COVER STORY
主題文章

澳門高端物業管理 — 探討外籍從業員的人文價值

黃敏婷
澳門地區會員

引言

「以人為本」，是以尊重人性為根本。人文價值是物業管理的重要因素。翻閱物管人文相關的文章，可大概認識到人文價值是如何滲透在物業管理服務中。物業管理的人文價值，除了用於提供具有溫度的服務給業主和其他物業使用者，作者認為，人文價值也能換個角度滲透在為物業提供服務的從業員身上。*如何從滿足外籍物管從業員自身的人文價值以提升其工作表現，從而迎合澳門需求漸增的高端物業管理服務？*這是本文探討的課題。

本文的核心是從人文的層面，探討提升外籍物管從業員的工作動力，為高端物業創造更高的價值。作為文章背景，以本地勞動力緊張和近年澳門高端物業的源起來闡述外籍從業員的確切需求，並簡述對於高端物業管理來說，外籍從業員是重要的持份者。他們在澳門的高端物業管理是被需要的，那麼，探討任何能讓其工作品質和整體表現提高的方法，便是正當的。繼而，本文探討與物管領域密不可分的人文價值，並將其應用在外籍從業員身上。簡單來說，企業如果分辨出外籍從業員自身於工作上的人文價值，並加以滿足，便可獲得他們的工作表現作回報。

本文的核心討論框架建立在著名的**馬斯洛需求層次理論(Maslow's Hierarchy of Needs)**，透過理論分析，並結合訪問現職高端物管的外籍從業員，以了解其對應理論中五個需求層次的自身人文需求，並針對每層需求提出一些讓企業參考的方案。當中也論及一些外籍從業員尤其會遇到的挑戰。從人文的角度探討在改革管理上，優化外籍從業員的工作表現，進一步為澳門的高端物業提供有溫度而優秀的服務。

澳門本地勞動力緊張

澳門的失業率長期維持在較低水平。據澳門統計局官方公佈的資料，2018年末澳門總體失業率僅為百分之1.8，相對比香港同期的百分之2.8和中國內地同期的百分之3.8為低。在中國內地，隨著中美貿易衝突對國家經濟所帶來的負面影響，失業率也面臨上升憂慮。多數行業隨著經濟週期的改變受影響，而物業管理這一行業在面對經濟起落時，受影響相對輕微。 經濟興與衰，人民都需要住屋，那便是對物業管理服務的剛需。行業特性對於從業員來說是優點，工作穩定性高，尤其是當一些行業面臨裁員時，物管從業員或會被凍薪甚至減酬，但未必面對大量裁員的情況。然而，物業管理行業普遍面對共通問題卻是人資短缺，在澳門尤其能體現出來。

眾所周知，博彩業作為澳門的支柱行業，帶來了大量的工作崗位，本地人即便不具備突出的能力，也有待遇福利較好的工作機會。因此，澳門的物業管理行業一直缺乏本地人的參與，尤其是基層從業員。儘管澳門政府在2016年1月1日對物業管理業務中擔任清潔及保安工作的從業員訂下了最低工資的法規，規定每月的最低薪酬為澳門幣6,240元，或每小時30元；在最低工資的規範下，從業員每天工作11小時，每月到手不過約澳門幣九千元左右。對比現時澳門本地人的入息中位數澳門幣20,000元，差距甚大。縱觀本地從業員的年齡和整體素質，普遍為中老年人，學歷低，且缺乏積極的工作態度和行動力，物管企業在很難對他們提出較高的服務要求。因此，物管行業需要大量的外籍勞動力來填補行業的空缺。

高端物業管理需求日漸增長

澳門近十載，住宅物業以較過往更高檔次的型態呈現，這是經濟也是行業的正面發展。開發商傾向打造高端型住宅，以迎合購買力相對提高了的買家，順理成章爭取以更高售價來銷售。多數情況下，作為行銷策略的一部分，開發商在銷售物業時，會引進一家行業公認比較優秀的管理公司作物業管理顧問和入伙後的物業管理公司，或直接由開發商旗下的物業管理公司自行負責日後的物業管理，藉此為專案加分，並為物業交付後的管理素質帶來美好的期待。由此可見，澳門正處於中高端物業管理服務的發展期，實在需要更多優秀的從業員來支撐發展。外籍從業員從素質和體力上都更符合為高端物業提供優質服務的先決條件，填補高端物業管理人力資源的空白。由此可見，外籍從業員是行業重要的持份者，下文將探討他們的人文價值與需求。

外籍從業員的人文價值

在澳門，來工作的外籍人士可分為兩類。一是高級管理層或專業型人才，另一種則是非專業人士擔當相對基層的工作。本文的外籍物業管理從業員屬於後者，他們大多來自東南亞的發展中國家，譬如菲律賓、印尼、緬甸

