

Bills Committee on Building Management (Amendment) Bill 2005

Sub-Deed of Mutual Covenant

1. At the meeting of the Bills Committee on 6 June 2006, Members raised a number of questions relating to sub-deed of mutual covenant (sub-DMC) during discussion of LC Paper No. CB(2)222/05-06(03)¹. Below are the responses of the Administration to these questions.

Approval of Sub-DMCs

2. Sub-DMCs are most common in phased developments. In most cases, the principal DMC covers matters which are applicable to the entire development and also the first phase of the development. The sub-DMCs then cover matters which are applicable to the subsequent phases only.

3. Guideline No.29 of the Guidelines for Deeds of Mutual Covenant issued by the Legal Advisory and Conveyancing Office (LACO) of Lands Department provides that the developer may reserve rights to execute sub-DMCs in respect of separate towers, phases etc. All sub-DMCs (as well as the principal DMC) require the approval of the Director of Lands but where the Director is satisfied, upon submission of the draft sub-DMC to the Director, that the sub-DMC relates only to the internal sub-division of an existing unit and by the sub-DMC there will be no alteration to common areas or liability for management or other charges under the principal DMC, the Director may, in his absolute discretion, waive the requirement of approval of the sub-DMC.

4. According to LACO, applications for a waiver under Guideline No.29 above is rare. Past cases include the partitioning of a commercial unit into smaller units and sub-allocation of undivided shares originally allocated to a wall to different parts of the external wall.

Application of Schedules 7 and 8 of the BMO

5. According to section 34E, the provisions in Schedule 7 to the BMO shall be impliedly incorporated into every DMC, regardless of the

¹ The Administration's Response to Views of the Professional Bodies in the Building Management Sector.

date it was made. The provisions shall bind the owners and manager of the building and prevail over any other provision in the DMC that is inconsistent with them. According to section 34F, the provisions in Schedule 8 shall, to the extent that they are consistent with the DMC, be impliedly incorporated into every DMC, regardless of the date it was made. The provisions shall also bind the owners and manager of the building.

6. Sections 34E and 34F fall within Part VIA of the BMO which, by virtue of section 34C², apply only to a building in respect of which a deed of mutual covenant is in force. A sub-DMC does not apply to the whole of a building. It merely regulates a certain part of a building (say commercial part or residential part; or in some cases, just a unit in a building) – in other words, a small portion of the whole. This certain part of a building represents only a discrete area of a building which cannot be a building under the definition of "building" in section 2 of the BMO³. Part VIA of the BMO is therefore not applicable in the circumstances and hence Schedules 7 and 8 would not be incorporated into a sub-DMC.

“Common Parts” Created by Sub-DMC

7. In some cases, a sub-DMC is executed to divide an originally large unit into smaller units either for sale/rental. The so-called “common parts” (say corridors) shared by these small units under the sub-DMC (which may or may not be accessible by other owners of the whole building) are co-owned only by the owners of these small units and definitely not by all owners of the building.

8. It follows that the so-called “common parts” created by the sub-DMC do not bear the same meaning as the term “common parts” defined in section 2 of the BMO and hence an owners’ corporation (OC) does not have the power to manage those “common parts”.

Judgments Related to Sub-DMCs

² Section 34C(1) of the BMO stipulates that Part VIA of the BMO, except where otherwise expressly provided, applies only to a building in respect of which a deed of mutual covenant is in force whether that deed came into force before or after the material date.

³ “Building”, under the BMO, means (a) any building which contains any number of flats comprising 2 or more levels, including basements or underground parking areas; (b) any land upon which that building is erected; and (c) any other land (if any) which is in common ownership with that building or land; or in relation to the appointment of a management committee, is owned or held by any person for the common use, enjoyment and benefit (whether exclusively or otherwise) of the owners and occupiers of the flats in that building.

