Bills Committee on Building Management (Amendment) Bill 2005

Matters Arising from Meetings on 4 January 2006
Appointment of a Management Committee

1. At the meeting of the Bills Committee on 4 January 2006, Members raised a number of questions regarding the appointment procedures of a management committee during discussion of LC Paper No. CB(2)2617/04-05(01) – *Response to Hon WONG Kwok-hing's Questions* (i.e. LC Paper No. CB(2)2617/04-05(04)). Below are the responses of the Administration to these questions.

Proposal in the Bill

2. Section 3(2) of the Building Management Ordinance (BMO) stipulates that at a meeting of owners, a management committee may be appointed (a) in accordance with the deed of mutual covenant (DMC); or (b) if there is no DMC or the DMC contains no provision for the appointment of a management committee, by a resolution of the owners of not less than 30% of the shares.

3. Clause 4 of the Bill amends section 3(2) by deleting all references to DMC. The proposed section 3(2) stipulates that at a meeting of owners, the owners may appoint a management committee by a resolution (a) passed by a majority of the votes of the owners voting either personally or by proxy; and (b) supported by the owners of not less than 30% of the shares in aggregate.

4. The proposed amendment serves two purposes. Firstly, it is not clear under the existing section 3(2) whether the resolution could still be passed if another 30% of the shares of owners object to the motion[1]. To remove such confusion and to ensure the management committee will operate with the support of the majority of owners, clause 4 makes it clear that the resolution on the appointment of the management committee under section 3(2) must be supported by not less than 30% of the shares as well as a majority of votes of the owners in the same meeting.

5. Secondly (which is also the main focus of this paper), the reference to DMC in the existing section 3 of the BMO has raised doubts

[1] These questions were raised in the case of *Kwan & Pun Company Limited v Chan Lai Yee and others* (CACV 234/2002).

over whether the provisions in the DMC or those in the BMO should prevail in the appointment of a management committee. This is especially the case as most DMCs contain provisions for the appointment of an owners' committee (in some cases, it is also named as management committee) having similar functions as a statutorily formed management committee under the BMO. Some of these DMC provisions are contrary to the requirements stipulated in the BMO. We do not think that this is desirable and the proposed amendment would help remedy the situation.

6. In *Siu Siu Hing v Land Registrar* (HCAL 77/2000) (Annex), the court held that unless the DMC of a building specifically referred to the appointment of a management committee under section 3 of the BMO, the management committee referred to in the DMC was not the same creature as the one provided for in the BMO. We fully subscribe to this view and would like to make this absolutely clear in the BMO – for a management committee to be formed under the BMO, the owners have to follow the procedures set out in the BMO; while for other committees (e.g. owners' committee, estate committee, howsoever it is named in the DMC), they have to follow the relevant procedures set out in the DMC.

7. Schedule 2 to the BMO sets out the composition and operational procedures for management committees. For the same reason stated above, clause 23 of the Bill deletes all references to the DMC in Schedule 2 so that the composition and operation of a management committee will follow the requirements under the BMO instead of the divergent DMCs. For the avoidance of doubt, paragraph 12 further provides that in the event of any inconsistency between Schedule 2 and the terms of a DMC, Schedule 2 shall prevail.

Members' Concerns

8. Some DMCs may provide for the composition of an owners' committee (or management committee, estate committee, howsoever it is named in the DMC). For developments composing a few blocks, for example, the DMC may provide for a certain number of representative(s) to be elected from each block. For composite developments, the DMC may provide for the ratio of representatives from the residential, commercial and industrial portions. Some Members considered that these are reasonable provisions and owners (both for existing owners' corporations (OCs) and to-be-formed OCs) should be allowed to flexibly follow such provisions in the DMCs.

The Administration's Views

9. As explained in paragraph 6 above, unless the DMC of a building specifically referred to the appointment of a management committee under section 3 of the BMO, the committee (howsoever it is named) referred to in the DMC was not the same creature as the one provided for in the BMO. As such, the provisions regarding the composition of the committee (and any other matters relating to the committee) as stipulated in the DMC should apply to that committee referred to in the DMC only – and not the management committee referred to in the BMO. Owners are, therefore, not bound by such DMC provisions (whether they are considered reasonable or not and whether they are looser or harsher than the BMO requirements) when they appoint a management committee under the BMO.

