36, its effect is to all intents and purposes the same, permitting any contract for which a deed is not required to be made in writing signed on behalf of the corporation by any person with authority, express or implied.⁶ It also states that any written contract may continue to be made by or on behalf of the corporation under seal.⁷ Companies formed and registered under the Companies Act are expressly

¹ *Wright & Son Ltd v Romford Borough Council* [1957] 1 QB 431, the case which prompted the Corporate Bodies' Contracts Act 1960. See also Consultation Paper No 143, para 11.7, n 6.

² The section goes on to state that any formalities required by law in the case of a contract made by an individual are also necessary where the contract is made by a company, unless a contrary intention appears.

³ It is clear from para 8.2(b) above, that the contract may be made orally or in writing.

⁴ See para 2.34 above.

⁵ SI 1994 No 950 (as amended), para 4. See Consultation Paper No 143, para 7.6.

⁶ Section 1(1)(a). Section 1(1)(b), unlike s 36 of the Companies Act 1986, makes separate provision for oral contracts.

⁷ Section 1(4).

excluded from the Corporate Bodies Contracts Act,⁸ but the Act applies to all other corporations “wherever incorporated”.

8.6 We raised for consideration whether the wording of the Corporate Bodies Contracts Act 1960 should be updated and brought into line with section 36. Our provisional view was that it should. Section 1 of the Act would therefore be reworded to state that for any corporation (other than a company) a contract could be made either:

(A) by a corporation, by writing under its seal; or

(B) on behalf of a corporation, by any person acting under its authority, express or implied

In each case, any formalities required by law in the case of a contract made by an individual would also be necessary, unless a contrary intention appeared.

8.7 We also drew attention to the overlap between the Act and the Foreign Companies (Execution of Documents) Regulations 1994, in that both apply to companies incorporated outside Great Britain. Whilst not aware of any particular difficulties in practice, we regarded the overlap as undesirable in principle. Our provisional view was that in order to deal with this overlap, any company or corporation subject to the Regulations should be excluded from section 1 of the Act.

8.8 However, we also canvassed the possibility of a wider reform. Insofar as there was support for a “common formula” for the execution of documents by all corporations aggregate, we suggested there would equally be a case for drawing the rules of section 1 of the 1960 Act and section 36 of the 1985 Act together into a single provision.

8.9 Dealing with the first issue on which we consulted, there was unanimous support from those who commented for our provisional view that section 1 of the Corporate Bodies Act 1960 should be re-worded to follow section 36 of the Companies Act 1985. Although only a few respondents went on to consider the overlap with the 1994 Regulations, those who did so considered that any company or corporation subject to the Regulations should be excluded from section 1 of the 1960 Act.

8.10 There was also considerable support for drawing section 1 of the 1960 Act and section 36 of the 1985 Act together into a single provision. Only one respondent (the Institute of Chartered Secretaries and Administrators) expressly disagreed with this approach. Its view was that section 36 of the Companies Act 1985 should be retained, and that there did not seem to be any logic in requiring corporations not otherwise subject to the Companies Act 1985 to refer to it in this respect.

8.11 Despite the considerable support for changes to the 1960 Act received on consultation, we do not consider, on further reflection, that amendments should be made at this stage. None of the responses indicated that there was any particular problem with the operation of the 1960 Act, and we are reluctant to recommend

⁸ Section 2.

change simply for the sake of consistency in the absence of practical difficulties with the current position.⁹ Were we to be undertaking a more major reform and/or codification of the provisions relating to execution of deeds and documents generally, then it would clearly make sense to update the wording of the Act in the context of those changes. However, we have explained why we consider that more limited recommendations should be made at this stage.¹⁰ **Accordingly we recommend against any amendment to section 1 of the Corporate Bodies' Contracts Act 1960.**

⁹ We have of course recommended changes to s 74(1) to remove inconsistencies with section 36A(6) but we consider that these give rise to significant difficulties, or potential difficulties, in practice.

¹⁰ See paras 1.12-1.15 above and paras 9.6-9.10 below.

PART 9

LEGISLATIVE APPROACH AND OTHER MATTERS

Legislative approach to implementation of recommendations

- 9.1 We have already given some indication of our views on the legislative approach which should be taken to implementing our final recommendations.¹ However, for the sake of completeness we draw together in this part the most important points on this issue.
- 9.2 A number of specific changes to particular provisions have been recommended. There are also a number of other relevant provisions in respect of which we are not recommending any specific changes. Currently the provisions which govern the execution of deeds and documents by and on behalf of corporations are to be found in a number of statutes and other legislative instruments including:

Law of Property Act 1925
Corporate Bodies' Contracts Act 1960
Powers of Attorney Act 1971
Companies Act 1985
Companies (Unregistered Companies) Regulations 1985
Law of Property (Miscellaneous Provisions) Act 1989
Foreign Companies (Execution of Documents) Regulations 1994

- 9.3 Although no specific question was raised on this point in the consultation paper,² several respondents took the opportunity to express the clear view that any amendments should ensure that the relevant provisions are brought together in an easily accessible form. The City of London Law Society, for example, commented:

We strongly support the insertion of any relevant new legislation into a single set of statutory provisions which can easily be referred to and understood by the legal profession.

