

Professional Practice, Professional Indemnity and Negligence – What Housing Managers should know?

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December 2023

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PART 1

Professional Negligence

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Negligence

- Failure to do something which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and that failure or the doing of that act results in injury or loss to the person to whom a duty of care is owed.
- A duty of care is owed to the plaintiff if it is reasonably foreseeable by the defendant that his failure to exercise reasonable care would cause harm to the plaintiff.
- The standard of care is that of a reasonable person with ordinary intelligence and experience, with reference to the state of his knowledge at the time of the act or omission in question.

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Professional Negligence

- Professional Negligence – if a situation involves the use of some special skill or competence on which the plaintiff relies, the defendant must act up to the standard of the ordinary skilled man exercising and professing to have that special skill.

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Professional Negligence

- This is higher than the standard of care imposed on the ordinary reasonable person without such specialized training.
- The court will determine whether a particular act or omission meets the standard of care with reference to the opinion and practice of a responsible and respected body of the profession at the time.
- Expert evidence may be adduced to prove such opinion and practice.

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Professional Negligence – Examples

- Hedley Byrne & Co. Ltd. v Heller & Partners Ltd. (1964)
 - The plaintiffs were advertising agents. A customer put in a large order. The plaintiffs made inquiry with the customer's banker about the customer's creditworthiness.
 - The reference was favourable but stated it was "without responsibility on the part of this bank or its officials".
 - The plaintiffs engaged in business in reliance on such advice, but the customer soon went into liquidation and the plaintiffs suffered financial loss and sued the customer's bank for providing negligent mis-statements.

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Professional Negligence – Examples

- Hedley Byrne & Co. Ltd. v Heller & Partners Ltd. (1964)
 - The court held that a negligent misrepresentation may give rise to an action for pure financial loss, when a party relied on another party possessed of a special skill for advice, and that other party knew or ought to have known that reliance was being placed on his skill and judgment.
 - However, in this case, the defendant's disclaimer was sufficient to protect them from liability.

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Professional Negligence – Examples

- Bright Gold v Mega Well Development Ltd (2019)
 - Solicitors for a purchaser of real property prepared the agreement for sale and purchase with a wrong plan in showing the property. The purchaser claimed against the solicitors for professional negligence for failing to ascertain the subject matter of the purchase.
 - However, the court held there was no professional negligence by the solicitors. There was no document available to the solicitors which would have shown that the plan was wrong.

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Professional Negligence – Examples

- Bright Gold v Mega Well Development Ltd (2019)
 - Errors of judgment are not equivalent to professional negligence.
 - To discharge the heavy onus of proving professional negligence, the plaintiff must prove that the defendant's conduct fell short of the standard of "what the reasonably competent practitioner would do having regard to the standard normally adopted in his profession" (i.e. acts of gross ignorance which could not have been committed by any other ordinarily informed member of the profession).

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Typical Defences – *Bolam* Test

- Acting in accordance with a competent and reasonable school of thought or practice in the profession
 - *Bolam v. Friern Hospital Management Committee* (1957)
 - The Plaintiff patient received treatment in the Defendant hospital involving passing of electric current through his brain, which might result in muscle contraction and spasm and possibly bone fracture.
 - Question was whether the Plaintiff should be administered some relaxant drug and manual restraints before the treatment.
 - However, there was a firm medical body of opinion against those measures. They took the view that the risk of fracture was minimal while the use of anaesthetic as relaxant drug might have mortality risk. Also, the more restraint imposed, the greater the risk of possible bone fracture.
 - Held: A doctor following a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment was not guilty of negligence merely because there was another body of competent professional opinion to the contrary.

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Typical Defences – *Bolam* Test

- *Edward Wong Finance Co Limited and Pomay Investments Limited v. Johnson, Stokes & Master* (a firm) (1980)
 - Conveyancing solicitors in Hong Kong in the sale and purchase of real properties often opted for “completion by undertaking”. This involves the purchaser’s payment of the purchase price upon the seller’s solicitors’ undertaking to send the executed documents of title to the purchaser’s solicitors on a later date.
 - Although it might have inherent risks, it had been widely practised in Hong Kong and was used in the overwhelming majority of property transactions. However, in this case, the seller’s solicitors absconded with the money paid over on completion.