10. On the other hand, the revised paragraphs 2(1) and 5(2) of Schedule 2 to the BMO provides that at a meeting of owners, the owners shall, by a resolution passed by a majority of the votes of the owners appoint, from amongst themselves, the members of the management committee and also appoint, from amongst the members of the management committee, the chairman and the vice-chairman[2]. There is no provision in the BMO governing the composition of the management committee. In other words, so long as the members of the management committee and the various post-holders are appointed from amongst the owners at an owners' meeting, they will have fulfilled the requirements under paragraphs 2(1) and 5(2) of Schedule 2.

11. The Administration's views are, therefore, that so long as the appointment of members of a management committee is endorsed at a general meeting of owners, such appointments are valid. Owners may choose to use whatever ways to allocate the posts in their management committee (they could choose to adopt the allocation stipulated in the DMC but they are not bound to do so) as long as the final appointment of each member is approved at the owners' meeting.

Example: A Composite Development in Eastern District

12. During discussion at the meeting, one composite development

[2] Paragraphs 2(1)(c) and (d) and 5(2)(c) and (d) to Schedule 2 also provide for the appointment of a secretary and a treasurer of the management committee but they need not be a member of the management committee.

(with 17 residential blocks) in Eastern District was mentioned. Let's look closer into the DMC of this particular development as an example. The following provisions extracted from the DMC (which are all related to the composition of the committee to be formed under the DMC) are worth noting –

(a) the management committee shall consist of not more than 20 persons, three of whom shall be elected to represent the owners of the non-domestic units and one of whom shall be elected to represent the owners of the each block;

(b) the husband or wife of any owner or any adult member of the family of any owner duly authorised in writing by such owner provided that such husband, wife or adult member of the family resides in the development;

(c) the officers of the management committee shall be the chairman, the vice-chairman, the secretary and such other officers as the management committee may from time to time elect;

(d) the officers of the management committee shall be elected by the members of the management committee themselves;

(e) a member of the management committee shall cease to hold office if (i) he resigns by notice in writing to the management committee; (ii) he ceases to be eligible; (iii) he is removed from office by the owner he represents; and (iv) he becomes bankrupt or insolvent or is convicted of a criminal offence other than a summary offence not involving dishonesty.

13. The owners of this development were incorporated in 2002 under the BMO. During incorporation, owners have chosen, through majority votes at an owners' meeting, to adopt the membership composition (i.e. paragraph 12(a)) stipulated in the DMC. We stress again that they were not bound by such a DMC requirement but it was the conscious decision of the owners, which was made at the owners' meeting, to adopt such a membership composition. One representative

was then selected from amongst owners of each of the 17 blocks. It must be noted that owners of Block 1 have no say in the election of representative in Block 2, and vice versa. The appointment of the whole group of members (the 17 residential representatives plus three commercial representatives) were then passed by a majority of votes at the owners' meeting. Because of this last and most important step, i.e. the resolution passed at the owners' meeting, the appointments were made in accordance with the requirements under the BMO.

14. Another point in the case is worth noting. Whilst owners of the development had consciously agreed to adopt certain DMC requirements on membership composition, they had also (probably not consciously as there was no resolution passed in this regard) decided not to adopt the other requirements on composition. They are notably the requirements in paragraphs 12(b) (non-owners like spouse or adult family member could be members), 12(c) (no provision for a treasurer post), 12(d) (post-holders are elected among the members themselves and no need for endorsement at owners' meeting), and 12(e) (different disqualification requirements). This shows clearly that the owners of this development have only followed some, and not all DMC requirements regarding composition of the committee.

15. Following the amendment to the BMO, owners of this development may continue to adopt the existing allocation method for membership of the management committee so long as the appointment of all members is approved at an owners' meeting.

Committee Stage Amendments

16. To make the above absolutely clear in the BMO, we propose amending clause 23(d)(i) (new paragraph 2(1)(a) of Schedule 2 to the BMO) and clause 23(g)(ii) (new paragraph 5(2)(a) of Schedule 2 to the BMO), in the English text, so that at a meeting of owners, the owners shall appoint, ***from amongst the owners*** (*instead of "from amongst themselves"*), the members of the management committee. Subject to Members' views, we will introduce Committee Stage Amendments as appropriate.

