Joint Seminar
on Nuisance and Building Management
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Nuisance and Building Management

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1. Meaning of nuisance in law

1.1 Private Nuisance

- Unlawful interference with others' reasonable use or enjoyment of their premises.
- Examples: water leakage, noise, odour, vibration

1.2 Public Nuisance

- Causing danger to users of public highways or obstructing their use of the highways

1.3 Nuisance vs. Harassment/Trespass against Person

1.3.1 General Principles

- Nuisance is "a tort against land", and must involve unlawful interference with the use or enjoyment of land. If, therefore, there is no interference with the plaintiff's right of use and enjoyment of his land, no claim for nuisance may be made.

- On the other hand, there is no such requirement for "trespass against person" (e.g. assault, intimidation).

- Trespass against person usually involves intentional acts causing threat or actual injury to another person. But no such threat or injury may be required for harassment. Emotional distress may be sufficient.

1.3.1 General Principles (Cont'd)

- However, it has not yet been settled whether there is a tort of harassment in common law in Hong Kong. There are conflicting decisions in such regard.

- In England, it has been held that there was no tort of harassment in common law. For example, in ***Patel v Patel*** [1988], the defendant harassed the plaintiff by telephone calls and visits to the plaintiff's home, but did not commit any trespass to either the person or property of the plaintiff.

- The Court of Appeal held that as harassment was not a tort at common law, the court had no power to grant an injunction to restrain the defendant from entering a region outside the plaintiff's premises unless the defendant had committed or was likely to commit trespass against the person or property of the plaintiff.

1.3.1 General Principles (Cont'd)

- The House of Lords came to a similar conclusion in ***Hunter*** *v* ***Canary Wharf*** [1997]. A victim who had no interest in the property in which the harassment (and thus nuisance) took place, and who suffered no actual bodily or psychiatric illness may not have any claim under the common law of England.

- Eventually, this led to the enactment of Protection of Harassment Act in England in 1997.

- In the Hong Kong case *朱祖永 訴 香港警務處* (HCMP 1676/2002; Date of decision: 21st November 2002), the Court of Appeal said that there was no tort of harassment under the common law.

1.3.1 General Principles (Cont'd)

- However, in the later decision of ***Wong Tai Wai David v The Hong Kong SAR Government*** (CACV 19/2003; Date of decision: 7th September 2004), the Court of Appeal observed that given the present state of the law and its possible development in Hong Kong, it was arguable that harassment was an actionable tort.

- In ***Lau Tat Wai v Yip Lai Kuen Joey*** (HCA 1466/2011; Date of decision: 24th April 2013), the High Court set out the principles relating to the tort of harassment as follows:

  (a) "harassment" means a course of conduct by a person, whether by words or action, directly or through third parties, sufficiently repetitive in nature as would cause, and which he ought reasonably to know would cause worry, emotional distress or annoyance to another person;

1.3.1 General Principles (Cont'd)

(b) the mental element required is either intention to cause injury or reckless as to whether the victim would suffer injury from the defendant's conduct; and

(c) the plaintiff must have suffered damage as a result of the harassment; mere humiliation is not sufficient to constitute the tort but mental distress or anxiety would suffice, and the defendant must take the victim as he finds him; financial loss is also recoverable.

- ***Lau Tat Wai***'s decision was followed in another High Court case ***Shen Xing v Li Jun*** (HCA 1680/2013; Date of decision: 9th April 2014), confirming that the tort of harassment exists under the law of Hong Kong.

1.3.1 General Principles (Cont'd)

- However, in ***Pong Seong Teresa and others v Chan Norman*** (HCA 627/2010 and CACV 186/2014; decision at the 1st instance: 13th August 2014; decision on appeal: 19th March 2015) and ***Tam Seen Mann Estefania v Chan Norman and another*** (HCA 726/2011 and CACV 187/2014; decision at the 1st instance: 13th August 2014; decision on appeal: 19th March 2015), the High Court considered itself being bound by*朱祖永*'s case, and held that no tort of harassment in Hong Kong.

- That case went to the Court of Appeal, but the Court of Appeal concluded that it would not be appropriate to set out their views on whether there is a tort of harassment, when they had already disposed of the appeals on another ground.

1.3.1 General Principles (Cont'd)

- In a recent case ***Lin Man Yuan v Kin Ming Holdings International Limited and another*** (HCA 216/2008; Date of decision: 3rd June 2015), the High Court expressed its agreement with ***Lau Tat Wai***'s decision, in that the tort of harassment should exist "*to protect the people of Hong Kong who live in a small place and in a world where technological advances occur in leaps and bounds*".

- The court said that intrusion on privacy is difficult to prevent and it is hard for the victim to escape harassment. So long as there is intention to inflict harm on the victim, there should be no difference between damages caused by a physical act of violence or a series of harassing conduct.

1.3.1 General Principles (Cont'd)

- In that case, the court considered that the Defendants (by counterclaim) would be liable for harassment to the Plaintiff (by counterclaim) due to their repeated and persistent telephone calls threatening to do harm to the Plaintiff and his family members, and also repeated and persistent unsolicited visits by the agents to his office with intimidating and threatening demeanour. The Defendants should have known that they would cause worry, emotional distress and annoyance to the Plaintiff, who indeed had suffered from mental distress.