- 9.4 Another respondent commented that it:

... would like to see a comprehensive codification of the law relating to the execution of deeds and documents. The current system is very complex and confusing. The problem is compounded by the fact that the rules are contained in a number of different statutes and statutory instruments, making it difficult for practitioners to familiarise themselves with the current law. A review such as this presents the opportunity to redress the problems by restating the law in a single piece of legislation.

¹ See, in particular, paras 1.12-1.15 and 4.14-4.16 above.

² Other than in relation to the codification of the methods of execution available to an attorney executing on behalf a donor; see paras 7.61-7.63 above.

- 9.5 This view was not universally held by those who commented, however. The response of the Institute of Chartered Secretaries and Administrators, for example, suggested that it would be against any such approach.³
- 9.6 Our view is that bringing together the relevant provisions into a single body of rules would, in principle, be a desirable and useful exercise. However, we do see some problems with this approach, and we are not persuaded that it would be appropriate to carry out such an exercise at this stage. There are several reasons for this.
- 9.7 First, the uncertainties and anomalies which we identified in the consultation paper can, for the most part, be addressed and resolved by making a number of detailed changes to the current provisions.
- 9.8 Secondly, for the reasons set out in Part 4,⁴ we have rejected the approach of extending a uniform execution provision to corporations generally. In the absence of such a provision (or set of provisions), the justification for a statutory “code” is less compelling. In this context, we also have some sympathy with the view that those who are dealing with companies would expect to find the provisions relating to execution by companies in the Companies Act, rather than some other more general piece of legislation.
- 9.9 Thirdly, we have drawn attention above to the increasing use of electronic communication and to the possibility that this may in due course prompt reconsideration of whether the current distinction between deeds and documents continues to be relevant.⁵ There are already a number of national and international initiatives directed at facilitating its use.⁶ Bringing the current provisions on execution of deeds and documents by and on behalf of corporations into a single “code” would be a considerable exercise in terms of the time and cost involved (including, of course, the use of scarce Parliamentary time). We are reluctant to recommend such an exercise when there is a risk that it may be relatively short lived in the light of technological advances and international developments.
- 9.10 Accordingly, we consider that the changes which have been recommended in this report can and should be implemented without any wider “codification” of the existing provisions. Appendix A contains a draft bill to implement these changes together with explanatory notes. Where further explanation is necessary in relation to particular provisions, this has been given in the text of the report in discussing the relevant recommendation. There are, however, several more general matters in relation to the bill which we mention here for the sake of completeness.

³ See para 8.10 above.

⁴ See paras 4.3-4.19 above.

⁵ See para 1.14 above.

⁶ In particular, the Land Registry’s consideration of the use of electronic conveyancing; the proposal for a European Parliament and Council Directive on a common framework for electronic signatures; the DTI proposals for a secure electronic commerce bill; and the United Nations Commission on International Trade Law (UNCITRAL) Draft Uniform Rules on Electronic Signatures. See para 1.13, nn 2 and 3 above.

Extent

- 9.11 The draft bill extends only to England and Wales. It is not for this Commission to make recommendations for changes to the law of the other jurisdictions of the United Kingdom. However, the current provisions concerning the powers of liquidators (Schedule 4 to the Insolvency Act 1986) extend to both England and Scotland. We can see no reason why our proposed amendments to those provisions⁷ should not also extend to Scotland, although this a matter for consideration by others. Clauses 11(5) and (6) include provisions in square brackets which are intended not as a recommendation (even in tentative form) but merely as a reminder that the question of application to Scotland may need to be considered by the appropriate authorities.

Commencement

- 9.12 The draft bill provides that the changes to be made shall not apply in relation to any instrument executed before those changes come into force.⁸

Consequential amendments

- 9.13 We have indicated above⁹ that we consider that the changes made to section 36A (including the addition of new section 36AA) should, where relevant, be reflected in the regulations which apply these provisions to foreign companies.¹⁰ The same point can be made in relation to unregistered companies.¹¹ We do not include in this report draft regulations to make these changes. However, we consider that minor changes are needed to the Companies Acts 1985 and 1989 to enable these changes to be fully reflected in any future regulations to be made in relation to foreign companies and unregistered companies. These consequential amendments are included in paragraphs 3(4) and 5 of Schedule 1 to the draft bill.

⁷ See para 7.74 above.

⁸ See clause 11(4).

⁹ See para 4.47.

¹⁰ See the Foreign Companies (Execution of Documents) Regulations 1994, SI 1994 No 950.

¹¹ See para 3.4 above.