Views Sought

17. Members' views are invited on the above.

Home Affairs Department
January 2006

Annex

HCAL77/2000

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 77 OF 2000

BETWEEN

SIU SIU HING trading as CHUNG SHING MANAGEMENT COMPANY — Applicant

and

THE LAND REGISTRAR — Respondent

Before : Hon Cheung J in Court
Dates of Hearing : 2 and 3 January 2001
Date of Judgment : 31 January 2001

J U D G M E N T

The application

This is an application for judicial review of the decision of the Land Registrar. The decision was given on 18 November 1999 when the Land Registrar issued a Certificate of Registration under section 8(1) of the Building Management Ordinance, Cap.344 ("the Ordinance"), under which the owners of Chun Fai Garden ("the Garden"), 132 Muk Kiu Tau Tsuen, Yuen Long, New Territories, Hong Kong were registered as a corporation.

The Incorporated Owners of the Garden had intervened in this application by filing evidence. Although counsel on their behalf was present at the hearing, he had, however, not made any submission on their case.

The Garden

The Garden consisted of 18 lots of land. 18 detached buildings are built on this 18 lots of land. Each building consists of three separate flats. Of the 18 buildings, two have not been issued with the Certificate of Compliance at the time when the proceeding was instituted. Of the 18 lots of land, each is subdivided into three equal and undivided parts or shares and held by the owner of the ground floor, first floor and the second floor of the building erected thereon respectively. The result of this is that the individual owners of the flats in the Garden do not have an undivided part or share in all the land in the Garden. What they have instead is an undivided part in the respective lots of land on which the buildings are constructed.

The events

On 24 February 1999, there was a meeting of the flat owners of the Garden which formed the first management committee under the Deed of Covenant and Management Agreement dated 2 August 1996 of the Garden ("the DMC"). On 25 June 1999, there was a further meeting of the flat owners of the Garden pursuant to section 3 of the Ordinance. At this meeting, a resolution was passed by the flat owners for the appointment of a management committee ("the Management Committee"). The Management Committee subsequently made an application to the Land Registrar for a Certificate of Registration of the Incorporated Owners of the Garden under section 7 of the Ordinance. On 18 November 1999, the Certificate of Registration was issued.

The applicant

The applicant was appointed to manage the Garden under the DMC. The appointment was for an initial period of two years, and thereafter for a further period of three years. The owners of the Garden had issued notice of termination of the applicant's appointment as the manager of the Garden. Three notices had been given. The first was dated 23 July 1999, terminating her appointment on 22 October 1999. The second was dated 22 November 1999, terminating her appointment on 31 November 1999 and the third was dated 23 December 1999, terminating her appointment on 22 March 2000. The last notice was issued by the Incorporated Owners of the Garden. There are disputes between the applicant and the Incorporated Owners arising out of the management of the Garden. Proceedings had been instituted by them in the Lands Tribunal.

The basis of challenge

The first ground of challenge to the decision of the Land Registrar is that under the Ordinance, the provisions for incorporation only applies to a building or buildings where the owners have an undivided share in the land on which there is a building or buildings. As the Garden does not have a common piece of land on which the owners have an undivided share, the owners are therefore not entitled to become incorporated.

The Ordinance

Under the Ordinance, the first step leading to the incorporation is by the appointment of a management committee under section 3. After this management committee has been appointed, it is required to apply to the Land Registrar for the registration of the owners as a corporation under section 7. Under section 8, if the Land Registrar is satisfied that the statutory requirements had been complied with, then he shall issue a Certificate of Registration. With effect from the date of the issue of the Certificate of Registration, the owners shall be a body corporate with perpetual succession.

Section 3 of the Ordinance provides that :

"(1) A meeting of the owners to appoint a management committee may be convened by—

(*a*) any person managing the building in accordance with the deed of mutual covenant (if any); or

(*b*) any other person authorized to convene such a meeting by the deed of mutual covenant (if any); or

(*c*) the owners of not less than 5% of the shares.

(2) At a meeting convened under subsection (1) a management committee may be appointed—

(*a*) in accordance with the deed of mutual covenant, if the deed provides for the appointment of a management committee; or

(*b*) if there is no deed of mutual covenant, or the deed contains no provision for the appointment of a management committee, by a resolution of the owners of not less than 50% of the shares."

Under section 2, an owner means, among other things, 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.

The statutory intent

Mr Kwok, counsel for the applicant referred to *Merrilong Dyeing Works Limited v. Chiu Shu Choi* [1984] HKC 535, in which the Court of Appeal dealt with the system of land holdings in Hong Kong in the context of a multi-storey building. The court held that when an owner is said to have ownership of one particular floor, all that it means is that he has an equal undivided part or share in the land and in the building as a whole.