等，當中部分來自中國內地。他們在澳門工作換取的工資，雖然在澳門只算中低水平，但對比各自原居地所賺的要多。除了賺錢供給自身的日常，也能定期給家鄉的親人寄錢。對於大部分外籍從業員來說，薪酬或許是首先吸引他們前來的因素，但這並不代表他們除了金錢就沒有其他需求。以下將借著相關服務企業的理念，進一步闡述他們的人文價值和需求。

瞭解他們的需求，因為他們和被服務的客戶一樣重要

只要是人，就有人性，伴隨著是人性的需求。以人為本，就是從外籍從業員的人性需求作為切入點。作為高端物業管理服務的前線人員，他們自身的人文價值因素足以影響工作品質，從而改變高端物業管理服務的呈現狀態，以及業主們能否獲得所期待的優質服務。正如國際高端酒店品牌 — 麗思卡爾頓Ritz Carlton和四季酒店Four Seasons 展示的理念：「*要成功為頂尖客戶提供最優質的服務，企業必須服務好為客戶提供優質服務的員工。*」英國航空企業巨頭 — 維珍航空的創始人布蘭森Richard Branson對於提供客戶服務的員工給出這樣一條簡單直接的公式：「*Happy employees equal happy customers. If the person who works at your company is not appreciated, they are not going to do things with a smile. 快樂的員工等於快樂的客人。如果一個員工在您的企業工作沒有被賞識，他便不會帶著微笑做任何事情。*」

從這些專注提供優質客戶服務的企業理念來思考，我們可以發現幾個共同點。一，企業把前線客戶服務員工看得如同客戶一樣重要。社會普遍對於前線客服人員，並沒有給與過多的尊重，這是普世價值。然而，作為定位高端物業管理服務的企業，可以借鑒一些優秀企業的理念，在管理上進行革新，致力讓從業員的需求得到滿足。二，這些成功的企業沒有只著眼金錢獎勵以滿足前線員工，而是強調要「服務好」員工。可見，人文價值同樣能體現在基層的客服員工身上。接著，下文以著名的心理學家馬斯洛的需求層次理論，逐層探討和分析本文的課題。

馬斯洛的需求層次理論

馬斯洛的需求層次理論(Maslow's Hierarchy of Needs)可稱得上是最著名的動機理論之一，是美國心理學家、哲學家 — 亞伯拉罕·馬斯洛(Abraham Maslow)在1943年發表的《人類動機的理論》中提出的。馬斯洛需求層次理論構成一個五層的需求金字塔 —— 生理需求(Physiological needs)、安全需求(Safe and security needs)、社交需求(Love and belonging needs)、尊重需求(Self-esteem needs)和自我實現需求(Self-actualization needs)，由較低層次到較高層次依次排列(如圖所示)。馬斯洛提出，人會為了滿足這五個需求而產生動力，首先是滿足最低層的生理需求。當滿足了最低層次，人類便會依次尋求滿足高一層需求，直到五層需求都滿足了。同一時期，一個人可能有幾種需要，但每一時期總有一種需要占支配地位，對行為起決定作用。任何一種需要都不會因為更高層次需要的發展而消失。各層次的需求相互依賴和重疊，高層次的需求在尋求滿足時到滿足後，低層次的需要仍然存在，只是對行為影響的程度降低。

需求金字塔套用在外籍從業員上

馬斯洛的需求層次理論在不同的領域被廣泛應用，本文也將其作為探討外籍物管從業員人文需求的框架。從五個層次分析從業員在各層的需求，並研究能滿足其需求的方法，以增強其工作動力，為推動高端物業管理的發展取得成效。

作為課題研究的一部分，作者在一個放鬆的環境下單獨訪問五位在職的高端物業管理從業員，以更直接瞭解他們的人文需求。五位被訪問的從業員分別來自於菲律賓(女)、菲律賓(男)、越南(女)、緬甸(男)和中國內地(男)。年齡由26到34歲，在作者現職的企業(某國際五大行之一)工作了兩年到五年。下文將簡述馬斯洛五個層次需求的通用論點和應用在一般工作上的概念，並在每一層論述對應外籍從業員的人文需求，結合訪問收集的資訊，向從事高端物業管理的企業整理出一些建議作參考。在每一層的討論結尾，關鍵字會被標注出，以突出重點。

1. 生理需求(水、食物、空氣、睡眠、居住、性)

生理需求的級別最低，人們在轉向較高層次的需求之前，總是盡力滿足這類需求。人在飢餓時不會對其它任何事物感興趣，他的主要動力是食物。生理需求是推動人們行動最首要的動力。未滿足生理需求的特徵是，什麼都不想，只想讓自己活下去，思考能力、道德觀明顯變得脆弱。

