

Building Management Workshop 2012

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The Manager appointed under the DMC had constructive if not actual knowledge of the provisions of the DMC and that the right to enjoy the Common Parts had been reserved to all the co-owners.

*The Incorporated Owners of Million Fortune
Industrial Centre v Jikan Development Ltd and
Another [2001] 1 HKLRD 463*

The preamble to the Building Management Ordinance

- To facilitate the incorporation of owners of flats in buildings or groups of buildings;
- To provide for the management of buildings or groups of buildings and for matters incidental thereto or connected therewith

The provisions of the Deed of Mutual Covenant and the Ordinance are usually aimed at:

- facilitating the management of the building by reducing conflicts among co-owners on the one hand and
- preventing abuse by the manager and the majority owner on the other.

Grande Properties Management Ltd v. Sun Wah Ornament Manufactory Ltd
[2006] 3 HKLRD 473

Inter-relation of DMCs and BMO

- The objective of the BMO is to supplement the DMC.
- Unless the BMO specifically provides otherwise, even if there is any inconsistency between BMO and DMC, the DMC will prevail. See *Pearl Island Hotel Ltd. v. Li Ka-yu* [1988] 2 HKLR 87.

A Guide on Building Management Ordinance (Cap.344)

- Formation of an Owners' Corporation;
- Meetings and Procedure of an Owners' Corporation;
- Powers and Duties of a Management Committee;
- Preparation of Budget and Maintenance of Accounts;
- Procurement Arrangements for Owners' Corporation;
- Duties of Manager

The Building Management (Amendment) Ordinance 2007

Except for the provisions relating to mandatory procurement of third party risks insurance by owners' corporations (OCs), it has come into force since August 1, 2007

The Building Management (Third Party Risks Insurance) Regulation has come into effect on January 1, 2011 whereby a policy is required to provide insurance of not less than \$10 million in respect of any prescribed liability that may be incurred in respect of the death, or the bodily injury, or both, arising out of one event.

S.16. Rights etc. of owners to be exercised etc. by corporation

- Where an OC has been formed, the rights, powers, privileges and duties of the owners in relation to the common parts of the building shall be exercised and performed by the OC.
- The liabilities of the owners in relation to the common parts of the building shall be enforceable against, the corporation to the exclusion of the owners.
- Accordingly-
 - (a) any notice, order or other document which relates to any of the common parts of the building may be served upon the corporation at its registered office; and
 - (b) any proceedings in the tribunal in respect of any of the common parts of the building may be brought and pursued by or against the corporation.

“It is plain that a major purpose of the incorporation of owners of flats in buildings at which the Ordinance expressly aims to facilitate is to provide convenience in suit and to avoid the problems that might arise from the multiplicity of parties and suits involving such owners which may be numerous. S 16 is specifically designed for such purpose, so that after incorporation under the Ordinance, **the rights, powers and privileges of the owners in relation to the common parts of the building** shall be exercised and the duties of the owners in relation thereto shall be performed by the corporation to the exclusion of the owners, and that the liabilities of the owners in relation thereto shall be enforceable against the corporation to the exclusion of the owners. The corporation is intended to be the sole representative of all the owners regarding matters within the ambit of s 16. ”

Hang Yick Properties Management Limited v The Incorporated Owners of Tuen Mun Kar Wah Building, [2005] 2 HKLRD 499

Notices of creation of easements etc.
under s. 21 of Railways Ordinance

Notice of creation of an easement or right is to
be -

(a) served on every person known to the
Secretary as having any estate, right, share
or interest in the land mentioned in the
order

Locus Standi to bring proceedings

- In respect of the common parts of a building, an individual owner cannot bring proceedings against another individual owner.

Chau Mei Lee Fragrance & Anor. v. Ng Yee Tim,
CACV 97 of 1996, reported as [1996] 4 HKC 46;

See Wah Fan v. The Incorporated Owners of Ki Tat Garden (Phase I),
CACV 389 of 2002, reported as [2003] 3 HKLRD 1,

IO should be joined as party to court proceedings

- In *Wong Wai Chun v. Shing Sau Wan*, CACV 173 of 2004, the applicant claimed the respondent, as chairman of the management committee, had in breach of section 18(2)(aa) of the *BMO* and without the approval of the corporation by resolution passed at a general meeting of owners paid or caused to be paid to herself out of the funds of the corporation as allowances the total sum of HK\$19,110.00.
- The nature of the relief sought by the applicant required the corporation to be a party to the proceedings.

*Fidelity Realty Limited v. Management Committee of
The Incorporated Owners of Hong Chiang Building,*
LDBM 241 of 2004 (reported as [2005] 1 HKLRD 309)

- This application is fought between members of the IO on the validity of the election of the Respondents to the MC of the IO.
- They should thus sue and be sued in their own names, instead of the IO.
- It would likewise be wrong to sue the MC as a representative of the IO.
- It is also wrong to sue a management committee as a respondent as it is not a legal entity.
- The IO should only be joined as a nominal Respondent so that it would be bound by the order to be made.

S.14 Powers of corporation generally

- (1) Subject to this Ordinance, at a meeting of a corporation any resolution may be passed with respect to the control, management and administration of the common parts or the renovation, improvement or decoration of those parts and any such resolution shall be binding on the management committee and all the owners.

Control, Management and Administration of the Common Parts

The clause should include reasonable
acts necessary to protect the interests
of the owners in the common parts

*(Yeung Chung Lau v. Incorporated Owners of
Century Industrial Centre [2007] 4 HKLRD 25)*

S. 18 Duties and Powers of Corporation

(1)(c) The corporation shall do all things reasonably necessary for the enforcement of the obligations contained in the deed of mutual covenant (if any) for the control, management and administration of the building.

