

CHAPTER 4

DEVELOPER AND FIRST PURCHASER

4.1 In chapter 1, we explained that the community of owners is formed on the first sale of undivided shares in a multi-unit development. In this chapter, we look at how the assignment of undivided shares and the DMC work together to set up the system of co-ownership.

4.2 All participants should familiarise themselves with the assignment and the DMC to identify the extent of their rights and liabilities. The duly executed assignment operates to transfer a certain number of undivided shares to the purchaser, together with the right to exclusive possession of a part or parts of the building. The proportion of shares which is paired with a particular unit is normally indicated in the DMC.¹

4.3 As pointed out in chapters 2 and 3, shares attach to the land, rather than to particular parts of the building. Nevertheless, since many of the rights and liabilities of an owner depend on the exact number of shares transferred and their proportion of the total number into which the development is divided, owners will not know the full extent of their rights and liabilities if there is no evidence to show that shares have been paired with a particular unit. For example, in *Lee Tak-chun v East Weal International Ltd and Global Luck Property Ltd*,² 227 out of 31,000 parts or shares had been paired with level 35 of a multi-storey building. Level 35 was subsequently divided into 12 units, but there was no subdivision of the 227 shares between those units. In a subsequent transaction, 147 shares were assigned to the vendor with eight of the 12 units. The vendor then agreed to sell 20 out of 31,000 parts or shares, together with the right to exclusive use of one of the eight units. There was no document to show that those shares had been paired with the particular unit which was being sold with the shares. If it turned out that 19 or 21 shares, or some other portion had been allotted, the purchaser's obligations would be materially different from those which would attach to 20

¹ See ch 2.

² [1994] 1 HKC 722.

shares. As a result, the court held that the purchaser was not bound to go through with the sale.³

4.4 Participants will also want to know how long their rights and obligations last, and whether they are affected by legislation, particularly the BMO.

4.5 In this chapter, therefore, we:

- (1) explain the process by which shares are obtained and transferred;
- (2) summarise the primary rights and duties of co-owners under a DMC;
- (3) show how the community of owners is terminated.

PART 1

FORMATION AND REGULATION OF THE COMMUNITY OF OWNERS

MECHANICS OF LAND TRANSFER IN HONG KONG

Unregistered conveyancing

4.6 Hong Kong currently has a system of private, unregistered conveyancing. This means that a landowner, such as the developer, who wishes to sell, lease or mortgage his land must prove his ownership by producing documents of title. The purchaser, lessee or mortgagee must check the title documents for a sufficient period of time into the past to exclude any reasonable possibility that someone, other than the vendor, may have a superior claim to the land enforceable against the purchaser. Subject to the agreement between the vendor and purchaser, the risk of defects or limitations on use rests with the purchaser.⁴ For this reason, the purchaser should also inspect the premises, conduct searches of public registers, such as the Land Register and the Companies Register, and make proper inquiries to satisfy himself of the condition or fitness for purpose of the property. This has to be done on each successive dealing with the land.

4.7 The developer will have title to sell the shares on the first sale, provided that he has performed all the positive conditions in the government grant and has obtained LACO's consent to sell. However, problems may arise on subsequent sales.⁵

3 See also *Woo Turhan & Anor v Taiwan Fuji Trading (HK) Ltd* [1995] 2 HKC 481 and *Greatek Investments Ltd v Lam Kit-sum & Ors* [2000] 4 HKC 761. Contrast *Goldjet International Investment Ltd v Ling Ki-wai* [1997] 3 HKC 503, where the assignment made it clear that 1/108 part or share had been paired with the flat being sold.

4 This is the principle of 'caveat emptor': let the buyer beware.

5 See Pt 2, below.

The conveyancing process

4.8 Conveyancing involves a series of steps designed to move the transaction from negotiation and execution of a sale and purchase agreement to completion of the agreement. At completion, the vendor conveys title to the property as agreed and delivers up possession or enjoyment of the relevant land. The purchaser accepts the title and pays the balance of the purchase price, part of the price usually having been paid by deposit earlier. Title to the land passes when the instrument of transfer, the assignment, is signed and delivered. Following completion, stamp duty is paid to the government and the stamped assignment and mortgage documents (if any) should be registered in the Land Registry.⁶

4.9 The new owner is usually called the 'registered owner', but registration does not mean that the title is registered. Hong Kong has a deeds registration system.⁷ Registration does not confer title. The object of deeds registration statutes is 'to let people know what they are to enquire about ... [rather] ... than to dispense with enquiring respecting deeds and documents memorials of which are registered ...'.⁸ This contrasts with a system of registration of title under which title is recorded on a public register, and is normally guaranteed by the state so that it is unnecessary for title to be proved afresh on each transfer.⁹

4.10 Hong Kong is moving towards a system of registration of title. A Land Titles Ordinance has been enacted but not yet brought into force.¹⁰ Even once it comes into force, the adaptation to title registration will take years. So, for the present, solicitors have to check the title deeds every time that land is conveyed.

Sale and purchase agreement

4.11 The sale and purchase agreement, or contract for sale of land, must satisfy all the elements of an enforceable contract — capacity, agreement on all essential terms, consideration and intention to create legal relations — and formalities. The date of completion is an essential term of any contract for the sale and purchase of land in Hong Kong.¹¹

4.12 Contracts for the sale or other disposition of land must comply with formal requirements. In Hong Kong, the agreement for sale and purchase may be, and usually is, in writing. However, an oral agreement is also enforceable by action

6 See Sihombing & Wilkinson, *op cit*, for a detailed account of conveyancing law and practice.

7 Registration is governed by the Land Registration Ordinance (Cap 128), the oldest ordinance in the statute book, originally enacted in 1844.

8 Per Lindley LJ in *Kettlewell v Watson* (1884) 26 Ch D 507.

9 See Willoughby & Wilkinson, *Registration of Titles in Hong Kong* (Butterworths, 1995) Div 1, for details on different systems of conveyancing.

10 Land Titles Ordinance, No 26 of 2004, enacted 7 July 2004 and gazetted on 23 July 2004.

11 *Kwan Siu Man Joshua v Yaacov Ozer* [1999] 1 HKLRD 216, [1999] 1 HKC 150 (CFA).

if a memorandum or note of the agreement is in writing and signed by the party against whom enforcement is sought or by his lawfully appointed agent.¹²

4.13 The contents of the agreement are a matter for the parties. However, LACO will not give consent to forward sales of units in an uncompleted development unless the sale and purchase agreement contains terms prescribed in its circular memoranda.

Assignment

4.14 Execution of the sale and purchase agreement creates binding contractual obligations between the parties. In addition, the purchaser acquires an equitable interest in the land, which is enforceable against the vendor and his successors in title who take with notice of the purchaser's prior right.¹³

4.15 Under section 4(1) of the CPO, a legal estate in land can generally be created or disposed of only by deed. In the case of sale and purchase, the title is disposed of by a deed of assignment. The assignment must be properly executed. However, failure to specify that the sale is subject to and with the benefit of the DMC will not prevent the vendor from proving title.¹⁴

4.16 Assignments can be detailed but, generally, have a standard structure.

- (1) *The opening words* describe the nature of the deed, from which we may deduce its purpose and the nature of the transaction. The object of an assignment is to transfer property, whereas a lease grants a term of years, while a mortgage or legal charge provides security for repayment of a loan or the performance of some other obligation.
- (2) *The date of delivery of the executed deed*, since deeds take effect only on delivery.
- (3) *Parties*.¹⁵
- (4) *Purchase price* (consideration).¹⁶

12 CPO, s 3(1).

13 Where the agreement is in writing, as it normally is, it should be registered in the Land Registry. Registration constitutes notice to subsequent purchasers.

14 *Wong Kam-lan v Well Win Investment Ltd* [1996] 2 HKC 143, where the CA was prepared to imply a term in the contract that the sale was subject to and with the benefit of a DMC 'in the usual terms'.

15 The necessary parties to a deed vary with the transaction. The vendor must sign a deed of assignment but the purchaser need not. A legal charge is executed only by the borrower, not by the lender, unless the latter gives covenants. By contrast, where property is released from the burdens of a mortgage or a receipt is given for discharge, only the lender signs.

16 A deed is enforceable at common law without consideration. However, the consideration or purchase price is generally inserted into an assignment to comply with other requirements, such as s 11 of the Stamp Duty Ordinance (Cap 117), which requires all facts and circumstances affecting the liability of any instrument to stamp duty to be set forth truly and fully in the instrument.

(5) *Acknowledgment of receipt of the purchase price*.¹⁷ Where someone other than the payer, such as a successor in title, wishes to rely on the fact that payment has been made, the receipt clause is sufficient evidence that payment has been made.

(6) *Covenants for title*. These are promises about ownership given by the vendor to the purchaser and his successors. The most important are that he has title to the property he has agreed to sell, that he will do all that is necessary to cure any defect in title and the covenant for quiet enjoyment, which is implied in all leaseholds.¹⁸ The covenants are often incorporated by reference, rather than being listed.¹⁹

(7) *Words of grant*. These are the phrases chosen to create or transfer interests in land.

They vary with the nature of the transaction. In an assignment, the relevant words are 'assigns to the purchaser'. Words of grant announce the operative part of the instrument, the part which carries out the main object of the transaction.

(8) *Parcels*. The term 'parcels' refers both to parts or portions of land to be acquired by the purchaser and to the part of the instrument which follows the operative words, to which the parcels clause refers. The property is usually described in a schedule. It is not sufficient merely to refer to the property by name, eg 'Handsome Gardens', as we have done in our fictional case study. If we take Mrs Chan as the first purchaser and give Handsome Gardens a fictional address, her property would be described for legal purposes as:

All that 1 equal undivided 25th part or share of and in all that piece or parcel of ground registered in the Land Registry as Inland Lot No 10 and of and in the messuages erections and buildings thereon now known as Handsome Gardens, No 4 Ling Ga Street, Wanchai, Hong Kong ('the Building') TOGETHER with the sole and exclusive right and privilege to hold, use, occupy and enjoy all that Flat No10A on the 12th floor of the Building.²⁰

(9) *The description of the property should, wherever possible, be accompanied by a plan which further describes and delineates the property being assigned*. This is especially relevant in Hong Kong, where land is divided up in various different ways such as sectioning and subdivision, and also where only part of the land is being sold. The plan should not be on too small a scale. The verbal description and plan should not conflict with each other. It is usual (and good practice) to use a form of words which shows clearly whether the

17 The phrase 'receipt whereof is acknowledged' in the body of the instrument acts as a sufficient discharge to the person paying the consideration — CPO, s 18(1).

18 See ch 2.

19 Eg, use of the words 'as beneficial owner' implies covenants for title set out in CPO, s 35, and pt II of the first sch.

20 Land in Hong Kong is divided into lots. Each lot is given a number and is designated as a town lot, marine lot, inland lot or rural building lot. In the New Territories, the demarcation or survey district (DD and SD) is also included.

plan or the verbal description is to prevail in cases of conflict. If the plan is to prevail, the words 'more particularly delineated on the plan annexed to assignment memorial number XY123456 and thereon edged red' should be used.²¹ If the verbal description is to prevail, the words 'for the purpose of identification only' are used.²² If no words are used indicating which is to prevail, it is a question of construction for the court to decide.

The purchaser will be granted all the estate, right, title, interest, property, claim and demand whatsoever of the vendor in and to the property. Even if there is no express provision, the assignment will operate to assign all of the vendor's estate, unless a contrary intention is expressed in the conveyance.²³

(10) *Exceptions and reservations.* These are rights which are preserved for the benefit of the vendor or third parties, including the SAR Government. They are burdens on the land assigned. Examples in favour of the government include the right to minerals and the right to lay sewers. On the first sale, the developer normally reserves the right to use and enjoy the remaining units and other rights which he may later wish to transfer to subsequent purchasers. Whether the developer must expressly reserve rights is considered in Part 3, below.

