COVER STORY
主題文章

Building Management under the Virus Pandemics — from the Legal Perspective

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In view of the COVID-19 pandemic, various social distancing measures have been implemented since early 2020, including the enactment of the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation ("**Cap.599F**") and the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation ("**Cap.599G**").

This article seeks to discuss some important provisions of the said regulations and certain Covid-related legal issues property managers may encounter in their day-to-day practice.

A. Restrictions against Group Gathering and Activities in 599F Premises

Group Gathering

Section 3(1) of Cap. 599G prohibits generally group gathering of more than 4 persons in "*public places*"[1]. Such prohibition also applies to group gatherings in certain premises defined in Cap. 599F ("**599F Premises**") when the relevant requirements or restrictions are not complied with[2].

Therefore, a face-to-face meeting (whether meetings of owners' committees, management committees or general meetings of owners) held in a "*public place*" and attended by more than 4 persons may be regarded as a prohibited group gathering[3]. Under section 6 of Cap. 599G, any person who participates in or organizes the gathering, owns, controls or operates the place or premises concerned and knowingly allows the gathering to take place will commit a crime and liable on conviction to a maximum fine up to HK$25,000.00 and imprisonment for 6 months.

Public Place

"*Public place*" is defined in section 2 of Cap. 599G as "*a place to which the public or a section of the public may or are permitted to have access from time to time, whether by payment or otherwise*". There is yet any decided case on the precise meaning of "*public place*" under Cap. 599G. However, the definition suggests that privately-owned premises may still be a "*public place*" if the public or a section of the public may have access to it from time to time, even if they need to pay for their admission. If no criteria for eligibility (other than payment of admission fees) are in force, and no real screening measures adopted to exclude visitors who are not eligible at the material time, so that members of public can in fact gain access to the place in question without difficulty, the place may still be regarded as a "*public place*" within the meaning of Cap. 599G even if it is privately owned.

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1 The maximum number of persons allowed for a group gathering may be reviewed from time to time by the Chief Executive in Council pursuant to section 8 of the Prevention and Control of Disease Ordinance (Cap.599). The current maximum number of *"4"* people as at the date of completion of this article was so determined and published in Gazette L.N. 28 of 2021 (replacing the previous maximum number of *"2"* persons).

2 Section 8(1) of Cap. 599F empowers the Secretary for Food and Health to issue directions in relation to 599F Premises from time to time. The directions shall be under constant review every 14 days or less and the latest version may be found in the Government Gazette.

3 If it is not exempted as a *"Specified Event"* held in an *"Event Premises"* being one of the 599F Premises discussed below.

In *R v. Lam Shing Chow* [1985], the appellant was charged with fighting in a public place (i.e. a common corridor of a private residential building) in violation of section 25 of the Public Order Ordinance. "*Public place*" is defined in that Ordinance as "*any place to which for the time being the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise…*". The court held that the common corridor of a private residential building was not a public place, as persons who might lawfully enter that place were "*neither members of the public nor any section of the public. Their legal right to access does not arise from being members of the public, but solely by virtue of their status as a licensees or invitees of the occupiers*".

On the face of it, the definitions of "*public place*" in Cap.599G and the Public Order Ordinance look quite similar. However, some difference may still be observed. Under Cap.599G, a "*public place*" is one where the public "*may*" have access, whereas in the Public Order Ordinance, a "*public place*" is one which the public is "*entitled to*" access. The former definition appears to be wider and covers a place where access "*may*" in fact be gained, although the person concerned is not "*entitled to*" and has no right in law to be there. Therefore, even if a place is not a "*public place*" under the Public Order Ordinance, it may still be a "*public place*" within the meaning of Cap.599G.

It should also be noted that *Lam Shing Chow* is a decision made more than three decades ago on the interpretation of another ordinance to preserve public order. Cap.599G was enacted quite recently in light of the virus pandemic which probably required some more draconian measures. The policy behind enacting Cap.599G was to discourage people from attending group gatherings. Indeed, virus can spread whether in public or private premises. Under such circumstances, the Court may interpret "*public place*" in Cap. 599G more widely to give effect to the legislative intent to prevent and control diseases.

Therefore, it will be unsafe to simply rely on *Lam Shing Chow*'s case and conclude that the common parts of a building or housing estate are not "*public places*" so that holding any meeting there will not be in breach of Cap.599G, especially in light of the possible criminal consequences attached.

Indeed, in *Jockey Club Kau Sai Chau Public Golf Course Ltd. v. HKSAR* [2013], the operator of the Kau Sai Chau Golf Course was convicted of one charge of using a motor vehicle without third party insurance contrary to the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap.272). One of the issues was whether a road in the golf course on which a traffic accident occurred was a "*road to which the public have access*". The Court of Final Appeal, in dismissing the appeal, said that the golf course was a public golf facility but not a private club, and the screening process constituted by the requirement of having a qualifying handicap would not change the character of those golfers who were members of the public generally. The Court held that the road was one to which the public had access.