在工作的層面上，可以把這最低層的需求理解為錢。如果員工能賺到足夠應付他們的日常生活所需的開銷，包括糧食、房租、水電費等雜費、足夠的衣服和一些必要的日用消耗品，這就代表著這工作滿足了員工最低層的需要。可試圖利用增加工資、改善勞動條件、給予更多的業餘時間和工間休息、提高福利待遇等來激勵員工。

外籍從業員的生理需求

來澳門工作的外籍員工，最初的動力就是賺錢比原本多。澳門政府已經為物業管理從業員訂下了最低工資的保障，並且適時評估作出調整。因此，在他們的角度，金錢方面的需求是基本滿足了，而且企業也不可能一直加薪來激勵他們。反而，被訪者更看重休息。

物業需要24小時服務，輪班工作是必然的；在高端物業服務的從業員，要求更比一般高，工作強度也相對大，例如，要幫每一位業主拉門、替業主分擔回來時提著的大包小包，等。每週一天的例假，是他們休息自我放鬆的關鍵。可是，有時候因為業務上的安排而調動或者取消了例假，以至於他們的休息受影響。

作者建議企業盡可能滿足這最低層次的要求，合理安排從業員的休息時間，如果業務允許的話，給予他們在工作期間輪流小休。若前線員工的精神狀態好，相信服務品質會隨之而提高。

生理需求的關鍵字：休息

2. 安全需求(人身安全、健康保障、工作職位保障、道德保障)

安全需求包括對人身安全、生活穩定以及免遭痛苦、威脅或疾病等的需求。和生理需求一樣，在安全需求沒有得到滿足之前，人們唯一關心的就是這種需求。

對員工而言，安全需求表現為穩定的工作、有醫療保險、退休福利等。如果企業認為對員工來說安全需求最重要，他們就在管理中著重利用這種需要，強調規章制度、職業保障和福利待遇。

外籍從業員的安全需求

外籍從業員自然也需要安全穩定的工作，畢竟他們要負擔在澳門的生活成本，同時也供給異地的家人。被訪者均表示，退休相關的福利對他們沒有影響，因為他們的長遠規劃是回原居地，這是意料中的。讓作者出乎意料的是，他們對於醫療保障並沒有十分在意，其中一位表示，小病痛能自己服藥或者去診所，費用也不貴，萬一患上較嚴重的疾病，他們希望回自己故鄉醫治，有家庭的依靠。被訪者比較在意的待遇和保障是工作上的公平性，尤其是本地從業員與外籍從業員要一視同仁。作者也十分認同，企業要盡一切能力避免種族歧視，也不要讓他們覺得因自己的出處而受到不公平對待。換位思考，如果您受到歧視了，還會帶著動力和熱情去工作嗎？寧可把精力投放在去勞工局爭取權益上。企業若要滿足安全需求這一層，建議完善規章制度，以文字規範工作上的公平性，並加強各級員工在有關方面的培訓，讓規章制度得以準確應用。

安全需求的關鍵字：工作穩定，公平，一視同仁，避免種族歧視

3. 社交需求(社交、友情、人際關係、歸屬感、群體)

社交需求包括了友愛、夥伴、愛情等社交方面的需要。當生理需求和安全需求得到滿足後，社交需求就會突顯出來，進而產生激勵作用。在馬斯洛需求層次中，這一層次是與前兩層次截然不同的另一層次。

對於員工，一般能通過組織團建活動，加深員工的交流，提升人際關係。如果員工在這層次未能滿足，會影響精神狀態，導致高缺勤率、低生產率、對工作不滿及情緒低落。

外籍從業員的社交需求

和一般員工一樣，外籍從業員希望與同事和上司於工作時感覺友好和舒暢。即使不是每一位同事都合得來，起碼大部分是友愛的，同時對團隊和公司產生歸屬感。被訪者特別高興能與同事和上

司能建立友誼，尤其是對於上司，彼此認識和關心對方，因為他們身在異鄉，缺乏家人和朋友。所有的被訪者均提到，有時候業主友好的互動和關懷，例如一句問候，囑咐冬天注意保暖，能讓身在異地工作的他們倍感溫暖。

物管從業員因為沒有固定的休假日，所以組織團建活動一起參與是困難的，但企業可以利用科技發達去促進彼此的社交，例如開一個工作外的微信群組。也可參考作者工作的企業，定期舉辦一些多元文化交流的聚會，可以是有關於美食、語言等任何主題，讓外籍從業員參與其中，加深認識，也建立起對公司的歸屬感。通過與被訪者的交流，作者認為滿足社交需求對外籍從業員能起到很大的工作動力。

社交需求的關鍵字：友情，團隊，歸屬感

4. 尊重需求(自我尊重、信心、成就、對他人尊重、被他人尊重、名聲)