(2)(g) A corporation may, in its discretion, act on behalf of the owners in respect of any other matter in which the owners have a common interest.

*Incorporated Owners of Block F1 – F7 Pearl Island
Holiday Flats v. Incorporated Owners of Pearl
Island Garden [1997] 4 HKC 424*

- The Court of Appeal held the incorporated owners could take action to enforce a right of way over a road which was not part of the common parts, because the owners had a common interest in respect of the right of way.

*Incorporated Owners of Mirador Mansion v.
Tecowin Development Limited* HCA 4069 of 1996

- The owners have a common interest over the user of the Roof (which was though assigned to the exclusive use of an owner), particularly, as a means of fire escape.

“The trial judge had plainly erred in this regard. Section 18(2) deals with management matters such as the employment and remuneration of staff, the insurance of the building, acquisition of property for use in connection with the common areas, etc. It does not confer power where none existed. *If* a right of action against an owner, in relation to the common parts, was in law exercisable by the corporation in terms of s.16, then s.18(2)(g) empowers the corporation to engage solicitors to institute proceedings. But it begs the very question.”

Jikan Development Ltd & Anor v The Incorporated Owners of Million Future Industrial Centre (2003) 6 HKCFAR 446

Whether the Incorporated Owners have the power to sell the property which they own?

- Incorporated Owners are “owners” in respect of undivided shares in the Building for the purposes of the BMO.
- Unless there is some express provision to the contrary, the power to sell one’s property must be implicit in the power to own.
- The proposed sale by the Incorporated Owners was not *ultra vires* their duty to manage the Building on behalf of individual owners.

The Incorporated Owners of Lee Hang Industrial Building v. Billion Development & Project Management Limited,
HCMP 2243 of 2007

Whether the Incorporated Owners have the power to invest the reserve of \$3M in bonds?

- Under s. 20(2), (3) & (7), a corporation may only maintain a contingency fund in an interest-bearing account (with a bank within the meaning of section 2 of the Banking Ordinance) and shall use that account exclusively in respect of the management of the building.

- Who will be responsible?
- Does it require a resolution to be passed at a meeting of the corporation?
- Whether the committee members are liable personally?

House Rules

- House Rules are legally subsidiaries of the DMC and are inherently inferior to the DMC.
- Usually, power to make House Rules is limited to the making of rules relating to the use of the common parts and the Access area.
- The House Rule that prohibits owners to keep dogs within their own unit has gone beyond its ambit under the DMC.
- The owner/occupants in exercising their right to exclusive use occupation and enjoyment of their flats, they ought to have reasonable access and usage of the common parts as access with their pet.

Tsang Chi Ming v. Broadway-Nassau Investments Limited and The Incorporated Owners of Mei Foo Sun Chuen Stage-VII, [2008] 5 HKC 19

The Incorporated Owners of Hang Tsui Court v. Ho Fu and Others, CACV 143 of 2010, reported as
[2011] 5 HKLRD 364

- House Rule: “No dog may be brought or kept upon any part of the Estate or the Common Areas of any building therein”
- The *general* right of the owners to exclusive occupation and enjoyment of their flat can be qualified by more *specific* provisions set out in the House Rules.
- Given that the residents of the Estate live in flats in close proximity, and even the best-trained dogs occasionally bark, it is clear that the intention of the DMC was to sacrifice what may be regarded as the right of a resident to keep a dog to the need to preserve peace and quiet for other residents.

Schedule 3 Meetings and Procedure of Corporation

- Paragraph 3(7) provides that no resolution passed at any meeting of the corporation shall have effect unless the same was set forth in the notice or is ancillary or incidental to a resolution or other matter so set forth

蘇振文、鄧平與盧永佳訴置安大廈業主立案法團
[2000]1 HKC 732

The Grande Properties Management Limited v. Sun Wah Ornament Manufactory Limited, [2006] 3 HKLRD 473; (2006) 9 HKCFAR 462

- It is important that the Manager and the owners are entitled to make appropriate decisions unless such decisions are prohibited by the DMC;
- Subsequent sanction or approval is also necessary to correct mistakes, cure defects or remedy oversight;
- There is no good ground for holding that a resolution is invalid simply because it takes retrospective effect;
- Insofar as the Court of Appeal in *So Chun Man Paul* had held that in law, no retrospective resolution can be valid, this was erroneous and should not be followed.

*Wing Kwai Investment Company Limited and
Another v. Kar Ming Machine Works
Company Limited [2008] 3 HKC 394*

- By a resolution of the owners' meeting in November 2007 WK, the developer of the building in question, was re-appointed manager of the building with retrospective effect from the expiry date of the first appointment some 20 years ago.
- The Respondent had not paid any management fees for some 20 years and challenged the authority of the Applicants' status.
- If the resolution was to allow its retrospective effect, it would be unfair and oppressive to the Respondents, especially when it would be difficult for him, if possible at all, to scrutinise the spending of the Applicants all these years.

Power of Management Committee

- Section 29 of the Building Management Ordinance delegates the powers and duties of the incorporated owners to the management committee.
- A management committee is the agent of the owners incorporated.
- Insofar as they are *intra vires*, decisions and acts taken by the members of a management committee are not only the decisions and acts of the management committee, but also those of the incorporated owners.