Moreover, some common parts in a development may well be "*public places*" because of some special features like provisions in the Government Grant. In *Attorney General v. Hui Shu Sang* [1993], the defendant sold food on an arcade of the privately owned Nam Fung Centre near Tsuen Wan MTR Station. Section 83B(1) of the Public Health and Municipal Services Ordinance provides that no person "*shall hawk in any street except in accordance with a licence…*". One of the issues before the court was whether the arcade was a "*public place*"[4]. The court held that whether a location was privately owned was highly relevant, but not conclusive on the issue of whether a location was or was not a public place. The requirement that under the Government Grant of the development, part of the arcade had been dedicated to the public use at all times free of charge or limitation made it a "*public place*" (indeed a public thoroughfare). The court also observed that "*a passage or a mall*

[4] Hawking was defined by Cap. 132 as trading in a "public place".

deliberately created or set aside for members of public to use as an access corridor from one form of public transport to another, and which is in fact so used, is a place of general resort, although on privately owned property". Adopting such reasoning, where certain area within a development has been designated in the Government Grant for use by members of public, whether it is a pedestrian walkway, elevated footbridge, public transport terminus, mall or any other facilities, such area will likely be a "*public place*" within the meaning of Cap. 599G.

599F Premises

As stated above, the prohibition against group gatherings is also applicable to events taking place in various 599F Premises in which the relevant requirements or restrictions are not complied with. At the time of writing this article, 599F Premises include club-house, swimming pool, sports premises, karaoke establishment, fitness centre, bathhouse, massage establishment etc., where the risk of infection may be relatively higher[5]. Therefore, special restrictive measures may have to be imposed for use of those premises. As a result, 599F Premises may only be opened subject to the directions concerning their operation issued by the Secretary for Food and Health ("**Directions**")[6]. If the development or housing estate under management contains any 599F Premises, those Directions which may from time to time be in force must be complied with[7].

Further, a face-to-face meeting, including a general meeting of owners, meeting of an owners' committee or management committee held as a "*Specified Event*" in an "*Event Premises*"[8] would be exempted from the group gathering prohibition imposed by Cap. 599G. A "*Specified Event*" means an event (including a meeting, forum, ceremony) that follows the Directions consisting primarily of access control measures[9]. According to the latest Directions in force when this article is written, the restrictions and requirements for operating an "*Event Premises*" include the following[10]:—

1. a person must wear a mask at all times;
2. body temperature screening must be conducted before the person is allowed to enter;
3. hand sanitisers must be provided;
4. the poster containing the "*LeaveHomeSafe*" venue QR code must be displayed at the entrance;
5. Participants must scan the "*LeaveHomeSafe*" QR code or registers his name, contact number and the date and time of his visit. Such records must be kept by the premises manager or event organizer for 31 days;
6. No eating or drinking (except as part of a religious ritual) is allowed at any one time within any event premises;
7. Organizers and persons who provide services for the event must undergo test for COVID-19 with test sample taken within 14 days prior to the date of the event;

5 A full list of the 599F Premises may be found in part 1 of schedule 2 to Cap.599F.

6 See also footnote 2 above.

7 The latest Directions in force as at the date when this article is completed were published in Gazette G.N.(E.) 770 of 2021 dated 10th November 2021 in force from 11th November 2021 to 24th November 2021.

8 *"Event Premises"* is one of the 599F Premises and defined as premises that *"are not private premises"* and *"are for the time being used, with the consent of the owner, manager or tenant of the premises, for holding a Specified Event"*. *"Private premises"* primarily adopts an opposite definition to *"public place"* in Cap. 599G.

9 See section 2 of Cap.599F.

10 The above list is not exhaustive. The full list can be found in Section P of the Annex to G.N.(E.) 770 of 2021 which is in force up to 24th November 2021 (see also footnote 7 above).

8. No more than 4 persons may be allowed in each group of participants in an event premises (except while participating in a photo-taking session and they must all wear masks);
9. Number of persons (participants only) allowed must not exceed 50% of the normal capacity of the premises (100% capacity is allowed if all event organizers have received first dose of COVID-19 vaccine AND at least 2/3 of the participants have received first dose of COVID-19 vaccine).

B. Validity of Resolutions Passed without Face-to-face meetings

Incorporated Owners ("IO") v. Companies

Internet and telephone conferences, like work-from-home measures, have become more popular after the Covid pandemic. Indeed, prior to that, some management committees have already made decisions through various means like WhatsApp or written resolutions, especially in cases of urgency[11]. Some prudent committees have adopted a good practice of confirming the decisions by resolutions passed in subsequent face-to-face meetings.

The constitutions of many organizations have long recognized the validity of resolutions passed otherwise than in a physical meeting. Most companies formed under the Companies Ordinance (Cap. 622) have provisions in their articles of association allowing resolutions to be passed on papers by the directors or members without actually convening or holding any meeting. Further, under section 584 of the Companies Ordinance, a company is expressly permitted to hold a general meeting at 2 or more places by using technology that enables members who are not at the same place to listen, speak and vote, subject to the provisions of the company's articles of association. There is, however, no such equivalent provision in the Building Management Ordinance ("**BMO**"), although provisions along the line that "*a written resolution signed by owners holding more than half of the undivided shares shall be as valid and as effectual as a resolution passed in an owners' meeting*" may occasionally be found in a Deed of Mutual Covenant ("**DMC**").