1.3.2 Harassment and Assault

- ***Pong Seong Teresa and others v Chan Norman*** (HCA 627/2010 and CACV 186/2014; decision at the 1st instance: 13th August 2014; decision on appeal: 19th March 2015) ("the 1st Action") and ***Tam Seen Mann Estefania v Chan Norman and another*** (HCA 726/2011 and CACV 187/2014; decision at the 1st instance: 13th August 2014; decision on appeal: 19th March 2015) ("the 2nd Action").

- The Plaintiffs in the 1st Action lived in a flat on the Ground Floor of the suit development, and her daughter, the Plaintiff in the 2nd Action lived on the 2nd Floor together with her husband and their baby. The Defendant lived on the 1st Floor in between the two units of the Plaintiffs.

1.3.2 Harassment and Assault (Cont'd)

- The Defendant was unhappy about the presence of unauthorized building works in the development, including works at the Plaintiffs' units, and made reports to the Buildings Department.

- In the 1st Action, the Plaintiffs alleged that the Defendant had on a number of occasions acted in such a way as to make them fear for their personal safety. They commenced court action for assault and/or harassment, and sought an injunction against the Defendant.

- In the 2nd Action, the Plaintiff alleged that on a number of occasions shortly after she had a baby, she and her family were disturbed at night by thumping noises from the slab between the Defendant's ceiling and her unit, and by loud radio and television sounds coming from the Defendant's unit. The Plaintiff sued for nuisance and sought injunction against the Defendant accordingly.

1.3.2 Harassment and Assault (Cont'd)

- For the 1st Action, the judge found that:

  (i) the Defendant shouted foul language or obscenities and gesturing in an intensifying aggressive manner towards the Plaintiffs (supported by records of police officers called to the scene);

  (ii) the Defendant had to be physically restrained from advancing towards the Plaintiffs on one occasion (as shown on a video);

  (iii) spraying on a wall near the front door of the Plaintiffs' unit and the adjacent area were spray painted with large words like: "COMMON AREA", "NOT A STORAGE SPACE", "UNAUTHORIZED BUILDING WORKS" (supported by the evidence of a domestic helper who saw the Defendant doing it)

1.3.2 Harassment and Assault (Cont'd)

- The Judge held that any reasonable person faced with those cumulative acts would feel very threatened and would be put in fear of assault, and held the Defendant liable for assault accordingly.

- It should be noted that there need not be actual physical contact to establish assault (both in the civil and criminal context). It will be sufficient if the victim has been under apprehension of immediate attack.

- After considering various cases touching on the question, however, the judge held that there was no tort of harassment under Hong Kong law.

1.3.2 Harassment and Assault (Cont'd)

- An injunction was granted against the Defendant in the 1st Action accordingly.

- As for the 2nd Action, the judge found that the Defendant had caused or allowed excessive noises to emanate from their residence which interfered with and disturbed the Plaintiff's quiet enjoyment of her premises, and were liable for nuisance.

- The Plaintiff's evidence was corroborated by the nanny, who had left her employ some three years before trial and contemporaneous records of 18 complaints in the management company's logbook, 16 of which had been made by the Plaintiff or her husband.

1.3.2 Harassment and Assault (Cont'd)

- An injunction was made to restrain the Defendants from:

  (i) deliberately creating nuisance to the Plaintiff by causing or allowing loud thumping noises, or excessive and unreasonably loud television or radio noises, to emanate from their residence at any time; and

  (ii) causing or allowing loud thumping noises, or excessive and unreasonably loud television or radio noises, to emanate from their residence between the hours of 11 pm and 7 am.

1.3.2 Harassment and Assault (Cont'd)

- The Defendant's appeals to the Court of Appeal in both actions were dismissed, as the court took the view that evidence supported the judge's findings.

- For example, various acts like vandalizing of the wall and stairwell areas on more than one occasions were completely out of line and showed an intensification of irrational behaviour.

1.3.3 Harassment and Intimidation

- There are 3 elements for a claim based on the tort of intimidation:

  (i) unlawful threat;

  (ii) intention to cause harm to the claimant with the threat; and

  (iii) damage to the claimant.

  (***Lau Tat Wai v Yip Lai Kuen Joey*** (HCA 1466/2011; Date of decision: 24th April 2013) and ***Lin Man Yuan v Kin Ming Holdings International Limited and another*** (HCA 216/2008; Date of decision: 3rd June 2015).

1.3.3 Harassment and Intimidation (Cont'd)

- The person under threat needs not yield to the defendant's demand, before the claim may be succeeded.

- In the said ***Lau Tat Wai***'s case, the parties were lovers for 4 months. After the termination of the relationship, the Defendant persisted in harassing and intimidating the Plaintiff for 6 years, both in Hong Kong and overseas, including making repeated telephone calls to him, hacking into his email account and surveillance on him and his family.

- These forced the plaintiff to switch jobs and to move from his home. Aggravated damages and exemplary damages were awarded in the sums of $600,000 and $200,000 respectively.

