

## **BILLS COMMITTEE ON LAND TITLES BILL**

### **Registration of Deeds of Mutual Covenant**

#### **Purpose**

This paper addresses Members' questions about the registration of Deeds of Mutual Covenants [**DMC**] raised at the 8th meeting on 19 June 2003. The Administration was requested to provide a list of the usual covenants provided in a DMC and to clarify the effect of a registration of DMC as provided under Clause 51(4) of the Land Titles Bill.

#### **Background**

2. The validity and enforceability of DMC covenants among the owners of a multi-storey building or an estate development are now governed by the Conveyancing and Property Ordinance (Cap.219) [**CPO**]. Certain terms are now incorporated into every DMC by virtue of Sections 34E and 34F of the Building Management Ordinance (Cap.344) [**BMO**]. Some of them are mandatory and override any inconsistent terms in a DMC. Some of them are automatically added if they are consistent with the content of the DMC.

3. The combined effect of Sections 39, 40, 41 & 42 of the CPO makes all DMC covenants, which benefit the land, enforceable against the occupiers<sup>1</sup> of the building; the covenantor (i.e. the owner who first gave the covenant); his successors in title (e.g. a subsequent purchaser); and any person deriving title from them (e.g. a tenant).

4. Section 41(9) of the CPO expressly provides that the DMC, after being registered with the Land Registry under the Land Registration Ordinance (Cap.128) [**LRO**] shall bind the successors in title of the covenantor and the persons deriving title from them, whether or not they have actual notice of the DMC covenants.

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<sup>1</sup> For occupiers and tenants, s.41(5) excludes them from being bound by the burden of positive covenants.

## **Effect of Registration of DMC under the Bill**

5. Clause 51 of the Bill does not change the current law on the validity and enforceability of covenants which are contained in a DMC and which may create easement, right, etc. which may benefit and affect the land. The validity and enforceability are still governed by the provisions of CPO mentioned above.

6. For an easement or covenant contained in an instrument other than a DMC, particulars of that instrument need to be registered according to Clause 49 (easement) or Clause 50 (covenant) against the respective title of the burdened land and the benefited land.

7. For easements, rights, or covenants contained in a DMC, one single registration of the particulars of the DMC<sup>2</sup> against the relevant title<sup>3</sup> will be sufficient [Clause 51(1)]. It will then take effect as a registration of all the easements, rights and covenants contained in the DMC which affect the registered land [Clause 51(4)]<sup>4</sup>. Section 41(9) of CPO, operating as before, will make the registered DMC binding on all successors in titles, whether or not they have actual notice of the covenants.

## **List of usual covenants in a DMC**

8. At the **Annex** is a list of usual covenants contained in a DMC and a list of the terms now imposed by Sections 34E and 34F of the BMO. They are gathered from the DMCs of 3 large scale estate developments completed in 1970s, 1980s and 1990s respectively.

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<sup>2</sup> It is the particulars of the DMC, rather than the particulars of the easements or rights, that are required to be stated in the application for registration - Clause 51(1)(b).

<sup>3</sup> For a multi-storey building where all owners of flats or units are co-owners of the same plot of land, there will be no question of burdened land and benefited land. Registration of the DMC against the title of that plot of land will constitute notice to the subsequent purchaser of a unit.

<sup>4</sup> Clause 2(2)(e) provides that any reference to "register in the Land Registry" , or words to the like effect, in any enactment shall be construed to mean register under the Land Registration Ordinance (Cap.128) or this Ordinance, as the case may require.

## Annex

### List of Usual Covenants in a DMC

The covenants listed in **Part 1** are gathered from the DMCs of 3 large scale estate developments completed respectively in 1970s, 1980s, and 1990s. It should be noted that each DMC is necessarily tailor made to fit the particular needs and circumstances of the development.

2. The mandatory terms now imposed by BMO on every DMC are also set out in **Part 2** of the list.

### Part 1 Usual covenants in DMC

#### A. Rights Among Owners

1. Definition of owners and allocation of individual shares in the land and building.
2. Definition of common area, residential area, commercial area, etc.
3. Reciprocal grant of exclusive use and enjoyment of own unit. Free right to assign own unit.
4. Reservation of exclusive right to use certain part or area by the developer (with or without a pre-condition of holding an undivided share in the building or land).
5. \*<sup>1</sup>Exclusive right to use not to be assigned separately from an undivided share.
6. Reservation of right to erect advertising sign at specified area or outer wall.
7. Right of developer to enter Sub-DMC and to alter designation of common area.
8. Right of developer to have access before completion of the development project.
9. \*#<sup>2</sup>Reservation of right to particular owner to change name<sup>3</sup> of building.

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<sup>1</sup> For covenants marked with an asterisk (\*), they were not present in the sample DMC of 1970s.

<sup>2</sup> For covenants marked with a symbol (#), it may *not* be a covenant *running with the land*. In other words it is a benefit personal to the covenantee. The benefit may not be enjoyed by his successor in title automatically upon becoming the next owner of the land.