(11) *Habendum.* This, which begins with the words 'TO HOLD', marks out the extent of the interest taken by the purchaser. In Hong Kong, this usually means the residue of the term of years created by the government grant.²⁴

Registration of assignment

4.17 The assignment completes the transfer from the vendor to the purchaser. However, the purchaser is advised to register the assignment in the Land Registry, to preserve priority against persons other than the vendor and to comply with any terms in the government grant.

PURCHASER'S RIGHTS

4.18 As explained in chapter 2, in addition to ownership of shares, the purchaser will obtain exclusive rights, plus benefits which are shared in common with the

21 *Eastwood v Ashton* [1915] AC 900 (HL).

22 *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 3 All ER 436 (CA), followed in *Green Park Properties Ltd v Dorku Ltd* [2000] 4 HKC 538, at pp 546-47. A plan which is said to be for the purpose of identification only 'cannot control the parcels in the body of the deed' — per Jenkins LJ in *Hopgood v Brown* [1955] 1 WLR 213, at p 228.

23 CPO, s 17. See *Mann Kam-foon Teresa v Top Brain International Ltd* [1997] 3 HKC 689.

24 An assignment may also contain recitals and a testatum.

developer and all other owners. The right to possession of part of the building is the most important exclusive right. The purchaser will also acquire the rights which are the normal incidents of ownership, such as the right to use, enjoy, manage and dispose of his property. Ownership of shares does not give any exclusive rights to possess the whole of the land comprised in the development, or to the whole of the income from that land. However, the right to use the land in common with others, to share in the income from the land and to a proportion of the proceeds of sale or compensation for resumption are all individual rights. They are part of the private property of each owner and can be dealt with as such. One co-owner cannot deprive another of these rights. Individual rights are the essence of a system of private property.

4.19 The purchaser will also normally acquire appurtenant rights²⁵ which have become attached to the property transferred, such as rights of way exercisable over other property.²⁶

4.20 Rights exercisable in common with the developer and other owners include the right to use:

- (1) lifts, entrance hall, staircases and landings for access to and egress from the property;
- (2) passages intended for common use and serving the property; and
- (3) common areas not reserved to the exclusive use of the developer.

DEVELOPER'S RIGHTS

Reservation of rights

4.21 Since a tenancy in undivided shares, without more, entitles each co-owner to possess every part of the land in common with all other co-owners, when selling the first unit, the developer must take some further action if it is to preserve the right to sell other units.

4.22 In order to obtain exclusive rights over the retained land, the developer should expressly reserve those rights.²⁷ He should also reserve rights which he wishes to exercise over the common parts, such as a right to affix a chimney on the roof or advertising boards or a duct on the external wall of the building which is part of the common areas.²⁸ The reservation of such a right does not make the

25 An 'appurtenance' is a right which has been granted or been acquired by long user (prescription). Appurtenances normally attach to ownership of one piece of land but are exercisable over another piece of land.

26 Such rights may be expressly granted or pass automatically by virtue of CPO, s 16. See ch 2.

27 Cf Thesiger LJ in *Wheeldon v Burrows* (1879) 12 ch D 31.

28 Eg. *Wealthy China Trading Ltd v Huie Man-kit & Ors* [1999] 3 HKC 832 and *The Incorporated Owners of Mai On Industrial Building & Lee Kam-ye v Hedit Ltd* [1987] HKCU 101 (unreported, HCA 6529/1987, 18 Dec 1987). See also the discussion of *Lo Yu Chu v Kam Fu Lai Development Co Ltd* [1994-95] CPR 87 (CA) in ch 2.

developer the sole owner of the wall, but it gives him exclusive rights in the sense that he, and not the other owners, has the right to use the common areas in that way. Any such rights would be subject to the implied obligation in section 34I(1)(b) of the BMO not to use the common parts unreasonably so as to interfere with the use and enjoyment of those parts by any owner or occupier of the building, or to cause a nuisance or a hazard to any person lawfully in the building.

4.23 A developer who has no right to exclusive possession of the retained land is in a precarious position. He cannot assign the exclusive right to use premises which are part of the common areas, or units which have been built on the common parts and to which no shares attach, without authority.²⁹

4.24 Subject to the provisions of the government grant and the DMC, the developer may reserve the right in the DMC to retain a part or parts of the lot for his own use. He may also allow other owners to make use of those retained parts. In either case, co-owners will find it difficult to identify their rights and obligations if the retained areas are not clearly defined. DMCs approved after 29 June 1999 prohibit retention of common areas for the developer's own use. Furthermore, retained areas must be defined and identified and be allocated to an appropriate number of undivided shares and management shares on a fair and reasonable basis. The developer remains liable to contribute pro rata to management and other charges. Any sales brochure and pre-sale advertising must clearly specify what uses of the retained areas will be allowed to purchasers.³⁰ We examine the reservation of rights in pre-1999 DMCs in Part 3.

4.25 Hence in pre-21st century DMCs, in addition to reserving the right to exclusive use of the whole of the development, except the part assigned to the purchaser, the developer may reserve rights for itself, its licensees or other third parties, in respect of the common areas. For example, in *Wealthy China Trading Ltd v Huie Man-kit & Ors*³¹ the developer expressly excepted and reserved the following rights:

- (1) to erect or install one or more chimneys or outlets adjacent or affixed to the exterior walls of the building and to have exclusive use thereof; and
- (2) to affix or erect one or more signs neon lights and advertisements on the exterior walls of the building or at or near the exterior dividing wall between any two flats.

Whether rights have been reserved is a question of intention of the parties. If they cannot agree on the meaning or effect of words in the assignment or DMC (if any), then a court or the Lands Tribunal may be called upon to construe the words to determine the parties' rights. The way in which the courts interpret legal documents is explained in chapter 5.

²⁹ *The Incorporated Owners of Chungking Mansions v Shamdasani* CACV 199/1991, where the vendor was unable to assign units which had been created by partitioning erected on the common areas.

³⁰ LACO CM 41(6); LACO CM 56(31); LACO CM 64(31).

³¹ [1999] 3 HKC 832.

Modes of reservation of rights

4.26 One or more of the following methods may be used to make provision for exclusive rights.

(a) Exceptions and reservations in the assignment

4.27 Exceptions and reservations are savings clauses. An exception preserves an existing right in favour of the vendor or third party, such as the government.³² A reservation keeps back something that would otherwise pass to the grantee, such as the right to receive rent from a lease which has been granted. Technically, certain rights, such as easements, cannot be created by reservation or exception: they are said to 'lie in grant' which means that they must be made by a positive grant. Reservations are construed against the purchaser.³³

(b) Mutual covenants in the DMC

4.28 The parties to the first sale usually execute a DMC as well as the assignment. Each party covenants in the DMC that ownership of a share entitles that party to the right to exclusive possession of a part of the building specifically designated by the DMC,³⁴ and to enjoyment of the rents and profits of that part of the building.

(c) Designation of parts of the building as common parts

The DMC generally has some description of common parts with rights of use conferred on all the owners. Since the purchaser takes 'subject to and with the benefit of the DMC', it is open to the developer to argue that the purchaser has no rights over the retained land beyond those specifically granted or covenanted.

CONTENTS OF THE DMC

4.29 Co-owners' rights and obligations are subject to the terms of the DMC (if there is one). The contents of DMCs vary considerably. Older DMCs tend to be relatively brief, with considerable variations among different developments. Since 1987, express terms have become more standardised and DMCs much longer and more detailed, but normally they follow a scheme.

4.30 Modern DMCs usually begin by naming the parties and their addresses. Then come the recitals, followed by qualifications and provisos, exceptions and reservations, and sometimes declarations. These are all preliminary to the main business of the deed which is contained in the next few sections, those dealing with easements, rights, privileges and covenants. Frequently these cross-refer to the detail of the rights and covenants which are found in schedules towards the

³² Exceptions are construed against the vendor: *Savill Bros Ltd v Bethell* [1902] 2 ch 523.

³³ *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 WLR 468.

³⁴ The shares and the part of the building are generally set out in a schedule.

CHAPTER 6

THE OWNERS' CORPORATION AND OWNERS

6.1 In the previous chapter, we looked at management of a building by a manager appointed under the DMC. In this chapter, we:

- (1) explain how the government supports owners to manage and maintain their buildings;
- (2) show how a corporation is formed and how it may be dissolved;
- (3) analyse the effects of incorporation;
- (4) set out the rights, powers, duties and liabilities of the corporation and its
- (5) management committee;
- (6) examine decision-making control within the corporation, with particular reference
- (7) to meetings; and
- (8) consider the relationship between the DMC and the BMO.

PART 1

BUILDING MANAGEMENT AND OWNERS' CORPORATIONS

ROLE OF GOVERNMENT IN BUILDING MANAGEMENT

6.2 The government's main role in building management is to provide advice, information, support and services to assist owners in discharging their responsibility for managing and maintaining multi-storey buildings in private ownership. This policy is manifested in various ways.

Facilitating incorporation

6.3 Since the enactment in 1970 of the Multi-Storey Buildings (Owners Incorporation) Ordinance,¹ the government has maintained a policy of voluntary incorporation. The original aim was to enable a single legal entity to be created

¹ Ordinance No 62 of 1970.

which could act, or be required to act, in respect of matters in which all the co-owners have a common interest. Subsequent amendments to the Ordinance have sought to make incorporation easier, and have extended the framework for self-management.

6.4 The government's encouragement of incorporation by owners is not driven simply by a desire that owners should take responsibility for and control of the management of their building. It is much easier for the administration to deal with a single body representing all owners than with a large number of individual owners. It is also much easier to regulate such a body. The most noticeable feature of governmental intervention in building management matters has been the increase in rules binding owners' corporations: new sections in the Building Management Ordinance ('BMO'), additional schedules and clauses in schedules to the BMO, more schemes, the introduction of codes of practice.

6.5 Despite the official encouragement, a large proportion of buildings have no owners' corporation. Some of the largest estates in the Hong Kong SAR continue to be run by a manager in occasional consultation with a committee of owners. It may be that the perception that incorporation is more for the benefit of government and third persons than it is for the benefit of owners, and causes more problems than it solves, has contributed to the reluctance to form an owners' corporation.

Practical and administrative support

6.6 In addition to the advisory bodies set up from time to time,² the government provides owners with practical and administrative support such as:

- (1) District Building Management Teams comprising Liaison Officers in the 18 District Offices to promote proper and effective building management. Officers visit owners to encourage good building management practices, advise on the procedures for the formation of an owners' corporation, attend owners' meetings and give advice to owners. The District Teams also:
 - arrange training courses for members of management committees;
 - organise educational and publicity activities;
 - assist in enforcing building maintenance and fire safety improvement; and
 - arrange for voluntary professional mediation in cases of disputes involving owners, owners' corporations and management companies.³

2 Eg, the Advisory Committee on Private Building Management appointed by the Chief Secretary in 1988 to review the effectiveness of policies and to recommend appropriate measures to improve the management of private building, and the Building Management Task Force.

3 Further information is available at: http://www.buildingmgt.gov.hk/en/district_building_management_liaison_teams/7.htm.

- (2) Building Safety Inspection Scheme which encourages owners to engage professionals to carry out inspections and, if necessary, repairs to buildings.⁴
- (3) Building Safety Improvement Loans for owners of residential and composite residential/commercial buildings.⁵
- (4) Fire Safety Improvement Loan Scheme for specified commercial premises or buildings as defined in the Fire Safety Commercial (Premises) Ordinance (Cap 502).⁶
- (5) Fire Safety Checklist to help owners and occupants to carry out routine inspections on fire safety provisions in their buildings, and to rectify minor irregularities. Written in simple language, the checklist identifies typical deficiencies such as missing or defective smoke stop doors, obstructions to means of access such as locked doors, missing or defective installations such as fire extinguishers, and damaged wiring.⁷

Publications and promotional information

6.7 Government publications provide practical guidance and information on many aspects of building management. The *Building Management Handbook* and *How to Form an Owners' Corporation and Achieve Effective Building Management*, both produced by the Home Affairs Department, help owners to set up and run a corporation. *A Guide on Building Management Ordinance* provides quite a detailed account of the legislation with fewer inaccuracies than might be expected in a summary of such lengthy legislation. The inappropriately named booklet *Frequently Asked Questions on Building Management (Amendment) Ordinance 2007*, deals not just with the changes introduced by that legislation but also with the BMO generally, in the form of answers to 247 questions that the booklet's authors imagine might often be asked about it. There is a website (www.buildingmgt.gov.hk) provided for up-to-date information.