While this is indeed the system of land holding in a multi-storey building in Hong Kong, the issue that has to be focused in this case is whether the Ordinance would only allow incorporation where there is a single tenancy in common. The preamble of the Ordinance states that the Ordinance is "to facilitate the incorporation of owners of flats in buildings or groups of buildings, to provide for the management or buildings or groups of buildings and for matters incidental thereto or connected therewith". The reference to "groups of buildings" was introduced in 1993 when the Ordinance was amended. Prior to that, the preamble merely mentioned about incorporation of owners of flats in multi-storey buildings. Clearly, the intention of the legislation is to ensure that incorporation of owners can be formed so as to provide better management for the buildings. In my view, this being the stated purpose of the Ordinance, in order for the applicant's argument to succeed, there must be clear and unambiguous provisions in the Ordinance itself that the owners of the Garden are unable to be incorporated. The Ordinance contains no provision which restricts incorporation to buildings built under a single piece of land or where there is only a single tenancy in common.

The absurd result

In my view, the definition of "owner" in section 2 does not mean that a management committee cannot be appointed for a residential development such as the Garden in which there is no single tenancy in common. All that section 2 does is to provide the qualification for being an owner. In other words, he must have an undivided share in land. However, there is nothing in section 3 which prevents the owners of a

development with multiple land holdings from agreeing to form a management committee. In fact, the reverse situation would create absurd results. Take the Garden as an example. There are 18 different lots of land, if the applicant's suggestion is correct, then it would mean that each building would have its own management committee and incorporated owners without a single management committee or incorporated owners managing the whole of the Garden. This is undesirable and cannot be the intention of the legislation. The absurdity is not merely in the number of management committees or incorporated owners but in substance, because without a single management committee or incorporated owners, matters relating to the Garden as a whole cannot be properly dealt by a single body. For this reason alone, one has to find against the applicant.

Who can convene the meeting?

Under section 3(1), three categories of person can convene the meeting :

(a) The person managing the building in accordance with the deed of mutual covenant.

(b) The person authorized to convene such a meeting by the deed of mutual covenant.

(c) The owners of not less than 5% of the shares.

The first two categories of person who can convene a section 3 meeting do not need to be owners.

Share of owners

Where the owners convene the meeting, they need to hold not less than 5% of the shares. "Share" is defined in section 2 as meaning the share of an owner in a building determined in accordance with section 39. Section 39 provides for the determination of an owner's share either in the manner provided in the deed of mutual covenant or, if there is no such deed or the deed does not contain any provision, then in the proportion which his undivided share in the building bears to the total number of shares into which the building is divided.

It can be seen that under section 3(c), there is no reference to undivided shares under the DMC. Each of the owner in the Garden has one undivided share in the land upon which the building is built. However, in matters such as management expenses, voting rights, the percentage required to exercise the power of appointment of a management committee under the DMC and other powers conferred to owners in the meetings of the owners, their share is by reference to the share of the owners in proportion to the number of flats owned by them in the property. In other words, each flat owner will have one out of 48 or 54 shares in the Garden (depending on whether the two other buildings in the Garden which has not been issued with the Certificate of Compliance are counted or not). Thus in section 7, payment of common expenses shall be borne and paid by the owners in proportion to the number of flats owned by them in the property. "Property" is defined as the 18 houses in the Garden. Under Clause 12.7, each flat owner shall be entitled to one vote in respect of each flat owned by him. Under Clause 12.11.4, a resolution in writing, signed by the owners who in the aggregate own not less than 95% of the total number of flats shall be as valid and effectual as it had been passed at a duly convened meeting of the owners. Under Clause 8.4, the first committee shall be appointed by an instrument of appointment signed by owners who own in the aggregate not less than 75% of the flats. Under Clause 10.1.2, the manager may continue for another three years after the first two years of appointment unless a notice of objection is signed by owners who own in the aggregate not less than 75% of the flats. Under Clause 12.2, meetings may be convened by the manager or the management committee of not less than 25% of the flat owners. Under Clause 12.4, the quorum in meetings are determined by the percentage of flat owners.

In the present case, the meeting was in fact convened by owners of not less than 5% of the total number of flats in the Garden. Given what I had said on the legislative intent, the owners were clearly able to convene and hold the meeting in which the Management Committee was appointed.

The building

As we had seen earlier, an owner means the owner of an undivided share in land on which there is a building. It is significant that the meaning of building in the Ordinance has an extended meaning. Under section 2, it means :

(a) any building which consists a number of flats comprising two or more storeys;

(b) any land upon which that building is erected; and

(c) any other land which

(i) is in common ownership with that building or land; or

(ii) in relation to the appointment of a management committee or any application in respect thereof, is owned or held by any person for the common use, enjoyment and benefit of the owners and occupiers of the flats in that building.