BMO was last substantially amended in 2007. At that time, it might not be common to conduct meetings through internet. However, even then, provisions for written esolutions in lieu of actual meetings were already found in many constitutions of companies or other organizations. Still, the BMO has not brought in any provisions of that kind. Instead, it is expressly provided in paragraph 10(2) of schedule 2 to the BMO that "*All acts, matters or things authorized or required to be done by the management committee **may** be decided by a resolution passed by a majority of the votes of members of the management committee **present at a meeting of the management committee***" (emphasis added). Although the use of the word "*may*", which connotes a permissive rather than mandatory meaning, appears to suggest that physical meeting may not be the exclusive means to pass valid resolutions of the management committee, there are other provisions in schedule 2 to the BMO which clearly anticipates that actual meetings should be held by the management committee at least regularly. For example, paragraph 7 of schedule 2 to the BMO requires management committee to meet at least once every 3 months, and under paragraph 4(2), any member of the management committee who absents himself from 3 or more consecutive meetings without the consent of the management committee shall cease to be a member. The use of the word "*may*" instead of "*shall*" in paragraph 10(2) should not, therefore, be over-emphasized. There is also no express provision for paper resolution or internet meeting for conducting general meetings of IO in the BMO. It might be the conscious decision of the legislature not to include those provisions and require decisions to be made after discussion or debate in conventional face-to-face meetings.

[11] Under paragraph 8(2) of schedule 2 to the BMO, not less than 7 days' notice must be served to convene a meeting of the management committee, which may not be practical if some urgent decisions are required.

Significance of Meetings and the Relevant Decided Cases

Face-to-face procedure enables the participants to meet and debate on a motion, so that they will have a chance to persuade other participants holding different view to change their stance. Written resolutions passed on papers without meeting and debate deprives the participants of such an opportunity. In *Gallium Development Ltd. & others v. Winning Property Management Ltd* [2004], the Court of Appeal said as follows:

"*…There seems to be a certain significance placed by the BMO on meetings amongst the owners, so that there would be discussion amongst them for a decision to be reached….there is no provision in the whole of the BMO for paper resolutions being used. This, to a certain extent, supports my view that decisions are to be made through these organs and no statutory provision allows paper resolutions signed by the owners…. to replace decisions taken at meetings.*"

On the other hand, in *IO of Grenville House v. Stanley Wong and another* [2011], the IO sought recovery of expenses incurred for applying for warrant to gain entry into the Defendant's flat to repair or replace the air grille on the external wall of the Defendant's flat pursuant to section 40 of the BMO. One of the defences raised was that there was no resolution passed in a physical meeting held by the management committee to apply for the warrant. The court accepted the IO's argument that a written resolution signed by all the committee members after telephone conference would be effective even without any face-to-face meeting.

It is noted that the *Gallium* case which emphasized the significance of meetings under BMO was not cited to the court in *Grenville House*. Telephone conference was said to be held but its details are unclear from the judgment, for instance whether it was held amongst all the members or only some of them, and whether each member could communicate with one another as if it were a physical meeting. Further, the Defendants were absent from the hearing and the court did not have the benefit of hearing contrary arguments before deciding the case.

Unanimous Consent

In any event, in *Grenville House*, the members of the management committee were unanimous in resolving to proceed with the legal action. Therefore, the significance of debate and the chance to persuade other members to change their view did not really exist. It is at least doubtful whether the decision will apply when there is no unanimous consent of all those entitled to attend and vote in the meeting. Thus, *Grenville House* should not be taken as clear authority that physical meetings may always be dispensed with if so desired.

On the other hand, there are authorities suggesting that if the matter receives unanimous consent of all those entitled to attend and vote in the meeting, a formal meeting may be dispensed with (*IO of Four Winds Apartment v Koa Hsung Land Investment Co. Ltd.* [2006]). *Four Winds Apartment* was also cited in *Grenville House*, when an analogy was drawn with the "*Duomatic Principle*" originated from the English case of *Re Duomatic Ltd.* [1969] to the effect that the unanimous though informal consent of all those entitled to vote in a meeting of a company could be treated as a binding resolution passed in such a meeting.

Procedures of Meetings May be Decided by the Participants

Paragraph 10(5) of schedule 2 of the BMO provides that subject to the BMO, the procedure at meetings of the management committees shall be determined by the management committee. Paragraph 7 of schedule 3 of the BMO contains a similar provision in relation to IO's general meeting[12]. Many DMCs also provide that the procedure at the meetings of the owners or owners' committee (i.e. in estates without any IO formed) may be decided by the owners or the owners' committee concerned[13]. However, where resolutions are passed without any meeting at all, it is not about the procedure of the meeting, but rather whether those entitled to attend and vote at the relevant meetings may dispense with the any requirement of meeting altogether. It does not appear that the provisions in the BMO or DMC enabling the participants to decide the procedures of a meeting will assist if no meeting is held at all.