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Typical Defences – *Bolam* Test

- Edward Wong Finance Co Limited and Pomay Investments Limited v. Johnson, Stokes & Master (a firm) (1980)
 - The solicitors' firm sending over the money on completion was held to be negligent.
 - The solicitors' firm had a duty to exercise reasonable skill in the conduct of their client's affairs, and to give such advice as the facts of the particular case demands. They must act up to the standard of a good competent member of the profession and follow a general practice which is accepted by a substantial portion of that profession.

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Typical Defences – *Bolam* Test

- Edward Wong Finance Co Limited and Pomay Investments Limited v. Johnson, Stokes & Master (a firm) (1980)
 - Although a large majority of property sales in Hong Kong are done through “completion by undertaking”, this transaction called for extra precautions.
 - In this case, the vendor's solicitors were a sole proprietorship. The amount involved was substantial.
 - In the circumstances, the solicitors should have warned their client, the purchaser's proposed mortgagee, about the risk and recommended actual completion instead of completion by undertaking.

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Typical Defences – *Bolam* Test

- Edward Wong Finance Co Limited and Pomay Investments Limited v. Johnson, Stokes & Master (a firm) (1980)
 - Although the solicitors followed the widespread practice of completion by undertaking, they could not excuse a failure to take an obvious precaution merely by showing that other solicitors would have acted in the way they did.

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Typical Defences – Contributory Negligence

- Contributory Negligence will be found where a plaintiff failed to take reasonable care for his own safety causing the accident and the injuries or losses or their aggravation.
- The court will then apportion the parties' respective culpability by comparing conduct, and accordingly reduce the award of damages.

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Typical Defences – Contributory Negligence

- **Hondon Development Ltd and Another v. Powerise Investments Limited and Others (2003)**
 - A purchaser discovered the size of the shop they purchased was smaller than anticipated and sued their solicitors for professional negligence for not pointing out some discrepancies between the plans showing the property attached to different title documents.
 - The court held that the solicitor was negligent in this case by failing to discharge his duty up to the standard of a normally competent solicitor.

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Typical Defences – Contributory Negligence

- **Hondon Development Ltd and Another v. Powerise Investments Limited and Others (2003)**
 - The court said that it would be the professional's duty to advise his lay client and to protect his interest. Contributory negligence by a professional against his lay client might only be successfully raised in very limited circumstances, including:-
 - where the lay client was particularly well placed to spot or correct the professional's mistake and
 - where the lay client had done something quite separate which aggravated the consequences of the professional's breach of duty.

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Typical Defences – Contributory Negligence

- **Hondon Development Ltd and Another v. Powerise Investments Limited and Others (2003)**
 - The purchaser had been shown the two plans, and he would have also seen the differences if he had examined them closely (he was particularly well placed to spot or correct the solicitors' mistake). His contributory negligence was assessed to be 50%.

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Typical Defences – Informed and Voluntary Consent

- A defendant may raise a defence against a claim in negligence if the plaintiff is shown to have acted according to his own free will and made an informed and voluntary consent to the defendant's act or omission.

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Typical Defences – Informed and Voluntary Consent

- To Chun Fung Albert v Medical Council of Hong Kong 2002
 - An inquiry was held on the charge that a doctor performed an unnecessary or inappropriate removal of a patient's uterus etc., knowing she was pregnant at the material times, without properly explaining to her other options when obtaining the patient's consent to perform the operation.

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Typical Defences – Informed and Voluntary Consent

- To Chun Fung Albert v Medical Council of Hong Kong 2002
 - The Medical Council has found a doctor guilty of professional misconduct by performing an inappropriate and unnecessary operation on a patient. The patient had not been given proper advice or guidance before the operation. Other available options were not explained to her.
 - The doctor appealed to the Court of Appeal.
 - It was argued that the patient had consented to the operation performed. However, the court said that if the consent had been given following incomplete and unsatisfactory advice, that consent could be no defence to the charge.