The extended meaning of "building" in (c)(ii) is particularly significant because it is specifically applicable to the appointment of a management committee. This is again one of the amendments introduced in 1993. Although for technical reasons one cannot simply substitute the words in (c)(ii) with the word "building" under the definition of an owner, in my view, the extended meaning of the word "building" clearly covers situations such as the present one in which all the other owners in the Garden would qualify as the owners of any one building. Because for the purpose of the appointment of a management committee, each lot in the Garden would have included the other land owned or held by any person for the common use of the owners and occupiers of the flats in that building. Hence the owners who can appoint the Management Committee are the owners of the 18 lots of land in the Garden.

In *Grace International Ltd v. Incorporated Owners of Fontana Gardens & Ors* [1996] 4 HKC 635 at 643, Le Pichon J (as she then was) agreed with the submission of counsel that the absence of common ownership and the existence of different DMCs appeared to be insurmountable obstacles for incorporation under the Ordinance. The learned judge, however, did not actually rule affirmatively on this issue. Hence her observation on the obstacles would not assist the applicant in this case.

The required majority

At a section 3 meeting, a management committee may be appointed either in accordance with the deed of mutual covenant if the

deed provides for the appointment of a management committee or if there is no deed of mutual covenant, or the deed contains no provision for the appointment of a management committee, by a resolution of the owners of not less than 50% of the shares. The percentage has since been lowered to 30% by Ordinance No.69 of 2000.

Under section 5(5)(a) of the Ordinance, at a meeting convened under section 3, each owner shall, save where the deed of mutual covenant otherwise provides, have one vote in respect of each share which he owns. The DMC of the Garden provides for one vote for each flat and that governs the voting at the section 3 meeting. In the present case, it is not disputed that owners of not less than 50% of the shares had voted in favour for the appointment of the Management Committee.

The applicant, however, argued that the required number of shares is 75% as required by the DMC and hence the Management Committee had not been properly appointed in this case. Clause 8.1 of the DMC provides that there shall be a management committee of the property. Clause 8.4 provides that the first committee shall be appointed by **an instrument of appointment signed by owners who own in the aggregate not less than 75% of the flats**. In my view, Clause 8.4 of the DMC does not fit into section 3(2) because the section requires the appointment of a management committee at a meeting, whereas Clause 8.4 provides for the appointment of the committee by an instrument of appointment signed by the owners.

Mr Kwok argued that the meeting can be adjourned for the instrument in writing to be signed. In my view, this is not what section 3(2)(b) intended. It clearly envisages the requirement of voting instead of what is contained in Clause 8.4. In my view, the situation is governed by section 3(2)(b). The appointment is to be made by the resolution of the owners of not less than 50% of the shares. The required votes had been fulfilled.

Nature of the committee

There is another reason why Clause 8.4 is not applicable because the committee appointed under the DMC is quite different from the management committee under the Ordinance. This can be seen from Clause 19 of the DMC which provides that if an Owners' Corporation of the Garden shall be formed under the Ordinance, "the Committee of the Owners' Corporation shall take the place of the Owners as the Committee

under this deed". This clearly envisages two kinds of bodies. Further, "management committee" is defined in section 2 of the Ordinance as a management committee appointed under section 3. Hence, unless the DMC specifically refers to the appointment of a management committee under section 3 of the Ordinance, the management committee referred to in the DMC is not the same creature as the one provided for in the Ordinance. As such Clause 8.4 is not relevant.

Mr Mok, counsel for the Land Registrar, had also referred to other arguments showing the difference between the management committee under the DMC and the statutory management committee. For example, a duty is imposed upon the statutory management committee to register the owners as a corporation. There is no similar requirement imposed on the management committee in the DMC. In view of what I had said, it is not necessary for me to deal with these other arguments.

Failure to consider objections raised by the applicant

The applicant further argued that the Registrar had failed to consider the objections raised by the applicant that there had been no or no sufficient verification of identity of those voting at the meeting who appointed the management committee.

The inquiry by the Land Registrar

After the meeting of 5 June 1999, the Management Committee on 12 July 1999 applied to the Land Registrar for the registration of the owners of the Garden as a corporation. The documents lodged for the application included the resolution for the appointment of the Management Committee and the affirmation of the secretary of the Management Committee, in which he stated that the provisions of sections 3 and 5 of the Ordinance had been complied with.