1.3.3 Harassment and Intimidation (Cont'd)

- In the said ***Lin Man Yuan***'s case, the Defendants (by counterclaim) had engaged agents to negotiate with the Plaintiff (by counterclaim) on the parties' dispute and agreed to pay those agents RMB 60 million if they were successful. The court found that those Defendants must have known the background of those agents, but had turned a blind eye to their intimidating activities. Hence, they must be responsible for those agents' intimidation.

- The Plaintiff (by counterclaim) made a report to the police about these incidents. For the safety of himself and his family, they even moved to live in a hotel for a while. He also alleged having suffered from mental distress.

1.3.3 Harassment and Intimidation (Cont'd)

- The acts of harassment and intimidation lasted for a few months. Although there was no actual act of violence leading to physical injuries, the threats were made by persons with dubious background which might cause real alarm to the Plaintiff (by counterclaim) and his family.

- The court awarded $300,000 as aggravated damages (to compensate the victim for his suffering in his feelings, dignity and pride, for his mental discomfort and distress) and $150,000 as exemplary damages (punitive in nature and are awarded to teach the culprit and to deter him and others from similar conduct).

2. Decided Cases on Nuisance

2.1 Private Nuisance

Water Leakage

- The commonest kind of nuisance occurring in Hong Kong is caused by water leakage. If the source of leakage is common part and facility, it will be for the IO/Manager to do all necessary repairs to stop the leakage.

- IO's/Manager's duty is to take reasonable measures to prevent such leakage only. They are not insurance companies and are under no duty to compensate the victims for all losses due to water leakage.

2.1 Water Leakage (Cont'd)

- Therefore, in ***Lee Ming Yueh v IO of Mei Foo Sun Chuen Stage VII & another*** (CACV 265/2008; Date of decision: 19th September 2012):

  (i) The Manager engaged contractors to replace the waterproof membrane underneath the roof. One year after the project had been completed, leakage occurred in a top floor unit.

  (ii) At first, the Manager mistakenly believed that the source of water seepage was the external walls, and arranged another contractor to do repair there.

  (ii) However, leakage continued. Later, after performing some tests, they found that the roof was the source of leakage.

2.1 Water Leakage (Cont'd)

(iv) As there was 10 years' DLP under the roof waterproofing contract, the Manager called upon the contractor to perform rectification works.

(v) About one year later, leakage occurred in the unit again. The Manager office asked the same contractor to do the repair, and after two more rounds of further repair works, the leakage ceased.

(vi) The owner of the top floor unit sued the IO and the Manager for having breached their duty to repair and maintain the common facility (i.e. the waterproofing membrane) which caused her nuisance and loss (including loss of rental during the period when the unit could not be let out due to the leakage problem).

2.1 Water Leakage (Cont'd)

(vii) The Lands Tribunal said that the Manager or IO were not insurance companies. If they had taken *reasonable* measures to maintain the common areas and facilities, they would not assume any liability.

(viii) In the case, the Manager dealt with the complaints swiftly every time, although they had mistaken in the beginning which caused some delay, it could not be said that they had failed to take reasonable measures to fulfill their responsibilities. Therefore, the claim was rejected.

(ix) The owner appealed to the Court of Appeal, where she argued that the Manager had failed to appoint a competent contractor to carry out repairs, or to properly supervise the works.

2.1 Water Leakage (Cont'd)

(x) The Court of Appeal held that there was no evidence to show that the management office hired an incompetent contractor to carry out the roof waterproofing project in the first place.

(xi) Later, since there was a 10-year DLP, they reasonably asked the same contractor to follow up with the works.

(xii) Although the problem did recur, after the first two rounds of maintenance, leakage did stop for about a year. It was not unreasonable for the Manager to ask the same contractor to attend to the subsequent follow up repairs.

2.1 Water Leakage (Cont'd)

(xiii) The Court considered other cases of the Court of Appeal (such as ***Lo Yuk Chu v Hang Yick Properties Management Ltd.*** (CACV 169/2006; Date of decision: 5th November 1996)and ***Lau Chun Wing Rod v IO of Po On Building*** (CACV 20/2007; Date of decision: 1st November 2007), and said that the DMC or section 18(1) of the BMO did not require the Manager or IO to make compensation whenever problems and damage occurred as if they were insurance companies. Their liabilities in law were based on fault, or, when a problem arose and they failed to rectify it for a long period of time.

(xiv) In the said ***IO of Po On Building***'s case, the Court of Appeal held that IO was liable to the owner of a top floor unit for nuisance caused by water leakage into his unit (including loss of rental), as every time the IO simply referred the owner's complaint to the contractor, even though the problem had persisted for a few years. Therefore, the IO had not taken reasonable and appropriate measures to solve the problem.

2.1 Water Leakage (Cont'd)

- Even if the developer may be liable for the repair of certain facilities for his exclusive use or possession, sometimes the IO/Manager may also have a concurrent duty of repair and maintenance under the DMC, and may be liable to an individual owner for failing that duty.

- For example, in *鄭惠娟* **v** *永利中心業主立案法團及另一人* (CACV 137/2006; Date of decision: 14th March 2007), the Court of Appeal affirmed the decision of the Lands Tribunal, which held the IO and Manager were liable for the damage to a basement shop of the building caused by water leakage through the external walls.