Incorporated Owners of Kwai Wan Industrial Building v. Kwai Fung Industrial Limited and Others,

LDBM 208, 209, 210, 212, 222, 226 & 20 of 2002;

龍珠島東座別墅業主立案法團及另一人 v. 王照偉及其他人，

LDBM 235 of 2010. 2011年4月12日

Legal Position of Management Committee

- A management committee of an incorporated owners of a multi-storey building or a housing estate is just like the board of directors of a limited company. The company is a legal person but the board of directors is not.
- The fact that section 45 of the Building Management Ordinance, Cap. 344 has included a management committee as one of the persons who is competent to commence proceedings in the Tribunal under that section is, without more, insufficient to make the management committee a legal person.
- When the interest of the company is in issue, it is the company that can sue or be sued in its own name, not the board of directors. The board of directors is not a legal person independent of the company. The same applies to an incorporated owners and its management committee.”

恆麗園業主立案法團第四屆管理委員會 訴 恆麗園業主立案法團第二屆管理委員會及恆麗園業主立案法團第三屆管理委員會，

LDBM 73 of 2004

*Yeung Chung Lau v. Incorporated
Owners of Century Industrial Centre,*
CACV 381 of 2006, reported as [2007] 4
HKLRD 25

- Section 14 covers the giving of an indemnity to members of the management committee against an action of defamation arising from the enforcement of obligation in the DMC

The Management Committee has
no power to act on behalf of the
owners in making donations

*The Incorporated Owners of Swiss
Towers v. Chow Yum Wah,*

CACV 122 of 2006

Para 1(1) of Schedule 3

The management committee shall convene-

- (a) the first annual general meeting of a corporation not later than 15 months after the date of the registration of the corporation;
- (b) an annual general meeting not earlier than 12 months, and not later than 15 months, after the date of the first or previous annual general meeting;
- (c)

Para 5(1) of Schedule 2

“(1) ... at every alternate annual general meeting, all members of the management committee, ... shall retire from office”

- Paragraph 3 of Schedule 2 to the BMO provides that the members of the Management Committee appointed by a meeting of owners under paragraph 2(1)(b) of Schedule 2 shall hold office until the members of a new Management Committee are appointed.
- The Management Committee will not automatically dissolve or cease to have the power to represent the corporation **even if no re-appointment is made.**

The Incorporated Owners of Finance Building v. Bright Hill Management Consultants Company Limited, CACV 386 of 2000 and Leung Ho Sing and Others v. Shum Yiu Tung and Others, CACV 108 of 2006.

Also Q51 of FAQ on Building Management (Amendment) Ordinance 007

The perpetuation of the management committee (MC) could thus only be achieved with the consent, acquiescence and lack of reaction from the owners because -

- (a) According to para.1(2) of Schedule 3, not less than 5% of the owners may request the chairman of the MC to convene a general meeting of the corporation;
- (b) Owners may make an application to the Lands Tribunal for an order to compel the MC to convene the annual general meeting of the corporation;
- (c) Owners may also make an application to the Lands Tribunal under s. 31 for the dissolution of the MC and the appointment of an administrator.

Schedule 2 Composition and Procedure of Management Committee

- The failure of the chairman of the management committee, or indeed, the secretary, to comply with those provisions (in Para. 8(2AA)) does not render the resolutions which have been passed invalid or unprovable but it does open up parties perhaps to the sanction of applications for their removal and, perhaps, for the appointment of an administrator.

Incorporated Owners of Million Fortune Industrial Centre v Jikan Development Ltd and Plotio Property and Management Ltd
CACV 122/2000 and Q103 of FAQ on Building Management
(Amendment) Ordinance 2007

S. 21 Contributions to funds

- (1) Subject to preparation of a budget, a management committee shall determine the amount to be contributed by the owners to the funds established and maintained under s. 20;
- (1A) Subject to complying with an order of the tribunal or otherwise, any amount ("subsequent amount" (其後的款額)) determined by a management committee under subsection (1) after the first such amount:-
shall not exceed a sum equivalent to 150% of the preceding amount (so determined under that subsection) unless that subsequent amount is approved by the corporation by a resolution passed at a general meeting.

Budget Preparation

- There are no restrictions or guidance on the amount of management fees in Hong Kong;
- The major components of the total expenses:
 - Staff salaries
 - Electricity supply costs
 - Security expenses
 - Electricity system repair and replacement
 - Cleaning expenses
 - Lift maintenance costs

Ref: Benchmarking of Management Fees for Residential Properties in Hong Kong, 2009, Department of Building and Construction, City University of Hong Kong

LACO Circular Memorandum No. 56 2006

- (i) For residential developments or for composite developments comprising both residential and non-residential units, the manager's remuneration must not exceed a percentage of the total expenses, costs and charges necessarily and reasonably incurred in the management of the development: -
- 20% for 20 residential units and parking spaces or below;
 - 15% for 21 to 100 residential units and parking spaces;
 - 10% for 101 residential units and parking spaces or above.
- (ii) For non-residential developments, the manager's remuneration must not exceed 15%.

Management fees would still be payable even if the Management Committee had not prepared and approved the annual budget for a particular year.

- *The Incorporated Owners of Sea View Estate v. Adsin Development Limited & Others*, LDBM 355-357 of 2003;
- Schedule 7 paragraph 1(3)

PART VIA

S. 34C Application of BMO

- (1) This Part, except where otherwise expressly provided, applies only to a building in respect of which a deed of mutual covenant is in force whether that deed came into force before or after the material date.
- (2) In the event of any inconsistency between this Part and the terms of a deed of mutual covenant or any other agreement, this Part shall prevail.**

S. 2 “Common Parts”

- (a) the whole of a building, except such parts as have been specified or designated in an instrument registered in the Land Registry as being for the exclusive use, occupation or enjoyment of an owner; and
- (b) unless so specified or designated, those parts specified in Schedule 1.