On 14 August 1999, the applicant's solicitors wrote to the Land Registrar stating that at the meeting no step was taken by any party to verify the identity of the voters at the meeting. Further, some of the owners who might have signed did not physically attend the meeting. The letter asked the Land Registrar to withhold the registration process pending the clarification of the controversy.

Upon receiving this letter, the Land Registrar enquired with the chairman of the Management Committee and also with the District

Office who had a representative present at the meeting. The response of the District Office was that there was no complaint or objection raised during the meeting. The lawyer for the chairman replied stating that there was no legal requirement for any formal verification of the identity of the voters. There was also no evidence indicating there was any doubt on the identity of the voters at the meeting. Furthermore, as the Garden is a small community consisting of 48 flats and the owners were well acquainted with each other, it was unnecessary to verify the identify of the owners. No complaints had been received from any of the owners for any procedural irregularity of the meeting.

The Land Registrar on 1 November 1999 responded to the applicant's complaint by referring them to these two letters. On 10 November 1999, the applicant's solicitors wrote again stating that the applicant "did query on lack of step/procedure taken on the verification of the identity of the voter at the meeting". The letter further referred to two lists of attendance of owners on the meetings of 24 February 1999 and 25 June 1999 respectively. The letters stated that "doubts arises as to the identity of the owners".

On 12 November 1999, the Land Registrar informed the applicant's solicitors that "It is not the stance of the Land Registrar nor his duty to attend and witness the owners' meeting, thereby assuring the regularity of all procedures. The District Officer (Yuen Long) and the convenors should be in a better position to take care of such matters." The Land Registrar further stated that since all papers in this case appeared to be in order, he shall have the application approved in the usual manner pursuant to section 8 of the Ordinance.

Further complaints

At the hearing, Mr Kwok further argued that the provisions of section 5 of the Ordinance had not been complied with. Specifically, section 5(2) deals with the mode of service of the notice of the meeting, it is submitted that there is no evidence showing that this provision had been observed. Section 5(4) requires the notice to specify the resolution which is to be proposed and in particular, the resolution for the appointment of a management committee. It is submitted that the notice merely set out the agenda which stated that :

(1) to form an incorporation of owners and appoint a management committee for the incorporated owners of the Garden; and

(2) to elect a chairman, secretary and other members of the management committee.

Section 5(5) states that the vote may either be cast personally or by proxy, appointed in accordance with paragraph 4(2) of the Third Schedule of the Ordinance. This paragraph provides that "the instrument appointing a proxy shall be in writing signed by the owner, or if the owner is a body corporate, under the seal of that body". It is submitted that the proxy is defective.

The failure to observe the provisions of section 5 had not been drawn to the attention of the Land Registrar before. It was only raised for the first time at the hearing. Mr Kwok's submission was considered on *de bene esse* basis. Mr Mok objected to the raising of these matters at this late stage.

Overview

In considering the submissions on procedural impropriety, it is necessary to take an overview of the matter. The applicant is not an owner of the Garden. After the meeting in June 1999, no owners had complained of any procedural irregularity of the meeting in which the Management Committee was formed. It was obviously the desire of the owners to form themselves into an owner's corporation. Under the DMC, the owners had expressly agreed that they are to be incorporated into an owner's corporation under the Ordinance. It is submitted that the applicant had a financial interest in this case because she was appointed to be the manager of the Garden and her status to challenge the decision arises because the owner's corporation had terminated her appointment. In my view, if the applicant was really concerned about whether the incorporated owners was properly formed or not, she could well have commenced proceedings after the meeting of 22 June 1999 to challenge the validity of the meeting. This she had not done. In my view, the Land Registrar had clearly considered the objections raised by the applicant's lawyer and made enquiries before deciding to approve the application for incorporation. There is no procedural impropriety.

In *Computer Land Ltd v. Registrar of Companies & Anor* [1986] HKC 49, Rhind J in considering the role of the Registrar of Companies held that it would not be reasonable to expect the Registrar to follow a procedure akin to a judge conducting a trial. As he had no

power of receiving evidence on oath or resolving conflicts in the evidence of competing parties, it is inconceivable that he is expected to do more than take note of the observations that an interested party choose to make to him.