- The court considered that although the developer was liable to maintain the external wall pursuant to Section 34H of the BMO, the IO/Manager owed the owner the same duty under the DMC, in light of the DMC provision requiring them "*to repair and keep in good repair and condition the main structure and fabric of the said building*".

2.1 Water Leakage (Cont'd)

- Further, the IO/Manager knew of the leakage problem but refused to perform any repair works, on the ground that the Plaintiff owner should approach the developer instead. Hence, they were guilty of "wilful negligence", and cannot claim protection under the exemption clause contained in the DMC.

- According to a series of long standing decisions like *梁有勝* **v** *馮源喜及另四人* (LDBM 249/2000; Date of decision: 16th July 2002), ***Kung Shing Investment Ltd. v The Sunbeam Manufacturing Co Ltd.*** (DCCJ 4093/2001; Date of decision: 26th August 2004), ***Tai Fong Trade Ltd. v IO of Nos. 167 & 169 Hoi Bun Road and another*** (LDBM 1/2006; Date of decision: 11th November 2004), ***IO of Hong Leong Industrial Complex and another v HL Resources Ltd. and another*** CACV 189/2009 (24th February 2010), ***Kimberley Assets Management Ltd. v Golden Star Overseas Ltd. and another*** LDBM 291/2004 (17th February 2011), and ***IO of Gordon Terrace*** **v** ***Shen Yang Lien and another*** (LDBM 291/2011; Date of decision: 27th August 2014), waterproofing membrane (even situated within a unit or a portion of a building exclusively used by an owner) were for the protection of the whole building.

2.1 Water Leakage (Cont'd)

- It would be for the IO/Manager to repair and maintain those parts of the building out of the building funds. If IO/Manager fails to do so, they will be liable not only for the repair cost, but also any loss and damage suffered by individual owners as a result.

- In a more recent High Court case ***Wing Ming Garment Factory Ltd. v IO of Wing Ming Industrial Centre*** (HCCT 60/2006; Date of decision: 23rd June 2014), the developer retained, amongst other properties in the building, the Roof Floor as well as part of the Upper Roof, whereas the other part of the Upper Roof was common parts of the building. The Roof Floor was flooded from time to time due to failure of the waterproofing membrane at the Upper Roof.

- Despite the said decided cases, IO still disputed liability to repair and maintain the waterproofing membrane situated within such part of the Upper Roof exclusively used by the developer.

2.1 Water Leakage (Cont'd)

- The High Court held, following the line of decided cases mentioned above, that the waterproofing membrane was a facility intended to serve the whole building, and there was no evidence that the waterproofing membrane only protected the area directly underneath it.

- The court further took the view that even if the waterproofing membrane only protected the area directly underneath it, it would still be a common part by virtue of paragraph 11 of Schedule 1 to the BMO, since it was a fixture situated within one flat but used in connection with the enjoyment of another flat of the building.

- "The indigo area on the Upper Roof, which is in the exclusive possession of [the Developer], is a flat as so defined. On the IO's own case, the relevant part of the waterproofing membrane is situated within such flat. Even assuming that the waterproofing membrane in the Upper Roof floor is meant for the protection only of the floor below, it is used in connection with the enjoyment of another flat of the building, namely the Roof Floor level. It follows that it is a common part."

2.1 Water Leakage (Cont'd)

- Alternatively, the waterproofing membrane was situated within the floor slab, which was a common part, and equally it should be regarded as a common part.

- In the circumstances, IO had failed to discharge its duty under Section 18(1)(a) of the BMO to keep the common parts in proper repair, and was ordered to replace the waterproofing layer to a specification to be agreed between the parties' experts.

  Damages for inconvenience and discomfort have been awarded in nuisance caused by water leakage. For example, in ***Yan Wing Fai Rick and another*** *v.* ***Century One Ltd***. DCCJ 2773/2009 (Date of decision: 2nd February 2011), damages for loss of enjoyment was awarded in the sum of $40,000 by reason of water leakage occurring in the plaintiff's guest toilet for about 2 years, and for some 50 days, the leakage problem was very serious.

2.1 Smoke and Odour

- ***Hu Wei Hsin*** *v* ***Ma Hung Wing & Ors.*** DCCJ 273/2011 (Date of decision: 3rd June 2011).

- The Defendants burnt 3 sticks of incenses in each of two censers outside their flat on various occasions every day for more than an hour.

- Smell and smoke emitted were trapped in the corridor.

- The Defendants allegedly swept the dust resulting from the burning of the incenses and threw some powder of unknown nature towards the Plaintiff's door.

- The Plaintiff and her family suffered from discomfort in breathing and also headaches and choking.

2.1 Smoke and Odour(Cont'd)

- Held: The Defendants were liable as claimed, and were required to burn "environmentally friendly" joss sticks at most twice a day and not more than 30 minutes each time, and to clean the censers on a regular basis. Damages for inconvenience and discomfort of $75,000 and cost were awarded to P.

2.1 Possible Radiation Caused by Antennae

- ***IO of Fanling Centre v Wong Yu Ting Terence*** (LDBM 28/2013; Date of decision: 9th May 2013)

- The Respondents were owners of a top floor unit together with the portion of the roof above the unit in the suit development. They had installed on their roof some antennae for wireless communication for the purpose of their taxis business since 1991 when they moved in to the flat. The installations were licensed by OFTA.