Definition of Building

- (a) any building which contains any number of flats comprising 2 or more levels, including basements or underground parking areas;
- (b) any land upon which that building is erected; and
- (c) any other land (if any) which-
 - (i) is in common ownership with that building or land; or
 - (ii) in relation to the appointment of a management committee or any application in respect thereof, is owned or held by any person for the common use, enjoyment and benefit (whether exclusively or otherwise) of the owners and occupiers of the flats in that building

Schedule 1 Common Parts

1. External walls and load bearing walls, foundations, columns, beams and other structural supports.
2.
3. The roofs, chimneys, gables, gutters, lightning conductors, satellite dishes and ancillary equipment, aerials and aerial cables.
4. Parapet walls, fences and boundary walls
-
8. Passageways, corridors, staircases, landings, light wells, staircase window frames and glazing, hatchways, roofways and outlets to the roofs and doors and gates giving access thereto
-
13. Swimming pools, tennis courts, basketball courts, squash courts and premises containing or housing any other sporting or recreational facilities.
- 15

- The incorporated owners were under a duty, among other things, to maintain the common parts, including the external walls, in good repair.
- To carry out that duty, they had to know what the common parts were and therefore can be expected, whether or not after consulting the approved plans, to have realised that the extended canopy was an illegal extension.

Leung Tsang Hung and Another v. Incorporated Owners of Kwok Wing House, [2007] 4 HKLRD 654

Ta Xuong v. Incorporated Owners of Sun Hing Building,
HCPI 496 of 1995

- Plumber fell from abandoned scaffolding connected to the exterior walls of the Building;
- Responsibility for such scaffolding rests primarily with the owners of the building against which it is erected;
- Damages were awarded at \$25,878,372.

*Lily Tse Lai Yin and Others v. The Incorporated
Owners of Albert House,*
HCPI 828B of 1997 (23 December 1999)

- Renovation work for opening a restaurant was being carried out whereby a fish tank was constructed, partly standing on a concrete canopy on 1st Floor;
- The whole of the concrete canopy along Sai On Street collapsed and fell onto the pavement;
- The canopy was not assigned to any owner for exclusive use and therefore became part of the common part.

*Wong Lai Kai v. Incorporated Owners
of Lok Fu Building, Yuen Long*
[2000] 3 HKC 633

- The plaintiff was walking on the pavement outside shop 5B on the Ground Floor of the Building when the awning attached to the external wall above the shop front outside the premises collapsed and he received quite serious injuries.
- No assignment was submitted before the judge.

“Whatever the Deed of Mutual Covenant may have said about what parts of the building constituted the common parts, the Deed of Mutual Covenant could have been no substitute for what was actually assigned to the 1st to 4th Defendants or their predecessors-in-title.”

*Incorporated Owners of Westlands Garden v. Oey
Chiou Ling & Wong Fung Ling, CACV 155 of
2010, 21 February 2011
(reported as [2011] 2 HKLRD 421)*

- Partition wall, 4 inches thick, was removed to convert two flats into one.
- “There was nothing in the 1st Assignment (of a Ground Floor shop) to suggest that the partition walls in the domestic portion were common areas.”
- “it would be an unattractive proposition to have a commonly-owned wall between areas exclusively occupied by the same owner as one unit - *Metro City Management Limited v Tsui Fee Hung Vincent and Lam Wai Fun, CACV 328/2005, 6 June 2006* ”

*Leung Tsang Hung and Another v.
Incorporated Owners of Kwok Wing House,*
[2007] 4 HKLRD 654

- An illegal extension to an authorised canopy on the top floor (i.e. 11th floor of the building) collapsed causing death to a user of the street;
- The external wall and the approved canopy each constitutes a common part within the meaning of the Ordinance
- The owners took the view that they were “additional structures put up by (individual owners) themselves and therefore were their own responsibility”.

“Where any part of, or anything annexed to, the common parts of a building falls off as a result of its hazardous state and causes death, injury or damage in the street below, the incorporated owners are liable in nuisance for the consequences if they knew or ought to have known of the hazard in time to remove it but had unreasonably failed to do so. ”

34I (1). Conversion of Common Parts

No person may-

- (a) convert any part of the common parts of a building to his own use unless such conversion is approved by a resolution of the owners' committee (if any);
- (b) use or permit to be used the common parts of a building in such a manner as-
 - (i) unreasonably to interfere with the use and enjoyment of those parts by any owner or occupier of the building; or
 - (ii) to cause a nuisance or hazard to any person lawfully in the building.

- The DMC in a particular case may contain provisions whereby areas constituting the common parts might lawfully be re-designated for the exclusive use of individual owners.
- But where parts of premises have been designated as Common Parts it goes without saying that they cannot be arrogated unilaterally to the exclusive use of a sole owner.

Jikan Development Ltd & Anor v The Incorporated Owners of Million Future Industrial Centre [2004] 1HKLRD 181; [2003] 6 HKCFAR 446

Gallium Development Limited and Others v. Winning Properties Management Limited and Another,

CACV 186 & 400 of 2003, 17 September 2004

- No owners' committee was ever formed in respect of the Building, nor for that matter, had the owners of the Building formed an incorporation of the owners or appointed a management committee.
- Construction and decoration works were carried out in the common parts of the shopping arcade of Island Beverly by the owner, converting portions for its own occupation, enjoyment and use, apparently with the approval by resolutions signed by it owning 77.09% of the shares of the Building authorising also drawing from the Sinking Fund of the Building to pay for the expenses;
- Those resolutions were passed in a meeting of the owners pursuant to the DMC of the Building.

