COVER STORY
主題文章

深圳市物業經理人學會介紹

深圳市物業經理人學會（下簡稱學會）成立於2024年4月9日，是中國國內首家以物業經理人為主體的社團組織。深圳作為中國內地物業管理的發源地，自1981年成立第一家物業管理企業以來，經過四十餘年的發展，積累了豐富的經驗和成熟的人才隊伍。然而，隨著行業的發展，也面臨著諸多挑戰，如從業門檻不清晰、行業認證體系不健全、人才培養體系缺失等問題。為了解決這些問題，提升執業經理的專業能力和職業素養，推動行業的專業化和職業化發展，深圳市物業經理人學會應運而生。

一、學會宗旨：

1、遵守憲法、法律、法規和國家政策，踐行社會主義核心價值觀，遵守社會道德風尚，推動行業專業發展，服務會員專業需求；2、擬定並推行相關物業經理人的執業技術標準和執業規則；3、加強物業經理人的自律管理，建立物業經理人誠信檔案；4、開展物業管理研究、交流活動，展開國際交流合作，做好繼續教育規劃，不斷提升物業經理人的專業勝任能力和職業修養；5、維護物業經理人的合法權益；6、承擔社會責任，樹立良好的社會服務形象。

二、學會業務範圍：

1、組織開展物業管理理論與實踐研究；2、擬訂並推行物業經理人執業標準；3、提供物業管理、房屋安全、社區相關諮詢和技術服務；4、搭建全媒體宣傳平台；5、為會員提供服務，開展會員培訓，反映會員訴求。

三、學會服務方向：

1、推動專業發展，開展物業經理人執業規範和標準研究，為物業經理人提供清晰、有價值的、可落地的職業行為指引。2、服務會員，做好學會平台建設，服務好每一位元會員。把學會打造成專業學習平台、經驗與技能交流平台、物業經理人職業發展支持平台、引領專業發展的平台。3、服務政府，發揮專業優勢、服務政府對行業的規範管理，為政府對行業改革發展政策的制定和實施提供諮詢意見，當好參謀、做好助手。4、服務行業企業，包括為行業發展展開相關課題研究，為企業提供專業諮詢與培訓，提供適配的人才資訊，為企業健康發展助力。5、服務社會，利用行業專業優勢與部分高校合作，推動行業專業人才培養和梯隊建設，促進行業人才的可持續發展。6、開展國際國內交流與合作，建立與港澳臺及國際、國內物業管理專業機構的聯繫，通過學術交流、參觀訪問、參加論壇和博覽會等，加強專業交流和學習，開闊廣大會員的視野。

四、學會會員類別：

學會會員分為創會會員、資深會員、普通會員、實習會員四類。

1. 創會會員為創立學會的會員，指應學會籌備工作組邀請、在學會成立大會召開之前加入學會的會員，創會會員也是資深會員，入會資格同資深會員一致。

2. 資深會員是指擁有國家承認學歷的大學本科及以上學歷、8年以上物業管理從業經驗，或大學專科以上學歷、12年以上物業管理從業經驗（其中3年以上項目管理經驗），經面試達到本學會資深會員專業要求的物業經理人。

3. 普通會員是指擁有國家承認學歷的大學專科及以上學歷、5年以上物業管理從業經驗、經考核達到學會普通會員專業要求的物業經理人。

4. 實習會員是指有志於從事物業管理的國家承認學歷的普通高校（含職業大學、大專院校，或同等學歷的技師學院、高級技校）在校學生，或從業一年以上，經線上考試達到學會實習會員專業要求的物業經理人。

五、學會會員入會與會費標準：

入會程式：申請人提交入會申請書後，學會會員發展事務委員會根據申請會員等級進行入會資格審核；申請資深會員資格的須通過由會員發展事務委員會組織的面試，申請普通會員資格的須通過由會員發展事務委員會組織的考核，實習會員須通過由會員發展事務委員會組織的線上考試，合格後提交學會理事會討論通過，授予相應會員資格。

學會會費標準：學會會員須每年交納會費，會費標準為：創會會員、資深會員每年會費標準為人民幣1200元，普通會員每年會費標準為人民幣800元，實習會員每年會費標準為人民幣500元。

六、學會合規管理：

1. 學會高度重視會員的個人操守和合規行為，對任何違法違規行為零容忍。2. 會員須嚴格遵守國家法律法規和相關政策，客觀、專業、公平、公正履行職責，為業主提供品質服務，為專業進步提供支援，為行業發展貢獻力量；會員在執行物業服務工作時，不得違犯法律法規、不得損害侵害業主利益、不得違背基本商業道德，不得利用職權謀取個人利益，不得顯失公平對待業主。3. 凡會員出現個人操守、違規、違紀、違法等方面問題，知情人均可向學會投訴，學會收到投訴後將由合規事務委員會組織調查小組進行查證，一經查實，將由合規事務委員會作出處罰決定、並報理事會會議討論通過後予以公佈，處罰決定將視其情節輕重給予警告、公開譴責、勸退會員資格、開除會籍等，處罰決定公佈的同時將書面知會會員所在物業管理企業和管理項目的業主委員會或物業管理合同委託人；如會員行為觸犯法律將移交司法機關處理。

七、學會業務主管單位與組織機構：

學會的主管單位是深圳市住房和建設局，學會登記管理機關是深圳市民政局。

學會組織機構：1. 學會的最高權力機構是會員大會，會員大會的執行機構和議事機構是理事會。2. 學會設會長1名，副會長2名，監事長1名，秘書長1名；其中，會長、副會長、監事長為兼職非受薪工作人員，秘書長為專職受薪工作人員。3. 學會設理事會、秘書處、六個專門委員會，其中，理事會為常設機構，不配備專職工作人員，由17名理事依據章程產生，含會長、副會長、理事。秘書處為常設機構，由秘書長具體負責，處理學會日常事務。專門委員會為非常設機構，不配備專職工作人員，主任委員由副會長或理事或資深會員兼任，專門委員會委員由主任委員提名產生；共設：(1) 會員發展事務委員會、(2) 教育與培訓事務委員會、(3) 專業發展事務委員會、(4) 政策與法律事務委員會、(5) 合規事務委員會、(6) 公共關係事務委員會6個專門委員會，負責處理學會各項專業事務。4. 學會會員大會、理事會每屆4年，每年召開一次會員大會，每年召開一次以上理事會；每月召開一次由會長、副會長、監事長、秘書長、各專門委員會主任委員副主任委員參加的會長辦公會。5. 學會會長實行任期制，每屆任期4年，連任不得超過一屆。

學會監督機構：1. 監事會為學會監督機構，對學會的決定決策和日常工作行使監督權；監事會為常設機構，不配備專職工作人員，由監事長1人、監事4人組成。2. 學會監事會行使下列職權：受會員大會授權對學會的重大事項決策行使監督權；對學會出現以下行為，可向主管部門申請召開臨時會員大會或理事會會議，對相關行為進行討論處理並做出決定，出席會議的人員超過應出席人員的2/3即為有效，會議決定須經出席會議的2/3以上人員同意方為有效：(1) 學會做出的決定明顯違反國家和政府的法律、法規和政策要求；(2) 學會做出的決定明顯侵害了會員利益；(3) 學會做出的決定明顯誤導行業或不利於行業的發展；(4) 學會日常管理和財務管理出現混亂，造成重大影響或損失。3. 監事會每年向會員大會報告年度監督工作；對學會的財務收支進行監督，並組織年度財務審計。

深圳市物業經理人學會的成立得到了社會各界的廣泛認可和積極評價。其成立被視為深圳物業管理行業發展的一個重要里程碑。學會的成立不僅為物業經理人提供了一個交流和學習的平台，也為行業的規範化和專業化發展提供了有力支援。此外，學會還被視為一個能引導和促進物業經理人為業主託付管理的資產保值增值、為業主追求的美好生活環境貢獻力量的社會大平台。總之，深圳市物業經理人學會的成立和發展，為深圳乃至全國的物業管理行業注入了新的活力和動力。

有關學會資訊可透過上述二維碼從微訊小程式取得

Overview of the Building Management (Amendment) Ordinance 2024

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Following the public consultations held on review of the Building Management Ordinance (Cap. 344) ("**BMO**") in 2014 and amendments made in 2018, the Building Management (Amendment) Ordinance 2024 ("**Amendment Ordinance**") was gazetted on 12 July 2024. Subject to certain exemptions discussed below, the Amendment Ordinance will come into operation on 13 July 2025.