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Typical Defences – Informed and Voluntary Consent

- To Chun Fung Albert v Medical Council of Hong Kong 2002
 - “Misconduct in a professional respect” was conduct which had fallen short of the standard expected amongst doctors. The Court said that “the best judges of that are the doctors themselves”.
 - The appeal was dismissed.

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PART 2

Professional Practice under the PMSO

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Licensing Requirement

- The licensing regime under PMSO came into effect on 1 August 2020 with a 3-year transitional period which ended on 31 July 2023.
- Other than licensing requirements, PMSO also provides for disciplinary actions to be taken against licensees.

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Disciplinary Actions--Investigation

- Under sections 21 to 25 of PMSO
 - PMSA's appointed investigator has wide powers to require a person to provide any relevant information or documents and to attend an investigation in person, failing which the person will commit an offence and may be subject to a maximum fine of \$200,000 and imprisonment for up to a year.
 - The person is not excused to provide information only on the ground of self-incrimination, but if the information tends to incriminate the provider and he claims self-incrimination, the information provided may not be used against him in any future criminal prosecution except for offences like perjury or failing to provide or providing false information.

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Disciplinary Actions--Hearing

- Under sections 21 to 25 of PMSO
 - If PMSA is satisfied after an investigation that there is evidence that tends to show a licensee has committed a disciplinary offence under PMSO or no longer meets any of the prescribed criteria for holding the licence, it may conduct a hearing into the matter.
 - In the hearing, PMSA has extensive powers to summon a person to give evidence or provide relevant information or documents at a hearing, examine witnesses, and consider any materials (including oral evidence, written statements, documents or otherwise).
 - Similar rule relating to providing information during investigation applies to providing information and giving evidence in the hearing.

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Disciplinary Offences

- Disciplinary offence under Section 4 of the PMSO: a property management licensee commits a disciplinary offence if :-
 - the licensee commits misconduct or neglect in a professional respect;
 - the licensee contravenes a condition imposed on the licensee's licence;
 - the licensee contravenes a requirement in this Ordinance that is applicable to the licensee;

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Disciplinary Offences

- Disciplinary offence under Section 4 of the PMSO: a property management licensee commits a disciplinary offence if :-
 - the licensee, without reasonable excuse, fails to—
 - comply with a requirement of a notice requiring the provision of information or documents or an answer to questions raised by an investigator appointed by PMSA; or
 - comply with a summons for a hearing or appeal hearing;
 - the court determines that the licensee has contravened a requirement in the BMO or a deed of mutual covenant that is applicable to the licensee; or

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Disciplinary Offences

- Disciplinary offence under Section 4 of the PMSO: a property management licensee commits a disciplinary offence if :-
 - the licensee is convicted in Hong Kong or elsewhere of a criminal offence that—
 - may bring the profession of property management services into disrepute; and
 - is punishable with imprisonment (whether or not the licensee was sentenced to imprisonment).

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Statutory Defence for PMP

- Section 63 PMSO: a Licensed PMP charged with a disciplinary offence under PMSO can raise a defence and prove that he :-
 - took all reasonable steps and exercised all due diligence to avoid committing the offence;
 - did the act or made the omission in the course of his employment and in accordance with instructions given to him by or on behalf of his employer in the course of his employment; and
 - was not in a position to make or influence a decision regarding the act or omission at the time of such act or omission.

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Disciplinary Actions--Appeal

- Section 34 of PMSO: A person may appeal to the Appeal Tribunal within 21 days against various decisions of the PMSA like not issuing or renewing a licence, decision that he has committed a disciplinary offence etc.
- The Appeal Tribunal may confirm, vary or reverse any decisions to which the appeal relates. Its decision is final.

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Disciplinary Actions--Orders

- Section 26 of PMSO: PMSA may make the following orders against the licensee in question :-
 - an order giving a verbal warning or written reprimand;
 - an order imposing a penalty not exceeding \$300,000;
 - an order imposing a condition on the licence;
 - an order varying a condition of the licence;
 - an order suspending the licence for a specified period or until a specified event occurs;
 - an order revoking the licence.