冠華大廈業主立案法團訴 *Truth Enterprises Limited*,

LDBM 94 OF 2004

- 根據公契條款，發展商擁有外牆、大廈入口大堂及主要通道等的使用權，後來爲了逃避分攤費，把業權轉移到一間空殼公司。多年來法團向此公司及其上手業主以數佰元租用大堂一小部份地方，用作管理處。除此之外，大堂入口及主要通道實際上是給住客出入之用，而公契也規限了該業主的使用權。
- 綜觀以上各點，大廈入口大堂和主要通道在法理上其實是公用地方，管理處範圍除外。
- 再者，維修外牆是涉及整體業主的利益，包括地下商戶。基於此等理由，公契的隱含條款是法團有權動用公款維修外牆。

- A developer may be given rights in respect of various matters such as the erection of signs and signboards and flu pipes at the external walls;
- This does not mean it is given either the exclusive possession of the external walls or the exclusive right to the use, occupation or enjoyment thereof.

Incorporated Owners of Goa Building v. Wui Tat Company Limited,
CACV 349 of 2002

The question of whether a particular area in a building constitutes a common part turns on a proper interpretation and construction of the relevant registered instruments.

*Jumbo King Ltd. v. Faithful Properties Ltd.
& Others*

[1999] 2 HKCFAR 279

The Incorporated Owners of Shatin New Town v. Yeung Kui, CACV 45 of 2009 (10 December 2009)

- A resolution was passed by IO to carry out maintenance works to the lobbies, entrance halls and exterior walls of the residential blocks.
- The developers have the exclusive right to use all the external walls of all of the Residential Block for advertising purposes and to display, install, erect, affix or permit to be displayed, installed, erected or affixed thereon and thereto such advertising signboard placards, posters and other advertising signs or structures whatsoever (whether illuminated or not) subject to the approval of the Public Works Department or other Government Authorities concerned and with the right to remove, repair, maintain, service or replace the same provided that the same shall not unnecessarily interrupt the enjoyment of the Residential Units in that Residential Block.

Proprietary Estoppel

- The developer of an industrial building was wound up without disposing of the title to **the three parking spaces** on the ground floor of the building.
- **The three parking spaces** has been used and regarded as common areas for unloading and loading.

The Incorporated Owners of Unison Industrial Building v. Director of Lands,
DCCJ 2233 of 2004 (11th May 2009)

S. 34H Duty to Maintain Property

- (1) If an owner has the right to the exclusive possession of any part of a building or has the exclusive right to the use, occupation or enjoyment of that part, the owner is obliged to maintain that part in good repair and condition even though there is no such requirement under the DMC of the building.
- (2) The obligation above shall be deemed to be an obligation owed to all owners of the building under the DMC.

*Uniland Investment Enterprises Limited v. The
Incorporated Owners of Sea View Estate and Another,*
HCA 20920 of 1998

- The plaintiff is the owner of the outer wall and flat roof of Sea View Estate in North Point;
- Notwithstanding, the DMC imposes on the Management Company the responsibility of repairing and maintaining the outer wall and flat roof at no costs to the plaintiff;
- A Building Order was served on the plaintiff requiring it to carry out certain repair works on the outer wall and flat roof;
- The plaintiff claimed for damages against both defendants for breach of the covenant to repair under DMC;
- The court concluded that s. 34H imposes on the plaintiff as owner, occupier or user, the obligation to maintain the outer wall and flat roof, notwithstanding that under the DMC the obligation falls fairly and squarely on the shoulders of the Management Company and hence the 1st defendant upon its incorporation;
- **Whereas the 1st defendant's duty to maintain the outer wall and flat roof under the DMC has been displaced by section 34H, no such duty could have been passed onto the 2nd defendant, the management company.**

鄭惠娟訴永利中心業主立案法團及他人 CACV 137 of 2006 (2007年3月14日)

- 事件的起因是大廈外牆防水功能損毀，以致有水經外牆及磚牆滲入該店鋪。
- 發展商雖然不用支付外牆的維修費用，卻保留了該大廈的外牆的業權 (獨自使用權) 作為登廣告及建煙窗之用，因此該大廈的外牆並非公用部份。
- 但原審法官同時裁定根據該大廈公契，法團和管理公司作為經理人有責任維修外牆，原因是外牆屬該大廈的主要結構部份(Main structure and fabric of the said building)。
- 上訴庭裁定原審法官的裁決是合理及正確的。
- 雖然根據該條例第34H條，該大廈的發展商負有維修大廈外牆的責任，但其他人士亦可以根據其他安排，包括合約上的安排，而負上相同責任。
- 法團和管理公司明知大廈外牆漏水，但故意不採取補救行動，不論背後原因是甚麼，都構成蓄意疏忽 (wilful negligence)。

So John v Lau Hon-man [1993] 2 HKC 356

- Escape of water from a pipe in the common part of a building which flowed into a flat belonging to another owner.
- The part of the floor slab occupied by the water pipe for the exclusive use of the respondents could be regarded as a part of the building, along with the rest of unit of which the respondents had exclusive right of use.
- As the respondents are the ones to get the exclusive benefit from the use of their fresh water pipe, it is not unreasonable they should bear the exclusive burden of the cost of repairing it if it becomes defective.