Key Amendments in the Amendment Ordinance

The new amendments follow the themes and issues suggested in the 2014 consultation paper published by the Home Affairs Department, including:

(a) Introducing the notions of large-scale maintenance and other high-value supplies, goods or services required for building management and imposing respective requirements in relation to each type of such procurement;

(b) Providing for a mechanism for natural persons authorized by corporate flat owners to act for the latter at general meeting of the incorporated owners ("**IO**");

(c) Imposing or adjusting requirements in relation to financial statements and other accounting documents of IOs and in relation to procedure of meetings; and

(d) Criminalizing failure to keep certain documents concerning building management.

While the new amendments mainly apply to buildings with IOs, substantially similar amendments concerning procurement, financial statements and duty to keep certain types of documents are also incorporated into Schedule 7 of the BMO to apply to developments of multiple ownership but without any IO formed. It will primarily be for the Manager of those developments to comply with the new statutory requirements in conducting procurements.

This article does not intend to set out exhaustively all the new amendments. Instead, the authors would discuss some important amendments for the general reference of property managers.

(i) Classification of Major Procurements and Their Respective Requirements

The Amendment Ordinance classifies relatively valuable procurement contracts into "type 1 high value procurement", "type 2 high value procurement" and "large-scale maintenance procurement" particularized as follows:–

(a)	**Type 1 High Value Procurement**[1]	Value of procurement exceeds or is likely to exceed HK$200,000 but does not exceed or is unlikely to exceed 20% of the "*reference amount*" for the procurement, and is not a large-scale maintenance procurement
(b)	**Type 2 High Value Procurement**[2]	Value of procurement exceeds or is likely to exceed 20% of the "*reference amount*" for procurement, and is not a large-scale maintenance procurement
(c)	**Large-scale Maintenance Procurement**[3]	It concerns the repair, replacement, maintenance or improvement of the common parts;
		Value of procurement exceeds or is likely to exceed HK$30,000 per flat (excluding garage, carpark, carport, unless every flat in the building concerned is, or is part of, a garage, carpark or carport);
		But it excludes: (i) Any cleaning or security services of the building; and (ii) Any building management services provided by the manager of the building

As opposed to taking the annual budget as the benchmark in the existing section 20A, "reference amount" in the Amendment Ordinance refers to the average specified annual expenditure of the past 3 financial years of the building (if any) or the proposed annual expenditure under the last budget prepared[4]. This may prevent artificial manipulation of the annual budget to circumvent the statutory requirements, say by deliberately yet unjustifiably inflating the estimated sum of expenditure for the current financial year. Under the Amendment Ordinance, however, where the "actual" total sum of management expenses incurred for the development is only ascertained for one financial year (or no such sum is so ascertained), the latest "budgeted or estimated" sum will continue to be adopted as the "reference amount" in determining, for example, whether the 20% rule relating to Type 2 High Value Procurement will apply. It is not readily apparent why the actual figure for that one financial year cannot be adopted in lieu of the estimated sum, if the concern is to avoid manipulation mentioned above. In any event, the chance that a new development in occupation for less than 3 financial years requires major renovation, hence triggering the Amendment Ordinance should not be high in reality.

1 Section 2D(1)(a) of Amendment Ordinance
2 Section 2D(1)(b) of Amendment Ordinance
3 Section 2E of Amendment Ordinance
4 Section 2D(3)-(6) of Amendment Ordinance

The important requirements for each of the said three types of major procurements are summarized below.

Table 1: table showing general requirements under each type of major procurement

	Type 1 High Value Procurement[5]	**Type 2 High Value Procurement[6]**	**Large-Scale Maintenance Procurement[7]**
General and tender requirements	Compliance with the Code of Practice for Procurement published by HAD ("**COP**")[8]. Note that for buildings with IO, it was expressly provided that non-compliance of COP itself will not void the Contract.[9]		
	All major procurements must be conducted by invitation to tender[10] **(essential requirement)**		
	Requirements of how to conduct the tender exercise as provided under Sch. 6A (for buildings with IO) or under Division 3 of Part 2 of Sch. 7 (for buildings without IO)[11]		
Declaration of interest and connects requirement	Requirements of declaration of interests and connections to be made by MC participants and responsible persons under Part 1 of Sch. 6B (for buildings with IO) or by responsible persons under Subdivision 1 of Division 4 of Part 2 of Sch. 7 (for buildings without IO)[12]		Requirements of declaration of interests and connections under Part 1 and declaration of no interests and connections (for large-scale maintenance projects) under Part 2 of Sch. 6B to be made by MC participants and responsible persons as defined below (for buildings with IO), or declaration of interests and connections and declaration of no interests and connections by responsible persons under Subdivisions 1 and 2 of Division 4 of Part 2 of Sch. 7 (for buildings without IO)[13]
Meeting requirements	–	Whether to accept or refuse a tender submitted for procurement must be decided by a corporation resolution (for buildings with IO), or owners resolution (for buildings without IO)[14] **(essential requirement)**	

5 See section 28D and paragraph 12 of Schedule 7 of the Amendment Ordinance
6 See section 28E and paragraph 13 of Schedule 7 of the Amendment Ordinance
7 See section 28F and paragraph 14 of Schedule 7 of the Amendment Ordinance
8 See section 28A and paragraphs 12(1)(a), 13(1)(a) and 14(1)(a) of Schedule 7 of the Amendment Ordinance
9 See section 28A(2) of the Amendment Ordinance
10 See section 28D(1), 28E(1) and 28F(1); and paragraphs 12(1)(b), 13(1)(b) and 14(1)(b) of Schedule 7 of the Amendment Ordinance
11 See section 28D(2)(a), 28E(2)(a) and 28F(2)(a); and paragraphs 12(2)(a), 13(2)(a) and 14(2)(a) of Schedule 7 of the Amendment Ordinance
12 See section 28D(2)(b) and 28E(2)(b); and paragraphs 12(2)(b) and 13(2)(b) of Schedule 7 of the Amendment Ordinance
13 See section 28F(2)(b); and paragraph 14(2)(b) of Schedule 7 of the Amendment Ordinance
14 See section 28E(2)(c) and 28F(2)(c); and paragraphs 13(1)(c), 14(1)(c) of Schedule 7 of the Amendment Ordinance