PART 10

SUMMARY OF RECOMMENDATIONS

The distinction between deeds and other documents

The face value requirement

- 10.1 We recommend against making the face-value requirement more specific. **(para 2.28)**

Relationship between deeds and contracts under seal

- 10.2 We recommend that there should be a statutory provision making it clear that the face-value requirement is not satisfied merely because an instrument is executed under seal. **(para 2.34; clause 7)**

Specialties

- 10.3 We recommend that there should be a statutory provision that except as otherwise provided by statute, an instrument, or an obligation created or confirmed in an instrument, shall be a specialty only if the instrument is a deed. **(para 2.44; clause 9)**

Defective deeds

- 10.4 We recommend against a rule of law that an instrument which fails to take effect as a deed nonetheless automatically has effect as a contract or other instrument under hand. **(para 2.49)**

Consistency of wording between Companies Act and Law of Property (Miscellaneous Provisions) Act 1989

- 10.5 We recommend that the discrepancy in the description of the face-value requirement between section 36A of the Companies Act 1985 and section 1(2)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 should be resolved by removing the reference to the face-value requirement from section 36A. **(para 2.56; clauses 3, 10(2) & Schedule 2)**

Execution by companies

Meaning of execution

- 10.6 We recommend that section 36A of the Companies Act 1985 should be amended to provide that execution “as a deed” for the purposes of section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 is by execution *and* delivery. **(para 3.12; clause 4)**
- 10.7 We recommend that a similar provision should be included in section 74 of the Law of Property Act 1925 in relation to corporations generally. **(para 3.13; clause 2)**

The dual regime

- 10.8 We recommend that the present “dual system” should be retained, so that companies may continue to execute deeds either under the common seal or by the signature of relevant persons. **(para 3.17)**

Execution without a seal

- 10.9 We recommend that there should be no relaxation in the requirements for execution by a company without using a seal under section 36A(4) of the Companies Act 1985. **(para 3.29)**
- 10.10 We recommend that there should be a provision to make it clear that a director or secretary of more than one company must sign separately for each company which is a party to the deed. **(para 3.33; clause 10(1) & para 3(2) of Schedule 1)**

Execution under seal

- 10.11 We do not recommend any change to section 36A(2) of the Companies Act 1985 (execution by affixing the common seal). **(para 3.39)**

Corporate officers

- 10.12 We recommend that section 36A of the Companies Act 1985 and section 74 of the Law of Property Act 1925 should be amended to provide that a director or secretary of a company which is itself a company or corporation may “sign” for the purposes of section 36A(4) and (6), or “attest” for the purposes of section 74(1), by the signature of a person authorised to do so on its behalf. **(para 3.47; clause 10(1), paras 1(2) & 3(3) of Schedule 1)**

Facsimile seals and signatures

- 10.13 We recommend that the requirement in section 350(1) of the Companies Act 1985 that the name of a company must be engraved on its seal should not be abolished. **(para 3.53)**
- 10.14 We recommend against a statutory provision for a company to have one or more duplicate seals. **(para 3.57)**
- 10.15 We recommend that there should be no relaxation in the requirement for personal signature in the case of companies. **(para 3.63)**
- 10.16 We do not consider that there should be a relaxation in the requirement for execution of particular classes of documents. **(para 3.68)**

Execution by other corporations

Corporations aggregate incorporated in England and Wales

- 10.17 We do not recommend the introduction of a formula for execution by all corporations aggregate. **(para 4.19)**

Corporations sole

- 10.18 We recommend against having a statutory provision for execution by all corporations sole. **(para 4.28)**

Foreign corporations

- 10.19 We recommend against any changes to the Foreign Companies (Execution of Documents) Regulations 1994 other than to reflect (where relevant) the changes to be made to section 36A of the Companies Act 1985 in relation to English companies. **(para 4.48)**

Due execution

Is a presumption of due execution still required?

- 10.20 We recommend that the presumptions of due execution in favour of a purchaser in good faith contained in section 36A(6) of the Companies Act 1985 and section 74(1) of the Law of Property Act 1925 should be retained. **(para 5.13)**

Inconsistencies between section 74(1) and section 36A(6)

- 10.21 We recommend that section 74(1) of the Law of Property Act 1925 should be amended as follows:

(i) so as to include the seal being affixed in the presence of and attested by “two members of the board of directors, council or other governing body”;

(ii) so that references to “purported” follow more closely the wording of section 36A(6) of the Companies Act 1985;

(iii) so as to refer to “instrument” instead of “deed”; **(para 5.33; clause 1)**

- 10.22 We recommend against amending sections 36A(4) and (6) of the Companies Act 1985 so as to include reference to a deputy or assistant secretary, and recommend against any change to the definition of “purchaser” in either section 36A(6) or section 74(1) of the Law of Property Act 1925. **(para 5.33)**

Forgery and fraud

- 10.23 We do not recommend any amendment to clarify the relationship between the deeming of due execution in sections 36A(6) of the Companies Act 1985 and 74(1) of the Law of Property Act 1925 and the rules governing forged documents. **(para 5.38)**

Delivery

Should the concept of delivery be retained

- 10.24 We recommend that the concept of delivery should be retained. **(para 6.22)**

