

## 5. DEED OF MUTUAL COVENANT (DMC)

### 5.1 Introduction

[4-99] The DMC is a contract entered into by the developer of the land, the manager appointed thereunder by the developer, and the first party to purchase a unit in the development. Whilst these three parties are the norm, it is possible for the DMC to be a contract between developer and the first owner. This then raises questions of whether or not the terms of s 41 of the Conveyancing and Property Ordinance (Cap 219) apply to enable the management (if owners have not incorporated) from enforcing obligations such as payment of fees for services rendered. The presence of a building scheme would seem to make unnecessary a DMC in the context in which that scheme operates; in other cases, *Halsall v Brizell*<sup>86</sup> would enable the passing of ‘mutual benefit, mutual burden’ interests: see *Fortune Link Ltd v Grand House Ltd*<sup>87</sup> where a DMC, relating only to common parts of a development, had not been executed correctly. The court found that the *Halsall* principle applied to enable common rights to pass.

[4-100] Some DMCs also provide for the manager to make house rules to facilitate management. But the terms of these rules, whilst binding on the owners, cannot operate contrary to the general law. In *Grace International Ltd v Incorporated Owners of Fontana Gardens*<sup>88</sup> house rules permitted the manager to cut off the water supply on default of payment of contributions by an owner. When this occurred, the owner successfully obtained an injunction to restrain the manager from so doing:

Under the Waterworks Ordinance (Cap 102) only the Water Authority had power to control the supply of water. Further there was no authority in that Ordinance to ‘authorise a disconnection of services for non-payment of management fees’.<sup>89</sup>

[4-101] Nothing in the Ordinance empowered or authorised the manager to cut off the water supply. One of the problems in *Grace International* was that the DMCs were 25 years old, and had been drafted to cover different blocks in the development with the result that the terms were not uniform: see *Incorporated Owners of Hang Tsui Court v Ho Fu & Ors*,<sup>90</sup> where the Court of Appeal said that House Rules that prohibited the keeping of dogs on the estate or the common areas of any building were valid as they were made under Schedule 3 to the DMC, and the rights of each owner were qualified by the House rules: cf *Tsang Chi Ming v Broadway Nassau Investments Ltd*<sup>91</sup> where it was held that the House rules went beyond the manager’s rights to make rules for the common parts and the access area. These House Rules sought to cover the whole of the estate including the

86 [1957] Ch 169.

87 [2010] 1 HKC 253.

88 [1996] 4 HKC 635.

89 [1996] 4 HKC 635, 642 per Le Pichon J.

90 [2011] 6 HKC 40 (CA).

91 [2008] 6 HKC 19.

units: see also *Silver triumph Holdings Ltd v Guardian Property Management Ltd*.<sup>92</sup>

**[4-102]** The DMC sets out the details of the management of the multi-storey building, giving the manager power to act on behalf of all owners in certain cases. In general, it provides, that owners must observe the covenants in the Government lease and any other legislation as well as the terms of the DMC. It also regulates the provision and payment of services and outgoings, the rights of ownership and restrictions thereon such as the prohibition on permitting a nuisance, and the organisation of the management of the building on the land.

**[4-103]** The terms of Sch 7 (which are implied into all DMCs) and Sch 8 (implied if not inconsistent with the terms of the DMC) of the Building Management Ordinance (Cap 344) should also be referred to in establishing the obligations of the parties to the DMC and those bound by it.

## 5.2 Terms of a typical DMC

**[4-104]** A typical DMC provides:

- (a) The details of title of the developer.
- (b) The distribution of the shares in the land, expressed as equal undivided shares. The quantum of shares held by each owner determines his liability for management cost. The owner is usually entitled to deal with his interest (subject only to any express restrictions in the DMC); however, he is unable to dispose of his interest in the common parts independently of his exclusive right to a particular unit.<sup>93</sup>

In *Yip Ngan Yee v Chan Tsz Yam & Anor*<sup>94</sup> the vendor's title was defective in that the DMC referred to the shop on the first floor as being entitled to 6 of 85 undivided parts of shares in the building, but that first floor now contained nine shops and there was no redistribution of the shares. As a result, the purchaser had rightly requisitioned about this point, and could rescind the contract when the vendor was unable to offer satisfactory replies. In *Nation Group Development Ltd v New Pacific Properties Ltd*<sup>95</sup> the vendor and the purchaser were at cross purposes about whether the whole of a canopy was part of the vendor's title. In the event the purchaser was held to have rightly rescinded the contract because the sale and purchase agreement purported to give exclusive rights over the whole canopy, something which the vendor was unable to do.

- (c) An annexation of the covenants in the DMC to the land. See s 41 of the Conveyancing and Property Ordinance (Cap 219).

92 [2012] 3 HKC 391 (CA).

93 *The Incorporated Owners of Chungking Mansions v Shamdasani, Murli Pessumal* [1993] HKLY 659, [1991] 2 HKC 342.

94 [2001] 2 HKC 81.

95 [2001] 1 HKLRD 375, [2000] HKCU 1029.

- (d) The interest of the purchaser expressed as a distinct yet an undivided share in the land together with ‘full and exclusive right and privilege to hold use occupy and enjoy any part of the said Building’ subject to and with the benefit of certain easements, reservations, rights, privileges and obligations. These relate to the use of the building and include the right to pass and re-pass, the right of subjacent and lateral support, the free and uninterrupted passage and running of water, gas, sewage, electricity and necessary pipes, and so on.
- (e) The right of the owner, or occupier, of a unit to enter into any part of the building (with or without workmen) to carry out necessary repair work, subject to the manager’s consent. A more expanded right is given to the manager.
- (f) Certain rights of the developer in the land, especially those enabling him to use the external walls for advertisements, which might or might not continue in existence once all units have been sold.
- (g) The right of the developer to name the building. The right to name a building is considered to be a personal right which does not run with the land, and consequently it is personal to the holder; whilst it can be assigned to a third person, that assignee will not be able to enforce it against the tenants in common.<sup>96</sup> This type of right was held to have terminated when the holder no longer owned land in the development.<sup>97</sup>
- (h) The owner’s obligation to pay his due share of management costs.

### 5.3 Schedule 7 to building maintenance ordinance and DMC

[4-105] Although it has been considered that Sch 7 of the Building Management Ordinance (Cap 344) applies to all DMCs, the language of some of the provisions of this Schedule is unclear. In view of the fact that the amendments were designed to overcome some of the problems with the management terms in DMCs, such as the inability to terminate the contract of the manager, and his control of investment of contributions, the better interpretation is that the Seventh Schedule – so far as possible – should be deemed to apply to all DMCs whether or not the owners have incorporated. Amendments in 2007 confirm that these provisions refer to non-incorporated schemes also, for which the manager is referred to as the ‘DMC manager’. Various other amendments were made in 2007 to strengthen the terms incorporated into all DMCs.

[4-106] The mandatory terms of Schedule 7 relate to:

- (a) determination of the total amount of management expenses;
- (b) keeping of accounts;
- (c) manager’s obligation to maintain a bank account;

96 *Supreme Honour v Lamaya* [1991] 1 HKC 198, see now the comments of the Court of Appeal in *Pak Fah Yeoh Co Ltd v Proper Invest Group Ltd* [2009] 3 HKC 285.

97 *Incorporated Owners of Cheong Wang & Cheong Wai Mansions v The Government of the HKSAR* [2001] 1 HKLRD 483, [2001] 1 HKC 57.