	Type 1 High Value Procurement[5]	Type 2 High Value Procurement[6]	Large-Scale Maintenance Procurement[7]
Meeting requirements (Cont'd)	–	Contract must not be varied or terminated other than by a corporation resolution (i.e. a resolution of owners passed at general meeting of IO) (for buildings with IO), or owners resolution (for buildings without IO)[15] **(essential requirement)**	
	–	–	Requirements for convening and conducting general meetings to consider the tenders and variation or termination of the contract as provided in Sch. 6C (for buildings with IO), or in Division 4 of Part 3 of Sch. 7 (for buildings without IO).[16] It is noted among the various requirements put forward, the "voting-in-person threshold" is an **essential requirement**
Exceptions from tender requirement	Exceptions from tender requirement relating to the renewal situation as provided in the existing section 20A(2A), where the existing supplier or service-provider may be engaged again on such terms as decided by a resolution passed in a corporation resolution or owners resolution may still apply.[17]		

15 See section 28E(2)(d) and 28F(2)(d); and paragraphs 13(4) and 14(3) of Schedule 7 of the Amendment Ordinance

16 See section 28F(2)(e); and paragraphs 14(1)(c) and 14(3) of Schedule 7 of the Amendment Ordinance

17 See section 28D(3) and 28E(3); and paragraphs 12(3) and 13(3) of Schedule 7 of the Amendment Ordinance

Major amendments to impose certain requirements regarding tender, declaration and general meeting by introducing new Schedules 6A, 6B and 6C and making similar corresponding amendments to Schedule 7 are summarized as follows:–

Table 2: table showing certain tender, declaration and meeting requirements

Tender Requirement *(Sch. 6A/Division 3 of Part 2 of Sch. 7)*	(a) It adopts some requirements similar to those contained under the COP, such as those regarding the contents of the tender, strict non-acceptance of late tender etc.. (b) Nevertheless, as opposed to the COP, there is no requirement of the number of "valid tenders obtained" as provided in the present paragraph 4.2 of the COP[18] (being 3 invitations for procurement which exceeds or is likely to exceed $10,000 but does not or is unlikely to exceed $200,000; and 5 invitations if the value of procurement exceeds or is likely to exceed $200,000).[19] (c) Advertisement say in the media or through the Internet cannot be treated as satisfying the requirement of the minimum number of invitations for tender.[20]
Declaration of Interests and Connections Requirement *(Sch. 6B/Sub-divisions 1 & 2 of Division 4 of Part 2 of Sch. 7)*	To enhance transparency and to allow owners to make a better-informed decision in casting a vote in procurement decision, certain groups of persons are required to declare their personal interest or connection with the tender made, and some required to declare also their relationship and connection with another. For buildings with IO, both the "management committee participants ("**MC participants**")" and "responsible person" are to make relevant declarations on interests and connections, whereas only the latter is required to make the relevant declarations for buildings without IO: (a) "MC participants" refer to both the MC members, and treasurer and secretary who are not MC members; (b) "Responsible persons" refer to the Manager and those accustomed to or obliged to follow instructions given by a Manager directly or indirectly. This wide definition aims to catch all employees, agents and any other persons who would follow the Manager's instructions. For all major procurements: (a) MC participants (if the building has IO) should declare their interests or connections for tenders submitted before the procurement contract is entered into; whereas (b) Responsible persons should declare both: (i) their dealings or connections with the MC members (if the building has IO), and (ii) interest or connections for tenders submitted before the procurement contract is entered into. (c) It is noted that the phrases "personal dealings" and "personal interests" do not come with a specific definition in the Amendment Ordinance but are left open for general interpretation.

[18] Paragraph 4.2 of COP provides that "Where the number of valid tenders obtained is fewer than the number of tenders stipulated above, the MC shall pass a resolution to accept or reject the tender exercise."

[19] See paragraph 5(1) of Schedule 6A; and paragraph 20(1) of Schedule 7 of the Amendment Ordinance

[20] See paragraph 5(3) of Schedule 6A; and paragraph 20(3) of Schedule 7 of the Amendment Ordinance

	(d) For interested MC participants: (i) they must not preside over or otherwise attend a MC meeting (to the extent that it relates to the procurement), but this prohibition may be exempted by an "exemption resolution" [as defined in (f) below]; (ii) however, they cannot be exempted from the prohibitions against voting on any proposed resolution concerning the procurement or being counted towards the quorum at the MC meeting, and they cannot even be present when any such voting takes place; and (iii) there is also a general prohibition (even with an "exemption resolution") against participating in procurement activities[21]. (e) Similarly, for interested responsible persons: (i) there is also a general prohibition that they must not participate in any procurement activities, but this prohibition could be exempted by an exemption resolution. (f) An "exemption resolution" is a resolution passed in a MC meeting or an IO general meeting (for buildings with IO) or by owners (for buildings without IO) to exempt the interested MC participants or responsible persons from the respective prohibition with reasons provided. For large-scale maintenance procurements, in addition to the above declarations: (a) MC participants (if the building has IO) should make a further declaration of no interests or connections with the tender (except those already declared, if any); (b) Likewise, the responsible person must also declare that he (i) has no personal dealing or connection with MC members (if the building has IO); and (ii) has no personal interest or connection with the tender (except those already declared, if any). To further enhance transparency, notice of the declarations made containing the prescribed particulars should be displayed in a prominent place of the building for at least 7 consecutive days within 7 days after the declaration was made.
Meeting Requirements *(Sch. 6C/Division 4 of Part 3 of Sch. 7) (for examples only)*	There are additional general meeting requirements to be complied with if a resolution is proposed regarding acceptance or refusal of tender for any large-scale maintenance procurement and whether such procurement contract entered into is to be varied, terminated or avoided. These requirements aim at increasing transparency and engaging more owners in participating in the decision-making in such type of procurements, including: (a) The notice of the meeting must bear the Chinese and English warning words of "Important Reminder";[22] (b) In passing a resolution regarding large-scale maintenance procurement, the "voting in person" threshold must be passed, i.e. it must either be passed by 5% of the total number of owners or by 100 owners computed according to Schedule 11 (whichever is less)[23], and the respective votes cast personally and by proxy must also be recorded clearly in the minutes of the proceedings;[24] (c) Copy of the certified minutes of the meeting must also be delivered to all owners within 28 days after the date of the meeting held.[25] In view of the "Vote-in-person" threshold introduced, the Amendment Ordinance also introduces the use of "authorization notice" to allow corporate owners to appoint a representative to vote on its behalf. If a corporate owner votes by an authorization notice, it will be regarded as voting "in person".

21 The term "procurement activities" is not specifically defined in the Amendment Ordinance. The Government's intention appears to be that the exemption resolution is to facilitate discussions about the tenders, if the MC or the owners think fit. However, in any event, the interested MC participant should in any way be prevented from participating in the decision-making process and should not even be present when the voting takes place (see Legislative Council, Bills Committee on Building Management (Amendment) Bill 2023 (2024, May 16). Minutes of meeting. *Website of Legislative Council* at: https://www.legco.gov.hk/yr2023/english/bc/bc56/minutes/bc5620240516.pdf, p.23-24). In the absence of clear definition of the term "procurement activities", in a particular case, there may be dispute on whether the exempted interested MC participant has in fact participated in some "procurement activities".