- One of the antenna was close to the room of another top floor unit (less than 10 feet away from the room).

2.1 Possible Radiation Caused by Antennae (Cont'd)

- In 1999, IO started to complain of the installations but the no legal action was taken at that time. In 2011, the IO made various requests for the demolition of the antennae and related structures on the roof.

- In 2012, the owner of the said other top floor unit wrote to the Respondents requesting for the removal of the antennae, saying that his daughter had brain tumor which he suspected to have been caused by them.

- At last, the IO applied to the Lands Tribunal for an injunction requiring the Respondents to remove the antennae.

2.1 Possible Radiation Caused by Antennae (Cont'd)

- The DMC contains the following provisions: -

  "*No Owner will … do cause or permit or suffer to be done any act or thing which may be or become a nuisance or annoyance or cause damage to the other Owners and occupiers for the time being.*"

  "*No Owner shall affix or install his own private aerial outside any part of any Building.*"

- Following some authorities, the Lands Tribunal took the view that "*Where the covenant is against any act which may lead to 'annoyance, nuisance or damage', it is wider, and is broken by anything which disturbs the reasonable peace of mind of an adjoining occupier. The disturbance need not amount to physical detriment to comfort…*"

2.1 Possible Radiation Caused by Antennae (Cont'd)

- Hence, any acts which disturb the peace of mind of the other occupiers in the building might constitute "disturbance " or "annoyance" in law, even if no physical damage had been proved.

- Accordingly, the Tribunal held that the Respondents had breached the said DMC provision, as the antennae had caused annoyance and disturbed the peace of mind of the occupiers of the said other top floor unit.

- Injunctions were granted compelling the demolition of the antennae and prohibiting any similar installations in future.

2.1 Possible Radiation Caused by Antennae (Cont'd)

- The Respondents appealed to the Court of Appeal, arguing that the Lands Tribunal had placed undue weight on the subjective perception of the occupiers of the other unit on the effect of the antennae.

- Their application for leave to appeal was refused. The Court of Appeal said that the Tribunal had adopted an objective test, and examined the evidence and reached the conclusion accordingly, and the finding was correct.

- In another case ***The IO of Kadoorie Avenue Mansion*** v ***Rising Dragon International Limited*** LDBM 201 of 2013 (Date of decision: 22nd December 2014), IO was again seeking injunctions requiring the Respondent owners to remove certain antennae and unauthorized structures on portion of the roof which was exclusively occupied by the Respondents.

2.1 Possible Radiation Caused by Antennae (Cont'd)

- One of the grounds relied upon was that those installations had caused annoyance, damage or disturbance to other owners and occupiers of the building in breach of the DMC and BMO.

- The DMC contained the following prohibition:

  "*Not to commit or suffer to be committed on the said Premises or the said Building anything which should become a* ***nuisance*** *to the other co-owners …*"

- The Lands Tribunal observed that the DMC provision was narrower than the one in *Fanling Centre's* case, and IO must prove nuisance. "Disturbance" and "annoyance" were not sufficient.

2.1 Possible Radiation Caused by Antennae (Cont'd)

- The question was whether mere honest and perhaps reasonable fear (thus causing disturbance to and annoyance of owners/residents or no peace of mind) of the possible harmful effect of the radiation, without scientific proof, is sufficient to substantiate a nuisance claim as a matter of law.

- The Tribunal held that it was not sufficient. The fear must be well-founded and the activities must be shown to be actually dangerous to health on a balance of probability.

- As IO admitted that there was no scientific proof to link the alleged health hazards and the radiation, the relevant paragraph of the Notice of Application was ordered to be struck out.

2.2 Public Nuisance

2.2.1 Causing danger to users of highway

- ***Leung Tsang Hung and another v IO of Kwok Wing House*** (FACV 4/2007; Date of decision: 26th October 2007

  This case established the liability in public nuisance of IO in respect of injuries and losses caused by illegal structures erected on common parts of a building, even if those structures were for the exclusive use or possession of individual units.

- Previous decisions drawing differences between damage caused by the dangerous conditions of the common parts and illegal structures attached to common parts are no longer of much significance.

2.2.1 Causing danger to users of highway (Cont'd)

- The same reasoning also applies and potential liability attached to property manager.
- Claims for "negligence" and possibly "occupier's liability" may also succeed.
- Offence under Section 4B of the Summary Offences Ordinance.
- Possible implication on public liability insurance.

2.2.2 Apportionment of liability between IO and individual owner

- n ***Lam Kan Mau v IO of Mei King Mansion Phase 1 and others*** (HCPI 1175-1179/2002; Date of decision: 16th July 2010), a portion of an unauthorized canopy affixed to a shop on the 1st Floor of the suit building in To Kwa Wan collapsed, causing injury to seven pedestrians on the pavement. The Building was over 35 years old at the time of the accident and contained many unauthorized structures.

- Building order was served on the IO requiring it to appoint a person to carry out investigation works on the common areas and exterior of the Building and to submit proposals for remedial works to be carried out on the dilapidation/defects found.