Codes of Practice

6.8 The Secretary for Home Affairs has power under section 44(1) of the BMO to prepare, revise and issue Codes of Practice giving guidance and direction on the procurement of supplies, goods and services, and on the standards and practices of management and safety to be observed and followed by an owners' corporation. Two codes have been issued: the *Code of Practice on Procurement of Supplies, Goods and Services* and the *Code of Practice on Building Management and Maintenance*.

4 The scheme is administered by the Buildings Department, available at: http://www.bd.gov.hk/english/services/index_exist2_pmb.html for more information.

5 Details and application forms are available at: http://www.bd.gov.hk/english/services/index_bsils.html.

6 Also administered by the Buildings Department.

7 The checklist is available from the Home Affairs Department.

FORMATION AND REGISTRATION OF CORPORATION

6.9 In jurisdictions which have strata title or condominium legislation, the owners' corporation comes into being when the developer registers the strata title plan.⁸ In Hong Kong the equivalent stage would be the establishment of the scheme of co-ownership at the time of the making of the assignment to the first purchaser and the making of the DMC, dealt with in chapter 2. However under the BMO formation of the owners' corporation comes later, for no corporation exists until:

- (1) a management committee is appointed;
- (2) an application is made to the Land Registrar; and
- (3) a certificate of registration is issued.⁹

Appointment of management committee

6.10 A management committee must be appointed at a meeting of owners. In keeping with the policy of facilitating incorporation, the BMO provides a spectrum of options for convening the meeting.

(a) Convening meeting to appoint management committee

6.11 A meeting of owners to appoint a management committee may be convened by:

- (1) the manager, in accordance with the DMC;
- (2) any other person authorised by the DMC to convene such a meeting;
- (3) one owner appointed to do so by the owners of not less than 5% of the shares; these first three methods are mandated by section 2(1) of the BMO; this is the method most frequently engaged; an owner or a small group of owners canvasses the support of owners of 5% of the shares (by visits, letters or circulars, for example) for one of their number to convene the meeting;¹⁰
- (4) an owner, by order of the Secretary for Home Affairs (the 'Authority') following an application made by the owners of not less than 20% of the shares¹¹ — BMO, section 3A(1). In practice, a district office carries out these functions on behalf of the Authority. The meeting must be convened by the owner directed in the order, unless a notice is served on the Authority not less than seven days before the date of the meeting objecting to its being convened. The notice of objection may be served by any owner, by the manager, or by any other person

⁸ See, for example, Ilkin (1998), op cit, p 12.

⁹ The Home Affairs Department's booklet 'How to Form an Owners' Corporation' is available at District Offices and at www.buildingmgt.gov.hk.

¹⁰ BMO, s 3(1)(c); sample forms to assist in this process can be obtained from District or Land Registry Offices or from www.landreg.gov.hk and www.buildingmgt.gov.hk.

¹¹ Reduced from 30% by the Building Management (Amendment) Ordinance 2000, Ord 69 of 2000, s 4.

entitled under the DMC to convene a meeting. If the objection is made or supported by owners of not less than 20% of the shares, the order has no effect and the Authority must notify the convenor, who must so far as practicable inform the owners of the cancellation of the order.¹²

- (5) an owner, by order of the Lands Tribunal, after an application by the Authority, an authorised officer¹³ or by owners of not less than 10% of the shares;¹⁴ or an owner, by order of the Lands Tribunal, where no management committee has been appointed under the procedures described above.¹⁵ The application is made by the Authority where:
 - no management committee has been appointed, despite an order made by the Tribunal under section 4, and is not likely to be appointed;
 - no person is, for the time being, managing the building; and
 - the Authority is satisfied that by reason of these circumstances, there is a danger or risk of danger to the occupiers or owners of the building.

6.12 The Tribunal may order that a meeting of owners be convened by an owner named in the order to consider whether to pass a resolution appointing a management committee and, if that resolution is not passed, to consider whether to pass a resolution appointing a building management agent for the purposes of managing the building.¹⁶

(b) Notices of meetings to appoint management committee

6.13 The convenor must give not less than 14 days' notice of the meeting to each owner and, where applicable, to the manager or other person authorised to convene the meeting.¹⁷ The notice must specify:

- (1) the date, time and place of the meeting; and
- (2) the resolutions which are to be proposed; these must relate to the appointment of a management committee only.¹⁸

6.14 Service of the notice may be effected:

- (1) personally;
- (2) by post addressed to the recipient at his last known address; or

¹² BMO, s 3A(4) and (5). The convenor may use any appropriate method to bring the Authority's notification to the attention of owners.

¹³ That is, a public officer authorised by the Secretary for Home Affairs.

¹⁴ BMO, s 4(1); *Owners Holding 10.43% of Undivided Shares in Mayfair Gardens v Kai Shing Management Services Ltd* LDBM 269/2014 (5 Aug 2015). See Part 2, 'Practical Questions', below.

¹⁵ BMO, s 40C.

¹⁶ BMO, s 40C(2). If neither resolution is passed, the convenor may appoint a manager anyway: s 40C(3A).

¹⁷ BMO, ss 3(3), 3A(3A), 4(5), and 40C(4).

¹⁸ BMO, ss 3(4), 3A(3B), 4(6) and 40C(5).

- (3) in the case of an owner, by leaving the notice at the owner's flat or depositing the notice in its letter box.¹⁹

6.15 'Owner' for this purpose means:

- (1) a person who, for the time being, appears from the records at the Land Registry to be the owner of an undivided share in land on which there is a building; and
- (2) a registered mortgagee in possession of such a share — BMO, section 2.

6.16 This means that the notice must be served on all owners, irrespective of the number or proportion of shares which they hold.

6.17 The notice must also be displayed in a prominent place in the building.²⁰ It need not be published in a newspaper.

(c) Required proportion of votes

6.18 The number of votes which must be cast before a management committee is appointed, or deemed to be appointed, depends on the section under which the meeting is convened. In the commonest case, where the meeting is convened under section 3(1) by an owner with the support of owners of 5 per cent of the shares, or by the manager or a person authorised to convene the meeting by the DMC, appointment is by resolution passed by a majority of votes cast personally or by proxy at the meeting with the support of the owners of not less than 30 per cent of the shares.²¹ There is one vote per share unless the DMC otherwise provides.²² These provisions apply even if the DMC purports to lay down a different procedure or voting. The requirement of support of a majority at the meeting reduces the possibility of owners who are divided into factions resolving upon incorporation with two separate management committees at two separate meetings, each with the support of 30 per cent or more of the shares.

6.19 Where the meeting is convened by order of the Authority on application of owners of at least 20 per cent of the shares or order of the Lands Tribunal on application of the Authority or officer or at least 10 per cent of the owners, appointment of a management committee is by resolution passed by a majority of the votes of the owners voting either personally or by proxy.²³ There is no minimum percentage of support of the total shares or owners which must be

¹⁹ BMO, ss 2(5), 3A(3C), 4(7) and 40C(6).

²⁰ BMO, ss 3(6), 3A(3D), 4(8) and 40C(7).

²¹ BMO, 3(2), amended in 2007 so as to clarify that the majority must also command at least 30% of the shares, in accordance with the view of the majority in *Kwan and Pun Co Ltd v Chan Lai Yee* [2002] 4 HKC 639 (CA). The minimum proportion was reduced from 50% in 2000. A further reduction has been suggested.

²² Voting is in person or by proxy and provision is made for voting by joint owners: BMO, s 3(9)(b) and (c). The meeting quorum is 10% of the owners.

²³ BMO, ss 3A(3) and 4(4).

achieved. The same applies to appointment at a meeting convened by order of the Lands Tribunal under section 40C.²⁴

6.20 The power of the Authority to order a meeting exists principally to deal with the position where some owners, perhaps a majority in number, wish to incorporate yet cannot garner the support of 30 per cent of the shares. It may be, for instance, that one owner who controls a large proportion, but less than 70 per cent, of the shares is uninterested in or hostile to incorporation. Although it is not a pre-requisite of seeking the help of the Authority that there has first been a failed attempt to incorporate under section 3, usually that will be so.

Registration of corporation

(a) Application for registration

6.21 Part III of the BMO provides for incorporation. Incorporation is the act or acts by which the members of an association form themselves into a single, separate entity. Incorporation is normally effected by registration of prescribed documents in a public register maintained by the government. Registration under the Companies Ordinance (Cap 622) accounts for the majority of companies in Hong Kong. However, the incorporation of owners registered in the Land Registry under the BMO is of greater significance for building management. Section 7 of the BMO provides that the management committee shall, within 28 days of its appointment, apply in the specified form,²⁵ accompanied by the required documentation,²⁶ to the Land Registrar for registration of the owners as a corporation under the BMO. If the application is in order and the appropriate fees have been received, the registrar must issue a certificate of registration.²⁷ The effect

²⁴ BMO, s 40C(3). At all such meetings voting may be both personal or by proxy, the form of proxy being prescribed, and the quorum is 10% of the owners. See the chapter on meetings, below.

²⁵ The form (LR164) prescribes the following particulars: (a) name of the proposed corporation, which shall be in the form 'The Incorporated Owners of [description of the building]'; (b) the name (if any) and address of the building; (c) the address of the proposed registered office of the corporation; and (d) the name and address of the chairman and secretary of the management committee — BMO, s 7(2).

²⁶ That is: (a) a copy of the deed of mutual covenant (if any) in respect of the building; (aa) where an application has been made to the Authority under s 3A(1), a copy of the order of the Authority; (b) where an application has been made to the tribunal under s 4(1) or 40C, a copy of the order of the tribunal; (c) a copy of the resolution or other document evidencing the appointment of the management committee under s 3, 3A, 4 or 40C certified as correct by the chairman or secretary of the management committee or by the chairman of the meeting at which the resolution was passed; (d) a declaration by the chairman or secretary of the management committee, in such form as the Land Registrar may specify, that the provisions of s 3, 3A, 4 or 40C and relevant provisions in s 5B have been complied with; and (e) a declaration that each member of the management committee is not disqualified from being a member — BMO, s 7(3).