22 See paragraph 3 of Schedule 6C; and paragraph 48 of Schedule 7 of Amendment Ordinance

23 See paragraph 4 of Schedule 6C; and paragraph 49 of Schedule 7 of Amendment Ordinance

24 See paragraph 5 of Schedule 6C; and paragraph 50 of Schedule 7 of Amendment Ordinance

25 See paragraph 6 of Schedule 6C; and paragraph 51 of Schedule 7 of Amendment Ordinance

It can be noted that the above requirements are numerous and tedious. The languages used are also complicated with the relevant sections and schedules scattering everywhere and many cross-references made. Often, the new requirements need careful reading for lawyers to comprehend, let alone for the concerned lay persons to comply. Take an example, under Schedule 6B of the Amendment Ordinance, the IO is only required to post up the notice of the declarations made instead of the declaration itself due to protection of personal data privacy reasons. Managers or MC members cannot claim protection on the ground of compliance with statutory requirements if faced with complaints or actions taken under the Personal Data Privacy Ordinance (Cap. 486) if they have posted up the declarations. Further, while there may be little dispute to require interested MC members and Managers to declare their interest and connection in the procurement process for the sake of transparency so that informed decisions can be made, some unsophisticated and less knowledgeable lay MC members, particularly those not assisted by any professional managers, may not be aware of the need to make declaration (i.e. of no interest) even when they have no interest in case of large-scale maintenance procurements. Moreover, the various rules relating to restriction against participation in the procurement process by interested parties and the related exemptions, the breach of which may affect the validity of any resolution passed, are perhaps not simple for many MC members.

Another interesting amendment is codifying some guidelines in the existing COP into the Amendment Ordinance. COP has its origin from section 44(1)(a) of the BMO, which provides that the Secretary for Home and Youth Affairs may from time to time prepare, revise and issue COP to give guidance and direction as to, amongst other matters, the procurement of supplies, goods and services required by the IO. While the BMO provides for the substantive requirements, like tendering and choosing the supplier by owners in IO general meetings for certain valuable procurements, COP provides for the detailed procedures and mechanisms for conducting tenders, such as the tender-box should be a double locked box to be placed with the 2 keys separately kept by the chairman and secretary or treasurer,[26] and all tenders to be opened at the same time in the presence of at least 3 MC members who should countersign and date each of the tenders,[27] that are meant to be directory guidelines and not compulsory rules. Section 44(2) of the BMO makes it clear that breach of the COP itself will not carry any civil or criminal liability but may only be relied on as tending to establish or negate any liability which is in question in legal proceedings (e.g. it may operate as a reference standard of care in proving or disproving negligence). That the COP and related procedural rules are only guidelines has been affirmed by decided cases. In the recent case *輝振有限公司對何耀與及其他人* (LDBM 164/2021, 13 May 2024), the Lands Tribunal accepted that the IO might have breached paragraphs 3.1 and 3.6(a) of COP by failing to display the meeting notice and tender documents (which were voluminous and soft copies were placed at the management office for owners to obtain) at conspicuous place of the estate. Nevertheless, the court has no power to declare a contract void, nor would the IO become liable in any civil or criminal proceedings merely because of any breach of COP. The owner's claim was therefore dismissed.

Despite that, prior to the amendments of BMO in 2007, which in the authors' view have been the most helpful and enlightening amendments of BMO ever made, there might be confusion as to the legal status of COP. Somehow, the then section 20A(3) stipulated that "the tender procedure in respect thereof shall comply with such standards and guidelines as may be specified in a COP relating to such procurement and tender procedures". Therefore, there may be doubt as to whether the COP has been incorporated as statutory requirements despite the above analysis as to its status and effect. Accordingly, a new section 20A(5) was introduced during the 2007 amendments, making it clear that breach of the COP would not by itself render the procurement contract void. Therefore, the conventional respective roles of section 20A of the BMO (i.e. the substantive requirements of tendering and allowing the owners to choose the supplier or service provider in IO general meeting for relatively valuable procurements) and the COP (i.e. the procedural requirements of how a tender should be conducted) and their respective effects (i.e. mandatory or directory) have been well-defined and settled.

[26] See paragraph 5.1 of the COP (effective from 1st Sept 2018)
[27] See paragraph 5.3 of the COP (effective from 1st Sept 2018)

Nevertheless, the Amendment Ordinance has now elaborated and incorporated some procedural requirements in the COP into the BMO. It should not be forgotten that all these numerous and tedious new rules are to be observed by the IOMC of the majority of the buildings and developments in Hong Kong who are largely laymen. One would naturally ask whether such amendments are necessary and effective for addressing some important mischiefs, like reducing disputes amongst the owners or bid-rigging activities to justify their introduction with resulting complication. In considering this question, perhaps we should examine the more fundamental question of legal consequences associated with non-compliance with the statutory provisions (and not the COP) relating to procurement, under the existing law and the Amendment Ordinance.

(ii) Effect of Breach of Statutory Requirements for Procurement

Even if certain procurement requirements, whether brand new or originated from the COP, are incorporated into the BMO, question will remain as to their effect and what will happen if they are not observed.

The objective of the BMO is to encourage the owners to incorporate themselves and manage their own buildings, particularly the common parts and facilities, according to the statutory framework. In order to achieve the objective, it requires active participation of laymen owners and volunteers who are passionate enough to step up and take up the responsibility as MC members on a primarily gratuitous basis. If the consequence for breach of the statutory procurement requirements is that all the IOMC members concerned will be personally liable (whether civilly or criminally), those volunteers will probably be scared away. This will be against the legislative intent of the BMO.

Another possible consequence of breach one can think of is that all contracts entered into will be void or voidable by the IO. However, there may be some contracts which are genuinely or even urgently required, and may have been entered into bona fide and reasonably by IOMC for the benefit of the owners, although somehow some rules for procurement have not been strictly followed. If the BMO provides, as a hard-and-fast rule, that all such contracts are void or may be avoided, this will only create uncertainties and unnecessary disputes if not injustice. For instance, if the contractor acting in good faith has incurred expenses pursuant to the contract by buying materials and employing workmen, or if they have carried out some works under the void contracts, should they be compensated or paid for, and if so, how much? Indeed, even if the contract is avoided, the contractor may still have a claim for reasonable remuneration in respect of the services rendered or work done under the contract. In *Lau Yee Trading as Hing Tai Lee Construction Co v the Incorporated Owners of Garland House* (DCCJ 2613/2007, 15 January 2010), the plaintiff contractor's claim that it entered into a further agreement with the defendant IO to carry out additional works was rejected. Nevertheless, as the defendant IO had enjoyed the fruit of the plaintiff's additional works carried out without complaints, the court agreed that the plaintiff contractor shall be entitled to a reasonable price for the additional works carried out on *quantum meruit* basis (i.e. reasonable remuneration for work done or services rendered). Generally, in situations where the alleged contract provided for a stipulated fee resulting in tendering and negotiation in the market, such sum may be accepted as the fair and reasonable value. There are other decided cases which upheld or recognized similar claims.[28]

On the other hand, statute is supposedly mandatory, carrying some consequences for non-compliance. It is also necessary to have some laws governing procurement when IOMC and Managers are not spending their own money, but money belonging to the owners in choosing the suppliers of goods and services. Therefore, amendments were introduced in 2007 for the court to exercise its discretion, where there is breach of the statutory provision, to decide whether the contract should be avoided after considering all the circumstances, including the factors enlisted in section 20A(7). By so doing, there is possible sanction for breach of the procurement requirement and a proper balance is struck between certainty and flexibility. Not all but some contracts may be avoided in extreme cases and lawyers could advise their clients with some criteria in mind on how the Court would likely decide on the matter. Such discretionary power of the Court is not uncommon in situations where more room is required to make decisions specific to factual context of individual case.[29]

Indeed, the Amendment Ordinance keeps and probably has no choice but keep this framework under the new sections 28I and 28J. However, it has now introduced numerous new procedural rules so that there will, in theory, be more cases caught by the BMO allowing judicial intervention. Moreover, the Amendment Ordinance also classifies certain procurement requirements as "essential requirements" (*which have been marked by * in Table 1 above*). The IO is allowed to pass a resolution in its general meeting to avoid the procurement contract entered into in breach of any essential requirement (section 28I).