An alternative presumption of delivery upon dating

- 10.25 We do not recommend that the current statutory presumptions of delivery should be replaced by a presumption of delivery based on the date which is inserted in the deed. **(para 6.30)**

Rebuttable presumption of delivery on execution (section 36A(5))

- 10.26 We recommend that the statutory rebuttable presumption of delivery upon execution contained in section 36A(5) of the Companies Act 1985 should be retained.¹ **(para 6.36)**

Irrebuttable presumption of delivery on execution (section 36A(6))

- 10.27 We recommend that the irrebuttable presumption of delivery contained in section 36A(6) of the Companies Act 1985 should be repealed. **(para 6.43; clause 3, 10(2) & Schedule 2)**

Other proposals in respect of delivery

- 10.28 We recommend that the wording of the rebuttable presumption of delivery contained in section 36A(5) of the Companies Act 1985 should be changed so that it no longer refers to the fact that an instrument “has *effect*, upon delivery, as a deed”.² **(para 6.47; clauses 4, 10(2) & Schedule 2)**
- 10.29 We recommend that the presumption of authority to deliver on behalf of the maker of a deed contained in section 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 should be extended to transactions other than those involving the creation or disposal of an interest in land. **(para 6.50; clause 8, 10(2) & Schedule 2)**
- 10.30 We recommend that there should be a new statutory provision extending the rebuttable presumption of delivery contained in section 36A(5) to all corporations aggregate. **(para 6.54; clause 2)**

Execution of Deeds on behalf of corporations

Execution by an attorney

- 10.31 We recommend against any amendment to section 38 of the Companies Act 1985. **(para 7.11)**
- 10.32 We recommend that:
- (i) section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 should be amended so as to include reference to execution *by* a person who is authorised to execute in the name or on behalf of the maker or party to the deed; **(para 7.44; clause 5(4))**

¹ Our draft bill in fact repeals s 36A(5) and redrafts the presumption in a new s 36AA(2); see clause 4 and Sched 2.

² As indicated in n 1 above, our draft bill repeals s 36A(5) and replaces it with a new s 36AA(2).

(ii) there should be statutory provisions that section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 and section 36A of the Companies Act 1985 apply in the case of an instrument executed by an individual and company respectively in the name or on behalf of another person whether or not that person is also an individual or company (as the case may be); **(para 7.44; clauses 5(5) & 5(2))**

(iii) section 1(4) of the Law of Property (Miscellaneous Provisions) Act 1989 should be amended to provide expressly that “sign” includes an individual signing the name of the person or party on whose behalf he executes the instrument; **(para 7.44; clause 10(1) & para 4(2) of Schedule 1)**

(iv) section 74(3) of the Law of Property Act 1925 should be amended so as to provide that the person who witnesses the signature of an individual who executes a conveyance in accordance with that section must attest the individual’s signature; **(para 7.44; clause 10(1) & para 1(3) of Schedule 1)**

(v) section 74(4) of the Law of Property Act 1925 should be amended to provide that where an instrument being executed by an appointed officer in accordance with that section is to be a deed, it must be signed in the presence of a witness who attests. **(para 7.44; clause 10(1) & para 1(4) of Schedule 1)**

10.33 We recommend that there should be a provision that section 74(1) of the Law of Property Act 1925 applies in the case of an instrument purporting to have been executed by a corporation aggregate in the name or on behalf of another person whether or not that person is also a corporation aggregate. **(para 7.51; clause 5(1))**

10.34 We recommend that section 7 of the Powers of Attorney Act should be amended to make more appropriate provision for execution by an individual attorney on behalf of a corporate donor. **(para 7.56; clause 10(1) & para 2 of Schedule 1)**

10.35 We recommend that section 7(3) of the Powers of Attorney Act 1971 should be repealed. **(para 7.60; clause 10, para 2(4) of Schedule 1 & Schedule 2)**

10.36 We recommend against codifying the present rules for execution by attorney. **(para 7.63)**

Execution by liquidators etc

10.37 We recommend so far as English law is concerned³ that Schedule 4 to the Insolvency Act 1986 should be amended to provide that the powers of a liquidator exercisable without sanction in any winding up include:

(i) the power to do all acts and to execute in the name and on behalf of the company any deed receipt or document; and

³ Schedule 4 to the Insolvency Act 1986 applies equally to Scotland. We are not in a position to recommend changes to the law applying to Scotland. But see para 9.11 above.