²⁷ BMO, s 8(1).

of issuance of the certificate is that the owners for the time being²⁸ shall be a body corporate with perpetual succession, which means that the corporation continues until it is dissolved, despite changes in ownership of the shares or bankruptcy of individual owners. Perpetual succession also means that the corporation survives termination of the government lease and the DMC. The corporation should have a common seal and a registered office in Hong Kong.²⁹

6.22 The management committee must display the registration documents in a prominent place in the building.³⁰ If this is not done, every member of the management committee is guilty of an offence and is liable on conviction to a fine of \$50, unless he proves that the offence was committed without his consent or connivance, and that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.³¹

(b) Name of corporation

6.23 The name of the corporation is usually that of the particular building, such as 'The Incorporated Owners of Handsome Gardens', or of the phase or block of the development, although the owners are free to choose any name, subject to the Land Registrar's power to refuse to register a name which in his opinion is undesirable.³² Any person other than a corporation registered under the BMO who uses a name or title containing the words 'Incorporated Owners', 'Owners' Corporation' or Chinese characters implying that such person is a corporation incorporated under the BMO is guilty of an offence and is liable on conviction to a \$25,000 fine.³³

6.24 The corporation may change the registered name if a resolution is passed by a majority of not less than 75 per cent of the votes of owners cast at a general meeting of the corporation, held in accordance with schedule 3.³⁴ The name does not change automatically when the name of the building is altered. The Land Registrar may issue a direction requiring a change of name where the current name is so similar to that of another registered corporation as to be likely to mislead. In this case, a simple majority of votes cast is sufficient.³⁵ The corporation will be guilty of an offence and liable on conviction to a fine of \$50 for each day during which it fails to comply with the direction.³⁶ The change of name does not affect any rights or obligations of the corporation or any legal proceedings by or against the corporation.³⁷

28 That is, the current owners at any particular time.

29 BMO, s 8(2), (3) and (4).

30 See BMO, s 11, for the list of documents.

31 BMO, s 11(3).

32 BMO, s 9.

33 BMO, s 35.

34 BMO, s 10(1). For meetings of the corporation, see the ch 10 on Meetings, below.

35 The meeting must be held within six weeks from the date of the direction or such longer period as the Land Registrar may allow — BMO, s 10(2).

36 BMO, s 10(3).

37 BMO, s 10(5).

(c) Register of Corporations

6.25 The Land Registrar is required to maintain a register of corporations.³⁸ The secretary of the management committee must notify him within 28 days of any changes in the registered particulars, including any change of name.³⁹ Failure to do so is an offence and the secretary will be liable on conviction to a fine of \$100 for each day during which the contravention continues.⁴⁰

6.26 The certificate of registration is conclusive evidence of incorporation⁴¹ but, as will be seen in Part 3, this does not mean that the court cannot inquire into the validity of the registration.

EFFECTS OF INCORPORATION

Separate legal personality

6.27 The corporation is a distinct legal entity, whose actions, assets, rights and liabilities are separate from those of the management committee and of the owners.⁴² It can sue and be sued in its own name, and do all things which corporate bodies can do, subject to the provisions of the BMO⁴³ and the DMC, where the DMC prevails over the BMO. Thus, the corporation has the capacity to enter into contracts and other legal transactions, and has the power to hold an undivided share in the building, together with the right to exclusive possession of any part of the building, other than the common parts.⁴⁴

6.28 The incorporated owners are the corporate embodiment of the co-owners collectively. Although the corporation is a separate entity, there is a close identification of the corporation with the owners. As we have seen, it is the owners who appoint the management committee to achieve incorporation and the committee applies for registration of the owners as a corporation. As we shall see, resolutions regarding management by the owners at general meetings bind the corporation, the owners' contributions finance the operations of the corporation and the owners may become personally liable to pay the debts of the corporation. It has been said that the corporation is given separate legal personality capable of suing and being sued in its own name not because it has or is given by statute any rights or liabilities separate from those that are vested in the co-owners but to facilitate the exercise and enforcement of those very rights and liabilities.⁴⁵

38 BMO, s 12(1).

39 BMO, s 12(3).

40 BMO, s 12(4).

41 BMO, s 13.

42 *Salomon v Salomon & Co Ltd* [1897] AC 22 and *EBM Co Ltd v Dominion Bank* [1937] 3 All ER 555 (PC). It is a body corporate with perpetual succession, with effect from the date of the issue of the certificate of registration: BMO, s 8(2)(a).

43 BMO, s 8(2).

44 BMO, s 8(2)(aa). The corporation owned a flat in *Incorporated Owners of Mirador Mansion v Tecowin Development Ltd* [1999] 4 HKC 113 — see below.

45 By Ribeiro PJ in *Leung Tsang Hing v Incorporated Owners of Kwok Wing House* [2007] 5 HKC 227.

6.29 An owners' corporation cannot sue an owner for libel, for instance in a document circulated to other owners criticising a management committee decision. The reason for this has been said to be that the corporation consists of the owners so that there is no publication to a third party, one of the requirements of the cause of action. However, this seems to ignore the separate personality of the corporation. A better reason is that the corporation suffers no loss from a libel because it does not carry on business for profit so cannot have financial loss and, because it is not a natural person, it has no feelings to be injured.⁴⁶

6.30 Although its duties are laid down and many of its functions regulated by statute, an owners' corporation is not the equivalent of a statutory public body.⁴⁷

Assumption of rights and liabilities in respect of the common parts — BMO, section 16

6.31 Section 16 of the BMO provides that the rights, powers, privileges and duties of owners, and their liabilities, in relation to the common parts, shall be exercised and performed by the corporation and be enforceable against the corporation to the exclusion of the owners. Section 16 assists the corporation in its task of management by enabling a single entity to represent all the owners, so that contractors and suppliers have only one person to deal with.

6.32 In *Grenville House Ltd v Incorporated Owners of Grenville House*,⁴⁸ the Court of Appeal held that convenience in bringing or defending an action was also a major purpose of incorporation. Therefore, section 16 has the effect of vesting permanently in the corporation a right of suit which may accrue to an individual owner for tortious acts relating to the common parts of the property, for instance, as in that case, where damage is caused by negligent failure to maintain slopes. As a result, the corporation had the exclusive right to sue the developer of the site to recover costs paid out by the corporation to contractors to make dangerous slopes safe.

6.33 Section 16 is limited to circumstances which concern all the owners as a result of their joint interest in the due maintenance, management and control of the common parts.⁴⁹ For example, all the owners have a common interest in the enforcement of the DMC. It follows that once the owners have incorporated, no individual owner or group of owners has the right to commence proceedings to enforce the DMC or otherwise in respect of the common parts. Thus, in *Chau*

46 *Incorporated Owners of Hiu Tsui Court v Lai Sing On* DCCJ 1008/2012 (5 Aug 14). Another reason is that the owner would have the defence of qualified privilege.

47 The analogy was rejected in *Leung Tsang Hing*, above, and in *Incorporated Owners of Green Villas v Wong Sui Fung* LDBM 321/2000 and *Pun Kwok Kei v Incorporated Owners of Merit Industrial Centre* LDBM 25/2003.

48 [1978] HKLR 235.

49 Cf The Attorney General, Mr DTE Roberts, in introducing the Bill: 'The effect of incorporation is to make the corporation responsible in law for the liabilities of individual owners in relation to the common parts.' (HK Hansard 1969/70, p 670).

*Mei Lee, Fragrance & Anor v Ng Yee Tim ('Chau Mei Lee')*⁵⁰ the Court of Appeal held that no one owner, even the chairman of the management committee of the corporation, had the right to take proceedings against an owner who had partitioned off an open area of the common parts, put a roof over it and used it for storing goods, in breach of the DMC. After pleadings had been amended, making the corporation the plaintiff, the court ordered the defendant to remove his belongings and the structure from the common parts and to make good any damage caused by the removal, and granted an injunction restraining the defendant from entering into or trespassing upon the open area except in the exercise of his non-exclusive right as a tenant-in-common. The court also ordered an inquiry as to damages, which would be payable to the corporation and not to any individual owner.⁵¹ *Chau Mei Lee* was followed in *Wah Fan v Tam Kam Yuk*⁵² where the tribunal struck out an action by an owner for an injunction to order the removal of an unauthorised structure from the common areas; similarly, in *Au Yeung Kam Ha v Maxlux Development Ltd*,⁵³ where one owner alleged that another owner had erected in the common parts an exhaust pipe for his shop; and in *Snowland Ltd v Topland Holdings Ltd*,⁵⁴ one owner who applied for a declaration that another had erected a signboard on the exterior wall of their building in breach of the DMC was refused relief. In each case, the corporation was the proper person to bring proceedings. An aggrieved owner should therefore complain to the owners' corporation and attempt to persuade it to commence proceedings. If this does not succeed, the owner may apply for an order compelling the corporation to take action.⁵⁵

6.34 The management committee may well resist the making of such an order, presenting arguments as to why action by the owners' corporation against an owner would not succeed, thereby inflicting more delay upon the aggrieved owner. When the Incorporated Owners of Pokfulam Gardens adopted such a tactic, it received short shrift from the tribunal, even though its arguments seemed quite strong.⁵⁶ However an order that the corporation take action may not be satisfactory from the point of view of an aggrieved owner. The management committee will not be enthusiastic about pursuing proceedings and could drag out the procedure in the new action that has been imposed upon it. The corporation may spend the bare minimum in time, effort and expense to advance the case and

50 [1996] 4 HKC 46.

51 See *Incorporated Owners of Golden Crown Court v Chow Shun-yung* HCA 4322/1986, where it was held that the right under the DMC to authorise owners to erect and display signboards in the entrance hall of the building, subject to a fee, was exercisable by the corporation. Also *The Incorporated Owners of Haiphong Mansion v Convey Advertising Co Ltd* HCA 9773/2000 — rights in respect of advertising on the outer wall exercisable by the corporation.

52 [2000] 3 HKLRD 406.

53 HCMP 3506/2001. Also *Pong Seong Teresa v Chan Norman* [2012] 4 HKC 529.

54 [2006] 4 HKC 188.

55 See *Wah Fan v Incorporated Owners of Ki Tat Garden* [2003] 3 HKLRD 1 (CA).

56 *Law Bik Ling Milly v Kai Shing Management Services Ltd* LDBM 42/2010; *Sunbeam Investments Ltd v Incorporated Owners of Villa Veneto* LDBM 175/2009 and LDBM 79/2007 (27 Aug 12; judgment in Chinese).

were not in existence at the time of the covenant to enforce it.²⁴⁶ For this reason, an assignee is unlikely to be able to rely upon it except in a very rare case.

In what circumstances can the burden of a personal covenant be enforced against successors in title of the covenantor?

7.138 Owners' covenants and management provisions in the DMC, whether personal or proprietary, are enforceable by the parties to the DMC or management agreement by virtue of the doctrine of privity of contract.

7.139 Where the covenant is personal, it may nevertheless be enforceable against assignees of the covenantor if there is either a chain of covenants or novation. In the former case, the covenant is either expressly or impliedly incorporated into each assignment of the burdened land.²⁴⁷ The chain of covenants is broken by the operation of section 41(8) of the CPO, which provides that a person is not liable for the breaches of his successor in title, although he will remain liable for breaches which occurred before the assignment of his interest in the land.

7.140 Alternatively, novation may be used to create a new obligation on the purchaser to perform the covenant in place of the original covenantor. For example, the obligation to pay the manager's remuneration is not a land covenant. The original parties to the DMC would remain liable on the covenant, but not purchasers. To avoid this, the manager, the original covenantor and the new owner execute an agreement which releases the original covenantor from his obligation under the DMC. The purchaser cannot be compelled to accept this but, in practice, in most cases would have little choice but to do so, if he really wished to proceed with the purchase of the shares in the land. Implied novation arises where the manager claims and is paid remuneration by the new owner.

246 *Beswick v Beswick* [1968] AC 58. See also Contracts (Rights of Third Parties) Ordinance (Cap 623).

247 CPO, s 35(1)(a) and Pt 1 of sch 1 to CPO implies a covenant to perform the government lease and to observe and perform the terms and conditions of the DMC into every assignment of the residue of the term held under the government lease.

CHAPTER 8

OWNERS AND GOVERNMENT

8.1 Owners of multi-unit developments may take the initiative in managing their own property. As illustrated in previous chapters, part of this process involves legal actions brought by a manager, the corporation or owners collectively for remedies to enforce obligations, or to protect private rights. This process of private ordering, whereby matters are resolved between the participants, is in the owners' best interests, not least because timely maintenance can reduce costs that might ultimately be incurred. This is the approach taken in the *Building Management Code*.¹

8.2 As pointed out in chapter 1, however, proper and effective building management is also a matter of public interest. Owners are not free to determine for themselves all the issues that may arise in connection with the use and occupation of their land and buildings. Alongside private ordering, there exists a separate system of public ordering through which the government exerts considerable influence on building management.