On the other hand, where there is indeed a "*meeting*" held via internet or telephone, it may be argued that the provision would enable the participants to decide to meet via the relevant electronic means in lieu of a physical meeting. In the said *Grenville House's* case, the Court cited paragraph 10(5) of schedule 2 to the BMO and said:—

"*Thus, the Management Committee plainly had the power to regulate its own procedure, including manner of holding a meeting through telephone*".

Practical Considerations

As discussed above, the court in *Grenville House* did not elaborate on how the suit telephone conference was held. In theory, if the Zoom or telephone meeting is held in such a way that each participant can take part in the debate and hear what others say as if a face-to-face meeting were held, the court may perhaps uphold the validity of any resolution passed, especially if it is passed unanimously.

Nevertheless, it should be noted that disputes may arise if a meeting is conducted by technology and digital aids. For instance, it is uncertain whether the participants can freely and effectively communicate throughout the meeting without substantial interruption. Validity of resolutions passed in the meeting may be disputed due to technical issues like alleged loss of signal due to poor network connection.

In the circumstances, for housing estates in which IO has been formed, as the procedure for a meeting is to be governed by the BMO which contains no provision for paper resolutions or internet meetings, in the absence of any clear provision enabling resolutions to be passed otherwise, it seems advisable to have resolutions passed in conventional face-to-face meetings duly convened and held. Where it is impractical to do that, at least the management committee or the owners should avoid passing any important resolution or one carrying substantial financial implication otherwise than in a physical meeting, especially when unanimous consent cannot be obtained. The decision should also be confirmed or ratified in a subsequent face-to-face meeting if practicable. For meetings of developments where no IO has been formed, the position will be the same unless there is any provision in the DMC to the contrary. Having said that, it is perhaps time for appropriate legislations to be introduced in the BMO along the line of the equivalent provisions in say, the Companies Ordinance concerning validity of resolutions passed in meetings held otherwise than the conventional face-to-face means.

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12 without even stating to be subject to the provision of the BMO.

13 Paragraphs 7 and 15 of schedule 8 to BMO contain those provisions which would be impliedly incorporated into the DMC if consistent with the DMC. Most relatively recent DMCs incorporate rather than exclude the provisions in schedule 8 as it is the requirement of the Law Advisory and Conveyancing Office (LACO) of Lands Department who approves the DMC that the developer should do so. See paragraph 1(d)(i) of *"Guidelines for Deeds of Mutual Covenant"* of LACO's latest Circular Memorandum no. 79.

C. Failure to convene Annual General Meeting ("AGM") within time

Obligations of Management Committee members to convene AGM in time

There are some housing estates in which the AGM, which is supposed to be held annually, has been suspended due to the virus pandemic. Paragraph 1(1)(b) of schedule 3 to BMO provides that the management committee shall convene an AGM not earlier than 12 months, and not later than 15 months, after the date of the previous AGM. The management committee is supposed to convene an AGM in time.

Paragraph 5(1) of schedule 2 to the BMO further provides that "*at the second annual general meeting of a corporation convened in accordance with paragraph 1(1)(b) of the Third Schedule and thereafter at every alternate general meeting, all members of the management committee…shall retire from office*". If no AGM is held after expiry of the prescribed period, there may be concern as to whether the existing members of the management committee may continue to act.

According to decided cases, even if no such AGM is convened after 15 months, existing members of the management committee would still remain in office (*IO of Finance Building v Bright Hill Management Consultants Co. Ltd* [2001]). In *Leung Ho Sing v Shum Yiu Tong* [2006], the Court of Appeal commented that "*the intention of the legislation is that there would be no period where the building would lapse into a state of 'anarchy'*". According to *Leung Ho Sing*, even if a general meeting is held for appointment of new members, but none is so appointed, the existing members will continue to act as such. This may happen if, for example, there are not sufficient candidates standing for the election, or if the owners present whether in person or by proxy are not sufficient to constitute a quorum, or the meeting is adjourned for whatever reason before the election is held or completed.

If the management committee refuses to convene an AGM for election of new members, the owners of not less than 5% in number may require the chairman of the management committee to convene a general meeting to do that pursuant to paragraph 1(2) of schedule 3 to the BMO. In appropriate cases, an owner, though less than 5% in number, may also apply to the court requiring the management committee to convene an AGM in light of the time frame imposed in paragraph 1(1)(b) of schedule 3 of the BMO mentioned above, although it will be up to the court in exercise of its discretion to decide whether to make any such order.

It is the personal responsibility of the chairman of the management committee to convene a general meeting upon receiving the said request from not less than 5% of the owners. In a recent case of 李志輝 *v* 蘇麗珍 [2021], the applicant, an owner of a flat of the suit estate, applied to the Lands Tribunal for an order to compel the respondent (i.e. chairlady of the management committee) to convene a general meeting pursuant to paragraph 1(2) of schedule 3 to the BMO. Initially, the respondent contended that the meeting should be held after the prohibition against group gathering in Cap.599G has ended and the current pandemic of COVID-19 subsided. Although the requested meeting was eventually convened and the applicant discontinued the legal proceedings against the respondent, the Tribunal held that the respondent should be personally liable for the applicant's costs.