尊重需求既包括對成就或自我價值的個人感覺，也包括他人對自己的認可與尊重。有尊重需求的人希望別人按照他們的實際形象來接受他們，並認為他們有能力能勝任工作。他們關心的是成就、名聲、地位和晉升機會。這是由於別人認識到他們的才能而得到的。當他們得到這些時，不僅贏得了人們的尊重，同時就其內心因對自己價值的滿足而充滿自信。不能滿足這類需求，就會使他們感到沮喪。

在工作上，可以對員工公開獎勵和表揚，強調工作任務的艱巨性以及成功所需要的高超技巧。頒發榮譽獎章、公佈優秀員工光榮榜等都可以提升員工對自己工作的自豪感。

外籍從業員的尊重需求

物業管理的工作未必最受敬重和讚賞，但從業員也有尊重的需求。尊重可以來自於每天服務的業主，也可以來自於上司和企業。從被訪者的分享瞭解到，在高端物業中，他們盡責並樂意為業主提供優質服務，往往能洞察有需要便會先主動幫忙，即使業主還沒有開口。當業主簡單的報以一聲「謝謝你，John」，他們就能感到尊重。同樣的，他們也需要被上司認可。其實，挑選在高端物業管理工作的外籍從業員，部分是有大專甚至學士學歷的，或許是文科的，資訊科技的，護理專業的；因此，企業可以鼓勵外籍從業員的上司，多了解他們，在適當的時候安排外籍從業員分擔一些其他的工作。例如，有設計天分的去幫忙節日裝飾佈置，有文書能力的幫忙做一些簡單的掃描和電腦歸檔。被訪者提到，每次被委以額外的任務都會盡力完成，倍感自身被需要和更有價值。此外，企業可以按照他們的工作表現，公開表揚，提升他們的自豪感。在高端物業裡服務的，特別需要這份自豪感來建立自信。

尊重需求的關鍵字：禮貌的對待，委以額外的任務，自豪感，自信

5. 自我實現需求(實現目標，發揮潛能)

這是最高層次的需要，是指實現個人理想、最大程度發揮自身能力，完成與自己的能力相稱的一切事情的需要。自我實現的需要是在努力實現自己的潛力，使自己越來越成為自己所期望的人物。員工會關注自身能力發展和進步，也在自己的工作上做的非常出色，並且希望有進一步的挑戰和學習的機會。

外籍從業員的自我實現需求

有些外籍從業員會因為他們不是本地人而遇到更多的挑戰。這些都會影響到他們的是否能最大程度的發揮自己能力。被訪者基本上都表示，在語言方面是最需要克服的。因此，作者建議企業為他們制定有系統的培訓，培訓可包括中文口語、常用中文認字、物業管理知識、簡單維修知識、急救證書課程、禮儀、等。這樣既可以提升他們的自身能力，滿足外籍從業員的自我實現需求，同時在工作上更得心應手，對於企業和業主都是正面的。

自我實現需求的關鍵字：克服困難，學習與培訓

結語

本文套用馬斯洛的需求層次理論，由基層到頂層的需求逐一與被訪者交流，了解到物業管理外籍從業員確切存在人文需求。同時，提出了一些滿足需求以實現人文價值的建議。企業應用馬斯洛的需求層次理論滿足外籍從業員的人文價值時，需充分了解到這理論一直在後台運作，並不是一旦滿足了就可以忽略。人的需求是會隨著時間和其他因素而改變的，因此，高端物管服務企業可持續地探討能給於外籍從業員在人文需求和價值上的滿足感，以提升他們的工作動力。正如本文中提到，國際一流的高端酒店集團看待員工和尊貴的客人一樣重要，正是他們認同人文價值在員工上的重要性。

寄望澳門的高端物業管理企業能繼續探討利用人文價值這一切入點，讓人文價值滲透於提供服務的人員，從而擁有更優秀的團隊，被服務的業主也隨之而獲得更優秀，且具有人文情懷的服務。

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Mediation in Building Management Disputes

By K.Y.Kwok and Alex Tsang of
Li, Kwok & Law Solicitors & Notaries

What is Mediation?

Mediation is designed to help parties in dispute to resolve their differences amicably as an alternative means to conventional litigation in court, and is therefore known as an ADR process (i.e. alternative dispute resolution). A trained and impartial third person, the mediator, would help the parties reach a settlement that is responsive to their needs and acceptable to them. It is believed that the expertize, experience and impartiality of the mediator may provide a communication channel and cool down the heat between the parties so as to enhance the chance of success of reaching settlement.

Duty to Participate in Mediation

The Lands Tribunal implemented a pilot scheme in January 2008 to streamline processing of building management cases. The scheme applied to cases with legal representation on both sides and encouraged parties to proceed with mediation or other means of alternative dispute resolutions.