8.3 These two systems of private and public law are distinct. Although there is some overlap, compliance or non-compliance with an ordinance does not affect the rights, powers and obligations of owners and managers under the DMC or the BMO. For example, in *Growth Bright Ltd v The Incorporated Owners of Grandview Building*,² the owner of a third floor shop was given permission by the government to break open the walls of lifts to extend access to his premises, but this did not prevent the corporation from obtaining an injunction to prevent what would have been a breach of the DMC.

8.4 In this chapter, the effects of public law on the private arrangements for managing multi-unit developments are considered, with particular reference to:

- (1) the powers and functions of the Building Authority in respect of building safety; and
- (2) the consequences of failure to comply with enforcement measures ordered by the government.

¹ See ch 6.

² CACV 843/2000; see ch 5.

PART 1

THE ROLE OF THE BUILDING AUTHORITY IN BUILDING MANAGEMENT

8.5 The principal source of law in respect of the safety of completed buildings is the Buildings Ordinance (Cap 123) ('the Ordinance') and its subsidiary legislation.³ The purposes of the Ordinance are:

To provide for the planning, design and construction of buildings and associated works; to make provision for the rendering safe of dangerous buildings and land; and to make provision for matters connected therewith.⁴

8.6 Powers are vested in the Building Authority, that is, the Director of Buildings ('the Director').⁵ In practice, the Director delegates functions to the Buildings Department ('the Department').⁶ In the following sections of this Part, we outline the Director's powers to enter and inspect premises, and to make orders in respect of:

- (1) unauthorised building works;
- (2) material change in the use of premises;
- (3) dangerous buildings;
- (4) dilapidated or defective buildings;
- (5) dangerous slopes, retaining walls and underground pipes;
- (6) the erection and condition of drainage works;
- (7) signboards projecting over a street; and
- (8) fire safety.

POWERS OF ENTRY AND INSPECTION

8.7 By section 22 of the Buildings Ordinance, the Director, or any public officer authorised in writing by him, may at any time enter any premises, or enter upon any land, to ascertain whether:

- (1) any building, structure, street or natural, formed or man-made land is dangerous or liable to become dangerous;
- (2) the Ordinance or any notice, order or regulation is being complied with; and
- (3) to carry out or cause to be carried out any work which he is authorised to carry out under the Ordinance.⁷

Entry is normally with the permission of the owner or occupier but, where necessary, forcible entry is authorised, provided that it is effected in the presence of a police officer.

³ All references in this chapter are to this ordinance, unless otherwise stated.

⁴ Long title of the Ordinance.

⁵ S 2.

⁶ Details of the BA's functions can be found at www.info.gov.hk/bd/.

⁷ S 22(1)(a), (c) and (d). The BA may also inspect or test any groundwater drainage works, drainage works or drainage system — s 22(1)(b).

UNAUTHORISED BUILDING WORKS

8.8 Section 14 of the Buildings Ordinance requires that, subject to certain exceptions which will be dealt with later, prior written approval be obtained from the Building Authority for the carrying out of building works. Unauthorised building works ('UBWs') refer to buildings which are erected, or building or street works which have been or are being carried out, without that approval. 'Building' includes the whole, or any part, of any domestic or public building.⁸ UBWs that involve construction rather than demolition are commonly called 'illegal structures'. UBWs are 'building works', which include any kind of building construction, site formation works, foundation works, repairs, demolition, alteration, addition and every kind of building operation, and drainage works.⁹ Accordingly UBWs are not confined to structures. There is little judicial guidance as to what does not constitute building works but we suggest that machines, equipment and furniture generally would not do so.

Demolition or alteration orders

8.9 Under section 24(1) of the Ordinance, the Director may by order in writing require:

- (1) the demolition of the UBWs, or
- (2) such alteration as may be necessary to make it comply with the provisions of the Ordinance, or otherwise to put an end to the contravention of the Ordinance.

Under section 24A, an order in writing may require works which will cause, or be likely to cause, a risk of injury to any person or damage to any property, to cease or be remedied. The Director, through the Department, maintains that he will eventually take action against all UBWs. He could hardly do otherwise since he is charged statutorily with removal of unauthorised works. However, since it is not possible to act immediately against all UBWs, the Department has for many years adopted and currently adopts the practice of placing unauthorised structures in one of two groups:

- (1) immediate enforcement group, which includes all new UBWs and all UBWs which pose an obvious hazard to life or property. This group implements the policy of containment of construction of new UBWs, but also functions as part of the policy on large scale clearance of existing UBWs; apart from unauthorised structures which are dangerous or new, those which pose a serious hazard or environmental nuisance (such as a balcony overhanging a lane or

⁸ The definition is very wide, extending to structures that would not normally be regarded as buildings, such as latrines. It also includes any building the Director declares by notice in the Gazette to be a building — s 2.

⁹ S 2. In *Building Authority v Owners of Illegal Structures on the roof of 9/F and roof above Flats A1 and A2 on 10/F 105 Austin Road, Pak On Building, Kowloon (KIL 2302)* [1987] 2 HKC 413, Downey DJ held that illegal structures were not buildings within s 2.

yard) come within this category, as do structures on buildings with extensive unauthorised structures or in neighbourhoods designated for a 'blitz operation' to remove all UBWs there; or

- (2) prioritised enforcement group, where enforcement action will be taken in sequence. For example, a roof-top structure on a self-contained house erected without the necessary approval some 40 years ago would fall into this category where there was no obvious risk to life or property.¹⁰

8.10 The terms 'prioritised enforcement' and 'action in sequence' appear to be civil service jargon designed to conceal that structures within the second group are of low priority for the department's attention. The sequence in which action will be taken against structures within this group is not spelt out: all that can be said is that it will be after action against all structures within the first group.

8.11 The policy of prioritised enforcement is recognition of the reality that the department has limited resources, that illegal structures are ubiquitous, and that not all illegal structures are of equal seriousness. It represents a relaxation of the previous policy which maintained the fiction that the only consideration was that the structure had not been authorised. The Building Authority has more recently, and somewhat contentiously, contracted out the work of enforcement to firms of private surveyors. This should speed up the reduction of UBWs but also brings into focus that UBWs include (at least in the view of the Authority) mundane items which most people would not consider to be building work and which pose very little danger indeed, such as small, lightweight awnings, frames or struts for air-conditioners and free-standing huts or sheds. Enforcement is however patchy. In the rural New Territories very little action is taken against UBWs despite the Ombudsman reports criticising this.¹¹

8.12 A section 24 order must specify the time within which the demolition, alteration or work required must begin, and the time within which it must be completed. The discretion to make the order must be properly exercised. It has been said that it is immaterial whether the structure is safe or not;¹² however, this statement may require qualification in light of the Court of Final Appeal's observation¹³ to the effect that protecting public safety is one of the purposes of the Buildings Ordinance and the revision of the policy since the date of that statement.

¹⁰ See *Spark Rich (China) Ltd v Valrose Ltd* [2004] 4 HKC 253. The same would be true of a greenhouse or outhouse in the garden eg, *Goldful Way Development Ltd v Wellstable Development Ltd* [1999] 1 HKLRD 563.

¹¹ *Direct Investigation, Enforcement Against Unauthorised Building Works in New Territories Exempted Houses*, Office of Ombudsman, April 2011. There were reports in 2004 and 1996 too.

¹² *Tang Ping-wai & Anor v Building Appeal Tribunal and Building Authority* CACV 405/2000.

¹³ In *Mariner International Hotels Ltd v Atlas Ltd* [2007] 1 HKLRD 413; see more below.

8.13 Under the amended section 24, in force from 31 December 2004, the order under section 24(1)(a) must be served upon the owner of the land or premises on which the building has been erected or on which the building works have been or are being carried out, not on the owner of the UBW.¹⁴ In *Lee Hoi Ching v Lok Fuk Ding*,¹⁵ it was stated in passing that, on a purposive construction, the owner of land and premises is confined to the owner of the parts of the building in which the UBW are located. Where exclusive use is allocated to any one of the co-owners, that person is the owner for the purposes of enforcement, and for common parts, the owner 'may well be' all the co-owners together.¹⁶ Applying this criterion, the defendant was the owner of the building works by reason of his entitlement to exclusive possession of the parts on which the structures were erected, notwithstanding that he had never taken physical possession of those parts.

8.14 This view is consistent with that taken before the amendments. 'Building owner' means a person desiring to build a new building or to alter an existing building, and includes the agent of and authorised person appointed by a building owner. 'Owner' includes any person holding premises direct from the government, whether under lease, licence or otherwise, any mortgagee in possession and any person receiving the rent of any premises.¹⁷ It also includes an agent of an owner who cannot be found or ascertained, or is absent from Hong Kong, or who is under disability.¹⁸ This would include the manager of the development where there is no corporation, at least where UBWs are erected on the common areas.

8.15 All the co-owners would together constitute the owner of a building in multiple ownership. Where there is a corporation, notices and orders should be served on the corporation which will be liable for non-compliance.¹⁹ However, where UBWs relate only to an area in the exclusive possession of one owner, they should be served on that owner, who will be solely responsible for the consequences of non-compliance.²⁰

8.16 A decision to issue a demolition order is discretionary: the Director 'may' issue it.²¹ Consequently, the decision may be challenged, initially by appeal to the

¹⁴ S 24(2)(a).

¹⁵ HCMP 1678/2007 (7 Jul 08).

¹⁶ See *Lee Hoi Ching*, above, at para 50.

¹⁷ Whether solely or with another, on his own behalf or that of any person, or who would receive the same if such premises were let to a tenant.

¹⁸ S 2.

¹⁹ *The Incorporated Owners of Kimberley House v Peace Book Co Ltd* HCA 19452/1999.

²⁰ See Pt 2 for the consequences of non-compliance with the Ordinance.

²¹ S 24. *Quebostock Ltd v Building Authority* [1986] HKLR 467. Established under s 44. A person aggrieved by any decision made by the Building Authority in the exercise of a discretion conferred on him under the Ordinance may, except where the Ordinance provides otherwise, appeal from that decision in accordance with this Part and regulations made under section 38(1B) — s 44(1).

Buildings Appeal Tribunal,²² and subsequently by judicial review. In issuing the order, the Director must follow his own published policy.

8.17 An order made on or after 31 December 2004 can be registered at the Land Registry in respect of the land or premises to which it relates.²³ The Building Authority can also do the work itself and recover the cost from owners.²⁴

Priority demolition applications

8.18 Under section 24B of the Ordinance, where it appears to the Director that UBWs:

- (1) constitute an imminent danger to life or property;
- (2) have been or are being carried out with a view to sale, letting or other disposal;
- (3) are situated in a common part of a building or land in multiple ownership and are seriously detrimental to the amenities of the neighbourhood; or
- (4) constitute a public nuisance,

he may apply to the District Court for a 'priority demolition order' under section 24B(1), instead of serving a section 24(1) notice.

8.19 Notice of the application is given by posting a copy of the notice upon a conspicuous part of the building or building works to which the notice relates. This is presumed to be notice to all persons of the application, whether or not they actually know about it.²⁵ In imminent danger and public nuisance cases, the notice, in English and Chinese, must be given at least three days before the hearing; in other cases, the period is seven days. It must advise any person affected that he may apply to be heard in the proceedings.²⁶

8.20 A public nuisance is an act which interferes with the rights of all members of the community, such as the right to use a highway. It is a crime, but will also give rise to a private law action for damages or an injunction if an individual can show that he has suffered special damage.²⁷ This was the basis of the injunctions granted against participants in the 'Occupy' movement in 2015.²⁸

22 Established under s 44. A person aggrieved by any decision made by the Building Authority in the exercise of a discretion conferred on him under the Ordinance may, except where the Ordinance provides otherwise, appeal from that decision in accordance with this Part and regulations made under section 38(1B) — s 44(1).