In making the cost order, the Tribunal said that the BMO did not have any provision to allow the respondent to have any exemption not to follow the deadlines for convening and holding the requested general meeting. On the other hand, schedule 1 of Cap.599G[14] provides for exemption for group gathering applicable to that case. The Secretary for Food and Health has also clarified and confirmed, upon the respondent's inquiry, that the requested meeting would be an exempted group gathering under Cap.599G. It was therefore wrong for the respondent to insist that the meeting should be held after the prohibition against group gathering in Cap.599G had ceased to have effect. It was also wrong for the respondent to insist that the meeting should be held after the pandemic had subsided. To insist on that would be equivalent to postponing the meeting indefinitely which was unreasonable delay when there were statutory deadlines for her to comply with.

Hence, it appears from the judgment that virus pandemic might not, by itself, be a sufficient cause for the chairman of the management committee to withhold a meeting required to be held by the owners of not less than 5% in number pursuant to schedule 1(2) of the BMO.

D. Opening and operation of Common Facilities

As mentioned above, the Secretary for Food and Health may from time to time issue Directions setting out requirements or restrictions on the operation of the 599F Premises (including club-house, swimming pool and sports premises)[15]. Section 9 of Cap.599F provides that the manager of the 599F Premises must comply with the Directions, failing which the manager commits an offence and is liable on conviction to a fine at $50,000 and to imprisonment for 6 months.

Further, if it can be shown that failure to comply with the measures causes or contributes to the infection of virus and therefore harm or injury to the occupiers and visitors of the development, the manager may be found to be negligent, and therefore held liable in a civil claim to compensate the victim for his injury and damage.

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14 the version of Cap.599G then in force which included exemptions like *"meeting of a body that must be held within a specified period in order to comply with any Ordinance"* at which *"no food or drink is served and, in the case of a group gathering of more than 50 persons, measures are in place for separating the participants in the gathering in different rooms or partitioned areas, each accommodating not more than 50 persons"*. This exemption has now been replaced by the more general exemption of *"Specified Events"* held in the *"Event Premises"* discussed above. See Gazette L.N. 127 of 2021 dated 20 July 2021.

15 For the full list of updated restrictions and requirements in operating club-house, swimming pool and sports premises, please refer to Section H, M and L of the Annex to G.N.(E.) 770 of 2021 which will be in force up to 24th November 2021 (see also footnote 8 above).

Whilst the Manager or IO should have taken out a public liability insurance policy to cover any such third party claim, a usual policy contains a provision requiring the insured to comply with the statutes and take reasonable precautions to prevent loss leading to any claim under the policy. Although the standard of negligence triggering the operation of such policy condition may be higher than ordinary negligence, failure to comply with the prescribed measures (i.e. the Directions in force under Cap.599F) may be regarded as failure to comply with the statutory requirements and ignoring known risks triggering the insurers to disclaim policy liability.

[END]

Does owner of top-floor unit and roof own everything?

By Chung Pui Lam, GBS, OBE, JP

Introduction

In recent years, there has been a trend of erecting internal staircase through the floor slab of top-floor unit leading to the roof above. Owners of top-floor unit and the roof above claim that the areas and facilities in above and beneath are all within the boundary of their property which they enjoy exclusive ownership, use and possession. From the perspective of building management, however, building managers or owners' corporation may look at the matter in a different way and would consider whether there is a potential breach of deed of mutual covenant or the Building Management Ordinance, Cap.344 ("BMO") because erection of internal staircase is usually accompanied with installation of some ancillary structures on the roof which touch in or on the common parts of a building.

What constitutes common parts and facilities of a building, especially when there is no clear definition or no mention in the deed of mutual covenant? Does owner of top-floor unit and roof own everything in above and beneath the property? And what if such owner produces approval from relevant government authority for alteration and addition works? Can such approval be accepted as conclusive evidence of regulatory compliance under a deed of mutual covenant or BMO? This article will give readers the answers in light of a recent judgment in Harriman Management Services Limited v Lam Chi Keung in LDBM 363/2014 which was handed down on 20 August 2021 by Deputy District Judge Michelle Soong, Presiding Officer of the Lands Tribunal.

Brief facts of the case

This was the application by a building manager Harriman Management Services Limited ("the Applicant") for a mandatory injunction requiring the Respondent Mr. Lam to remove an internal staircase ("the Internal Staircase") together with some other erections in his property in Bellagio, Sham Tseng, New Territories. In January 2003, the Respondent became the owner of a unit ("the Unit") on the 71st Floor together with the roof above ("the Roof"). In around 2005 or 2006, he engaged an architectural firm to undertake the renovation project. The Respondent through his contractor submitted to the Applicant an application form together with the building plans of the staircase as approved by the Building Authority and paid the renovation deposit as well.