- A contractor company was appointed accordingly. Some scaffolding in connection with the renovation works performed pursuant to the building order was erected onto the canopy.

2.2.2 Apportionment of liability between IO and individual owner (Cont'd)

- The court after hearing expert evidence found that the major cause of the collapse of the canopy was the failure of the steel frames inside. Those steel frames were in such a severely corroded state that a brittle mode failure occurred.

- No maintenance work had been carried out on the canopy. Loading onto the canopy caused by storage of goods over the years and the vibration caused by falling debris of some demolition works nearby also contributed to the collapse.

- In apportioning liability between the shop owner and IO, the court attributed to each of them the acts and defaults of their respective contractors and sub-contractors, as a person's responsibility for the damage in question includes responsibility for the acts and defaults of his contractors and sub-contractors, even though such acts and defaults of independent contractors may not create personal or vicarious liability on the part of that person.

2.2.2 Apportionment of liability between IO and individual owner (Cont'd)

- Further, the fact that the shop owner was guilty of multiple breaches of duty (breach of DMC and common law duty etc.) might not render him liable for more. The court distinguished between moral culpability and legal liability.

- The High Court took the view that the IO were substantially more to blame for the accident than the owners and tenant of the shop premises

2.2.2 Apportionment of liability between IO and individual owner (Cont'd)

- IO had been in existence since 1978, at or about the time that the unauthorized canopy was constructed. The severely dilapidated condition of the unauthorized canopy was plain and obvious. IO must have known that the canopy had not been maintained for many years, if at all, and they had far greater capacity to repair the unauthorized canopy or remove it than any other individual owner of other premises in the Building.

- They enjoyed greater resources and powers under the Deed of Mutual Covenant and under the Building Management Ordinance to take steps to render the building safe than any individual flat owner. IO was held to be liable for 65% and the shop owner for 35% accordingly.

- The court pointed out that if an insured person adopted a could-not-care-less attitude because he felt adequately protected by insurance, the conduct of the insured defendant would be a relevant consideration to have regard to in the exercise of apportioning responsibility.

2.2.3 Obstruction of public highways

- Other instances of claims being brought by private citizens (as opposed to the Secretary of Justice) on public nuisance include the recent cases involving obstruction of highways due to the Occupation Movement: ***Chiu Luen Public Light Bus Company Limited***'s case (HCA 2086/2014; Date of decision: 10th November 2014) and ***Lai Hoi Ping (suing on his own behalf and on the behalf of all other members of Hong Kong Taxi Association) and Tam Chun Hung (suing on his own behalf and on the behalf of all other members of Taxi Drivers and Operators Association)***'s case (HCA 2104/2014 and HCMP 2975 & 3014/2014; Date of decision: 10th November 2014) and ***Kwoon Chung Motors Company Limited*** **and** ***All China Express Limited***'s case (HCA 2222 & 2223/2014; Date of decision: 1st December 2014).

- The Plaintiffs in the two actions sue on public nuisance, and have to show that they have suffered, or would suffer if no injunctions were granted, "particular, substantial and direct damage" because of the obstruction of the public roads in question, over and above that which is suffered by the general public

2.2.3 Obstruction of public highways (Cont'd)

- At the end, they obtained interlocutory injunction against the occupiers restraining them from blocking and occupying the public highways.
- Whether a damage or loss said to be suffered by the plaintiff can be regarded as particular, substantial and direct is essentially a question of fact, and a matter of degree and extent.
- The "particular" damage needs not be pecuniary (and thus special) in nature. It may consist of proved general damage, such as inconvenience and delay provided that it is substantial, that it is direct and non-consequential, and that it is appreciably greater in degree than any suffered by the general public.
- It is also not necessary prove that the plaintiff has any injury to property, or has any interest or relationship with any land or building.

3. DMC and BMO provisions on Nuisance

3.1 Some common DMC provisions on nuisance

- Other than the common law tort of nuisance, assault, intimidation and possibly harassment, there are BMO provisions and very often DMC provisions which a victim of nuisance may sue upon if they are breached.

3.1 Some common DMC provisions on nuisance (Cont'd)

- *"No owner shall do or permit or suffer his flat to be used for any illegal or immoral purpose nor shall he do, cause or permit or suffer to be done any act or thing which may be or become a nuisance or annoyance to or cause damage to the other owners and occupiers for the time being of the Land and the Estate*."

- *"No owner shall do or permit or suffer his flat to be used for any illegal or immoral purpose nor shall he do, cause or permit or suffer to be done any act or thing which may be or become a nuisance or annoyance to or cause damage to the other owners and occupiers for the time being of the Land and the Estate*."

- *"no owner shall make or cause or permit any disturbing noise in his flat or do or cause or permit anything to be done which will interfere with the rights, comforts and convenience of the other occupants of the Estate*."

3.2 BMO provisions on nuisance

- Section 34I (1)(b) of the BMO:

  "No person may 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."

- Section 34I (2) of the BMO:

  "Any person who contravenes subsection (1) shall be deemed to be in breach of an obligation imposed on him by the deed of mutual covenant in respect of the building."

- Hence, even if the DMC contains no express provision preventing owners from causing nuisance to another owner or occupier, the victim may sue for nuisance under the common law, and may also maintain an action under section 34I(1)(b) and 34I(2) , as if the defendant has breached an express DMC provision.