(ii) as a separate power, the power to use the company's seal. **(para 7.74; clause 6)**

10.38 We recommend against a provision to clarify that the powers of an administrative receiver are statutory (although subject to modification in the debenture or appointment). **(para 7.83)**

10.39 We consider that whilst clarification of the ability of a non-administrative receiver to execute deeds in the company's name following the commencement of liquidation of the chargor company is desirable, this would best be dealt with as part of a discrete exercise on the powers of non-administrative receivers generally **(para 7.97)**

Execution of contracts by and on behalf of corporations

10.40 We recommend against any amendment to section 1 of the Corporate Bodies' Contracts Act 1960. **(para 8.11)**

(Signed) MARY ARDEN, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
24 June 1998

APPENDIX B

CURRENT PROVISIONS SHOWING PROPOSED AMENDMENTS

Law of Property Act 1925, section 74

Powers of Attorney Act 1971, section 7

Companies Act 1985, section 36A

Insolvency Act 1986, Schedule 4, Part III, para 7

Law of Property (Miscellaneous Provisions Act) 1989, section 1

THE LAW OF PROPERTY ACT 1925

Execution of instruments by or on behalf of corporations

74. —(1) In favour of a purchaser an instrument shall be deemed to have been duly executed by a corporation aggregate if a seal purporting to be the corporation's seal purports to be affixed to the instrument in the presence of and attested by—

(a) two members of the board of directors, council or other governing body of the corporation, or

(b) one such member and the clerk, secretary or other permanent officer of the corporation or his deputy.

(1A) Subsection (1) of this section applies in the case of an instrument purporting to have been executed by a corporation aggregate in the name or on behalf of another person whether or not that person is also a corporation aggregate.

(1B) For the purposes of subsection (1) of this section, a seal purports to be affixed in the presence of and attested by an officer of the corporation, in the case of an officer which is not an individual, if it is affixed in the presence of and attested by an individual authorised by the officer to attest on its behalf.

(2) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument which is not a deed in relation to any matter within the powers of the corporation.

(3) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, he may as attorney execute the conveyance by signing the name of the corporation in the presence of at least one witness *who attests the signature*, and such execution shall take effect and be valid in like manner as if the corporation had executed the conveyance.

(4) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the *instrument by signing it* in the name of such other person *or, if the instrument is to be a deed, by so signing it in the presence of a witness who attests the signature*, and where an instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised.

(5) The foregoing provisions of this section apply to transactions wherever effected, but only to deeds and instruments executed after the commencement of this Act, except that, in the case of powers or appointments of an agent or officer, they apply whether the power was conferred or the appointment was made before or after the commencement of this Act or by this Act.

(6) Notwithstanding anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs thereof, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.

Execution of instrument as a deed

74A. —(1) *An instrument is validly executed by a corporation aggregate as a deed for the purposes of section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989, if and only if—*

(a) it is duly executed by the corporation, and

(b) it is delivered as a deed.

(2) An instrument shall be presumed to be delivered for the purposes of subsection (1)(b) of this section upon its being executed, unless a contrary intention is proved.

THE POWERS OF ATTORNEY ACT 1971

Execution of instruments etc by donee of power of attorney

7. —(1) If the donee of a power of attorney is an individual, he may, if he thinks fit—

(a) execute any instrument with his own signature, and

(b) do any other thing in his own name,

by the authority of the donor of the power; and any *instrument executed or thing done in that manner shall, subject to subsection (1A) of this section, be as effective as if executed by the donee in any manner which would constitute due execution of that instrument by the donor or, as the case may be, as if done by the donee in the name of the donor.*

(1A) Where an instrument is executed by the donee as a deed, it shall be as effective as if executed by the donee in a manner which would constitute due execution of it as a deed by the donor only if it is executed in accordance with section 1(3)(a) of the Law of Property (Miscellaneous Provisions) Act 1989.

(2) For the avoidance of doubt it is hereby declared that an instrument to which subsection (3) of section 74 of the Law of Property Act 1925 applies may be executed either as provided in that subsection or as provided in this section.

....

(4) This section applies whenever the power of attorney was created.

THE COMPANIES ACT 1985

Execution of documents: England and Wales.

36A. —(1) Under the law of England and Wales the following provisions have effect with respect to the execution of documents by a company.

(2) A document is executed by a company by the affixing of its common seal.

(3) A company need not have a common seal, however, and the following subsections apply whether it does or not.

(4) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company.

(4A) Where a document is to be signed by a person as a director or the secretary of more than one company, it shall not be taken to be duly signed by that person for the purposes of subsection (4) unless the person signs it separately in each capacity.

....

(6) In favour of a purchaser a document shall be deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company ...

A “purchaser” means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

(7) This section applies in the case of a document which is, or purports to be, executed by a company in the name or on behalf of another person whether or not that person is also a company.

(8) For the purposes of this section, a document is (or purports to be) signed, in relation to a director or the secretary of a company which is not an individual, if it is (or purports to be) signed by an individual authorised by the director or secretary to sign on its behalf.

Execution of deeds: England and Wales.

36AA. —(1) A document is validly executed by a company as a deed for the purposes of section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989, if and only if—

(a) it is duly executed by the company, and

(b) it is delivered as a deed.

(2) A document shall be presumed to be delivered for the purposes of subsection (1)(b) upon its being executed, unless a contrary intention is proved.

THE INSOLVENCY ACT 1986

Schedule 4 — Powers of Liquidator in a Winding up

Part III—Powers Exercisable Without Sanction in any Winding Up

7. Power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents ...

7A. *Power to use the company's seal.*

THE LAW OF PROPERTY (MISCELLANEOUS PROVISIONS) ACT 1989

Deeds and their execution

1. —(1) Any rule of law which—

(a) restricts the substances on which a deed may be written;

(b) requires a seal for the valid execution of an instrument as a deed by an individual; or

(c) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed,

is abolished.