Incorporated Owners of Summit Court v. Full Surplus Investment Limited, [2007] 3 HKLRD 351

- On the roof, there were three water tanks with pipes conveying the potable water or flush water, as the case may be, to the individual flats.
- There was only one potable water pipe which runs along the floor from the potable water tank before it branches out into the separate meters on the parapet wall for each of the flats.
- The potable water pipes even after they have branched out at or after the separate meters would still fall within the definition of common parts because although they were for the exclusive use of the individual owners, they had not been designated as such by reason of any instrument registered in the Land Registry.

Waterproofing Layer

- “申請人所針對的並不是天台的一般維修，而是天台防水層的維修。該大廈的天台防水層應該是分佈整個天台，包括第三至第五答辯人所擁有的物業之內。本席認為天台防水層亦是公用部份，因為防水層絕不會是為該天台單位而是為整幢大廈而設的。”
- “the owner of a unit would have right to the exclusive use of the floor and ceiling surfaces of the floor owned by him and the air space between them, but not use of the underside of the concrete slab.”
- “The mere fact that the concrete tile layer could offer extra protection to the layers underneath would not make it a common part of the Building.”

梁有勝 訴 馮源禧及另四人, LDBM 249 of 2000;

Kung Shing Investment Ltd. v. The Sunbeam Manufacturing Co. Ltd. and Another,
DCCJ 4093 of 2002;

Nation Group Development Limited v. New Pacific Properties Limited,
CACV 160 of 1999 (CA) & [2001] 1 HKLRD 375 (CFA);

Tai Fong Trade Limited v. The Incorporated Owners of Nos. 167 & 169 Hoi Bun Road and Another, LDBM 1 of 2006.

S. 26A Management committee to display information about legal proceedings

- A management committee shall notify the owners of any legal proceedings to which the corporation is a party ...within 7 days of receiving any court documents commencing the proceedings.
- A letter from a lawyer is not a court document.

Particulars of Proceedings to be included in the Notice

- Name and capacity of the parties;
- Legal representatives of the parties (if any);
- Case number of the proceedings;
- Forum of the case (e.g. Lands Tribunal);
- Brief summary of the case background;
- Amount claimed by the plaintiff (if the OC is the defendant) or to be claimed by the OC (if the OC is the plaintiff), and the remedies sought by the plaintiff if they are not monetary in nature.

Chi Kit Co Ltd v Lucky Health International Enterprise Ltd
(2000) 3 HKC 143; (2000) 3 HKCFAR 268

- “Although the liability is not a charge on the unit itself, it is a liability which goes with ownership of the unit. It is a liability which is imposed in virtue of ownership of the unit. ... Although the liability of the unit owner to meet a contribution is not charged on the unit, it binds the unit and therefore it can constitute a blot on the title or an incumbrance. ...”
- “It is not a liability which is merely personal to the owner at a given time.”

Potential liability under s.17(1)(b) to suffer an execution for a judgment against the **corporation**

- If a judgment is given or an order is made against a corporation, execution to enforce the judgment or order may issue-
 - (a) against any property of the corporation; or
 - (b) with leave of the tribunal, against any owner
- That liability is not expressed to be limited to the proportionate share of an individual owner.

S.34 Liability of owners on winding up

- In the winding up of a corporation registered under section 33, the owners shall be liable, both jointly and severally, to contribute, according to their respective shares, to the assets of the corporation to an amount sufficient to discharge its debts and liabilities.
- The value of the right of action pursuant to section 34 of the BMO can be equated to the amount needed to discharge the debts and liabilities of the Corporation (*Re: The Incorporated Owners of Foremost Building*, [2005] 3 HKLRD 509)

S. 3(1) of the Civil Liability
(Contribution) Ordinance (Cap. 377)

“...any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).”

Aberdeen Winner Investment Company Limited v. The Incorporated Owners of Albert House and Others, [2004] HKLR 910

Liability of Occupier to pay Contributions

s.23 which empowers the **corporation** in limited circumstances to pass an owner's liability on to an occupier for the time being of the unit concerned.

Lam Kei Fung v. Incorporated Owners of Yue Tin Court & Others, DCPI 1237 of 2005, 2 April, 2008

- Housing Authority, as the developer of Yue Tin Court, has retained the exclusive right and privilege under the Deed of Mutual Covenant relating to Yue Tin Court to hold, use, occupy and enjoy the carparks in Yue Tin Court.
- It also had power to, and did, appoint its own manager to operate the carpark of Yue Tin Court.
- Under its agreement with the carpark managers, the Housing Authority has control over the efficient operation and management of, and security over, the carparks within the properties of the Housing Authority, including the cleaning of the lobby areas and stairways of the carparks.
- It was held to be liable for an accident at a staircase leading from the upper floor to the lower floor of the carpark
- The Housing Authority's activity in and use of the subject carpark and the subject staircase adjacent thereto, and its powers of management over the carpark and access to the carpark, was regarded as coming very close to occupational control of the subject staircase.

Duties of Manager

- Although obligation was imposed by the deed of mutual covenant on the manager to maintain all common facilities, the Court of Appeal* held that the deed of mutual covenant was never intended to impose an absolute duty on the manager to ensure that no common facility ever broke down.
- What is required would simply be proper management, to take reasonable steps, inspection and action, and to act promptly as circumstances required.

**Lo Yuk Chu v. Hang Yick Properties Management Ltd.*
(1996) 4 HKC 278

As long as there is no disruption or discontinuance of the essential services performed by the management company, then there cannot be said to be a fundamental breach by the management company such as to exclude the management company from the management duties.