The Applicant's case

The Applicant alleged that the Respondent had caused to be erected the Internal Staircase connecting the Unit and the Roof without obtaining their prior consent. Some ancillary structures and alterations were respectively installed and made on the Roof which included, among others, wooden fencing at the parapet walls; metallic door frame; sealing up of the opening on a wall with concrete; erecting a concrete structure with windows inside and under which the Internal Staircase was built; removing the floor slab inside a concrete structure for erecting the Internal Staircase; damaging or removing the water resistant membrane when the floor slab was removed; water basin at the Roof; and blocking a segment of the surface channel (collectively "the said erections and alterations"). The Applicant alleged that the said erections and alterations were all touching on or in the common parts and were in breach of the Deed of Mutual Covenant ("DMC") and the BMO.

The Respondent's case

The Respondent alleged that the said erections and alterations were done in reliance on two representations ("the Representations") made by a Mr. Wong (who was and is still the senior management of the vendor which wholly owns the Applicant) in 2002, before he decided to purchase the property. Firstly, Mr. Wong represented to potential purchasers in a newspaper article in September 2002 that owners of the top-floor units could construct an internal staircase to link their apartments with the roof above. Secondly, Mr. Wong met with the Respondent and his wife at Bellagio in October 2002 and represented to them that owners of any apartment on the 71/F could construct an internal staircase to connect the apartment with the roof above and could, for example, have a garden and build a jacuzzi on the roof. The Respondent submitted that even if the Applicant could prove breaches of the DMC, the injunction application should be refused by reason of estoppel and/or acquiescence as no complaint was raised by the Applicant until 2013 and no legal action was taken until 2014.

Issues tried in the Tribunal

Among the issues of the case tried in the Tribunal, building managers may feel more interested in the one as to whether the Internal Staircase, the said erections and alterations were in breach of the DMC and the BMO as well as its related issue as to whether the areas or facilities over which the said erections and alterations were made are "*Common Areas and Facilities*" within the meaning of the DMC and "*common parts*" within the meaning of the BMO. All these relate directly to the daily management of building managers, and we shall focus more in this article on these several inter-related issues. We shall discuss briefly other issues like whether Mr. Wong had made the Representations; whether the Applicant had given consent to the erection of the Internal Staircase; and whether the Applicant had acquiesced to and/or should be estopped from complaining about the Internal Staircase.

Issue 1 Whether the areas or facilities over which the Internal Staircase together with the erections and alterations were made are common areas and facilities?

The Internal Staircase, the said erections and alterations were all allegedly touching in or on the following areas or facilities:- (1) Parapet wall; (2) Opening on the wall with concrete; (3) Floor slab inside the concrete structure; (4) Water resistant membrane in the floor slab; (5) Segment of the surface channel. Whether these areas or facilities are "*common areas or facilities*" under the DMC and "*common parts*" under the BMO? The Respondent argued that they were not, purportedly in reliance of the assignment ("the Assignment") under which the property was assigned to him. What was assigned to him was "*the sole and exclusive right to hold use occupy and enjoy ALL THAT UNIT [D] on the [SEVENTY FIRST] FLOOR together with the main roof above*". Accordingly, the Respondent believed that the aforesaid areas and facilities were all within the boundary of the property which he enjoyed exclusive ownership, use and possession.

The Respondent also argued that the definition clause of the DMC defined the "Residential Common Area and Facilities", "Residential Owner" and "Unit" in such a way that confirmed his exclusive right to use and enjoy the Roof. Further, there were 77 undivided shares assigned to his Unit together with the Roof whereas only 71 undivided shares were assigned to the units of the lower floors without roofs. It meant that his Roof carried undivided shares by itself. The Unit and the Roof were exclusively occupied by himself as the same owner, there were actually no common areas/common parts between the Unit and the Roof. As such, the Respondent argued that the aforesaid areas or facilities did not fall into the definition of "*common parts*" under section 2 of the BMO which excludes such parts as have been specified or designated in an instrument registered in the Land Registry as being for the exclusive use, occupation or enjoyment of an owner.

Judge Soong was not persuaded by the Respondent's arguments. She found that all the aforesaid areas or facilities were the common areas/parts and facilities of the building because they fell within their respective definitions under the DMC and the BMO. The Assignment did not designate the parapet wall for the exclusive use and enjoyment of the Respondent. The parapet wall is clearly defined as a common part in paragraph 4 of Schedule 1 to the BMO.

Concerning the wall with an opening which was sealed up by the Respondent, it was a wall to set apart the Roof (exclusively owned by the Respondent) and the common area on the other side of the wall. Again, the Assignment did not specify or designate that piece of wall for the exclusive use and enjoyment of the Respondent.