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28 See *Powertechnic Limited v The IO of Monte Vista* (DCCJ 874 & 878/2019, 9 Jun 2023) and *Yee Tai Cleaning Co Ltd v The Incorporated Owners of Tai On Building Shau Kei Wan & Anor* (DCCJ 2645/2005, 27 Oct 2006 and 2 Jan 2007).

29 See, for example, section 7 Matrimonial Proceedings and Property Ordinance (Cap. 192) which enlisted various factors like the age and conduct of the parties, the duration of the marriage etc. for the court to take into account in making orders for financial provision on divorce, and section 3 of Control of Exemption Clauses Ordinance (Cap. 71) for determining the reasonableness and hence validity of an exemption clause in some circumstances.

However, even if an "essential requirement" has been breached, not to mention whether the new amendments are effective in combating the mischief it aims at, ultimately the validity of the contract involved is still in the discretion of the Court in case of dispute[30]. If IO purports to pass a resolution in its general meeting to avoid a contract in such cases, the contractor may still challenge the resolution in court. Indeed, in reality, from the moment the IO convenes a general meeting to consider passing a resolution to avoid a contract due to breach of some essential requirements by a 14 days' notice, the contractor may immediately resort to legal action, for example, by commencing legal proceedings in court seeking a court declaration that the contract should be upheld, as well as an injunction preventing the IO from passing the resolution. The contractor may also seek an interim injunction on an urgent basis to restrain the passing of the resolution pending the final decision by the Court of its claim. Of course, whether the Court will grant any such injunction, interim or permanent, is highly fact-sensitive. Different cases will have different outcomes. One thing that must be certain is that very substantial time and costs will be incurred for these legal proceedings resulting from the IO purporting to exercise its statutory remedy based on the breach of some essential requirements. Any necessary repair and renovation works may have to be delayed pending resolution of the disputes with the contractor even if IO intends to avoid the contract swiftly.

It must be noted that the consequences of making a wrong judgmental call by the IO could be devastating, for instance, in *Ipson Renovation Ltd v the Incorporated Owners of Connie Towers* (HCCT 26/2014, 16 December 2016), the IO has approved a project for repair and maintenance works at a general meeting and signed the contract for around HK$37 million. But subsequently, some new MC members were elected in place of the previous ones. Some owners prevented the contractor from carrying out the works to press for reduction on the contractual price but the contractor refused. The IO was sued by the contractor. The Court found that the IO had wrongfully repudiated the contract and was liable. The total sum involved came up to about $18 million including damages, interests and costs of the legal action. As a result, the owners of the development had to contribute to payment of the said sums.

Therefore, if IO seeks to avoid a contract on the ground of breach of an "essential requirement", but the validity of the contract is upheld by the Court at the end of the day, the IO and all the owners of the building may have to bear adverse financial consequences. The introduction of all the new requirements, including the essential requirements, may not reduce disputes and costly litigation.

In the circumstances, one would direct one's mind back to the question of what precise mischief the numerous new procedural rules are to address and whether such rules are effective in achieving their aims. Experienced property managers will perhaps be in a better position to answer these questions than the authors.

(iii) Financial Statements

Apart from the procurement regime, the threshold for requiring audit of financial statements has been changed from "more than 50 flats" to "total income or total expenditure of the corporation contained in the income and expenditure account, or both of them, exceeds or are likely to exceed $500,000" under the Amendment Ordinance. Therefore, if due to the need to conduct some major repair and maintenance in a particular financial year, the income or expenditure of the building exceeds $500,000, auditors will have to be employed for that year.

To further provide transparency and information to owners, in addition to the existing requirements to lay the financial statements before the owners at the annual general meeting, they should also be displayed in a prominent place in the building once available for 7 days after they were signed without waiting for the annual general meeting.

The Amendment Ordinance also introduces a new offence against failure to keep the supporting documents referred to in the accounting documents for 6 years after the date of which the MC obtains such documents. Indeed, several new offences are introduced in the Amendment Ordinance against failure to keep certain documents by the IO (*see Table 3 below*).

[30] That is, the "essential" requirement may at the end turn out to be "dispensable".

(iv) Keeping of Documents and Criminal Sanctions

Some important provisions about the need to keep certain documents under the Amendment Ordinance may be summarized as follows:

Table 3: table showing the main duty to keep documents under the Amendment Ordinance

Documents to keep	Terms	Provisions	Criminal sanction under BMO
Declarations made under Sch. 6B/Division 4 of Part 2 of Sch. 7	6 years after the contract was entered into	By IO: paragraphs 6, 15, 21, 27 of Sch. 6B	NA
		By manager (if no IO): paragraphs 28 and 36 of Sch. 7	NA
Procurement documents: those contains information that enables a person who inspects it to readily verify the financial liability or otherwise relates to the procurement, such as all tender documents, copy of contract, statement of account and invoice, and all underlying financial and/or relevant documents, but exclude declarations under Sch. 6B/Division 4 of Part 2 of Sch. 7	6 years after the contract is entered into	By IO: s.28B	Yes
		By manager (if no IO): paragraph 10 of Sch. 7	NA
Lodged proxy instruments for corporation meeting	12 months after conclusion of meeting	By IO: ss.4A & 4B, 40C, 40CA, 36A	Yes
Lodged authorization notice (original hardcopy/e-copy)	3 years after conclusion of meeting	By IO: s.36A	Yes
Certified minutes of MC meeting and corporation general meeting	6 years after the date on which they are certified	By IO: s.36A	Yes
		By manager (if no IO): paragraph 40 of Sch. 7	NA
Each bill, invoice, voucher, receipt or any other document (i.e. supporting document) referred to in the accounting document (i.e. any books or records of account or any other financial records maintained)	6 years after the date of which the document was obtained	By IO: s.27(6) & s.27A(2)	Yes
		By manager (if no IO): existing paragraph 2(1) of Sch. 7	NA

The relevant criminal liability in failing to keep the documents is imposed on the "accountable" MC participants. Accountable is defined under section 2C of the Amendment Ordinance, in which a person is accountable for the contravention if

(a) The contravention occurs because a MC fails to perform a duty; and

(b) At time of contravention, the person is, as a participant of MC assuming (whether expressly or by implication) responsibility for taking the actions required for the MC's performance of the duty.

In balancing the imposition of offence, statutory defence is also provided for the person charged with the respective offence to establish that he or she "exercised all due diligence that [he or she] ought to have exercised in the circumstances to prevent the commission of the offence". To lower the threshold of the defence, there is no requirement that the offence must be committed "without the person's consent or connivance" to raise a valid statutory defence. If there is sufficient evidence to show that the defendant has exercised due diligence as aforesaid, the burden is then on the prosecution to disprove it beyond reasonable doubt.