With the Civil Justice Reform came into operation on 2nd April 2009, a new "Practice Direction 31 – Mediation" was introduced by the Judiciary. It applies to all building management cases (whether or not the parties are represented by lawyers as in the previous scheme) and the parties are required to comply with the said Practice Direction to attempt settling their disputes through mediation.

Although it is said that mediation is a "voluntary process", in reality, the "voluntary process" is more or less compulsory. The Judiciary states, "in exercising its discretion on costs, the Court takes into account all relevant circumstances", including any unreasonably failure of a party to engage in mediation. In other words, a winning party who has unreasonably refused to participate in mediation by attending at least one mediation session will likely be unable to recover some or all of his cost against the losing party.

On the question of what constitutes unreasonable refusal to conduct mediation, in the English case *Halsey v Milton Keynes General NHS Trust* [2004], the Court of Appeal said that the court might not order costs sanction against a party who refused to participate in mediation under the following scenarios:-

1. When the defendant's defence is overwhelming and the claimant's unmeritorious claims might invite mediation as a tactical ploy to exert pressure on the defendants to settle;

2. The costs relating to the mediation was disproportionate to the costs for a trial;

3. The proposal to mediation was made too late; and

4. The case itself is not suitable for mediation, i.e. where the case involved arguments purely on points of law, or the party considered that a binding precedent would be useful.

However, in the subsequent Hong Kong case of *Golden Eagle International (Group) Ltd. v GR Investment Holdings Ltd.* [2010], the court opined that the English decision was not binding in Hong Kong. It highlighted the following matters:-

1. There will be no adverse costs order if the parties have participated in mediation up to the "minimum level of participation", i.e. agree on the identity of the mediator and details of the mediation and attend one session of mediation. It should not be difficult for a party to comply with it.

2. In case of a nuisance claim, the defendant should not refuse to participate in mediation only for saving costs. Indeed, the costs involved in such participation would usually not be high when compared with the costs of the whole action up to trial.

3. The costs of mediation can be included as part of the legal costs and recoverable by the successful party. Hence, even if the mediation is unsuccessful, the winning party may seek against the losing party his costs incurred for participating in the mediation.

In light of the observations of the High Court mentioned above, it may perhaps be unwise for a party to litigation to refuse to participate into mediation at all even if his case falls into one of the scenarios mentioned in the said English decision.

It should be noted, however, that as analysed below, the incorporated owners ("**IO**") or managers may in some cases stand in a different position, and there are cases where a successful IO is not deprived of its cost although it refuses to mediate.

Practical Benefits of Mediation

(1) Chance of Face-to-face Communication

It is sometimes more effective to have face-to-face discussion rather than attempting to convince the opposite side by correspondence or telephone conversations between solicitors. Messages may not be directly or accurately conveyed to the opposite party, as different people may hold different legal opinion, and such opinion may be twisted or undermined when it is conveyed by a third party using different wordings and tone. Mediation would provide a forum for in-depth face-to-face discussions between the parties personally. In building management cases, the dispute is often not for pecuniary interest, but rather matters like whether a resolution is validly passed in a meeting of the owners or the management committee. Some litigants choose to go to the court for emotional reasons. If they have a chance to have a sensible face-to-face dialogue with the other party, they may have their emotion vented or calmed down and differences resolved.

(2) Lobbying by the Mediator

Being a middle man, the mediator may use his skill to explore the parties' respective position and bottom line. While mediator is not supposed give legal opinion to either side during the mediation, he may analyse the advantages and disadvantages of continuing with the litigation, and sometimes the strength and weakness of the parties' case. As he is supposed to be a disinterested third party, his opinion and analysis may be more readily received by the litigants.

Points to Note for Managers and IO

(1) Decision on Law/Interpretation of DMC

There are decided cases in which the Hong Kong courts held that IO had justifiably refused to mediate. In *The Incorporated Owners of Shatin New Town v Yeung Kui* [2010], the owner of a flat disputed the amount he was required to contribute to the renovation costs of the residential premises of the estate. He succeeded before the Lands Tribunal but lost the appeal. He then applied for review of the costs order made against him on the ground that the IO had refused to resolve the dispute through mediation. He argued that the unreasonably failure by the IO to make a good faith attempt to mediate should be taken into account when deciding on costs.

The Court of Appeal said that in determining whether a party has acted unreasonably in refusing to proceed with mediation, it would take into account all the relevant circumstances. Since the dispute between the parties ultimately involved a decision on law concerning the correct interpretation of the terms of the DMC, the IO had a responsibility in applying the DMC correctly whether in

the case before them or in future. IO cannot be blamed if they would like to have a court decision on the effect of the DMC under such circumstances. Hence an adverse costs order should not be made against the IO in that particular case on the ground of its refusal to participate in mediation.