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Disciplinary Actions

- Codes of Conduct
 - Under section 5 of PMSO, the PMSA may issue Codes of Conduct containing any practical guidance that it considers appropriate. These Codes of Conduct may specify the matters that the PMSA considers to be relevant in determining whether a licensed PMP has committed any misconduct or neglect in a professional respect or any criminal offence that would bring the profession into disrepute.
 - According to section 5 of PMSO, a licensed PMP will not incur civil or criminal liability only because he has contravened the Codes of Conduct. However, the Codes of Conduct are admissible in evidence in disciplinary or legal proceedings and proof of their contravention may be relied on as tending to establish or negate any matter in issue.

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Standard of Proof

- The standard of proof is the degree of evidence and proof which a party must present to the court or adjudicating tribunal to establish a charge or claim. In a civil claim, the plaintiff has the burden to adduce evidence to establish its claim against the defendant usually **on the balance of probabilities**. In a criminal case, the prosecutor bears the burden to adduce evidence to establish a criminal charge **beyond reasonable doubt**.
- In Hong Kong, the civil standard of proof may be applied in disciplinary proceedings, but with such flexibility so that the more serious the complaint, and the more dire its consequences, the greater the degree of proof required to prove it.

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Standard of Proof

- Tse Lo Hong v AG 1995
 - Police discipline case involving indecent assault
 - The court held that the criminal standard of proof should have been applied, as the standard of proof must be commensurate with the gravity of the charge.
 - “Charge A was, in essence, one of indecent assault. This carried severe penalties for the defaulter’. The standard of proof must be commensurate with the gravity of the charge. Here the tribunal seems to have required the prosecution to prove the case on a mere balance of probabilities’ which was plainly unacceptable.”

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Standard of Proof

- Chan Sau Fong, Shirley v Secretary for the Civil Service (2002)
 - Disciplinary proceedings were commenced against a registered psychiatric nurse for submitting a false report on a fire drill scheduled to take place in a psychiatric hospital but which did not actually take place.
 - An Inquiry Committee found that the applicant was guilty of misconduct and commented that the standard of proof applied was “that of common sense and professional judgment”. The applicant sought to quash the tribunal’s findings, and one of the grounds relied on was that the committee erred in adopting the wrong standard of proof and shifting the burden of proof to the applicant.

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Standard of Proof

- Chan Sau Fong, Shirley v Secretary for the Civil Service (2002)
 - The standard of proof to be applied must be commensurate with the gravity of the charge.
 - The tribunal’s comments indicated a fundamental misunderstanding of the appropriate standard, so it could not be said that the tribunal had turned its mind to the appropriate standard, and its decision was quashed.

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PART 3

Negligence by Property Manager – Decided Cases

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Negligence by Property Manager – Decided Cases

- *Lo Yuk Chu v. Hang Yick Properties Management Limited* 1996 CACV
 - An owner found her flat flooded with water and sewage and sued the manager for negligence and failing to discharge duty as manager, alleging that the water damage to her premises was due to the manager's failure to inspect and maintain a sewage pipe which had become blocked because other occupants of the building had put solid material into their lavatories.
 - The judge in the first instance held that the manager was not negligent, as it was powerless to stop occupants from putting solid materials down their lavatories in their own homes, and that there was no evidence that the manager had created the flooding or that it had been given any warning that a flooding might possibly occur.

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Negligence by Property Manager – Decided Cases

- *Lo Yuk Chu v. Hang Yick Properties Management Limited* 1996 CACV
 - The Court of Appeal reaffirmed the decision at the first instance that the duty imposed on the manager was not an absolute duty, but one to take all reasonable steps, like to warn residents of the danger of blockage, undertake regular inspections if such inspections were feasible and in accord with proper plumbing practice, and take proper action upon discovery of malfunction or obstructions.
 - As there had been no complaints of main blockage in the 3-4 years before the incident, and there was no evidence to suggest that proper plumbing practice required a system of regular inspection or that a particular maintenance strategy was necessary in this case, the court dismissed the owner's claim against the manager.

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Negligence by Property Manager – Decided Cases

- *Lo Yuk Chu v. Hang Yick Properties Management Limited* 1996 CACV
 - It should be noted that under more recent DMCs, there may now be a work manual requiring certain inspection and maintenance works to be performed at a stated frequency, after the Lands Department included such provision in the Guidelines of the DMC terms.