It appears that the concept of "accountable" MC participants is introduced to address the concerns of criminal sanction being too stringent and too wide if they were imposed on every MC participants. As an example, the Government said that in case of change of MC, the incoming MC who never has possession or custody of the documents concerned may avail themselves of this defence[31]. Of course, in a particular case whether a particular MC member may succeed with this new defence remains to be seen. However, at least the Government will perhaps unlikely prosecute a particular MC member if the document concerned was not created at a time when he was such a member and he can prove that he has never had possession or custody of the document despite having taken diligent steps to obtain them.

Nevertheless, MC members must be conversant with the scope of documents covered by the newly created offences to avoid committing any of them. They should establish a proper system for safekeeping the relevant documents, preferably endorsed by a resolution passed in a MC meeting. When there is any change of MC member, the new member should ensure that the documents are in proper custody and can be produced if necessary. If not, he should make proper effort to locate the documents and record that those documents have never come into his custody or possession, so that he may have a greater chance of persuading the court to acquit him if required. Professional property manager should assist the MC in taking those steps and all other necessary steps to protect themselves from the newly imposed criminal liability. In this regard, we do not intend to repeat our observations on the legislative intent of the BMO and the possible impact on holding MC members personally liable for crimes other than due to their dishonest or fraudulent acts made above.

Caution to Property Management Companies (PMC)/ Practitioners (PMP)

As discussed above, many of the new provisions relating to procurement imposed on IO have been incorporated, *mutatis mutandis*, into Schedule 7 of the BMO, primarily to be observed by Managers of developments with no IO formed yet. Pursuant to section 34E of the BMO, the provisions of Schedule 7 will be incorporated into every DMC and override any contrary provision in the DMC. This means that if the procurement requirements are not observed, the Manager will be in breach of the DMC and legal proceedings may be brought against it on such basis. Further, section 4 of the Property Management Services Ordinance (Cap. 626) ("**PMSO**") provides that it will be a "disciplinary offence" if the court has determined that a property management company/practitioner has been in breach of the DMC or BMO. In theory, therefore, breach of any of the tedious new rules, if so determined by the court, may lead to disciplinary consequences. Of course, not many cases are brought before the court and most cases so brought do not proceed to trial. If there is no court determination of any breach, the said provision in PMSO relating to disciplinary offence may not apply.

Similarly, many new provisions requiring IOMC to keep documents have also been incorporated into Schedule 7 of the BMO applicable to Managers. While it is noted that similar offence was not imposed on Managers as in the case of IOMC, breach of Schedule 7 may, as discussed above, amount to breach of DMC and BMO and if so ruled by the court, may lead to disciplinary actions under PMSO.[32] However, even on the present version of paragraph 5 of Schedule 7 of BMO, the Manager is already required to observe the entire COP. Therefore, even before the Amendment Ordinance comes into operation, if a licensed PMC or PMP acts in breach of the COP and is so determined by the Court, he may technically have committed a disciplinary offence under the PMSO.

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31 see Legislative Council, Bills Committee on Building Management (Amendment) Bill 2023 (2024, May 7). Minutes of meeting. *Website of Legislative Council* at: https://www.legco.gov.hk/yr2023/english/bc/bc56/minutes/bc5620240507.pdf, p.30:
This is an example raised by the Home Affairs Department during the Legislative Council debate held regarding the offence in failing to keep the accounting and supporting documents under section 27 of then draft amendment bill on BMO.

32 It is thought that no similar criminal liability is required to be imposed on Managers for failing to keep the prescribed documents because they are already under scrutiny of the PMSA under the PMSO and the guidelines of various Codes of Conduct.

Transitions

A transitional grace period of 3 years (from 13 July 2025 to 12 July 2028) is given to facilitate the transition from the present procurement regime to the new one under the Amendment Ordinance.[33] In short, the procurement may not be governed by the new statutory framework if the date on which an "*initiation decision*" for procurement was made falls before 13 July 2025 and a procurement contract was entered into within the said 3 years' grace period. An "*initiation decision*" refers to a resolution passed by the MC or the owners to conduct the procurement, and includes also a decision to approach potential suppliers for such purpose.

The new duty to keep certified minutes does not apply if such minutes are certified before 13 July 2025, and the duty to keep lodged proxy instruments and authorization notices and the respective offences do not apply if the notice convening the meeting is given before 13 July 2025.

Conclusion

We believe in the benefit of viewing matters from the critical perspective and have been conducting our legal practice and studying the Amendment Ordinance on such basis. We also take the view that the Government should be slow to prosecute and the court also slow to convict a MC member for acts which are not fraudulent or dishonest, or at least when they are not guilty of any willful neglect (e.g. turning a blind eye or ignoring a known risk as opposed to purely acting below the objective standard of reasonableness). Further, it should not be difficult for the law to be understood and observed, particularly when it is a piece of legislation of wide and general application, as in the case of the BMO which applies primarily to all MC members and property management personnel in all buildings and developments of multiple ownership in Hong Kong. New laws requiring people to do something or prohibiting them against doing something should only be enacted when there are good reasons to do so, for example when there are clear circumstances which suggest that they will be effective in addressing some common or important mischiefs in our society. It will be up to the readers to consider whether they agree to the above observations and whether the Amendment Ordinance as a whole fulfills those objectives.

As far as we understand, the Government has been acting sensibly and has always borne in mind the legislative intent of the BMO and the significance of encouraging owners to participate in management of their own buildings and act as MC members. Therefore, there have been very few, if any at all, prosecutions brought against the MC members for failing to comply with the existing BMO provisions.[34] Even if more acts or omissions will be criminalized under the Amendment Ordinance, we believe the Government will continue to act sensibly after considering all the circumstances before deciding whether to take any action in a particular case. On the other hand, it will be incumbent upon property managers to familiarize themselves with the new provisions and take all reasonable and proper measures to ensure their due compliance, whether in conducting procurement or other affairs in managing buildings without any IO, or advising and reminding the MC members of the IOs.

[END]

This article is purely for readers' reference. If an actual case arises, please seek legal advice.

[33] See section 44B of the Amendment Ordinance

[34] On the other hand, if the understanding is correct, it will be difficult to see why it is necessary to include various new offences directed against MC members in the Amendment Ordinance.

Who should be responsible for the leakage at the roof of a building?

By Chung Pui Lam, GBS, JP

Water leakage or seepage at the roof or the top floor unit of a building is a very common problem that not only the owners of the floor below are facing, but it is also a headache to most of the owners' corporations of the building. Who should be responsible for the leakage/seepage? Is it so simple that whoever is the roof owner must be held responsible? What if there is no roof owner? What about the cases in which the leakage/seepage originates from the upper floor unit to the floor immediately below? Is it the owner of the upper floor held responsible? This article will discuss different scenarios with illustration of a landmark case about water leakage decided in the Lands Tribunal.

Maintenance and repair of the roof itself

In general, the owner of a roof must be responsible for the maintenance and repair of the roof insofar as its interior and surface are involved. Even if there is no such obligation imposed on the roof owner in the deed of mutual covenant of the building, reference may be made to Section 34H of the Building Management Ordinance ("BMO") regarding the duty to maintain property which provides that:–

"(1) Where a person who owns any part of a building, has the right to the exclusive possession of any part of a building or has the exclusive right to the use, occupation or enjoyment of that part, as the case may be, but the deed of mutual covenant in respect of the building does not impose an obligation on that person to maintain the part in good repair and condition, that person shall maintain that part in good repair and condition.