Similarly, in *The Incorporated Owners of Greenwood Terrace v U-Teck Limited* [2012], the IO disagreed with one of the shop owners as to how the expenses for the repair of the waterproofing membrane beneath the roof floor of the non-domestic premises of the development should be shared amongst various owners.

The Tribunal decided the case in the IO's favour, and the shop owner contended that the Land Tribunal should take into account IO's refusal to mediate in deciding the appropriate cost order to be made. The Tribunal said that the IO was asking for a declaration to determine the rights and obligations amongst the owners. With such a relief being sought, a determination by the court was a must and mediation was not suitable.

Considering the argument of the DMC clause in dispute may arise from time to time by other shop owners, the court considered that the IO's intention to have a precedent on the interpretation of the DMC is "well justified since this will be essential for the future discharge of its duty."

In the circumstances, when it comes to cases that involve interpretation on arguable DMC clauses, IO or Managers may be excused for failing to mediate. The court may consider that it is not unreasonable for them to obtain a precedent for future guidance of their work, and as a message to all the owners of the building from time to time how the DMC provisions should be interpreted, and hence what the owners' rights and obligations are in law. This may save time and cost for similar disputes which, but for the decision, may arise from time to time in future. However, bearing in mind that the time and cost to be consumed for a mediation session is not relatively large compared to the time and cost for litigation, it may not be prudent for the IO and Manager not to attempt mediation merely on the strength of the said decisions.

(2) Concession

Property managers and the IO are often acting as the representative of all the owners and not in their personal capacities in building management litigation. They also have the duty in law to enforce the provisions of the DMC instead of waiving their compliance. Hence, they should not make substantial concession in a meritorious enforcement action purely with a view to reaching settlement. For example, while they may allow an owner more time to demolish an unauthorized structure posing no danger, they should think twice if they intend to permit its continued existence when breach of DMC has been clearly established. Otherwise, they may set a bad example and may be blamed for failing to fulfill their duty to enforce the DMC. Also, they should not waive any claim for money of substantial amount without good reason simply because they are not recovering their own money, but money belonging to all the owners.

(3) Confidentiality

Mediation is supposedly a confidential process. This means that all communications conducted in the course of mediation should generally be kept confidential. The confidentiality requirement would enable the parties to talk freely so as to facilitate settlement. However, as stated above, since the property manager or the IO are acting as representatives of the owners and not in their personal capacity, they may need to report to other owners the progress of the mediation and the terms of settlement reached. Some managers and members of the management committee may even

prefer putting forward the proposed terms of settlement for decision by the owners in the general meeting. Therefore, managers and IO should seek proper legal advice on the confidentiality provision often contained in the mediation agreement to ensure that they are in a position to comply with its requirements, while fulfilling their duty to report and account to the owners.

Finding the Mediator

There are Joint Mediation Helpline Office and Mediation information Office (for litigants in person) in High Court. Whereas the Lands Tribunal has a Building Management Mediation Coordinator's Office which holds information sessions providing parties to building management disputes with information about mediation and a list of mediators may be obtained from them.

One may also find a mediator through professional bodies like the Law Society, The Hong Kong Mediation Council of the Hong Kong International Arbitration Centre and The Hong Kong Mediation Centre. Lists of accredited mediators and their charges may be obtained. If a party is represented by solicitors, the solicitors will usually recommend mediators whom they have worked with to their clients.

Conclusion

Speaking from our experience, more than half of the court cases going to mediation end with success (during the mediation session or in the follow-up negotiation conducted soon afterwards). We believe that mediation is effective means to resolve disputes in civil litigation, especially building management cases which often do not involve any or any substantial sum of money. Litigation is a relatively slow and expensive process and a lose-lose game, when even the winning party will usually be deprived of some of his cost, not to mention the time and energy incurred. In the said *Shatin New Town*'s case, the owner disputed the extent of his liability in contributing to the cost for the major renovation of the estate, but the difference was only some $5,000. At the end, he had to pay legal fees of huge sums and might even need to sell his flat for such purpose. The Court of Appeal commented that "the quintessential reasonable man on the Shau Kei Wan tram is bound to wonder whether a system which permits such a nonsensical situation to develop should remain in place in its present form, and that consideration should be given to devising an alternative method of resolving disputes between individual owners and Incorporated Owners in any residential development which does not contain therein the seeds of commercial disaster." A lot of building management litigation falls into that category. A professional building manager should advise the IO and the owners concerned to consider seriously resorting to ADR like mediation to resolve the dispute instead of going to court.

[END]

Li, Kwok & Law
Solicitors & Notaries
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The exercise of decision under Section 34 I of the Building Management Ordinance, Cap. 344 - Conversion of common parts

By Chung Pui Lam, GBS, JP
Chung & Kwan, Solicitors

Introduction

Building managers may from time to time receive applications from owners or occupiers for conversion of the common parts to their own use by making alteration or installation works, for example, to connect pipes or wires for supply of water or electricity. Commercial institutions or service providers may also approach building managers (or incorporated owners) for the possibility of installing different kinds of facilities or devices in the common parts, ranging from newspaper stands, vending machines and electronic lockers to electronic vehicle charging device.