(2) An instrument shall not be a deed unless—

(a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and

(b) it is validly executed as a deed—

(i) *by that person or a person authorised to execute it in the name or on behalf of that person, or*

(ii) by one or more of those parties or a person authorised to execute it in the name or on behalf of one or more of those parties.

(2A) For the purposes of subsection (2) (a) above, an instrument shall not be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal.

(3) An instrument is validly executed as a deed by an individual if, and only if—

(a) it is signed—

(i) by him in the presence of a witness who attests the signature; or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is delivered as a deed ...

(4) In subsections (2) and (3) above “sign”, in relation to an instrument, includes—

(a) an individual signing the name of the person or party on whose behalf he executes the instrument; and

(b) making one's mark on the instrument,

and “signature” is to be construed accordingly.

(4A) Subsection (3) above applies in the case of an instrument executed by an individual in the name or on behalf of another person whether or not that person is also an individual.

(5) Where a solicitor, duly certificated notary public or licensed conveyancer, or an agent or employee of a solicitor, duly certificated notary public or licensed conveyancer, in the course of or in connection with a transaction ... , purports to deliver an instrument as a deed on behalf of a party to the instrument, it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument.

(6) In subsection (5) above—

“purchaser” has the same meaning as in the Law of Property Act 1925;

“duly certificated notary public” has the same meaning as it has in the Solicitors Act 1974 by virtue of section 87 of that Act.

....

(7) Where an instrument under seal that constitutes a deed is required for the purposes of an Act passed before this section comes into force, this section shall have effect as to signing, sealing or delivery of an instrument by an individual in place of any provision of that Act as to signing, sealing or delivery.

(8) The enactments mentioned in Schedule 1 to this Act (which in consequence of this section require amendments other than those provided by subsection (7) above) shall have effect with the amendments specified in that Schedule.

(9) Nothing in subsection (1)(b), (2), (3), (7) and (8) above applies in relation to deeds required or authorised to be made under—

(a) the seal of the county palatine of Lancaster;

(b) the seal of the Duchy of Lancaster; or

(c) the seal of the Duchy of Cornwall.

(10) The references in this section to the execution of a deed by an individual do not include execution by a corporation sole and the reference in subsection (7) above to signing, sealing or delivery by an individual does not include signing, sealing or delivery by such a corporation.

(11) Nothing in this section applies in relation to instruments delivered as deeds before this section comes into force.

APPENDIX C

EXTRACTS FROM RELEVANT LEGISLATION

Law of Property Act 1925, section 74

Corporate Bodies' Contracts Act 1960, section 1

Powers of Attorney Act 1971, sections 1 and 7

Companies Act 1985, sections 36, 36A and 38

Insolvency Act 1986, sections 42, 165, 167; Schedule 1, paras 8, 9, 23; and Schedule 4, Part III, paras 7, 13

Law of Property (Miscellaneous Provisions Act) 1989, section 1

The Foreign Companies (Execution of Documents) Regulations 1994, regulations 2, 3, 4 and 5

THE LAW OF PROPERTY ACT 1925

Execution of instruments by or on behalf of corporations

74.—(1) In favour of a purchaser a deed shall be deemed to have been duly executed by a corporation aggregate if its seal be affixed thereto in the presence of and attested by its clerk, secretary or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation, and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices as aforesaid, the deed shall be deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly.

(2) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument which is not a deed in relation to any matter within the powers of the corporation.

(3) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, he may as attorney execute the conveyance by signing the name of the corporation in the presence of at least one witness, and such execution shall take effect and be valid in like manner as if the corporation had executed the conveyance.

(4) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the deed or other

instrument in the name of such other person; and where an instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised.

(5) The foregoing provisions of this section apply to transactions wherever effected, but only to deeds and instruments executed after the commencement of this Act, except that, in the case of powers or appointments of an agent or officer, they apply whether the power was conferred or the appointment was made before or after the commencement of this Act or by this Act.

(6) Notwithstanding anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs thereof, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.

THE CORPORATE BODIES' CONTRACTS ACT 1960

Cases where contracts need not be under seal

1.—(1) Contracts may be made on behalf of any body corporate, wherever incorporated, as follows:—

(a) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the body corporate in writing signed by any person acting under its authority, express or implied, and

(b) a contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the body corporate by any person acting under its authority, express or implied.

(2) A contract made according to this section shall be effectual in law, and shall bind the body corporate and its successors and all other parties thereto.

(3) A contract made according to this section may be varied or discharged in the same manner in which it is authorised by this section to be made.

(4) Nothing in this section shall be taken as preventing a contract under seal from being made by or on behalf of a body corporate.

(5) This section shall not apply to the making, variation or discharge of a contract before the commencement of this Act but shall apply whether the body corporate gave its authority before or after the commencement of this Act.

