Flat, namely the respondents in the present case? Was the "waterproofing layer or system" a common part of Mirador Mansion? If so, should the incorporated owners of Mirador Mansion ("IO") be responsible instead?[88]

[3-207] However, the Tribunal did not have to decide the question. It only held that whether or not a waterproofing layer or system is a common part of a building, is a question of fact for the trial judge.

[3-208] The Tribunal found that the applicant failed to discharge its burden of proof and the application should be dismissed.

[3-209] In *Li Ching Har v Wong Suk Kit*[89] the Defendant applied under Order 29 rule 2 for entry into the plaintiffs' premises, which was downstairs, to carry out tests to identify the cause of the water seepage, and for other consequential reliefs.

[3-210] In this action, the plaintiffs claim that water seepage occurring in their premises they resided at the 13th Floor of the building are caused by the defendant who owned and occupied the flat directly above, on the 14th Floor. This action was commenced in November 2014. The plaintiffs sought damages and an order for injunction to restrain the defendant from continuing with the water seepage allegedly caused from the 14th Floor.

[3-211] The Court dismissed the application on case management grounds. The Court held that the application of the defendant bears hall marks of a desperate attempt to delay the conduct of this action. It is devoid of merits, and is an application made just for the making of application. The defendant's reason for a test on the plaintiffs' premises was not even properly articulated in the supporting affirmation, nor in the written submission of the defendant's counsel for this hearing. This is so, not to mention that proper supporting evidence was lacking. Lack of merits and proper evidence aside, the making of the application was very late – on 20 March 2018 – which was close to the coming Case Management Conference on 17 April 2018.

2.16 Laying of drainage pipes

[3-212] In *383[illegible] Ltd v The Incorporated Owners of Tak Bo Building*,[90] the Court was concerned with the right to have drainage pipes in a multi-storey building.

[3-213] The plaintiff is the registered owner of one of the 35 small shop premises at the ground floor shopping arcade of Tak Bo Building, a 22-storey block situated opposite the MacPherson Playground on Nelson Street, Mong Kok. The defendant is the incorporated owners of the building. The 5th to 22nd floors are residential floors, whereas the ground floor to the 4th floor are commercial ones. The ground floor shopping arcade comprises 15 shops having frontages on the streets around the building, whereas the remainder are in the corridors which

88 See *Incorporated Owners of Hong Leong Industrial Complex & Anor v HL Resources Ltd* & Anor [2010] 4 HKC 463; and *Wing Ming Garment Factory Ltd v Wing Ming Industrial Centre (IO)* [2014] 4 HKLRD 52, [2014] HKCU 1506.

89 [2018] 2 HKLRD 806, [2018] HKCU 1183.

90 [2018] 2 HKC 559.

form a T-shaped arcade inside the ground floor. The building was designed and built in the late 1970s. There were no provisions of facilities included for fresh water and drainage pipes to the individual shop premises on the ground floor. Owners and occupiers of the ground floor premises may obtain water supply from the 10 toilet units in one particular part inside the arcade. The toilets are connected to the building's main fresh water and drainage pipes.

[3-214] The ground floor shops are not connected to the building's water and drainage pipes has played a part in determining the general nature of the businesses that have been done in the shopping arcade since the early 1980s. A survey done in 2013 describes about 50% of the shops as printing shops; others include car accessories, sports wear etc. The evidence suggests that 4 of the 35 shops have apparently privately installed water pipes to their premises. They are not recent installations but have been there for some time. The defendant's case is that none of them have resulted from consent being sought from the defendant, none of them have been approved and none of them are legal.

[3-215] The plaintiff purchased unit 17 on the ground floor in 2009. It wanted the provision of fresh water and drainage facilities to its shop. It applied to the defendant for consent to carry out the necessary installation work. It was refused.

[3-216] The plaintiff nonetheless went ahead with the installation of water and drainage pipes to unit 17 to be connected up with the building's main water and drainage pipes located at the rear of the building. The work involved drilling two holes (25 mm and 40 mm in diameter for fresh water supply and drainage respectively) through the concrete canopy which ran around the outside of the building at the ceiling level of the ground floor shops. The plan was then to run the pipes along the common parts of the building, that is, the surface of the canopy (per the deputy judge at paragraph 13 of the judgment) or the external walls of the building (per the plaintiff in the appeal), connecting with the main pipes at the rear of the building. It is common ground that the installation work constituted an unauthorised building work.