Section 34 I(1) of the Building Management Ordinance (Cap. 344) provides that:

"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); ….. "

This essentially prohibits anyone from converting any common parts of a building to his own use without the authorization by resolution of the owners' committee or, where there is one, the management committee as per section 34K of the Ordinance.

To give or not to give approval or consent is the question that building managers may often come across, but the Ordinance does not expressly provide any guideline in this regard. In exercising the decision, what should they pay attention to? This article will discuss the relevant factors for decision in light of the judgment in a Court of Appeal case in 383HK Limited v The Incorporated Owners of Tak Bo Building in CACV 99/2017 [2018] HKCA 164 (on appeal from HCA 1333/2011) handed down on 21 March 2018 with practical considerations and inspiring views extracted.

Factual background of the case of Tak Bo Building

The underlying facts are simple. The plaintiff is the registered owner of one of the 35 small shops on the ground floor shopping arcade of Tak Bo Building which was built in the late 1970s. The defendant is the Incorporated Owners of the Building. There were no provisions of facilities included for fresh water and drainage pipes to the individual shops on the ground floor.

The plaintiff purchased its shop in 2009. It wanted the provision of fresh water and drainage facilities to its shop. It applied to the defendant for consent to carry out the necessary installation work. It was refused. However, the plaintiff still carried out the installation of water and drainage pipes to its shop to be connected with the Building's main water and drainage pipes located at the rear of the Building. The work involved drilling two holes (for fresh water supply and drainage respectively) through the concrete canopy which ran around the outside of the Building at the ceiling level of the ground floor shops. The plan was then to run the pipes along the common parts of the Building to connect with the main pipes at the rear of the Building.

The plaintiff claimed that it had a right to access the main pipes of the Building for water supply and drainage under a relevant clause of the Deed of Mutual Covenants of the Building ("DMC"), so long as it would not cause damage to the Building

or inconvenience, nuisance or annoyance to other occupiers. The plaintiff also asked the court for an order directing the defendant to give its consent to the installation work.

The judgment below by Deputy High Court Judge

After referring to some case authorities, concerning almost identical clauses in similar contexts, the deputy judge Burrell concluded that although there was a right to run water and drainage pipes through the Building or any part thereof, there was no right to lay any private pipes to connect with the existing main water and drainage pipes by encroaching on the common parts of the Building.

By reference to Section 34 I, the deputy judge observed that the Ordinance does not contemplate the situation where a co-owner acquires a right to encroach on the common parts of the building. He therefore concluded that the plaintiff had failed to establish that the plaintiff was entitled to such right under the DMC.

The deputy judge also rejected the plaintiff's argument that the defendant had unreasonably withheld its consent for the laying of pipes. In deciding whether the refusal was unreasonable, the deputy judge looked at all the facts including, in particular, the fact that the laying of pipes was illegal, which he regarded as "a crucial factor". He also took into account a number of factors and concluded that consent was not unreasonably withheld. The following are some of the factors that the deputy judge took into account which may be relevant and helpful to building managers in deciding whether to give consent to applications involving conversion of common areas:-

(1) The plaintiff made 4 or 5 requests prior to commencing the works, but all were refused as none contained any detail as to exactly what was intended.

(2) The defendant was concerned about the safety of the canopy. Any layman would be concerned about the drilling of holes in concrete cantilevered canopy at 1st floor level above the street.

(3) It could not possibly be known whether or not other shops with street frontages would follow suit if consent had been granted to the plaintiff. Expecting the defendant to deal with each application on a case-by-case basis is unrealistic. Such a piecemeal approach would have been poor administration and management of the Building by the defendant.

(4) The defendant in its letter reminded the plaintiff of the possible illegality of the proposal as well as the relevant clauses of the DMC not to make alterations which may cause damage and not to use the Building for an illegal purpose. Also, the installation of any pipes over the common area would lead to legal proceedings.

The Plaintiff's arguments on appeal and the Chief Judge's views

The Court of Appeal upheld the deputy judge's decision and dismissed the plaintiff's appeal. Also, the Hon. Cheung Chief Judge of High Court confirmed that consent had not been unreasonably withheld.

As of right to install pipes over the common parts ?

The plaintiff's arguments on appeal and the Chief Judge's views worth noting which may be taken as useful considerations in deciding whether to grant or to refuse consent. The first argument was that the plaintiff contended that under the relevant clause of the DMC and also as a co-owner under common law, the plaintiff was entitled as of right to install connecting pipes, running over the common parts of the Building, for fresh water supply and drainage purpose.