10. Provisions in relation to destruction, damage, or other events making the building unfit for habitation.

**B. Owner's liability under DMC**

1. Mutual right of enforcement of DMC provisions among owners against each other.
2. Provisions to stipulate the share of contribution by owners to management fees and other funds.
3. Provision for owner's liability under DMC and non-liability after ceasing to be owner.
4. Right to register a charge against the share or interest of defaulting owner for outstanding payment due under DMC.

**C. Positive Covenants<sup>4</sup>**

1. To keep interior of each unit and its wirings, pipings and sanitary appliances in good repair and conditions.
2. To indemnify Manager and other owners for acts or omissions due to acts of occupier of any individual unit.
3. To pay management fees and to contribute to management or contingency fund.
4. To observe and perform all provisions of the DMC and House Rules.
5. \*To notify Manager upon change of ownership.

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<sup>3</sup> To fall within the scope of Section 41(2)(c) of CPO and thus the successor in title of the covenantee (i.e. the new owner) may enjoy the enforceability against other owners and occupiers of the building as provided under Section 41(3), the 'covenant' should be not merely intended to run with the land but also be benefiting the land. The *right to name the building* as a whole did not in any way benefit the exclusive occupation of any particular floor or the roof above it. The commercial value was intrinsic in the right itself, and would remain the same whether the person holding it had the right to any occupation at all. See *Lamaya Ltd. v Supreme Honour Development Ltd.* [1991] 1 HKC 198 Court of Appeal.

<sup>4</sup> A positive covenant is defined as a covenant to expend money, do something or which is otherwise positive in nature - Section 41(6) of CPO

**D. Restrictive (Negative) Covenants**

1. Not to do any act in contravention of the terms and conditions of Government lease.
2. Not to do any act in contravention of DMC.
3. Not to exercise any right to partition the relevant lot or lots (excepted by the first owner).
4. Not to make structural alteration to the building.
5. \*Not to alter any pipes, ducts, valves, etc. of the common area and common facilities.
6. Not to clog the flush or drainage system.
7. Not to do anything to render the insurance of building void.
8. Not to store any hazardous, dangerous, or combustible goods or materials.
9. Not to use the unit for any purposes prohibited or restricted under DMC.
10. Not to use the unit for any unlawful, illegal, or immoral purposes.
11. Not to use residential unit except for private residential purpose.
12. Not to install or display from interior or exterior of any unit any sign or structure.
13. Not to put up radio or television aerial from interior or exterior.
14. \*Not to alter the outward appearance of the unit or to paint the exterior of the unit.
15. Not to cause nuisance or annoyance to other owners or occupiers.
16. \*Not to keep pets or animals.
17. \*Not to allow bicycles in lifts, corridor, etc.
18. \*Not to install furnace or equipment producing smoke, fumes, etc.
19. \*Not to obstruct access to any terrace or flat roofs.

20. Not to dirty the common area.

21. Not to obstruct common area.

#### **E. Easements**

1. Right to free and uninterrupted passage and running of water, sewage, gas, etc. to individual unit.
2. Right of way to go, pass and re-pass over and along designated area and common area.
3. \*Reciprocal right to enter other parts of building for maintenance and repair which cannot practically be carried out without such access.
4. Reciprocal right to subjacent and lateral support of the building and individual unit.
5. Reciprocal right to all easements, rights of way, etc. relating to the building.
6. \*Owner's right to apply for membership of facilities club.

#### **F. Management**

1. Provisions as to establishment of owners' committee and meetings.
2. Provisions as to relation between Incorporated Owners and the Manager.
3. @<sup>5</sup>Manager deemed agent of owners in enforcement of DMC.
4. @Provisions as to powers, duties and liability of Manager.
5. @Provisions as to term, remuneration and removal of Manager.
6. @Provisions as to accounts, budget, and bank accounts of Manager.

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<sup>5</sup> DMC contains mutual covenants among owners themselves as well as covenants between owner and manager only. Manager is not an owner of the land. For covenant between owners and manager marked with the symbol (@), they may not run with the land. But in each assignment the new owner agreed to buy subject to and with the benefit of DMC. Through this chain of assignments the manager and the owners are contractually bound.

7. @\*To provide copy of DMC in Chinese version.

## **Part 2 Mandatory terms imposed by BMO**

### **A. Compulsory terms imposed by s.34E**

These terms shall bind the owners and manager of the building. They shall override any existing provision in a DMC that is inconsistent with them.

1. Determination of total amount of management expenses.
2. Keeping of accounts by Manager.
3. Manager to maintain bank account.
4. Establishment and maintenance of special fund for expenses not expected to be incurred annually.
5. Provisions as to contract to be entered by Manager.
6. Resignation by Manager.
7. Termination of Manager's appointment by owner's corporation.
8. Obligations after Manager's appointment ends.

### **B. List of terms added by s.34F of BMO if consistent**

These terms are automatically incorporated into every DMC in so far as they are consistent with its existing provisions. The owner may pass resolution at meetings to amend or delete these terms if they so wish.

1. Provisions on meetings of owners' committee.
2. Provisions on meeting of owners.