In my view, this observation applies equally to the role of the Land Registrar in the present case. Furthermore, a judicial review is not concerned with the merits of the decision. Unless the Registrar has been specifically drawn to the complaints under section 5, otherwise, I fail to see how it can be said that he had failed to properly take such objections into account when granting the application. Under section 8 of the Ordinance, the Land Registrar, if satisfied that the provisions of section 3 had been complied with, shall then issue the Certificate of Registration. There is clearly evidence that the section 3 requirement had been complied with and it is clear that the Ordinance does not require the Land Registrar to consider the procedural matters relating to the notice and voting at meetings under section 5.

Furthermore, this is clearly a case where section 13 of the Ordinance comes into play. This section provides that the Certificate of Registration shall be conclusive evidence that such corporation is incorporated under this Ordinance. In *R. v. Registrar of Companies, Ex parte Central Bank of India* [1986] 2 WLR 177 at 192 to 193, Lawton LJ adopted the submission of counsel that the conclusive evidence clause excluded the admission of evidence but not the jurisdiction of the court to grant judicial review. In my view, this clause specifically excludes evidence relating to any alleged procedural irregularity of the meeting.

Mr Mok further referred to *Incorporated Owners of Million Fortune Industrial Centre v. Jikan Development Limited*, CACV 122 of 2000, the Court of Appeal had to construe section 6 and the Second Schedule of the Ordinance. Rogers JA stated that Clause 10 of the Second Schedule imposed mandatory requirements to ensure that the owners are kept informed of the transactions of the management committee, however, the failure by the chairman of the management committee to comply with this provision does not render the resolutions which had been passed invalid or unprovable, but it does open up parties perhaps to the sanction of applications for their removal and, perhaps, for the appointment of an administrator. In view of my decision, it is not necessary for me to consider whether the same approach should be adopted to a suggestion there had been breach of the provisions of section 5.

Conclusion

Accordingly, the application for judicial review is dismissed with costs *nisi* to the Land Registrar.

(P. Cheung)
Judge of the Court of First Instance,
High Court

Mr Tim Kwok, instructed by Messrs Quan & Co., for the Applicant

Mr Y.C. Mok, instructed by Department of Justice, for the Respondent

Mr Sammy Ho, instructed by Messrs Ivan Tang & Co.,
for the Incorporated Owners of Chun Fai Garden, as Observer

Annex

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J U D G M E N T

The application

This is an application for judicial review of the decision of the Land Registrar. The decision was given on 18 November 1999 when the Land Registrar issued a Certificate of Registration under section 8(1) of the Building Management Ordinance, Cap.344 ("the Ordinance"), under which the owners of Chun Fai Garden ("the Garden"), 132 Muk Kiu Tau Tsuen, Yuen Long, New Territories, Hong Kong were registered as a corporation.

The Incorporated Owners of the Garden had intervened in this application by filing evidence. Although counsel on their behalf was present at the hearing, he had, however, not made any submission on their case.

The Garden

The Garden consisted of 18 lots of land. 18 detached buildings are built on this 18 lots of land. Each building consists of three separate flats. Of the 18 buildings, two have not been issued with the Certificate of Compliance at the time when the proceeding was instituted. Of the 18 lots of land, each is subdivided into three equal and undivided parts or shares and held by the owner of the ground floor, first floor and the second floor of the building erected thereon respectively. The result of this is that the individual owners of the flats in the Garden do not have an undivided part or share in all the land in the Garden. What they have instead is an undivided part in the respective lots of land on which the buildings are constructed.

The events

On 24 February 1999, there was a meeting of the flat owners of the Garden which formed the first management committee under the Deed of Covenant and Management Agreement dated 2 August 1996 of the Garden ("the DMC"). On 25 June 1999, there was a further meeting of the flat owners of the Garden pursuant to section 3 of the Ordinance. At this meeting, a resolution was passed by the flat owners for the appointment of a management committee ("the Management Committee"). The Management Committee subsequently made an application to the Land Registrar for a Certificate of Registration of the Incorporated Owners of the Garden under section 7 of the Ordinance. On 18 November 1999, the Certificate of Registration was issued.

The applicant

The applicant was appointed to manage the Garden under the DMC. The appointment was for an initial period of two years, and thereafter for a further period of three years. The owners of the Garden had issued notice of termination of the applicant's appointment as the manager of the Garden. Three notices had been given. The first was dated 23 July 1999, terminating her appointment on 22 October 1999. The second was dated 22 November 1999, terminating her appointment on 31 November 1999 and the third was dated 23 December 1999, terminating her appointment on 22 March 2000. The last notice was issued by the Incorporated Owners of the Garden. There are disputes between the applicant and the Incorporated Owners arising out of the management of the Garden. Proceedings had been instituted by them in the Lands Tribunal.