23 S 24(2C).

24 S 24(4) and (4A).

25 S 24B(2).

26 S 24B(3)–(4).

27 *Halsey v Esso Petroleum* [1961] 2 All ER 145 — emission of harmful deposits from an oil refinery a public nuisance, and a private nuisance since they damaged the plaintiff's house and car. See ch 7 for private nuisance.

28 *Lai Hoi Ping v Persons Occupying Portions of Nathan Road* HCMP 2975/2014 (15 Nov 14).

8.21 If satisfied that the notice has been given, and that the grounds are made out, the court may make an order for the demolition or alteration of the building or building works.²⁹

MATERIAL CHANGE IN USE OF BUILDINGS

8.22 Section 25 of the Ordinance is intended to deal with material changes in the use of a building from those stated in the plans approved under section 14, or in an occupation permit ('OP') issued under section 21, of the Ordinance. Any person intending to carry out such a change must give the Director one month's notice in a specified form.³⁰ A person who fails to give such notice is guilty of an offence, for which he is liable on conviction to a fine at level 6 and to imprisonment for two years.³¹

8.23 However, once the notice has been given, the onus is upon the Director to object promptly, otherwise the change can go ahead.

8.24 Where, in the opinion of the Director, a building is not suitable by reason of its construction for its present or intended use, he may, by order in writing served on the owner or occupier, prohibit the intended use or require the owner or occupier to discontinue the current use, within one month from the receipt of the notice, or service of the order, as the case may be.³² An occupier is a person who resides in a domestic building or, in the case of other buildings, is a person carrying on an occupation full-time in such building.³³

8.25 Notice is required only if the change is material.³⁴ This implies that the requirement does not apply to all changes in use and that some changes are not material. When is a change in use material? The Ordinance provides limited guidance, simply giving instances in which a change is presumed to be material. It would seem from those instances and from the fact that the word appears in the Ordinance that 'material' means material to the purposes of the Ordinance. There have however been first instance decisions in which the judge seems to have equated material change with any change or any large change.

8.26 The law presumes that the change of use is material where:

- (1) the carrying out of building works would have contravened the Ordinance; or
- (2) the Director could have refused to give approval to plans of such building works on the ground that they would result in a building

29 S 24B(9).

30 S 25(1).

31 S 40(2)(a). A fine at level 6 is \$100,000.

32 S 25(2)(a)–(b). The Director may permit by notice in writing such building works as he deems necessary for the purpose of rendering the building suitable for its present or intended use — proviso to s 25(2).

33 S 2.

34 *Wing Hong Investment Co Ltd v Fung Sok Han* [2016] 1 HKLRD 1, HCA 2075/2009 (25 Sept 15).

differing in height, design, type or intended use from buildings in the immediate neighbourhood or previously existing on the same site.³⁵

Applying this subsection in *Summit Investment Ltd v Sha Ning Enterprise Ltd* ('Summit Investment')³⁶ and *Billion Profit Enterprises Ltd v Rise Path Investments Ltd & Anor* ('Billion Profit')³⁷ Chung J held that an order cannot be served under section 25 unless UBWs have been carried out. To put this another way, the change of use must have involved structural alterations. The mere fact that there is a difference or 'discrepancy' between the OP and the new or current use is not sufficient. Thus, there was no material change of use in *Summit Investment* where a floor had been divided into two portions by partitions, thereby creating two offices where the OP permitted one office only per floor. A similar decision was reached in *Billion Profit*, where a shop was used as a karaoke lounge. Consequently in *Wing Hong Investment Co Ltd v Fung Sok Han Louis Chan J* explained that a change of use, even a material one, is not illegal. It is only if the Director chooses to make and serve an order prohibiting the use and it is not discontinued that an offence occurs but even then the use itself is not illegal.³⁸

8.27 By contrast, the courts held that there was a material change of use where:

- (1) premises were being used as a shop instead of a garage for 10 motor vehicles;³⁹ and
- (2) cocklofts above a shop intended for storage had been converted into a restaurant.⁴⁰

However, there must be some doubt as to the soundness of these decisions since in neither was consideration given to the full statutory provisions (in contrast with *Summit Investment* and *Billion Profit*). The courts seem to have assumed in their judgments that the question of whether a change was material depended upon how different the old and the new uses were (which is doubtful), and even that any change from the use described in the occupation permit was a material change, which cannot be correct.

MINOR WORKS

8.28 The wide requirement of prior permission for building works has been drawn back a little by section 14AA, an exception for minor works introduced

35 S 25(3).

36 [1999] 2 HKLRD 798.

37 HCA 711/1999. See also *Chan Sing Hoi Enterprises Ltd v Vykong Media Technology* CACV 324/2007 (CA); *Incorporated Owners of Estoril Court v Cheer Rich Enterprises Ltd* LDBM 41/2010.

38 [2016] 1 HKLRD 1, HCA 2075/2009 (25 Sept 15). The Lands Tribunal's finding in *Tong Lau Fung v Incorporated Owners of Yue Sun Mansion* LDBM 32/2015 that use of premises in 'breach' of the occupation permit renders the use illegal is accordingly mistaken.

39 *Worldful Investments Ltd v Young King Asia Ltd* [1996] 4 HKC 238.

40 *Even Growth Investment Ltd v Shing Yip Investment Ltd & Ors* HCMP 2369/1996.

in 2010.⁴¹ For certain types of small works, the requirements are replaced by less demanding stipulations, varying according to the extent and kind of work involved. Minor works are classified into three, the most minor (Class III) requiring the appointment of a prescribed registered contractor, who may be an individual, to carry out the work but no notification to the Department that the work has been done. Middle-ranking minor works (Class II) are required to be carried out by a prescribed registered contractor which is a company and the Department merely notified of the work, with plans and other documents submitted, before the carrying out of work and further documents submitted after the event. Minor works in the largest type (Class I) have to be designed and supervised by authorised persons or certain other building professionals and carried out by prescribed registered contractors, with plans and other documents submitted to (but not approved by) the Department prior to commencement of and after completion of works.

8.29 The vital questions of what constitutes minor works and which works fall into which categories have been left to regulations drafted by the Department. Class III includes common household features such as supporting frames for air conditioners, drying racks and window canopies. Class II includes repair of the surfaces of external walls and erection of medium-sized projecting signboards. The more complicated minor works that fall within Class I include internal staircases, repair of columns or load-bearing walls and removal of large rooftop structures.⁴²

8.30 Most significantly, a validation scheme enables Class III minor works which have been carried out before the exceptions were instituted to be registered and become immune from enforcement action. The householder will have to appoint a prescribed building professional or contractor to inspect and certify the safety of the works, then lodge reports with the Department. In this way, small but harmless UBWs will in effect obtain retrospective approval. This partially remedies a weakness in the Hong Kong system that building works, irrespective of what kind and no matter how well or where executed, could not be approved after they had been completed or started.

8.31 Minor works which an owner wishes to have done legally must be carried out by a contractor registered with the Department. The intention is that registration ensures the quality of the work. Contractors, both corporate and individual, are entered on the register by virtue of their specialisation, experience, qualifications and competence. To attain immunity for Class III work the contractor need not be a company but Class II and Class I work must be carried out by a registered contractor which is a company. This restriction is perplexing since there is no apparent connection between the legal status of a business and the quality of its work.

41 By the Buildings (Amendment) Ordinance 2008 (No 20 of 2008), which came into operation on 31 Dec 10, after the Building (Minor Works) Regulations (Cap 123N) had been approved. See http://www.bd.gov.hk/english/services/index_legal.html. There are 15 items of designated exempted works.

42 These were first announced in 'Minor Works Control System' (Buildings Department, 29 Jul 08).

8.32 Further information on the system is posted on the Department's website.⁴³

EXEMPT WORKS

8.33 Building works which do not involve the structure of a building may be carried out in that building without application to or approval from the Building Authority — section 41(3).⁴⁴ Such works are not unauthorised, provided that they do not contravene any regulation made under the Ordinance, and so the Director cannot take enforcement action under sections 24 or 25 against the owners in such cases.

8.34 The scope of the exemption in section 41(3) was briefly considered by the Court of Final Appeal in *Mariner International Hotels Ltd v Atlas Ltd*.⁴⁵ Bokhary PJ there said that works are 'in' the building if they are inside it so as to be protected from the elements. So structures on the roof are not in the building even if (as in that case) they can be approached only through the building and are within the envelope or line of the building. The judge also said that works involve the structure of the building not only if they are structural in nature but also if they are capable of affecting the integrity of the structure.

8.35 Whether works involve the structure of a building is a question of fact and degree, to be proved by evidence in each case.⁴⁶ If there is any doubt, owners should obtain expert evidence, preferably from an architect or structural engineer, before undertaking building or drainage works. In *R v New Best Restaurant Ltd ('New Best')*,⁴⁷ Wong J referred to the size, weight, manner of erection, duration, degree of fixation and materials used as factors to be taken into account in determining whether an alteration is structural. In that case, the demolition of a fish tank belonging to a restaurant, weighing 4,900 kilograms when 75 per cent full, resting on but probably fixed to a canopy which was part of the building, was held not exempt. The owner of the restaurant was convicted, together with the sub-contractor and two of the sub-contractor's workers, for unauthorised development contrary to section 14(1) of the Ordinance.⁴⁸ The corporation and the managers of the block were each responsible for 15 per cent of the damages

43 http://www.bd.gov.hk/english/services/index_legal.html.

44 The subsection was rephrased by the Buildings (Amendment) Ordinance 2008 (No 20 of 2008). Approval must be obtained for ground investigation in the scheduled areas or site formation works. There are currently five scheduled areas, including the mid-levels and areas around underground railway lines — see the fifth sch to the Ordinance.

45 [2007] 1 HKLRD 413. See also Merry (2007) 37 HKLJ 751.

46 *Good Think Consultants Ltd v Attorney General* MP No 810/1994.

47 HCMA 448/1996.

48 Any person who contravenes ss 14(1) is guilty of an offence and is liable on conviction (a) to a fine of \$400,000 and to imprisonment for two years; and (b) to a fine of \$20,000 for each day during which it is proved to the satisfaction of the court that the offence has continued — s 40(1AA).

in a civil action for death and personal injury, because the canopy was a common part of the building.⁴⁹

8.36 The erection of mere partitions is not structural.⁵⁰ However, partitioning work will require approval if it involves any alteration to the structure of the building. It is up to the owner to show that it does not do so. In *Dei Chuen*, the occupation permit specified four shops on the ground floor. These had been partitioned to create 24 shops, but there was no evidence that this did not involve the structure of the building. As a result, there was a risk of enforcement action by the Director, and so the vendor had not shown good title to a shop he had agreed to sell.

8.37 In some cases, there will be little doubt that an alteration involves the structure. For example, in *Active Keen Industries Ltd v Fok Chi-keong*,⁵¹ Litton JA thought it 'most unlikely' that the addition of two flats on each floor, or the rearrangement of seven flats into nine, would not involve the structure of a multi-storeyed building. By contrast, in *Cheung Kwok-yiu, Ringo v Leung Chi-sing & Anor*,⁵² partition walls to two bedrooms and a kitchen had been removed. A new partition wall had been erected to form a larger bedroom. The court, after referring to an architect's opinion, held that these changes were not structural. The judge further held that removing a bath and replacing it with a shower tray was not structural and was thus exempt.

8.38 Even if works are exempt or Building Authority permission has been given for the works, there may still be a breach of a particular covenant in the DMC, such as a covenant against alterations or a covenant against conversion of or interference with the common parts.⁵³

8.39 There is a difference between structural alterations and alterations involving the structure of a building, but the cases decided prior to *Mariner* do not seem to consider this. All structural alterations necessarily involve the structure but an alteration which is not structural in nature might still affect the integrity of the structure. The fish tank in *New Best* is probably an instance of the latter.