(2) The obligation in subsection (1) shall be deemed to be an obligation owed to all owners of the building under the deed of mutual covenant."

Maintenance and repair of the waterproof membrane installed beneath the roof

What if the waterproof membrane installed beneath the roof becoming defective that requires maintenance and repair? Must the roof owner be held responsible? The answer lies in a Lands Tribunal case of Tai Fong Trade Limited v The Incorporated Owners of Nos.167 & 169 Hoi Bun Road and Lam, Chan & Co. Ltd. in LDBM 1/2006. This case has established the general principles with expert evidence in support as to who should be responsible for water leakage at the roof. Extracted below are the relevant facts of the case and the reasons for the court's decision revealed in the Judgment.

Tai Fong Trade Limited Case

Background

The Applicant in the case, Tai Fong Trade Limited had been the owner of the 5th floor ("5/F") of a building in Kwun Tong, Kowloon ("Building") since 1996. Its associated company was the owner of 5/F between 1983 and 1996. The 1st Respondent was the owners' corporation of the Building. The 2nd Respondent was the developer of the Building and still owned the roof of the Building at the relevant times. These proceedings concerned the water leakage problem from the roof to 5/F.

The parties had no dispute that there were various layers making up the floor slab of the roof cum ceiling slab of 5/F from the top downwards, namely concrete tile layer; cement/sand screeding layer; thermal insulation material layer; waterproof membrane; cement/sand screeding and bedding layer; and structural slab. It was also not in dispute that among the various layers, only the waterproof membrane was waterproof, all the other layers were porous and not waterproof. The concrete tile layer was still the original concrete tile layer existing at the time when the Building was first constructed and had never been changed. Likewise, the waterproof membrane had never been replaced.

The 5/F was formerly used as a factory. There had been 3 chimneys, some air-conditioning cooling towers and a water tank erected on the roof serving the other factories in the floors below. Amongst the aforesaid structures, a chimney and a water tank were erected by the Applicant's predecessor in about 1983, at which time the other 2 chimneys and many other structures had already been erected on the roof. It was not disputed that in erecting the chimneys and the water tank, certain parts of the waterproof membrane were penetrated, as the anchorage for the chimneys had to be anchored onto the structural slab (though the chimneys themselves did not penetrate the floor slab) and the outward water pipe from the water tank did penetrate the structural slab to go down to 5/F.

Notwithstanding the erection of the aforesaid structures, there was no water leakage from the roof to 5/F for over 14 years. The water leakage problem only occurred in about mid-1990s. In about October 1997, the factory on 5/F was closed down and moved to somewhere else. Then, 5/F was renovated, and the renovation was completed by February 1998. The Applicant then put it on the market for lease. However, the Applicant only managed to get a tenant by December 2000 and at a rental very much below the market rent. According to the Applicant, the reason for not being able to rent out earlier and the low rental was that there was widespread and substantial water leakage from the roof to 5/F affecting the use of 5/F. Despite complaints made by the Applicant, the 1st and 2nd Respondents failed to effect repair to the roof, and the water leakage problem continued.

The Applicant's case was that the water leakage had been caused by two factors as follows:–

(1) The waterproof function of the waterproof membrane had failed due to aging and lapse of its natural life span. It was the 1st Respondent's fault in failing to maintain the waterproof membrane.

(2) The lack of proper repair and maintenance of the roof floor had aggravated the water leakage problem. It was the 2nd Respondent's fault in failing to properly repair and maintain the roof.

Thus, the Applicant claimed against the 1st and 2nd Respondents, among others, for a mandatory injunction to repair the waterproof membrane; and damages for cost of repair and inspection already incurred and loss of rental sustained.

Water leakage

From the evidence, it was clear that the water leakage problem at the ceiling of 5/F was very serious and that the only source of water causing the leakage was from rainwater. As observed by the Applicant's expert, there was no water supply or drainage pipes that ran on the surface of the roof, except a fire service water pipe running along the periphery of the roof, but the 1st Respondent's expert confirmed that the fire service water pipe was still in good condition.

The court accepted the Applicant's evidence that the water leakage problem at 5/F started in or not long before 1997. The first batch of water leakage spots were noticed by the Applicant a couple of years before 1997, and those were actually the spots in the middle of the ceiling, where had been no structures erected on the corresponding part of the roof. For the leakages in the vicinity around the place where there used to be structures erected, they were discovered close to 1997, some 14 years or more after the structures had been erected. Since the water leakage was discovered, the problem has deteriorated over time. The water leakage problem had become extremely widespread and substantial. It affected almost each part of the ceiling.

As the size of 5/F ceiling was huge, and there was water leakage at virtually each part of the ceiling, given the small horizontal distance which the experts for all the parties estimated the water seeping through the waterproof membrane could travel, it was obvious that there were many points of leakage and they covered almost the entire ceiling. It was clearly not a case that there was only one or a few spots, or one or some localized parts of the waterproof membrane having failed. It was clearly a case where a very substantial part of the waterproof membrane, if not the whole of it, had failed. Thus, the court found that the water leakage from the roof through the defective waterproof membrane to 5/F had caused damages to the ceiling and the walls of 5/F.

Whose responsibility

There was no dispute amongst the parties' experts that all layers in the floor slab of the roof were porous except the waterproof membrane. Thus, when water was leaking from the roof surface to the ceiling of 5/F, it must be due to the defects of the waterproof membrane. Whoever was responsible for the defects of the waterproof membrane would be responsible for the damages to 5/F caused by water leakage.

The waterproof membrane is there to protect the interior of the whole of a building, and not for any particular owner alone. It must fall within the definition of "common part" in Section 2 of the BMO. The case authorities also clearly establish that such water proofing layer is a common part of the building (see 梁有勝 訴 馮源禧及另四人 in LDBM 249/2000, Kung Shing Investment Ltd. v. The Sunbeam Manufacturing Co. Ltd. and another in DCCJ 4093/2002 and Nation Group Development Limited v. New Pacific Properties Limited in CACV/1999).

As the waterproof membrane was a common part of the Building, it must be the duty of the 1st Respondent to maintain it in a state of good and serviceable repair and clean condition. Section 18(1)(a) of the BMO stipulates that "The corporation shall maintain the common parts and the property of the corporation in a state of good and serviceable repair and clean condition."

It was also common ground of the experts for the parties that the layer of cement/sand screeding above the waterproof membrane was for the protection of the waterproof membrane. It followed that this layer of cement/sand screeding should also be a common part of the Building, and was within the responsibility of the 1st Respondent to maintain and repair.

The 2nd Respondent, as the roof owner, had actually the exclusive right to possession and use of the roof. As pointed out by the Applicant's expert, it would be very much up to the 2nd Respondent to decide what sort of layer he wanted to put on the surface of the roof, just like what an owner of an internal storey or flat of a building could do to his flooring.

As pointed out by Godfrey JA in the Nation Group Case, whose observations were affirmed by the Court of Final Appeal, the owner of a unit would have right to the exclusive use of the floor and ceiling surfaces of the floor owned by him and the air space between them, but not use of the underside of the concrete slab. The court accepted that with that right, it also came with the right of the owner to change the finishes of the floor surface (be it wooden, plastic, carpet, tile or marble) and the ceiling surface (be it paint or ceiling paper). It was the responsibilities of flat owners to maintain the floor and ceiling surfaces, as they had the exclusive use of them, by virtue of section 34H of the BMO. In the case of a roof owner, the situation was the same except that the roof would have no ceiling. However, as far as the floor of the roof was concerned, the owner would still be entitled to the exclusive use of the floor surface, which carried with it the right to change the finishes of the floor surface and also the responsibility to maintain it.