9. The above interpretation regarding application of Schedules 7 and 8 is shared in *Rightop Investment Ltd & anor and Yu Tsui Sheung & anor* (HCA 2691/2001). In the judgment, it was held that “DMC” in section 34F of the BMO must refer to a DMC which is applicable to a whole building as mentioned in section 34C. Schedule 8 to the BMO therefore only supplements the provisions of a DMC governing a building as a whole and does not apply to a sub-DMC regulating the affairs of a discrete area of a building. So is section 34E of the BMO which applies only to a DMC which governs a building as a whole. The terms of Schedules 7 and 8 to the BMO therefore are not to be read into a sub-DMC.

10. In *The Incorporated Owners of Po Lok Mansion and Richards Company Limited* (CACV 282/2004), the judge commented that it was trite law to say that whilst the DMC binds all the owners, the sub-DMC only binds the parties to the sub-DMC. In the subject case, the sub-DMC is just an agreement entered into by a deed among nearly all of the owners of the commercial centre of the building. The binding deed for all the owners is the DMC from which the OC concerned received its power. The OC should therefore collect its charges according to the DMC but not the sub-DMC.

11. In *寶樂大廈業主立案法團及梁冠和其他*(CACV 194/2005), it was held that 「寶樂大廈業主之間的關係屬合約（因土地權而延續）關係；各單一業主受大廈公契的約束。商業中心的商舖業主……不單共同和個別受大廈公契的約束，亦受分公契的約束。……商業中心的業主有合法的結社權利和自由。他們有權訂立分公契並根據分公契成立寶靈業委會。他們亦有合約責任履行分公契內的條款，包括支付有關管理費。……從合約角度而言，分公契的安排和商業中心業主外的其他寶樂大廈業主無關。只要商業中心的業主整體履行大廈公契施加於商業中心業主的責任，法團無權干預他們根據分公契作出的安排。……商業中心的“公用”地方和設施屬“土地註冊處註冊的文書所指明或指定專供某一業主使用、佔用或享用的部份”，故不屬寶樂大廈公用部份。……“分公契”衍生出來的商業中心之共用地方及設施屬專供商業中心商舖的業主使用、佔用或享用。雖然他們大家之間共同享有，但不構成寶樂大廈的公用部份。……“分公契”衍生而出的商業中心“共用”地方和設施的運用及管理，全在商業中心商舖業主的整體的管轄下，和寶樂大廈的其他業主無關，而不受大廈公契的規範，法團無權力亦無責任處

理。」

Termination of the Appointment of the Manager under Sub-DMC

12. Schedule 7 to the BMO provides a mechanism for OCs to terminate the appointment of the DMC manager⁴. Members were concerned that, if Schedule 7 is not applicable to sub-DMCs, owners will not be able to terminate the manager who is appointed under the sub-DMC.

13. Although the Guidelines for DMC issued by LACO do not mandate the appointment of a manager under the principal DMC, LACO advised that for phased developments, it is extremely unusual for the developer to not do so (i.e. no appointment of manager made under the DMC, but under different sub-DMCs) and LACO will certainly request an explanation for such exceptional arrangement. In fact, LACO is unaware of any cases where the principal DMC did not appoint a manager and the appointment was only made in the sub-DMCs. According to LACO, as the principal DMC should have set out the relevant rights and responsibilities of the manager as well as the termination mechanism, most sub-DMCs are silent on these matters. In the unusual scenario where no manager is appointed under the principal DMC and thus it does not contain any termination mechanism for the manager, Guidelines No.8⁵ and No.29⁶ of the Guidelines for DMC will apply when the sub-DMC is submitted to LACO for approval.

Home Affairs Department
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⁴ Paragraph 7(1) of Schedule 7 to the BMO provides that at a general meeting convened for the purpose a corporation may, by resolution of the owners of not less than 50% of the shares, terminate by notice the manager's appointment without compensation.

⁵ Guideline No.8 provides that the owners' committee may at any time terminate the manager's appointment without compensation by a resolution of the owners of not less than 50% of all undivided shares (excluding the undivided shares allocated to the common areas) and by giving the manager 3 months' notice in writing.

⁶ See paragraphs 3 and 4 above.