49 *Lily Tse Lai-yin & Ors v The Incorporated Owners of Albert House & Ors* HCPI 828B/1997. The tenants of the restaurant were 50% to blame, while the owners of the unit at which the restaurant operated had to contribute 15% of the damages. The contractor carrying out the work was liable for the remaining 5%. In the event, only the owner of the unit and the incorporated owners were able to pay.

50 *Dei Chuen Ho Industrial Ltd v Leung Yin-por ('Dei Chuen')* [1993] 2 HKC 495; *Incorporated Owners of Westlands Garden v Oey Chou Ling* [2011] 2 HKLRD 421, [2011] 2 HKC 460 (CA); *Tam Sze Man v Incorporated Owners of Shan Tsui Court* [2011] 5 HKLRD 434 (CA); *Central Management Ltd v Light Field Investment Ltd* [2011] 2 HKLRD 34 (CA). Cf *Chi Fu Fa Yuen Ltd v Cho Wai Man* [2008] 1 HKC 59.

51 [1994] 2 HKC 67, at p 80.

52 HCMP 2489/1995.

53 *Eg, Chi Fu Fa Yuen Ltd v Cho Wai Man* [2008] 1 HKC 59.

DANGEROUS BUILDINGS

8.40 Where in the opinion of the Director any building, or building works,⁵⁴ has been rendered dangerous or liable to become dangerous by fire, wind, rain, dilapidation, use, lack of fire escapes or any other cause, he may by order in writing served on the owner declare such building, or building works, to be dangerous or liable to become dangerous — section 26(1).⁵⁵ A dangerous building is one which is in such a condition as to cause risk of injury either to the occupiers or users of the building or to the occupiers or users of any neighbouring building or to the general public.⁵⁶ It is not necessary to prove that the building or building work was unauthorised.

8.41 The order may:

- (1) require the demolition of the whole or part of such building;
- (2) require that the building be made safe generally;
- (3) specify work that must be done to make such building safe;
- (4) require that shoring shall be erected and may specify the manner and location thereof;
- (5) require a fence or hoarding for the protection of the public;
- (6) require the closure of such building; and
- (7) specify the time within which the demolition, shoring, erection of fencing or hoarding, closure or other work or thing required by such order shall be commenced and the time within which the same shall be completed.⁵⁷

In cases of emergency, the Director may carry out or cause to be carried out such work as may appear to him to be necessary, without giving notice to the owner, or before or after notice. The Director's decision that there is an emergency is final and binding on all persons. The cost of the work can be recovered from the owner, so far as in the Director's opinion it was attributable to the emergency.⁵⁸

8.42 The phrase 'liable to become dangerous' implies that, unless remedial work is done, there is a reasonable possibility that a building will become dangerous.⁵⁹ For instance, in *All Ports Holdings Ltd v Grandfix Ltd*,⁶⁰ the Director ordered the corporation to carry out the following works in the common areas and external parts of the building:

- (1) Remove loose cracked and otherwise defective concrete from the reinforced concrete structure of the building, clean existing exposed steel bars of loose rust and foreign matter, provide and securely

54 S 26(5).

55 See form 27 of the Ordinance.

56 S 2.

57 S 26(2).

58 S 26(4).

59 *Squibb United Kingdom Staff Association v Certification Officer* [1979] 2 All ER 452. This standard is lower than that required for proof that it is likely to become dangerous.

60 CACV 1102/2000.

fix in place additional steel bars as necessary and reinstate. New concrete was not to be placed prior to inspection by the Building Authority.

- (2) Remove all loose and defective external rendering and internal plastering.
- (3) Repair, secure or replace all loose and defective window frames and glazing.

The works were to be commenced on 20 November 1999 and to be completed by 20 February 2000, to a standard acceptable to the director, and in compliance with building regulations.

DEFECTIVE BUILDINGS

8.43 Where an inspection reveals any dilapidation or defect in a building, the Director may by order in writing served on the owner of such building require:

- (1) such works as may be specified in the order to be carried out;
- (2) an authorised person to be appointed to carry out such investigation in relation to the building as may be so specified; and
- (3) the submission for approval by the Director of proposals for remedial work to be carried out as regards the dilapidation or defect, being proposals based on the findings of the investigation, within such time or times as may be specified in the order.⁶¹

All specified work and investigations must be carried out to a standard acceptable to the Director, and in accordance with building regulations.⁶²

8.44 Proposals for remedial work may be:

- (1) approved;
- (2) required to be amended or substituted; or
- (3) refused.⁶³

Where approval is given, the Director may by order in writing require the approved work to be carried out within a time specified in the order.⁶⁴ This provision is aimed at buildings which are in need of repair and maintenance, but which have not yet reached the stage of being either dangerous, or requiring remedial work to prevent them becoming dangerous. The difference is one of degree, but any confusion should be avoided so long as the order clearly states the relevant provision under which the Director is acting. For instance, in *The Incorporated Owners of Man Ying Building v Lai Ming-fung*,⁶⁵ an order was made to carry out repairs on the outer wall, canopy and other common parts of the building.⁶⁶

61 S 26A(1).

62 S 26A(4).

63 S 26A(2).

64 S 26A(3).

65 LDBM 342/1999.

66 See also *The Incorporated Owners of Hopewell House v Ng Hak-lun* LDBM 74/1999 — investigation work and submit proposals for remedial works; and *The*

DANGEROUS SLOPES, EARTH-RETAINING STRUCTURES, AND LEAKING UNDERGROUND PIPES

8.45 Where in the opinion of the Director:

- (1) any natural, formed or man-made land, or any earth-retaining structure,
- (2) has due to any cause been rendered so dangerous or liable to become so dangerous that it will collapse, or be likely to collapse, either totally or partially, and
- (3) thereby will cause, or will be likely to cause, a risk of injury to any person or damage to any property,

the Director may by order in writing served on the owner of the land or structure, or on the person who under the terms of a government lease is under an obligation to maintain the land or structure, declare the land or structure to be dangerous or liable to become dangerous.⁶⁷ The order, and the powers of the Director in respect of proposals, are similar to those in section 26A, above, with the modification that the land and structure must be made safe.⁶⁸

8.46 Not surprisingly, given Hong Kong's topography and the incidence of landslips in the very wet weather prevalent in its summer, section 27A orders are not uncommon. For instance in:

- (1) *The Incorporated Owners of Kimberley House v Peace Book Co Ltd*⁶⁹ — the corporation was ordered to submit within six months proposals for remedial works to a retaining wall.⁷⁰
- (2) *HKSAR v Liem Hung & Ors*⁷¹ — an order was made for investigation, analysis and report on a masonry wall where a site inspection had revealed an extremely low safety factor against sliding and overturning.
- (3) *Lam Mee Hing v Leung Hing Wah*⁷² — two orders were made, the first requiring investigation and analysis, the second requiring remedial work to be carried out, on a slope at the rear of an apartment block, which was a common part under the DMC.⁷³

Similar orders may be made in respect of a water pipe, drain or sewer of any building which is laid in, on or under the ground, in or in the vicinity of any natural, formed or man-made land, or any earth-retaining structure, where:

Incorporated Owners of Luen Fat Mansion v Tse Luk-lun, Danny LDBM 297/1998.
 67 S 27A.
 68 S 27A(2), (2A) and (2B).
 69 HCA 19452/1999.
 70 A similar order was made in *Wah Ying Properties Ltd v Sound Cash Ltd* [1994] 1 HKC 786.
 71 HCMA 554A/1999.
 72 [1995] 3 HKC 247.
 73 See also *Hu Mei-yu, Anastasia v King Best Enterprise Ltd* [2000] HKCU 503 (unreported, HCA 9317/1998, 10 July 2000), where a similar order was given.

- (1) the Director is of the opinion that any leakage, defect or inadequacy of the water pipe, drain or sewer,
- (2) may result in a landslip of the land or a collapse of the structure, either totally or partially, and such landslip or collapse may cause, or may be likely to cause, a risk of injury to any person or damage to any property.⁷⁴

DRAINAGE WORKS

8.47 Drainage works means any work connected with the construction, repair, alteration, disconnection, trapping and ventilation of drains or sewers.⁷⁵

8.48 Drainage works in existing buildings are exempt works, and do not require approval of the Director, if they do not involve:

- (1) the structure of any building;
- (2) any drain or sewer into which there is discharged, or it is intended to discharge, any trade effluent, chemical refuse, waste steam, petroleum spirit, carbide of calcium, acid, grease or oil; or
- (3) altering any manhole at which any drain or sewer from the building is connected with a public sewer.⁷⁶

(4) Exempt works must not contravene regulations made under the Ordinance. In *The Incorporated Owners of Mirador Mansion v Europe Direct Trading Ltd & Ors*,⁷⁷ an owner constructed additional foul water drainage pipes, leading from a toilet in his shop on the first floor of a building, to the main sewage system in the basement. The court held that these works were not exempt, since they involved cutting holes into the cement concrete flooring of the building and had affected the structural strength of the building. The Building Authority had already notified the owner that the works were unauthorised and had given him three months to rectify the unauthorised work.

8.50 Non-exempt drainage works for any building must, save as provided by regulations, be carried out by the owner of such building to the satisfaction of the Director, in compliance with regulations.⁷⁸

8.51 Where, in the opinion of the Director, the drains or sewers of any building are:

- (1) inadequate; or
- (2) in a defective or insanitary condition,

74 S 27C.
 75 S 2. A drain is a drain used for the drainage of one building and any buildings and yards appurtenant thereto.
 76 S 41(3A)(a)–(c). Works are also exempt if they do not involve altering any septic tank or cesspool; making a direct or indirect connection of an additional drain or sewer to a septic tank or cesspool; or underground drainage works in area number 3 of the scheduled areas — s 41(3A)(d)–(f).
 77 [2000] HKCU 931 (unreported, HCA 11468/1997, 28 November 2011).
 78 S 28(1).

he may make similar orders for works to be carried out, and investigations to be made, as in respect of defective buildings and dangerous slopes, above.⁷⁹

Where, in the opinion of the Director, any group of buildings may be drained more advantageously in combination than separately, he may:

- (1) by an order in writing served on the owners of such buildings require to be carried out the necessary drainage works under a combined plan approved by him; or
- (2) carry out or cause to be carried out such works, and recover the cost thereof from such owners.⁸⁰

PROJECTIONS ON OR OVER STREETS

8.52 It is an offence to erect a building or other structure in, over, under or upon any portion of any street whether or not on land held under lease from the government, unless:

- (1) the building or other structure complies with the relevant criteria stipulated in Part II of the Building (Planning) Regulations (Cap 123) (subsidiary legislation); or
- (2) an exemption has been granted by the Director pursuant to section 42.⁸¹

The offence carries a penalty on conviction of a fine of \$50,000 and imprisonment for 1 year.⁸² 'Street' includes the whole or any part of any square, court or alley, highway, lane, road, road-bridge, footpath, or passage whether a thoroughfare or not.⁸³

8.53 The grant of an exemption means that there will be no offence, but it does not relieve a person intending to erect it from applying for approval and consent. Projections are not exempt building works and the Director has no power to exempt a person from applying for approval under section 14.

8.54 Advertising signboards, some of which exert considerable pressure upon the structure of a building and many of them no doubt unapproved, account for the great majority of structures projecting over streets. Balconies and canopies are also common protrusions and, unfortunately, it is not unknown for them to collapse onto the pavement below.⁸⁴

8.55 What powers does the Director have in respect of projections? Where, in the opinion of the Director, the public interest so requires, he may:

⁷⁹ S 28(3) and (4).

⁸⁰ S 28(2).

⁸¹ S 31(1).

⁸² S 40(1B).

⁸³ S 2.

⁸⁴ As in *Lily Tse Lai-yin & Ors v The Incorporated Owners of Albert House & Ors* HCPI 828B of 1997, above; and *Nation Group Development Ltd v New Pacific Properties Ltd* [2001] 1 HKLRD 375. See also ch 9.