Incorporated Owners of South Seas Centre, Mody Road v. South Seas Centre Management Co. Ltd. and Others [1985] HKLR 457

*Grace International Limited v. Incorporated Owners
of Fontana Gardens* [1996] 4 HKC 635

- Assuming that the Defendants have not discharged their duty to effect necessary repairs to the common parts of the Buildings, would this fact debar them from recovering management fees?
- Bearing in mind that effecting repairs was not the only duty of the Defendants and in respect of which management fees are paid, I am not prepared to hold that because of this breach they are not entitled to any management fees.

Manager owes a fiduciary duty
towards all the owners of the
Building.

20A Supplies, Goods and Services

(1) The procurement of all supplies, goods or services required by a corporation in the exercise of its powers and the performance of its duties under the deed of mutual covenant (if any) or this Ordinance shall comply with such standards and guidelines as may be specified in a Code of Practice relating to such procurement.

Invitation to Tender

(2) Subject to subsection (2A), any goods or services referred to in subsection (1) the value of which exceeds or is likely to exceed-

(a) the sum of **\$200000** or such other sum in substitution therefor as the Authority may specify by notice in the Gazette; or

(b) a sum which is equivalent to **20% of the annual budget of the corporation** or such other percentage in substitution therefor as the Authority may specify by notice in the Gazette,

whichever is the lesser, shall be procured by invitation to tender.

Incumbent Supplier

(2A) Subsection (2) does not apply to any supplies, goods or services if

(a) the relevant supplies, goods or services are of the same type as any supplies, goods or services which are for the time being supplied to the corporation by a supplier; and

(b) the corporation decides by a resolution of the owners passed at a general meeting of the corporation

(2B) No Tenders should be Rejected
without Approval of a General Meeting of
the OC

Where any supplies, goods or services are required under subsection (2)(b) to be procured by invitation to tender, whether a tender submitted for the purpose is accepted or not shall be decided by a resolution of the owners passed at a general meeting of the corporation.

Non-compliant Contract

- (5) Any contract for the procurement of any supplies, goods or services shall not be void by reason only that it does not comply with the standards and guidelines specified in the Code of Practice.

(6) (a) Any procurement contract made by the OC shall not be void by reason only that it does not comply with

- the tendering requirement; or
- the requirement of deciding whether a tender is accepted or not by a resolution of the owners passed at a general meeting of the OC.

(b) In the event that the procurement contract made by the OC does not comply with the procurement requirements above, the owners may

- avoid the contract by a resolution of the owners passed at a general meeting of the OC; or

(7) seek an order from the court with regard to the validity of the contract.

... the court may make such orders (including whether the contract is void or voidable) and give such directions in respect of the rights and obligations of the contractual parties as the court think fit having regard to all the circumstances of the case, including (but not limited to) the following factors -

- (a) whether the supplies, goods or services have been procured by invitation to tender;
- (b) whether a general meeting of the corporation has been convened to consider the procurement of the supplies, goods or services;
- (c) whether the Code of Practice referred to in subsection (1) has been complied with;
- (d) whether the contract has been split, for the sole purpose of avoiding the compliance of the requirements in subsection (2) or (2B), ...
- (e) whether the supplies, goods or services were urgently required;
- (f) the progress of any activities or works in relation to the supplies, goods or services;
- (g) whether the owners have benefited from the contract;
- (h) whether the owners have incurred any financial loss due to the contract and the extent thereof;
- (i) whether the supplier of the supplies, goods or services under the contract has acted in good faith;
- (j) whether the supplier of the supplies, goods or services under the contract has benefited from the contract; and
- (k) whether the supplier of the supplies, goods or services under the contract has incurred any financial loss due to the contract and the extent thereof.

Personal Liability

(9) ...subject to section 29A, any person who enters into a contract for the procurement of any supplies, goods or services otherwise than in compliance with subsection (2) or, if applicable, subsection (2B) may be personally liable for any claims arising from the contract.

S. 29A Protection of Members of Management Committee

- (1) No member of a management committee, acting in good faith and in a reasonable manner, shall be personally liable for any act done or default made by or on behalf of the corporation –
 - (a) in the exercise or purported exercise of the powers conferred by this Ordinance on the corporation; or
 - (b) in the performance or purported performance of the duties imposed by this Ordinance on the corporation.

S. 44 Codes of Practice

- (1) The Authority may from time to time prepare, revise and issue Codes of Practice giving guidance and direction as to-
 - (a) the procurement of supplies, goods and services required by a corporation including such procurement by invitation to tender and the tender procedure in respect thereof;
 - (b) the standards and practices of management and safety that are to be observed and followed by a corporation including standards and practices relating to-
 - (i) building management;
 - (ii) building safety;
 - (iii) fire safety;
 - (iv) slope safety;
 - (v) lifts and escalators; and
 - (vi) utilities and other installations in the common parts of a building.

(2) A failure on the part of any person to observe any Code of Practice issued under subsection (1):-

- shall not of itself render that person liable to criminal proceedings of any kind
- but any such failure may, in any proceedings whether civil or criminal including proceedings for an offence under this Ordinance, be relied upon as tending to establish or to negative any liability which is in question in those proceedings.

Sch. 7 Mandatory Terms in DMCs

1. Preparation of budget by Manager

In respect of each financial year, the manager shall-

- (a) prepare a draft budget setting out the proposed expenditure during the financial year;
- (b) send a copy of the draft budget to the owners' committee or, where there is no owners' committee, display a copy of the draft budget in a prominent place in the building, and cause it to remain so displayed for at least 7 consecutive days;
- (c) send or display, as the case may be, with the copy of the draft budget a notice inviting each owner to send his comments on the draft budget to the manager within a period of 14 days from the date the draft budget was sent or first displayed;
- (d) after the end of that period, prepare a budget specifying the total proposed expenditure during the financial year;
- (e) send a copy of the budget to the owners' committee or, where there is no owners' committee, display a copy of the budget in a prominent place in the building, and cause it to remain so displayed for at least 7 consecutive days.