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Negligence by Property Manager – Decided Cases

- Ma Chung Lam & Another v. Citybase Property Management Limited (2007)
 - An owner's property became flooded by the overflowing of water from the common drain pipes while they were out of Hong Kong and could not be contacted, and upon their return, they claimed against the manager for the loss.

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Negligence by Property Manager – Decided Cases

- Ma Chung Lam & Another v. Citybase Property Management Limited (2007)
 - The Court followed the approach in *Lo Yuk Chu* and said the manager's duties were to take all reasonable steps in the circumstances.
 - There was no evidence that proper maintenance practice required inspections to be carried out regularly or periodically, and the blockage was not discovered until after scaffoldings were erected for inspection. The owners had not proved that the managers had breached their duties.

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Negligence by Property Manager – Decided Cases

- **Ma Chung Lam & Another v. Citybase Property Management Limited (2007)**
 - It was also argued that the manager should have broken into the property earlier by exercising its powers under the DMC, which allows the manager to allow them to enter a flat at a reasonable time to inspect, repair, maintain or renew any common parts in the property.
 - The Court held that this power might be exercised only in a case of emergency, meaning an event or incident involving serious danger to persons or property which would brook no delay, and as the present circumstances did not justify breaking into the property, there was no evidence of wilful default on the manager’s part.

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Negligence by Property Manager – Decided Cases

- **Lee Ming Yueh v Broadway-Nassau Investments Limited and Another (2012)**
 - After the manager had arranged to replace the waterproofing system on the roof of the suit building, water leakage had occurred in a unit of the top floor which had persisted for about 2 years. The owner claimed against the IO and manager.
 - It was held that the manager’s duty was one of “proper management”, which meant doing all that was reasonably required of a manager in the circumstances. As such, the court held the IO and manager had not acted unreasonably, since they had done what they could in the circumstances to resolve the problem upon receiving each successive complaint without undue delay.

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Negligence by Property Manager – Decided Cases

- Kong Lin Fat Johnny v. The IO of Chang Pao Ching Building & Another (2014)

An occupier was using the lift when the lift car suddenly accelerated its descent before it stopped, trapping him inside for about 20 minutes. He sued the IO and manager for negligence in failing to ensure the lift was working properly and claimed damages for his resulting physical and psychiatric injuries.

The evidence showed that there had been 7 other minor breakdowns of the lift during the preceding months. The IO had sub-contracted the lift maintenance and repair work to a sub-contractor who was called to deal with each breakdown.

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Negligence by Property Manager – Decided Cases

- Kong Lin Fat Johnny v. The IO of Chang Pao Ching Building & Another (2014)

The court said that the IO and manager were under a duty to do all reasonable acts to prevent foreseeable lift incidents. Their duty was continuing, in that they must from time to time review the conditions of the lifts under their management and solve any problems with assistance from their lift maintenance companies.

The IO and manager were held to be negligent as the accident could have been avoided if they had taken reasonable steps to maintain and repair the lift prior to the accident, such as by asking the lift sub-contractor to identify and resolve the causes of the 7 prior breakdowns.

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Negligence by Property Manager – Decided Cases

- *The IO of Long Mansion v. Good Choice Industrial Limited and Others (2016)*
 - There was legal action between IO and the owner of the car port of the suit building in which the owner was required to remove and demolish certain unauthorized structures and reinstate the areas within stated period but failed to do so.
 - The IO cited an employee of the owner who managed the car port for contempt for failure to comply with the court order.

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Negligence by Property Manager – Decided Cases

- *The IO of Long Mansion v. Good Choice Industrial Limited and Others (2016)*
 - An officer's liability for a company's breach of injunction is dependent on whether :-
 - The officer is fully aware of the terms of the order with which his company must comply
 - The officer must have knowledge at a time when he can use his position as an officer to secure compliance and
 - The officer must be aware that, if he does not so use his position, steps may be taken against him personally to enforce compliance

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Negligence by Property Manager – Decided Cases

- *The IO of Long Mansion v. Good Choice Industrial Limited and Others* (2016)
 - The court held that the individual property manager should not be held liable for contempt of court, as it had not been proved beyond reasonable doubt that he was in a position to secure compliance.