[3-217] The pipe installation work was not completed, and the defendant's consent upon a renewed application was still withheld. The drilled holes were eventually sealed up.

[3-218] In July 2011, after obtaining permission from the Water Supplies Department, unit 17 was connected to a public water supply nearby. But there is still no provision for drainage facility.

[3-219] The plaintiff claimed that on a proper construction of the Deed of Mutual Covenant (DMC) it had a right to access the main pipes of the building for water supply and drainage, conditional upon no damage being caused to the building or inconvenience, nuisance or annoyance being caused to other occupiers. The plaintiff sought a declaration to that effect. The plaintiff also sought an order directing the defendant to give its written consent to the installation work required and an injunction preventing the defendant from interfering with the work. It also asked for damages. Shortly before the trial started, the plaintiff amended the pleadings to argue there was an implied term that the defendant's consent might

not be unreasonably withheld. However, the plaintiff did not seek to amend the terms of the declarations sought in the prayer for relief.

[3-220] The Court of First Instance dismissed the claim and the appeal was also dismissed.

[3-221] The Court of Appeal considered that the issue of whether the plaintiff has a right, whether subject to the defendant's consent (and whether any such consent, if required, is itself subject to the requirement of reasonableness), to install connecting pipes over the common parts of the building for the supply of fresh water and drainage purpose, there are several interrelated matters.

[3-222] First, there is the common law right of a co-owner to use and enjoy each and every part of the land under co-ownership subject to the question of ouster. Secondly, there is clause 3(c) of the DMC, which counsel submitted gives the plaintiff the right to do so. Lastly, there is section 34I(1)(a) of the Building Management Ordinance (Cap 344), which essentially prohibits anyone (including a co-owner) from converting any common parts of a building to his own use without the authorisation by resolution of the owners' committee or, where there is one, the management committee (as per section 34K of the Ordinance).

[3-223] The Court of Appeal then held that the common law right described above is of course subject to the provisions of the DMC and of the Building Management Ordinance. As between the DMC and the Ordinance, if the DMC provides for a right to do the thing in issue on or over the common parts of the building, the co-owner may do so accordingly. Section 34I(1)(a) does not stand in the way because in the scenario under discussion, the management committee would be bound under the DMC (as a contract between all co-owners for the time being) to give its consent.

[3-224] If the matter is not empowered under the DMC, section 34I(1)(a) is determinative of the issue and everything turns on whether a resolution by the management committee authorising the act in question can be obtained. To this extent, section 34I(1)(a) modifies the common law on ouster, as a resolution passed by a simple majority of the votes of the members of the management committee present at a meeting (per section 34D(2)) can now approve what under common law cannot be done without unanimous agreement of all co-owners.

[3-225] The Court of Appeal held that what clause 3(c) provides is the right to have free and uninterrupted passage and running of water and sewage from and to a co-owner's part of the building either through the water and drainage pipes already constructed at the time of the making of the DMC or through any future pipes to be installed in the building. What it does not say is who has the right to install these future pipes in the building, particularly on or over the common parts of the building. It certainly does not say that an individual co-owner has such a right.

2.17 Noise

[3-226] In *Tam Wai Cheung Roger v Goodwell Property Management Ltd*[91] the second plaintiff is and was the registered owner of a flat and the first plaintiff

91 [2016] HKCU 68 (unreported, DCCJ 2262/2013, 11 January 2016).

was a director and beneficial owner of the second plaintiff. The defendant was the manager under the Deed of Mutual Covenant of the building. The second plaintiff and his deceased wife heard some disturbing noises allegedly generated outside their property during normal sleeping hours for a period of time since about April 2012. Those disturbing noises included noises similar to the pulling of furniture across the floor, objects being dropped, dragged, bumped and/or rolled on the floor, slamming of doors and heavy footsteps similar to running or doing exercise on the floor (collectively 'Disturbing Noises'). The second plaintiff lodged complaints to the defendant in relation to the Disturbing Noises. In response, the defendant had caused a number of measures to be carried out. The second plaintiff apparently was not satisfied with the result and had to moved out to alternative accommodation. The plaintiffs claimed for damages by reason of the defendant's breach of DMC, negligence and nuisance. The plaintiffs also asked for an injunction order that the defendant 'does identify the cause of the Disturbing Noises and take such steps to stop the Disturbing Noises.'