The Chief Judge stated his views that if every shop owner on the ground floor is entitled to install his own connecting pipes, the resulting situation could be chaotic. Rather, the DMC was entered

into to govern the relationship between co-owners and provide for good management of the common parts, if there was to be any future connection, it is reasonable to assume that the DMC intended such connection to be done centrally by the owners' committee or the incorporated owners acting through the management committee.

Further, such connecting pipes would not only be going over the common parts of the Building, which are under the management of the management committee, but such pipes would also be connected up with the main water supply and drainage pipes of the Building, which are common facilities obviously within the control of the incorporated owners through the management committee. Not to say the possible accidental damage to the main water and drainage pipes, if not done properly, such connection work could, for instance, cause the temporary suspension of water supply to the Building affecting all other owners and occupiers, requiring central co-ordination by the management committee.

Therefore, it cannot be a contractual intention under the DMC that each of the 35 co-owners of the ground floor shops shall have a right to make such connection to the main water supply and drainage pipes. Rather, when one is concerned with the common parts of the Building, the most natural entity to handle any such connection of pipes serving the ground floor shops must be the incorporated owners.

Regarding the common law right of a co-owner to install the pipes over the common parts of the Building, the Chief Judge rejected this argument both at the level of common law and in the light of section 34 I. His view is that under common law, if there is no unanimous agreement, a co-owner cannot dispossess and oust his fellow co-owners by so using and occupying a particular part of the land in question as to prevent any of his fellow co-owners from using and enjoying it. Section 34 I(1)(a) simply codifies that common law position but makes a concession at the same time. At common law, if all other co-owners consent, there can be no ouster. Section 34 I(1)(a) makes life easier in that so long as the action is approved by the management committee by resolution passed by a majority present at a meeting of the committee, what cannot otherwise be done under common law can be done.

Is there a requirement of reasonableness ?

Turning to the plaintiff's another argument that a co-owner may only install the connecting pipes over the common parts of the Building with the consent of the incorporated owners, which, however, cannot be unreasonably withheld. The Chief Judge stated his views that if there is to be any requirement of reasonableness, it is by definition an objective standard and the purpose must be to strike a balance between good management of the building and fair use and enjoyment by a co-owner of his own land and building. In short, all relevant considerations, whether or not expressly taken into account by the incorporated owners at the time of refusal of consent, may be taken into account by the court when assessing whether consent has been unreasonably withheld, provided that it would not do any injustice or unfairness to the co-owner who challenged the refusal of consent.

Exercise of decision in other scenarios

In light of the considerations discussed above, building managers may now have a better understanding about the exercise of decision when dealing with applications for conversion of common parts from the owners or occupiers. But, what about commercial institutions or different kinds of service providers who make requests to building managers (or incorporated owners) for using the common parts, by way of licence, to sell or promote their products or services ? Indeed, building managers may have received more and more such requests in recent years. Just to name a few as follows:-

— installing newspaper stands, vending machines, electronic lockers, counters for collection and delivery of laundry, tele-communications equipment or even auto-teller machines (ATM) etc. at the entrance lobby, communal areas, open space;

— placing advertisement or signboards on the external walls;

— installing electrical vehicle charging devices in the carpark common areas;

— erecting fun stalls or game booths in open space for carnival or festive occasion;

— installing photovoltaic system at the rooftops.

Out of practical needs or convenience to the owners and occupiers and also as an additional source of revenue to the management account, building managers (or incorporated owners) may consider entertaining such requests or even explore the possibility of co-operation with the commercial institutions and service providers. Of course, when installing such facilities or devices in the common parts, primary consideration should be given to safety and legality of the installation. Whether it would cause danger, disturbance, annoyance, nuisance to the owners and occupiers. In particular, whether it would breach the deed of mutual covenants, Government lease and other relevant Ordinances applicable to such installations.

If it is intended to grant a licence agreement for the use of the common parts, building managers are reminded to include essential terms in the agreement apart from the amount of licence fee (if any). For example,

- insurance (of public and third party insurance for an adequate sum);
- indemnity (given to incorporated owners against all claims arising from the use of the common parts);
- compliance (with relevant provisions of the Government lease and Ordinances relating to the use of the common parts);
- reinstatement and delivery (of the common parts in good repair and tenantable condition at the expiration or sooner termination of the agreement);
- no warranty (given to the licensee as to the fitness of the common parts for the licensee's intended purpose);
- exclusion of all liabilities (on the part of incorporated owners relating to the use of the common parts) and so on.

Last but not least, licence agreements for different subject matters named above may have different requirements to be complied with under relevant Ordinances. Therefore, it is advisable to seek legal advice for preparing or reviewing such licence agreement in order to better safeguard the interest of incorporated owners, whilst earning additional revenue.

Chung & Kwan
Solicitors
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