It was therefore the court found that the 1st Respondent should bear the responsibility for the maintenance of the waterproof membrane and the cement/sand screeding layer above it, whereas the 2nd Respondent should bear the responsibility to maintain the concrete tile layer.

Who caused the damage to the waterproof membrane

There was no dispute that the waterproof membrane had not been repaired, replaced or re-done by the 1st Respondent or anyone since it was first laid there when the Building was erected in the 1960s. According to the Applicant's expert, the normal life span of a waterproofing layer like the one in the Building would be around 15 to 25 years. From these evidence, it was clear that by the time the water leakage started in the Building, i.e. in mid-1990s or around 1997, the normal life span of the waterproof membrane of the Building had probably lapsed, and the waterproof membrane would have started to fail and required a complete replacement. As the Applicant's expert put it, by 1997, after lapse of some 29 years since completion of construction of the Building in 1968, there was a high probability – "99% probability" – that there would be leakage because of aging of the waterproof membrane. Indeed, with the widespread water leakage all over the ceiling of 5/F, it was clearly the case that the waterproof membrane had gone well beyond its life span.

The court took the view that it was extremely unreasonable for the 1st Respondent not to take any action to repair or replace the waterproof membrane, when it was clearly their duty to maintain it in a state of good and serviceable repair and clean condition under Section 18(1)(a) of the BMO. The court did not think that the 1st Respondent could raise the defence that since the concrete tile layer belonged to the 2nd Respondent, they could not repair the waterproof membrane without the consent of the 2nd Respondent. The 2nd Respondent never refused the 1st Respondent to repair the roof and indeed contended that the 1st Respondent should have the duty to repair it. As long as the 1st Respondent could reinstate the concrete tile layer for the 2nd Respondent, there was no reason why the 2nd Respondent would object to the 1st Respondent carrying work to repair or replace the waterproof membrane.

No doubt the 2nd Respondent had never repaired or maintained the concrete tile layer of the roof and the surface concrete tiles are still the same tiles when the Building was constructed. Some of the tiles were cracked, bulging or even heaving. There was a large extent of vegetation growing along the cement joints of the original concrete tiles. The 1st Respondent's expert, opined that with the cracks, vegetation grew, and as the vegetation grew the cracks got bigger, allowing vegetation to grow more and bigger, a vicious cycle aggravating the condition of the roof, and eventually, the roots kept digging deeper damaging the waterproof membrane. The Applicant therefore argued that the lack of repair and maintenance of the surface of the roof by the 2nd Respondent had also caused the water leakage problem to 5/F.

Nevertheless, the court did not accept the Applicant's argument in this regard. The concrete tile layer, as opined by the Applicant's and the 1st Respondent's experts, whose evidence were accepted by the court, was not for the protection of the waterproof membrane. Even if there were many cracks at this layer and vegetation grew along the cracks, there should still be protection of the waterproof membrane afforded by the cement/sand screeding layer. To take an extreme example, assuming the 2nd Respondent took away all the concrete tiles, leaving the cement/sand screeding layer exposed to open air and water, and vegetation grew on this layer, the Applicant could not hold the 2nd Respondent liable for anything. As an owner of the concrete tiles, the 2nd Respondent was entitled to do whatever they like to this layer. They could change the tiles and also to remove the tiles. As the tiles were not for the protection of the waterproof membrane, the Applicant could not insist that the tiles must be there intact. The same argument would apply when the 2nd Respondent simply did nothing to maintain the tiles and cracks occurred. The 2nd Respondent was under no duty to provide an intact concrete tile layer to protect the waterproof membrane. As the protection was afforded by the cement/sand screeding layer, when vegetation grows at this layer, it was the duty of the 1st Respondent to remove the vegetation in order to protect the waterproof membrane from being damaged by the roots of the plants. In the circumstances, the court did not find that the 2nd Respondent should be responsible for the water leakage to 5/F.

The Respondents also sought to rely on the additional loading by the structures previously there to suggest that such additional loading might have damaged the floor slab of the roof and the waterproof membrane. The court accepted the Applicant's submission in this regard. There was simply no evidence to support this contention. No figures about the loading capacity of the roof, nor figures of the weight of the structures were produced. Without those figures, one could not say with any degree of certainty whether the loading capacity would be exceeded. Indeed, visual inspection of the roof showed no obvious or widespread damage by additional load to the surface of the roof. There was also no evidence that the load of such installation had damaged the waterproof membrane. On the contrary, many of the tiles along the base of the chimneys or the water tank were not damaged. It was therefore purely speculative for the Respondents to suggest that the load of the structures would have damaged or affected the waterproof membrane.

Thus, the court did not find that the structures erected on the roof had anything to do with the water leakage, and even if they did, the effect was insignificant, and the Applicant was not responsible for the damage caused by the water leakage. In other words, only the 1st Respondent was responsible for the water leakage.

The court therefore ordered (1) a declaration that the waterproof membrane formed part of the common parts of the Building and it was the duty and obligation of the 1st Respondent to repair the defects in the waterproof membrane and to maintain the waterproof membrane in a state of good and serviceable repair and clean condition; and (2) a mandatory injunction that the 1st Respondent must carry out remedial works to rectify the water leakage problem, including but not limited to repairing or reinstalling the waterproof membrane.

Conclusion

In light of the above discussion with illustration of the court case Tai Fong Trade Limited and pursuant to the BMO, if the interior or surface of a roof requires maintenance and repair, it must be the roof owner who should be held responsible. If the waterproof membrane installed beneath the roof becoming defective requires maintenance and repair, it must be the owners' corporation of the building who should be responsible mainly because the waterproof membrane is a common facility for the use and benefit of all owners of the building. Hence, we cannot jump to the conclusion whenever there is water leakage at a roof that whoever is the roof owner must be held responsible for it.

If there is no roof owner and there is no mention about the ownership of the roof in the deed of mutual covenant, then we may refer to the list of common parts and facilities of a building contained in the Schedule 1 to the BMO which includes the roof. As discussed above, Section 18 of the BMO provides that "The corporation shall maintain the common parts and the property of the corporation in a state of good and serviceable repair and clean condition." Accordingly, the owners' corporation of the building has the responsibility to repair the waterproof membrane installed beneath the roof. Anyhow, the responsibility of the owners' corporation is in fact the responsibility of all owners who have to pay for the maintenance and repair.

Although the case Tai Fong Trade Limited has established the general principles in determining the responsibility for water leakage at the roof, it should be noted that each case is different and may have different outcome due to different circumstances in each case. Therefore, it is advisable to engage an expert with experience in dealing with water leakage problem, usually a registered surveyor, to investigate the real cause or source of leakage at the roof. Likewise, for cases in which the leakage or seepage originates from the upper floor unit to the floor immediately below, it must not necessarily be the owner of the upper floor unit who should be held responsible. That depends on the circumstances of each case. If, for example, the leakage or seepage originates from the defective public drainage pipe (which is a common part and facility of the building) embedded in the upper floor unit, it may be the responsibility of the owners' corporation to repair subject to the findings of the expert.