[3-227] The court applied *Ng Yuen Han v Lam Fei Fui*,[92] where the Court of Appeal (with Jeremy Poon J (as he then was) giving the judgment) in considering a case involving noise complaint arose from the daily activities of the neighbour, said (at p 615): 'To decide whether the noise nuisance is substantiated, we will certainly not take account of the plaintiff's subjective sense of sound.' The judge held that the test of considering whether or not the Disturbing Noises were disturbing should be by way of an objective test. A number of factors, including the length of period over which such noises occurred, when did such noises occur and also the nature, frequency and volume of such noises should be considered.

[3-228] The court dismissed the plaintiffs' claim and refused the injunction on the basis that order sought was unreasonable:

> 89. … the plaintiffs are seeking a mandatory injunction order. They demand the defendant, as a DMC manager, to firstly 'identify the causes'. I think that is unreasonable. The defendant can continue to investigate, to patrol and to remind the occupants. But even if everything were done, the defendant might still not be able to identify the causes of the Disturbing Noises, assuming it still exists. In particular, [the second Plaintiff] admitted in court that the Flat had been rented out and there is no evidence that the new tenant complains for any disturbing noise.
>
> …
>
> 92. To conclude, the injunction order sought is unrealistic and unreasonable. In *Tech Focus Ltd v Austria Property Management Ltd* [2004] 1 HKC 343, Rogers VP said:
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> > It is very important when mandatory injunctions are framed that they are framed in precise terms so that everybody, including in particular the defendant, must know exactly what he must do and what steps he must take. (at 345A–C).

92 [2013] 3 HKLRD 608, [2013] HKCU 683.

2.18 Under a Deed of Mutual Covenant

[3-229] A Deed of Mutual Covenant (DMC) is a contract by deed and its terms are enforceable by injunction, often in conjunction also with the statutory powers given to the incorporated owners of a building.

[3-230] Mandatory injunctions have been granted to:

(1) remove the trade names '香港免稅店' affixed to and exhibited on the external wall of the building, to be more particular, at the part above the doorway facing Sung Wong Toi Road next to an entrance of the building in *Freder Centre (IO) v Gringo Ltd*;[93]

(2) remedy the defects in the waterproofing system of the upper roof and repair damage thereby caused to the external walls in *Wing Ming Garment Factory Ltd v Wing Ming Industrial Centre (IO)*;[94]

(3) remove the drying racks, retractable canvas awnings, storage cabinets, wooden flower rack and other items in the terraces or at the external wall, and reinstate the affected parts to their original state in *Park Vale (Management) Ltd v Tang Wing Kin*;[95]

(4) require the incorporated owners to carry out all reasonably necessary repair to the water tanks, the water proofing structure of the roof as well as the external walls of the building within 6 months to the satisfaction of an authorised person jointly appointed by the applicant and the respondent but solely at the expenses of the respondent in 顏小明 訴 多福大廈業主立案法團;[96]

(5) allow the IO to enter the premises during business hours from 9am to 6 pm within 21 days for the purpose of carrying out repairs at the common parts of the building in *Incorporated Owners of Tak Wing Industrial Building v Poon Chi Hung William*.[97]

(6) require the IO do within 9 months from the date of the order 'remove the part of the Wall that is situated within the boundary of CP25 as stipulated in the Approved Plan so that it will not cause any blockage to the use of CP25' in *Lung Po Kwan v Tang Kam Sheung*;[98]

93 [2015] 1 HKLRD 362, [2014] HKCU 2838. The order granted was: "A mandatory injunction that the first and/or second respondents whether by himself/herself/themselves, his/her/their servants, agents, tenants, or otherwise howsoever do forthwith remove the Trade Names on the External Wall and reinstate the External Wall to the original state within 3 months from the date of this order."

94 [2014] 4 HKLRD 52, [2014] HKCU 1506; *Incorporated Owners of Hong Leong Industrial Complex v HL Resources Ltd* [2009] 4 HKC 145, [2009] 4 HKLRD 692 applied.

95 [2013] HKCU 544 (unreported, LDBM 290/2012, 11 March 2013).

96 [2012] HKCU 1758 (unreported, LDBM 79/2007, 27 August 2012).

97 [2011] HKCU 1601 (unreported, LDBM 247/2011, 15 August 2011).

98 [2010] 5 HKC 153, a case where after major renovation, car parks were realigned in accordance with the approved building plan and the Respondent's van had been parked protruding from the boundary of CP25. There was a wall at the rear part of the lower carport which was built in a position that cut across the rear portion of CP25, rendering about 1/3 of the area of CP25 behind the Wall.