THE POWERS OF ATTORNEY ACT 1971

Execution of powers of attorney

1.—(1) An instrument creating a power of attorney shall be executed as a deed by the donor of the power.

....

(3) This section is without prejudice to any requirement in, or having effect under, any other Act as to the witnessing of instruments creating powers of attorney and does not affect the rules relating to the execution of instruments by bodies corporate.

....

Execution of instruments, etc by donee of power of attorney

7.—(1) If the donee of a power of attorney is an individual, he may, if he thinks fit—

- (a) execute any instrument with his own signature, and
- (b) do any other thing in his own name,

by the authority of the donor of the power; and any document executed or thing done in that manner shall be as effective as if executed or done by the donee with the signature or, as the case may be, in the name, of the donor of the power.

(2) For the avoidance of doubt it is hereby declared that an instrument to which subsection (3) of section 74 of the Law of Property Act 1925 applies may be executed either as provided in that subsection or as provided in this section.

(3) This section is without prejudice to any statutory direction requiring an instrument to be executed in the name of an estate owner within the meaning of the said Act of 1925.

(4) This section applies whenever the power of attorney was created.

THE COMPANIES ACT 1985

Company contracts: England and Wales

36.— Under the law of England and Wales a contract may be made—

- (a) by a company, by writing under its common seal, or
- (b) on behalf of a company, by any person acting under its authority, express or implied;

and any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of a company.

Execution of documents: England and Wales

36A.—(1) Under the law of England and Wales the following provisions have effect with respect to the execution of documents by a company.

(2) A document is executed by a company by the affixing of its common seal.

(3) A company need not have a common seal, however, and the following subsections apply whether it does or not.

(4) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company.

(5) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed.

(6) In favour of a purchaser a document shall be deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company, and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, to have been delivered upon its being executed.

A “purchaser” means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

....

Execution of deeds abroad

38.—(1) A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place elsewhere than in the United Kingdom.

(2) A deed executed by such an attorney on behalf of the company has the same effect as if it were executed under the company's common seal.

(3) This section does not extend to Scotland.

THE INSOLVENCY ACT 1986

Administrative Receivers: General

General powers

42.—(1) The powers conferred on the administrative receiver of a company by the debentures by virtue of which he was appointed are deemed to include (except in so far as they are inconsistent with any of the provisions of those debentures) the powers specified in Schedule 1 to this Act.

(2) In the application of Schedule 1 to the administrative receiver of a company—

(a) the words “he” and “him” refer to the administrative receiver, and

(b) references to the property of the company are to the property of which he is or, but for the appointment of some other person as the receiver of part of the company's property, would be the receiver or manager.

(3) A person dealing with the administrative receiver in good faith and for value is not concerned to inquire whether the receiver is acting within his powers.

....

Liquidator's Powers and Duties

Voluntary winding up

165.—(2) The liquidator may—

(a) in the case of a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, and

(b) in the case of a creditors' voluntary winding up, with the sanction of the court or the liquidation committee (or, if there is no such committee, a meeting of the company's creditors),

exercise any of the powers specified in Part I of Schedule 4 to this Act (payment of debts, compromise of claims, etc).

....

Winding up by the court

167.— (1) Where a company is being wound up by the court, the liquidator may—

(a) with the sanction of the court or the liquidation committee, exercise any of the powers specified in Parts I and II of Schedule 4 to this Act (payment of debts; compromise of claims, etc; institution and defence of proceedings; carrying on of the business of the company), and

(b) with or without that sanction, exercise any of the general powers specified in Part III of that Schedule.

....

Schedule 1 - Powers of Administrator or Administrative Receiver

8. Power to use the company's seal.

9. Power to do all acts and to execute in the name and on behalf of the company any deed, receipt or other document.

....

23. Power to do all other things incidental to the exercise of the foregoing powers.

....

Schedule 4 — Powers of Liquidator in a Winding up

Part III—Powers Exercisable Without Sanction in any Winding Up

7. Power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company's seal.

....

13. Power to do all such other things as may be necessary for winding up the company's affairs and distributing its assets.

THE LAW OF PROPERTY (MISCELLANEOUS PROVISIONS) ACT 1989

Deeds and their execution

1.—(1) Any rule of law which—

(a) restricts the substances on which a deed may be written;

(b) requires a seal for the valid execution of an instrument as a deed by an individual; or

(c) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed,

is abolished.

(2) An instrument shall not be a deed unless—

(a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and

(b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties.

(3) An instrument is validly executed as a deed by an individual if, and only if—

(a) it is signed—

(i) by him in the presence of a witness who attests the signature; or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is delivered as a deed by him or a person authorised to do so on his behalf.

(4) In subsections (2) and (3) above “sign”, in relation to an instrument, includes making one's mark on the instrument and “signature” is to be construed accordingly.

(5) Where a solicitor, duly certificated notary public or licensed conveyancer, or an agent or employee of a solicitor, duly certificated notary public or licensed conveyancer, in the course of or in connection with a transaction involving the disposition or creation of an interest in land, purports to deliver an instrument as a deed on behalf of a party to the instrument, it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument.