As for the floor slab, there are usually some sort of facilities embedded in the floor slab for the common use of the owners as a whole. Here in this case, within the floor slab was the water-resistant membrane on the Roof for the protection of the whole building and should be a common part thereof. It was held in 梁有勝 v 馮源禧及另四人that the water proofing layer was a common part as it was not for individual owner but for the benefit of the building as a whole. The same conclusion was reached in Kung Shing Investment Ltd v The Sunbeam Manufacturing Co. Ltd and The Incorporated Owners of Fortune Gardens v Cha, Grant and Another (where the respondent installed an internal staircase leading from their unit to the roof above and the tribunal found the floor slab a common part).

As for the segment of the surface channel at the Roof, there was no clear evidence from either party as to whether the channel exclusively served the Respondent's Unit or serve the building as a whole. But common sense suggests that the surface channel by its design and position should serve the basic or common function of diverting water to other drain(s) and hence preventing accumulation of water on the roof. On balance, Judge Soong tended to believe that it fell within the definition of "*Residential Common Areas and Facilities*" as it was the drain, pipe or sewer intended for the common use and benefit of the building.

The next question to consider is whether the Respondent had breached Clause 11(a) of the DMC; the Third Schedule to the DMC; and section 34I of the BMO as the Applicant alleged. Clause 11(a) restricted and prohibited owner of the flat roof/roof from erecting any structure whatsoever on the flat roof/roof or any part thereof. Under the Third Schedule, the owners could not without the previous written consent of the Manager erect any sign or other structure whatsoever on the roof or flat roof forming part of a Unit or any part thereof. Section 34I (1) (a) of the BMO provides that "*No person may 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).*" Section 34I (2) provides that "*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.*" Judge Soong found that the aforesaid provisions of the DMC and the BMO were all engaged and applicable.

The Respondent argued that Clause 11(a) was inapplicable because the "*flat roof/roof*" referred to in Clause 11(a) and the four types of roofs classified as "*Doom Roof*", "*Upper Roof*", "*Roof*" and "*Main Roof*" in the floor plans annexed to the DMC did not actually refer to his Roof. Judge Soong was not persuaded by these arguments. She observed that the DMC did not define or classify the roofs and that different terms were actually used throughout the DMC to refer to the roofs. As regards the floor plans, Judge Soong said that one must not muddle up the real purpose of those plans in the DMC which were "*for the purpose of identification*" to show the location of the residential common areas and facilities. She opined that the references to the roof(s) in Clause 11(a) and the Third Schedule, be they labelled as "*any roof*", "*roof*", "*roofs*", "*roofs or flat roofs*" or "*flat roof/roof*", were made in their generic sense rather than specific sense.

As for the proviso in the Third Schedule, the Respondent submitted that the Applicant failed to prove "*without the previous written consent of the Manager*". As Judge Soong did not find that a written consent to erect the Internal Staircase had been given by the Applicant to the Respondent (see discussion under Issue 2 below), this argument would not succeed. About section 34I of the BMO, the Respondent submitted that all renovation works in different locations of the Roof were within his property and they had not occupied or damaged the common areas. Judge Soong believed her discussions about what constituted common areas and facilities could dispose of this argument.

In view of the above, Judge Soong made findings of breach for the said erections and alterations except the removal of the floor slab inside the concrete structure. Readers may refer to paragraphs 69 - 77 of the Judgment for details as to the said erections and alterations (including other items of erections, installations or alterations not mentioned in this article) and in what way each of them contravened the DMC provisions.

Issue 2: Representations & Reliance

The fact that Mr. Wong made the Representations was supported by the Respondent's witness evidence and documentary evidence which were not seriously challenged by the Applicant. The Applicant had chosen not to call Mr. Wong to give evidence to rebut the Respondent's case. Judge Soong opined that the Applicant's failure to call Mr. Wong to give evidence justified the application of the evidential principle, namely when a party without proper explanation fails to call a witness whom the party might reasonably be expected to call, the court may draw an adverse inference against the party that the evidence of the witness may not help the party's case. Judge Soong found the Respondent a credible witness and accepted his evidence about the making of the Representations to be true. She also accepted and found that the Respondent did, in reliance of Mr. Wong's representations, purchase the property and incurred expenses in the erection of the Internal Staircase.

Issue 4: Whether Applicant had consented to the erection of the Internal Staircase?

The Applicant's case was that the Respondent had not applied for consent for the erection works of the Internal Staircase. On the other hand, the Respondent's case was that the Applicant had already given the consent. The Respondent argued that it was inherently improbable for him not to seek approval from the Applicant when he already took all the troubles to apply for approval from the Building Authority and that the Applicant could not explain why they made full refund of renovation deposit to him upon completion of the renovation works if the works had caused damage to the common areas as they alleged.

In short, there was no documentary evidence at all about the existence of a written consent nor was there any witness evidence from anyone who was actually involved in the process of giving or obtaining approval. Judge Soong tended to think that if a written consent really came into existence in about 2006 or 2007, there was no reason why the Respondent did not safe keep this important document as he did for the Consent given by Mr. Wong in 2002. On balance, Judge Soong was unable to make a positive finding that a written consent for the erection of the Internal Staircase was given by the Applicant at the material time.

Issues 3, 5 & 6: Whether Applicant be bound by Representations? Whether injunction be granted? Estoppel & Acquiescence?