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Exemption Clauses in the DMC

- *Gallium Development Limited and Others v. Winning Properties Management Limited and Winning Properties Holdings Limited* (2004)
 - Owners in a building claimed against the developer/majority owner for converting some common parts in a building to its private use and using the building's common funds to pay for the works for such conversion.
 - They also claimed against the manager for allowing the works to take place and applying the building's common funds to the said works.

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Exemption Clauses in the DMC

- *Gallium Development Limited and Others v. Winning Properties Management Limited and Winning Properties Holdings Limited (2004)*
 - An argument raised by the manager was that it was protected by the exemption clause in the DMC which said the manager was not liable except for, amongst other matters, wilful negligence.
 - The court said that a person would not be guilty of wilful negligence unless he knew that he was committing, or intended to commit, a breach of his duty, or was recklessly careless in the sense of not caring whether his act or omission was or was not a breach of duty.

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Exemption Clauses in the DMC

- *Gallium Development Limited and Others v. Winning Properties Management Limited and Winning Properties Holdings Limited (2004)*
 - The manager must have known that the developer intended to interfere with the common parts but failed to exercise its independent judgment and only followed the developer's instructions.
 - The manager was liable, as it was wilfully negligent for recklessly disregarding its contractual and fiduciary duties to the other owners as a manager and custodian of common funds.

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Exemption Clauses in the DMC

- *Gallium Development Limited and Others v. Winning Properties Management Limited and Winning Properties Holdings Limited (2004)*
 - It should be noted that more recent DMCs have prevented exemption clauses from covering even ordinary negligence according to the Guidelines issued by the Lands Department.

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Exemption Clauses in the DMC

- 陳炳華及另一人 v 家利物業管理有限公司 (2020)
 - An owner suffered loss due to water leakage occurring at the ceiling of his shop space, and he commenced proceedings against the manager for negligence and nuisance in failing to send regular warnings to residents against improper use of toilets and risks of blocking sewage pipes.

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Exemption Clauses in the DMC

- 陳炳華及另一人 v 家利物業管理有限公司 (2020)
 - The Small Claims Tribunal held that the manager was protected by the following DMC clause :-
 - “Neither the Manager nor any servant agent or other person employed by the Manager shall be liable to the Owners... for or in respect of any act... not being an act or omission involving or criminal liability or dishonesty or wilful negligence...”

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Exemption Clauses in the DMC

- 陳炳華及另一人 v 家利物業管理有限公司 (2020)
 - On appeal to the High Court, the court agreed that the DMC clause limited the manager’s liability to acts or omissions involving criminal liability, dishonesty or wilful negligence. The words “wilful negligence” indicated that the manager would not be liable for ordinary negligence or nuisance.
 - The owner’s appeal was dismissed.

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PART 4

Professional Indemnity

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Features of a Professional Indemnity Policy

- Definition of professional indemnity
 - The term “professional indemnity” is typically defined in the policy to cover loss arising from claims in respect of liability incurred by a professional in connection with his practice.
- Typically on a “claims made basis” – covers claims made and reported by the policyholder to the insurer during the policy period
- A policyholder may need to pay a relatively high “excess” as compared to other liability policies, sometimes to ensure the policyholder also has a financial stake in conducting his practice, and when the quantum of such claims are usually relatively larger.

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Features of a Professional Indemnity Policy

- Many other provisions for a typical liability policy will likely appear in a professional indemnity policy, like: -
 - giving prompt notice of any occurrence which may give rise to a claim under the policy;
 - providing reasonable assistance to the insurers;
 - insurers having conduct of the defence to a claim;
 - no settlement or admission of any claims; and
 - “condition precedent” clause.
- The usual common law rule requiring the insured to make full and frank disclosure of any material circumstances which may affect the insurer’s decision on whether to issue the policy and the terms of such policy also applies.

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Features of a Professional Indemnity Policy

- For some professions like solicitors, professional indemnities are mandatory. The professional rules also require solicitors to report every claim to ensure insurance coverage for the benefit of the claimants.

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《END》

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