- (1) by order in writing served on the owner of the building any part of which projects, or attached to which is any projection, over any street or unleased government land require the alteration or removal of such projection within three months from the service of the order or within such lesser period as he may deem necessary in the circumstances; or
- (2) carry out or cause to be carried out such alteration or removal and, except in the case of a projection over a street held on lease from the government, recover the cost thereof from such owner.⁸⁵

Where the owner (referred to in section 31(2)(a)) cannot be found or fails to comply with the requirements of an order served under that subsection, the Building Authority may carry out or cause to be carried out the works specified in the order or such other works as he considers to be necessary and recover the cost from the owner.⁸⁶

CLOSURE ORDERS

8.56 The Director may make an application to the District Court for a closure order where he is of the opinion that any building:

- (1) is dangerous or liable to become dangerous; or
- (2) should be closed in order to enable any works, which the Director is empowered to carry out or cause to be carried out, without danger to the occupiers or to the public — section 27(1)(a).⁸⁷

The applicant must give not less than seven days' notice of his intention to apply for a closure order, by posting a copy of it upon a conspicuous part of the building to be affected. Posting is deemed to be notice to all persons of the intention to make the application.⁸⁸ In an emergency, the applicant must give such notice as is practicable. The notice, in English and Chinese, must reproduce in clear and legible form subsections (8), (10) and (11).⁸⁹

8.57 If the court is satisfied that notice has been given, a closure order must be made. Thus, the court has no power to consider whether an order is justified. The legislature has left the matter in the hands of the Director, whose opinion cannot be challenged, except where it could be shown that he did not honestly or genuinely

⁸⁵ S 31(2).

⁸⁶ S 2A.

⁸⁷ The owner may also apply to the District Court where a notice has been served upon him by the Director requiring closure of a building under s 26, and a certificate has been supplied to him showing that a building should be closed in order to enable building works to be carried out without danger to the occupiers or to the public — s 27(1)(b).

⁸⁸ S 27(2)(a).

⁸⁹ S 27(2)(b). These subsections deal with the duration of the closure order, and notices that must, in certain cases, be given by the owner to former occupiers when the order ceases.

hold that opinion.⁹⁰ The power does not infringe the Bill of Rights.⁹¹ An owner who undertakes non-exempt building works without the necessary permission is acting illegally and has no rights in the matter. The Director is merely seeking to put an end to the illegality.⁹²

8.58 There is no legal requirement that a closure order can be sought only where an owner has failed to comply with less coercive orders. However, in practice, it is not uncommon to find an application following such non-compliance. For example, in *Ho King Kwan v Attorney General*,⁹³ two demolition orders were served under section 24, one in 1964 the other in 1978, requiring removal of illegal rooftop structures which prevented any appropriate means of escape to the roof. These were followed in 1984 by a closure order to enable the authority to do the work.⁹⁴

SERVICE OF NOTICES, ORDERS AND CERTIFICATES

8.59 Section 35 provides that a copy of any notice, order or certificate which must be served under the Ordinance may be served:

- (1) personally on the person to be served;
- (2) by registered post addressed to the last known place of business or residence of the person to be served;
- (3) by leaving it with an adult occupier of the premises or land to which the notice or order relates;
- (4) by posting the same upon a conspicuous part of such premises or land;
- (5) in addition to or in substitution for any of the above methods, by publication in the *Gazette*, together with the available particulars of the person to whom it is addressed.⁹⁵

8.60 These options make it difficult in practice for an owner to claim that he is not bound to comply with an order because he did not know anything about it, perhaps because he was out of Hong Kong at the relevant time. Provided that the

⁹⁰ *Building Authority v Owners of Illegal Structures on the roof of 9/F and roof above Flats A1 and A2 on 10/F 105 Austin Road, Pak On Building, Kowloon (KIL 2302)* [1987] 2 HKC 413.

⁹¹ See the Hong Kong Bill of Rights Ordinance (Cap 383), s 8.

⁹² See Litton JA in *Building Authority v Business Rights Ltd* [1994] 2 HKLR 341. The court also held that the Building Appeal Tribunal was an impartial and independent tribunal.

⁹³ CACV 61/1986.

⁹⁴ The court rejected the owner's application for judicial review. He had no legitimate expectation that no further enforcement action would be taken against him, following a letter in 1979 stating that a notice given in 1978 had been complied with satisfactorily. The rooftop structures and the fire risk remained. The only representation made by the government was that no further action would be taken in respect of the 1978 notice.

⁹⁵ S 35(a)-(c) and proviso.

notice is posted in a conspicuous place, this is sufficient.⁹⁶ The date of service is also important for determining whether an appeal against the order is made in time.

ENHANCED FIRE SAFETY POWERS FOR OLDER BUILDINGS

8.61 The Code of Practice on Building Management and Maintenance, issued by the Home Affairs Department, contains information on the day-to-day measures that should be taken to prevent fire in privately-owned multi-storey buildings.⁹⁷ The legislature may also impose requirements, as happened in 2002 when the Fire Safety Buildings Ordinance (Cap 572),⁹⁸ was passed to require owners and occupiers to comply with fire safety measures in certain older buildings. This ordinance (the FSBO) was brought into force on 1 July 2007.⁹⁹

8.62 The purpose of the FSBO is to provide better protection from the risk of fire for occupants and users of, and visitors to, buildings whose building plans were submitted for approval on or before 1 March 1987 or, if no plans were submitted, which were constructed on or before that date. The FSBO applies only to a building constructed or intended to be used:

- (1) partly for domestic purposes and partly for non-domestic purposes ('composite building'), but excludes a building where the part intended for non-domestic purposes¹⁰⁰ consists wholly of a factory or industrial undertaking, godown, warehouse or place of bulk storage; or
- (2) for domestic purposes,¹⁰¹ with more than three storeys used principally for such purposes ('domestic building'), including ancillary club house, carpark and recreation facilities that are provided for the exclusive use of residents of the building and persons invited to use them by such residents.¹⁰²

8.63 The FSBO confers wide-ranging powers on an enforcement authority to require owners and occupiers to comply with fire safety requirements set out or otherwise provided for in the FSBO.¹⁰³ The enforcement authority in relation to

⁹⁶ *Re Yick Fung Garment Factory Ltd ('Re Yick Fung')* HCMP 1410/1992.

⁹⁷ See para 3 of the code.

⁹⁸ Originally 21/2002.

⁹⁹ LN 63 of 2007 (1 Jul 07).

¹⁰⁰ 'Non-domestic purposes' includes use as a hotel, guesthouse, home for the elderly, child care centre or nursery: s 3.

¹⁰¹ Domestic purposes means use for human habitation, but does not include a building or part of a building that is used for a hotel, guesthouse, home for the elderly, child care centre or nursery: s 3.

¹⁰² S 2. The Ordinance does not apply to New Territories exempted small houses of three storeys or fewer, constructed in accordance with the Buildings Ordinance (Application to the New Territories) Ordinance (Cap 121): s 4.

¹⁰³ An authorised officer may enter and inspect a building or part of a building without warrant if the officer reasonably believes that it is or may be a composite building or

the planning, design and construction of the building is the Director of Buildings, while the Director of Fire Services exercises the powers in respect of fire service installations and equipment.¹⁰⁴ An enforcement authority may, in writing, authorise a public officer to exercise or perform such of the functions conferred or imposed on authorised officers by the FSBO as are specified in the authorisation.¹⁰⁵ The Director of Fire Services and the Director of Buildings and all police officers are taken to be authorised officers for the purposes of the FSBO. Any person who, without reasonable excuse, resists, obstructs or delays a person who is exercising or performing, or attempting to exercise or perform, a function conferred or imposed by the FSBO is guilty of an offence and is liable on conviction to a \$25,000¹⁰⁶ fine and to imprisonment for six months.¹⁰⁷

8.64 The principal powers for giving effect to the purpose of the FSBO are fire safety directions, fire safety compliance orders, and prohibition orders.

FIRE SAFETY DIRECTIONS

8.65 A fire safety direction is a direction given under section 5 by one or both¹⁰⁸ of the enforcement authorities to an owner or occupier¹⁰⁹ of a composite or domestic building, directing him to comply with fire safety requirements.¹¹⁰ The direction must be in writing and must specify a reasonable period of time, which must be sufficient to allow the owner or occupier to comply with the requirements of the direction.¹¹¹

8.66 Unless it is withdrawn by a notice in writing,¹¹² the direction remains in force until it is complied with to the satisfaction of the relevant enforcement authority, or is replaced by a fire safety compliance order.¹¹³

domestic building or a part thereof, or an offence against the Ordinance is being or has been committed therein: s 16(1).

104 S 3.

105 S 15(1).

106 The FSBO, in general, fixes the maximum fine by references to the 'levels' specified in schedule 8 of the Criminal Procedure Ordinance (Cap 221). A \$25,000 fine is a fine 'at level 4'.

107 S 18.

108 A fire safety direction given by both enforcement authorities acting jointly may be amended or withdrawn only by both enforcement authorities acting jointly: s 5(7).

109 An authorised officer has the power to request information that might identify an owner or occupier of the building or part of the building from any person whom the officer reasonably believes has the information, and it is not readily available by an inspection of a public record: s 17(1). A person who, without reasonable excuse, refuses to answer a question or who provides an answer that the person knows or ought reasonably to know is false or misleading, is guilty of an offence and is liable on conviction to a \$25,000 fine: s 17(2).

110 For the purpose of assisting in determining what measures, if any, might be appropriate the relevant enforcement authority must establish, and consider any advice from, an advisory committee: s 5(10).

111 S 5(4).

112 Under s 5(5).

113 S 5(6). See below for compliance orders.

Requirements that can be imposed upon an owner¹¹⁴

8.67 Where the building is owned by one person, he may be required to comply with all or any of the requirements in schedule 1, in relation to the non-domestic part of a composite building, and those relating to schedule 2 relating to the domestic part of the building. Different requirements may be imposed if the relevant enforcement authority is of the opinion that it would not be reasonable for the owner to comply with the requirements in the two schedules, having regard to the structural integrity of the building and the technology available to comply with such requirements.¹¹⁵

8.68 Where the building is co-owned, and each owner has an exclusive right to occupy a specified part of it, the direction may be imposed upon that person, in respect of the relevant part he exclusively occupies or in respect of the part he does not exclusively occupy.¹¹⁶ The direction may also require the owner to provide relevant connections to integrate the fire service installations and equipment between the parts of the building exclusively occupied by different owners.

8.69 Schedules 1 and 2 are each divided into two paragraphs, one dealing with the provision of fire service installations and equipment,¹¹⁷ the other with the construction of the building and related matters.

(a) Provision of installations and equipment

8.70 The owner may be required to provide or improve the following installations and equipment in respect of both parts of a composite building, and a domestic building to which the FSBO applies:

114 'Owner' has the same meaning as in the Buildings Ordinance (Cap 123): s 3. S 2 of that Ordinance defines 'owner' to include any person holding premises direct from the government whether under lease, licence or otherwise, any mortgagee in possession, and any person receiving the rent of any premises, solely or with another, on his own behalf or that of any person, or who would receive the same if such premises were let to a tenant, and where such owner as above defined cannot be found or ascertained or is absent from Hong Kong or is under disability, the agent of such owner.

115 S 5(1)(a). Schedule 2 also applies to a domestic building: s 5(1)(b).

116 S 5(2), emphasis added.

117 That is "any installation or equipment manufactured, used or designed to be used for the purpose of—

- (1) extinguishing, attacking, preventing or limiting a fire;
- (2) giving warning of a fire;
- (3) providing access to any premises or place for the purpose of extinguishing, attacking, preventing or limiting a fire;
- (4) facilitating the evacuation from any premises or place in case of fire; or
- (5) providing a stand-by power supply to an installation or equipment the purposes of which are mentioned in paras (a)-(d) in the event of the loss of normal power supply: s 3.