Judge Soong gathered from the Respondent's evidence that his mind was completely blown and he virtually set his heart on an internal staircase having heard Mr. Wong's representations. The Respondent instantly decided to purchase the property. In Judge Soong's view, it was reasonable for the Respondent to expect the Applicant would approve the application as a matter of formality so long as the building plans were endorsed by the government. It was also reasonable for the Respondent to expect that the Applicant would not treat the erection of an internal staircase as contravention of the DMC and take enforcement action against him.

Judge Soong also considered the undisputed fact that the Internal Staircase was built in accordance with building plans approved by the Building Authority. There was no evidence that it was in any way unsafe or was in breach of any law. On the other hand, the Respondent, now retired, would need to incur substantial expenses to demolish the Internal Staircase and to reinstate the premises.

Having taken into account of the entire circumstances of the case and applied equitable principles, Judge Soong found that notwithstanding the breaches as discussed under Issue 1 above, it would be unjust to grant a mandatory injunction to require the Respondent to reverse the alterations in relation to the Internal Staircase and the said erections or alterations which were part and parcel thereof or connecting thereto. Instead, she granted a mandatory injunction order against the Respondent to dismantle and remove at his own costs the wooden fencing at the parapet wall, the metallic door frame and the water basin at the Roof and to reinstate the relevant parts to their original states.

Given her ruling on the mandatory injunction, Judge Soong did not rule on the issues of estoppel and acquiescence which was ultimately the same consideration of what was fair and just.

Miscellaneous

Having looked at the arguments of both sides and the findings of the court on the above issues, let us turn to several other findings revealed in the case which deserve readers' attention. Firstly, the Respondent did obtain approval from the Building Authority for the erection works of the Internal Staircase. In Judge Soong's view, it was an undisputed fact that the Internal Staircase was built in accordance with approved building plans. We would like to add that such approval from the Building Authority is only evidencing the compliance with relevant requirements for building works, especially structural and fire safety, under the Building Ordinance, Cap. 123, but not further or otherwise. The Building Authority's approval cannot be regarded as conclusive evidence of compliance with relevant provisions for installation or alteration works under the DMC or conversion of common parts under the BMO. Therefore, building managers should draw attention of the owners that Building Authority's approval is only one of the considerations for giving consent to the application for installation or alteration works.

Secondly, it is about internal policy and practice on approving renovation works by building managers. Judge Soong pointed out that aside from the erection of the Internal Staircase, the Respondent was also undertaking some other renovation works to his property at that period of time. It was not disputed that the Respondent had submitted an application form for the "*conventional*" renovation works and the Applicant had granted approval therefor. What was really in dispute was whether in that application, the Respondent also obtained consent for the "*unconventional*" part of the renovation, i.e. the erection of Internal Staircase as well. There were possibilities that the Respondent did not apply for such consent at all; or that the Respondent did apply and the Applicant did give one in writing; or that the Respondent's application about the Internal Staircase accidentally escaped the Applicant's attention and the Applicant's consent was meant for the conventional renovation works only but not the Internal Staircase.

From the circumstantial evidence before her, Judge Soong tended to believe the dispute as to the existence of such written consent could be attributable to the wrongful belief on the part of the frontline staff that the works being carried out were within the scope of what had been approved under the application form, or attributable to their insensitivity toward potential contraventions of the DMC by performing their duties in a robotic manner. Therefore, building managers should (1) cause the frontline staff to check carefully whether the application includes "*unconventional*" renovation works in order to avoid escape of attention; and (2) cause patrolling security guard to report on any "*unconventional*" renovation works to avoid doubt or misunderstanding which may cause delay in prevention of "*unconventional*" renovation works and hence leading to litigation as a result.

Thirdly, the Respondent submitted that even if he was proved to have breached the DMC, the injunction application should be refused by reason of estoppel and/or acquiescence as no complaint had ever been raised by the Applicant until 2013 and no legal action was taken until 2014, that was exceeding 8 years after the renovation works had been carried out. In light of the late action taken in this case, building managers or owners' corporation should seek legal advice once becoming aware of any potential breach of deed of mutual covenant and take action as soon as practicable to avoid defaulting owners from relying on defence of estoppel and/or acquiescence by the building managers or owners' corporation.

Conclusion

In discussing what constituted common parts and facilities of a building, Judge Soong concluded by reference to case authorities that there was usually some sort of facilities, like water-proofing layer, embedded in the floor slab for the common use of the owners as a whole and hence found the floor slab a common part. Accordingly, the erection of the Internal Staircase together with the ancillary structures, even with the Building Authority's approval but without prior consent of the Applicant, was in breach of the DMC and the BMO, despite that the Judge only granted a partial injunctive relief requiring the Respondent to remove some other unauthorised structures.

So, to answer the question, does owner of top-floor unit and roof own everything? No, it does not, at least in the case of multi-storey buildings in which all owners from ground floor to top floor and roof must observe and perform the obligations and comply with the restrictive covenants under the deed of mutual covenant and the BMO as well.