(6) In subsection (5) above—

“disposition” and “purchaser” have the same meanings as in the Law of Property Act 1925; and

“duly certificated notary public” has the same meaning as it has in the Solicitors Act 1974 by virtue of section 87(1) of that Act;

“interest in land” means any estate interest or charge in or over land or in or over the proceeds of sale of land.

(7) Where an instrument under seal that constitutes a deed is required for the purposes of an Act passed before this section comes into force, this section shall have effect as to signing, sealing or delivery of an instrument by an individual in place of any provision of that Act as to signing, sealing or delivery.

(8) The enactments mentioned in Schedule 1 to this Act (which in consequence of this section require amendments other than those provided by subsection (7) above) shall have effect with the amendments specified in that Schedule.

(9) Nothing in subsection (1)(b), (2), (3), (7) or (8) above applies in relation to deeds required or authorised to be made under—

(a) the seal of the county palatine of Lancaster;

(b) the seal of the Duchy of Lancaster; or

(c) the seal of the Duchy of Cornwall.

(10) The references in this section to the execution of a deed by an individual do not include execution by a corporation sole and the reference in subsection (7) above to signing, sealing or delivery by an individual does not include signing, sealing or delivery by such a corporation.

(11) Nothing in this section applies in relation to instruments delivered as deeds before this section comes into force.

THE FOREIGN COMPANIES (EXECUTION OF DOCUMENTS) REGULATIONS 1994 (SI 1994 NO 950)

Application of sections 36 to 36C Companies Act 1985

2. Sections 36 to 36C of the Companies Act 1985 shall apply to companies incorporated outside Great Britain with the adaptations and modifications set out in regulations 3 to 6 below.

3. References in the said sections 36 to 36C to a company shall be construed as references to a company incorporated outside Great Britain.

Adaptation of section 36

4. — (1) Section 36 shall apply as if—

(a) after the words “common seal,” in paragraph (a) there were inserted— “or in any manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company,”, and

(b) for paragraph (b) there were substituted—

“(b) on behalf of a company, by any person who, in accordance with the laws of the territory in which the company is incorporated, is acting under the authority (express or implied) of that company;”.

Adaptation of section 36A

5. Section 36A shall apply as if—

(a) at the end of subsection (2) there were inserted—

“, or if it is executed in any manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company.”,

(b) for subsection (4) there were substituted—

“(4) A document which—

(a) is signed by a person or persons who, in accordance with the laws of the territory in which the company is incorporated, is or are acting under the authority (express or implied) of that company, and

(b) is expressed (in whatever form of words) to be executed by the company, has the same effect in relation to that company as it would have in relation to a company incorporated in England and Wales if executed under the common seal of a company so incorporated.”, and

(c) in subsection (6) for the words from a “director” to “directors of the company” there were substituted “ a person or persons who, in accordance with the laws of the territory in which the company is incorporated, is or are acting under the authority (express or implied) of that company”.

APPENDIX D

LIST OF RESPONDENTS

Barristers

Christopher Brougham QC and Lloyd Tamlyn

Benjamin Levy QC

Solicitors

Addleshaw Booth & Co

Antony Thomlinson (Frere Cholmeley Bischoff)

Bond Pearce

Clifford Chance

Devonshires

Paul Ellington (McKenna & Co)

Eversheds

Frere Cholmeley Bischoff (Craig Eadie)

Farrer & Co

Peter Graham (Norton Rose)

Mr H W Higginson

Lovell White Durrant

Malcolm Lynch

Pinsent Curtis Eversheds

Mark Dakeyne (Wragge & Co)

Stephenson Harwood

Titmuss Sainer Dechert

Academic Lawyers

Professor J H Baker (St Catharines College, Cambridge)

David N Clarke (University of Bristol)

Professor P H Kenny (University of Northumbria)

Professor L Sealy (Gonville and Caius College, Cambridge)

Professional Bodies

Association of District Councils

Birmingham Law Society

City of London Law Society

City of Westminster Law Society (Company Law Committee)

Council of Mortgage Lenders

Devon & Exeter Incorporated Law Society

Ecclesiastical Law Association

General Council of the Bar

Holborn Law Society

Institute of Chartered Secretaries & Administrators

Institute of Legal Conveyancers

Institute of Legal Executives

Non-Administrative Receivers Association

Nottinghamshire Law Society

Society of Local Council Clerks

Society of Practitioners of Insolvency

Society of Public Notaries
The Law Society (Company Law Committee)
The Co-operative Union Limited

Company/Commercial Organisations

Finance & Leasing Association
Shell International Ltd

Financial Bodies

Abbey National plc
Barclays plc
London Stock Exchange
Lloyds TSB Group plc
NatWest Group

Royal connection

Crown Estate
Duchy of Cornwall
Duchy of Lancaster

Government Departments

Department of Trade and Industry
HM Land Registry
Lord Chancellor's Department
Scottish Law Commission
Scottish Office
The Insolvency Service