4. Enforcement

4.1 Going to Court

- If the nuisance or the relevant tort or breach of DMC/BMO persists, the usual remedies are for the victim to apply to the court for an injunction restraining the unlawful activities, and seeking for damages.

- If the unlawful activities still persist after an injunction is granted, committal proceedings may be taken against the defendant who may incur criminal liability punishable by imprisonment, on the ground of his willful disobedience to a court order.

- The victim may also ask for damages (monetary compensation). This may include, in an appropriate case, general damage (i.e. pain, suffering and loss of amenities, damages for distress or inconvenience, special damage (loss of income and medical expenses), aggravated damages and exemplary (punitive) damages.

4.1 Going to Court (Cont'd)

- However, legal proceedings are costly and the successful party usually cannot recover all his costs incurred. The taxed off portion may be substantial and in some cases, may be more than the monetary compensation recovered if the injuries are mild.

- Alternative dispute resolution like mediation may be considered. Services of Building Management Mediation Co-ordinator's Office may be considered and engaged.

- See: http://mediation.judiciary.gov.hk/en/mcos.html

4.2 Other Enforcement Authorities and the Relevant Statutes

4.2.1 Noise

- The main statute which deals with noise problem in Hong Kong is the Noise Control Ordinance.

- For domestic premises and public places, according to the Environmental Protection Department, "*it is not possible to specify fixed acceptable noise levels or noise measurement procedures to be used in assessing the acceptability of the noise. As is the case in other countries, noise from domestic premises and in public places is to be responsively dealt with by the police on a reasonableness approach*." (See "A Concise Guide to the Noise Control Ordinance 9th Edn." published by the EPD).

4.2.1 Noise (Cont'd)

- "Domestic premises" is defined in section 2 of the Ordinance to mean:

  (a) any premises used wholly or mainly for residential purposes and constituting a separate household unit; and

  (b) any part of a hotel or boarding-house that is let by the keeper of the hotel or boarding-house to a guest

- Section 4 of the Ordinance makes it a criminal offence punishable with a maximum fine of $10,000 for a person who makes any noise which is a source of annoyance to any person between the hours of 11 p.m. and 7 a.m., or at any time on a general holiday in any domestic premises or public place.

- In case of domestic premises, the owner, tenant, occupier or person in charge of the premises who knowingly permits or suffers such noise to be made will also be liable.

4.2.1 Noise (Cont'd)

- Section 5 creates similar offences also punishable with a maximum fine of $10,000 for noises produced in domestic premises or public places by musical instrument, record or cassette player or radio or television apparatus, loud-speaker, air-conditioning or ventilating system, animal or bird or by playing games or carrying on a trade or business (including attracting attention to goods or trade), if such noise is a source of annoyance to any person.

- "Annoyance" is defined in section 2 of the Ordinance to mean "annoyance that would not be tolerated by a reasonable person". The issue is whether the noise caused annoyance to a reasonable person. According to cases like ***HKSAR v Woo Carrie*** (HCMA 1229/2004; Date of decision: 31st December 2004), scientific evidence of decibels of the noise would not be required.

4.2.1 Noise (Cont'd)

- In ***HKSAR v Chan Oi Chun*** (HCMA 833/2010; Date of decision: 21st April 2011), a case about noise caused by dog barking, it was said that the test of whether there is any "annoyance" under section 4 and section 5 is as follows:

  (1) Did any animal which was kept by anyone make any disturbing noise?

  (2) Did such noise emanate from D's residence?

  (3) Did the complainant suffer any annoyance?

  (4) Was the disturbing noise the source of annoyance to the complainant?

  (5) Was the annoyance of such nature and extent that it would not be tolerated by a reasonable person?

4.2.1 Noise (Cont'd)

- The court took the view that the duration of the annoyance is more important than the volume level, and a 30-minute non-stop dog barking constituted an annoyance to a reasonable person whilst a 10-minute one would not.

- For noises coming from industrial, commercial, trade or business premises, the Noise Control Authority may issue Noise Abatement Notices to the owners or occupiers of premises if the noise emitted from those premises causes annoyance or does not comply with prescribed limits under the applicable Technical Memorandum.

- It is an offence to fail to comply with a noise abatement notice. Any person who, having been served with a Noise Abatement Notice but fails to comply with it shall be liable:

  (a) on first conviction to a fine of $100,000;
  (b) on second or subsequent conviction, to a fine of $200,000,

  and in any case to a fine of $20,000 for each day during which the offence continues.

4.2.1 Noise (Cont'd)

- In the Court of Final Appeal's decision in ***Noise Control Authority & another v Step In Ltd.*** (FACV 11/2004; Date of decision: 4th April 2005), the Applicant operated a bar in which live music was played. The bar was on the Ground Floor of a building and the upper floors were residences. After the residents' complaints, the Noise Control Authority served a noise abatement notice which required the Applicant to ensure that noise from the bar was "not audible" between 11 pm and 7 am in the nearest "noise sensitive receiver", which was the flat above the bar (the requirement).