Determination of Total Amount of Management Expenses

- 條例附表7(1)(6)的規定，只是預算需要由業主大會通過，但在實際的開支上，申請人並不需要每項開支都經由業主大會通過，而且實際的開支亦不會受預算的數字約束。申請人是可以就實際的需要批出有關的支出。

The Incorporated Owners of Faraday House v. Leung Hang Nin & Sin Choi Ha, LDBM 215 of 2005

Sch. 7 Mandatory Terms in DMCs

5. Contracts entered into by manager

Threshold	Invitation to tender	Meeting of OCs/owners
> \$200,000	Yes	-
> 20% of the annual budget	Yes	Yes

Sch. 7 Mandatory Terms in DMCs

7. Termination of manager's appointment by owners' corporation

(2) A resolution to terminate the DMC manager's appointment shall have effect only if-

- (a) the notice of termination of appointment is in writing;
- (b) provision is made in the resolution for a period of not less than 3 months notice or, in lieu of notice, provision is made for an agreement to be made with the DMC manager for the payment to him of a sum equal to the amount of remuneration which would have accrued to him during that period;
- (c) the notice is accompanied by a copy of the resolution terminating the DMC manager's appointment; and
- (d) the notice and the copy of the resolution is given to the DMC manager within 14 days after the date of the meeting.

Disbursement from time to time during managership

- Expenses were incurred prior to the incorporation of the owners.
- There was no contractual relationship between the Manager and the Owners' Corporation prior to the incorporation.

*Hang Yick Properties Management Limited v.
Incorporated Owners of Tuen Mun Kar Wah
Building, [2005] 2 HKLRD 499*

- The DMC binds all the owners for the time being as successors in title of the parties to the DMC, and they are obliged to pay management expenses incurred by the plaintiff on their behalf as manager of the building in relation to the common parts.
- The covenant to pay runs with the land and the undivided shares held by the owners for the time being.
- This justifies the liability of each of the owners of the undivided shares in a building being passed onto his successor in title, and if the liability is one that is owed by the owners as a whole, that liability is justifiably passed onto their successors, ie owners for the time being of the undivided shares.

Limitation Period

- Since the DMC is a document under seal it is a specialty so that a claim may be made under the terms of the DMC within 12 years under s. 4(3) of the Limitation Ordinance.

Incorporated Owners of Million Fortune Industrial Centre v. Jikan Development Ltd. & Another [2002] 4 HKC 33 ; [2003] 1 HKLR 455

S.6(1) of Limitation Ordinance

- Where under section 3 of the Civil Liability (Contribution) Ordinance (Cap 377) any person becomes entitled to a right to recover contribution in respect of any damage from any other person, no action to recover contribution by virtue of that right shall (subject to sections 22 and 26) be brought after the end of the period of 2 years from the date on which that right accrued.

Pilot Scheme for Building Management Cases

- With effect from 1 January 2008, parties and those advising them are encouraged to explore settlement or alternative dispute resolution such as mediation, before or after they issue proceedings in the Tribunal.
- Unreasonable failure to make a *bona fide* attempt in that regard on the part of either party will be relevant conduct to be taken into account by the Tribunal in deciding on costs.
- A case will not be placed in the Pilot Scheme List or will be taken out from the same if either one or both parties are not legally represented.

Civil Justice Reform

- The amendments to the Rules of the High Court come into operation on 2 April 2009 (Civil Justice (Miscellaneous Amendments) Ordinance 2008).
- The six underlying objectives are as follows:
 - (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
 - (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
 - (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
 - (d) to ensure fairness between the parties;
 - (e) to facilitate the settlement of disputes; and
 - (f) to ensure that the resources of the Court are distributed fairly.

iRiver Hong Kong Ltd v Thakral Corp (HK) Ltd
[2008] 4 HKLRD 1000; [2008] 6 HKC 391

The Court of Appeal condemned the parties for not trying (or their legal advisers for not advising) mediation simply when the legal costs incurred turned out to have far exceeded the damages awarded

*Supply Chain & Logistics Technology Ltd v
NEC Hong Kong Ltd [2009] HKCU 123*
(unreported, HCA 1939/2006, 29 January 2009)

- The judge sought to justify the court's power to penalise a party on costs for not trying mediation on the basis that 'the purpose of civil litigation is to resolve dispute between the parties', and so a party should not insist on resorting to litigation 'if there is an alternative by which the dispute may be resolved in a more cost effective, timely and satisfactory manner' – that alternative being mediation.

Practice Direction 31 on Mediation

- Parties in litigation may face adverse costs order unless
 - (a) one engages in mediation to the minimum level of participation agreed to by the parties (or as directed by the court), or
 - (b) one engages in active settlement negotiations.

*“Stay on Target: Achieving the
Primary Aim of
Civil Justice Reform”*

Eric TM Cheung, Hong Kong Lawyer,
Issue 04.09, p. 102

The Incorporated Owners of Shatin New Town v. Yeung Kui (unreported, CACV 45 of 2009, 5 February 2010)

- The Court of Appeal allowed the applicant's appeal and ordered costs of the appeal and below against the respondent on a provisional basis.
- The Incorporated Owners has a responsibility in applying the DMC correctly.
- Its refusal to take part in the mediation should be not visited with an order that it could not recoup the costs below.