- The Applicant argued that the abatement notice should have specified limits in decibels, as audibility was dependent upon the listener's subjective sensitivity, which was variable. Thus the requirement was uncertain and unreasonable and the Authority had no authority to issue such an abatement notice. Further, it would offend article 11(1) of the Hong Kong Bill of Rights and article 39 of the Basic Law, as it offended the principle of legal certainty.

4.2.1 Noise (Cont'd)

- However, the Court of Final Appeal considered that the requirement was entirely certain, reasonable and clearly within the power conferred by the Ordinance. The requirements of the abatement notice must be construed as confined to abating noise which would be an annoyance to a reasonable person, whatever that person's auditory capacity might be.

- "Annoyance" is not the same as "actionable nuisance". Hong Kong people living in a multi-storey building might be expected to live with some annoyance.

- Complaint of domestic noise may be made to the local Police stations, whereas the Environmental Protection has regional office as well as a complaint hotline.

4.2.1 Noise (Cont'd)

- Enforcement action taken in 2013 under the Ordinance[1]: - Source: http://www.epd.gov.hk/epd/tc_chi/laws_regulations/enforcement/resource_enfor4_2013.html

類別	警告／勸諭	消減噪音通知書	發出傳票
一般建築噪音	455	-	102
撞擊式打樁噪音	60	-	0
工商業噪音	1088	43	21
鄰里噪音	453	-	3
防盜警鐘	0	-	0

1Source: http://www.epd.gov.hk/epd/tc_chi/laws_regulations/enforcement/resource_enfor4_2013.html

4.2 Water Leakage

- A Joint Office was established by FEHD and BD to tackle the water leakage problems which are very common in Hong Kong.

  See the following FEHD website for FAQ about water leakage occurring in Hong Kong: -

  http://www.fehd.gov.hk/english/faq/pleasant_environment/water_seepage_dripping/faq_wseepage.html

- Section 127 of the Public Health and Municipal Services Ordinance empowers FEHD to issue a Nuisance Notice.

4.2 Water Leakage (Cont'd)

- Other statutory provisions relating to water seepage include the Buildings Ordinance also empowers the BD to investigate and remedy building defects (section 26A), and to investigate and remedy drainage defects (section 28), and section 16 of the Waterworks Ordinance confers on Water Services Department the power to issue notices requiring repairs in case of wastage of water.

- Generally, the Government is not concerned with seepage that does not constitute public health nuisance, building safety risks or wastage of water. These are for the owners of the buildings to deal with.

- Under Section 127 of the Public Health and Municipal Services Ordinance, if FEHD is satisfied that a relevant nuisance exists, it may serve a Nuisance Notice on the person by reason of whose act, default or sufferance the nuisance arose or continues, or, if that person cannot be found, on the occupier or owner of the premises on which the nuisance exists, requiring him to abate the nuisance within the period specified in the notice.

4.2 Water Leakage (Cont'd)

- Failing to comply with a Nuisance Notice within the time specified will be an offence
- The maximum penalty is fine for $10,000 and $200 per day when the default continues.
- In ***HKSAR v Sze Kuk Sui*** (HCMA 504/2010; Date of decision: 4th October 2010), the Defendant was convicted of failing to comply with a notice to abate a nuisance arising from water seepage from his unit. FEHD conducted tests which confirmed that the seepage originated from the balcony floor of D's unit.
- He appealed to the High Court against the conviction, and alleged that the leakage occurred due to the damage of the waterproofing membrane beneath the balcony of his unit, which was common facility for the IO to repair and maintain.

  However, his appeal was dismissed, as the court held that there was no evidence of the existence and extent of the alleged waterproofing membrane.

4.2 Water Leakage (Cont'd)

- Further, so far as FEHD was satisfied that a nuisance existed, a nuisance notice might be served on the person who had caused the nuisance to arise or continue within the meaning of the Ordinance. It was clear that the balcony was occupied or enjoyed by the Defendant exclusively.

- The objective of the Ordinance was to ensure that a nuisance was abated as soon as possible, while issues regarding the ultimate cause of nuisance, liability and costs and expenses were to be resolved at a subsequent stage.

- An abatement order may require a person to comply with all or any of the requirements of a Nuisance Notice in connection with which the order is made, or otherwise to abate the nuisance or to do what may be necessary to prevent the recurrence of the nuisance within the period specified in the order.

4.2 Water Leakage (Cont'd)

- A prohibition order may prohibit the recurrence of a nuisance.

- A closing order may prohibit the use of any premises for human habitation, but shall only be made if it is proved to the satisfaction of the court that, by reason of a nuisance, the premises are or is unfit for human habitation.

- Any person who fails without reasonable excuse to comply with, or knowingly contravenes, a Nuisance Order shall be guilty of an offence. The maximum penalty is fine for $25,000 and $450 per day when the default continues.

4.2 Water Leakage (Cont'd)

- FEHD may also abate the nuisance and recover any expenses reasonably incurred.

- Pursuant to section 126(2) of the Ordinance, FEHD may apply to the court for a warrant to effect entry into the premises, by force if necessary.

These notes are for reference only and should not be relied upon to resolve any dispute. If an actual case arises, please consult legal opinion. Full judgments of the Hong Kong cases may be downloaded from the website *www.judiciary.gov.hk*.