The basis of challenge

The first ground of challenge to the decision of the Land Registrar is that under the Ordinance, the provisions for incorporation only applies to a building or buildings where the owners have an undivided share in the land on which there is a building or buildings. As the Garden does not have a common piece of land on which the owners have an undivided share, the owners are therefore not entitled to become incorporated.

The Ordinance

Under the Ordinance, the first step leading to the incorporation is by the appointment of a management committee under section 3. After this management committee has been appointed, it is required to apply to the Land Registrar for the registration of the owners as a corporation under section 7. Under section 8, if the Land Registrar is satisfied that the statutory requirements had been complied with, then he shall issue a Certificate of Registration. With effect from the date of the issue of the Certificate of Registration, the owners shall be a body corporate with perpetual succession.

Section 3 of the Ordinance provides that :

"(1) A meeting of the owners to appoint a management committee may be convened by—

(*a*) any person managing the building in accordance with the deed of mutual covenant (if any); or

(*b*) any other person authorized to convene such a meeting by the deed of mutual covenant (if any); or

(*c*) the owners of not less than 5% of the shares.

(2) At a meeting convened under subsection (1) a management committee may be appointed—

(*a*) in accordance with the deed of mutual covenant, if the deed provides for the appointment of a management committee; or

(*b*) if there is no deed of mutual covenant, or the deed contains no provision for the appointment of a management committee, by a resolution of the owners of not less than 50% of the shares."

Under section 2, an owner means, among other things, 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.

The statutory intent

Mr Kwok, counsel for the applicant referred to *Merrilong Dyeing Works Limited v. Chiu Shu Choi* [1984] HKC 535, in which the Court of Appeal dealt with the system of land holdings in Hong Kong in the context of a multi-storey building. The court held that when an owner is said to have ownership of one particular floor, all that it means is that he has an equal undivided part or share in the land and in the building as a whole.

While this is indeed the system of land holding in a multi-storey building in Hong Kong, the issue that has to be focused in this case is whether the Ordinance would only allow incorporation where there is a single tenancy in common. The preamble of the Ordinance states that the Ordinance is "to facilitate the incorporation of owners of flats in buildings or groups of buildings, to provide for the management or buildings or groups of buildings and for matters incidental thereto or connected therewith". The reference to "groups of buildings" was introduced in 1993 when the Ordinance was amended. Prior to that, the preamble merely mentioned about incorporation of owners of flats in multi-storey buildings. Clearly, the intention of the legislation is to ensure that incorporation of owners can be formed so as to provide better management for the buildings. In my view, this being the stated purpose of the Ordinance, in order for the applicant's argument to succeed, there must be clear and unambiguous provisions in the Ordinance itself that the owners of the Garden are unable to be incorporated. The Ordinance contains no provision which restricts incorporation to buildings built under a single piece of land or where there is only a single tenancy in common.

The absurd result

In my view, the definition of "owner" in section 2 does not mean that a management committee cannot be appointed for a residential development such as the Garden in which there is no single tenancy in common. All that section 2 does is to provide the qualification for being an owner. In other words, he must have an undivided share in land. However, there is nothing in section 3 which prevents the owners of a

development with multiple land holdings from agreeing to form a management committee. In fact, the reverse situation would create absurd results. Take the Garden as an example. There are 18 different lots of land, if the applicant's suggestion is correct, then it would mean that each building would have its own management committee and incorporated owners without a single management committee or incorporated owners managing the whole of the Garden. This is undesirable and cannot be the intention of the legislation. The absurdity is not merely in the number of management committees or incorporated owners but in substance, because without a single management committee or incorporated owners, matters relating to the Garden as a whole cannot be properly dealt by a single body. For this reason alone, one has to find against the applicant.

Who can convene the meeting?

Under section 3(1), three categories of person can convene the meeting :

(a) The person managing the building in accordance with the deed of mutual covenant.

(b) The person authorized to convene such a meeting by the deed of mutual covenant.

(c) The owners of not less than 5% of the shares.

The first two categories of person who can convene a section 3 meeting do not need to be owners.

Share of owners

Where the owners convene the meeting, they need to hold not less than 5% of the shares. "Share" is defined in section 2 as meaning the share of an owner in a building determined in accordance with section 39. Section 39 provides for the determination of an owner's share either in the manner provided in the deed of mutual covenant or, if there is no such deed or the deed does not contain any provision, then in the proportion which his undivided share in the building bears to the total number of shares into which the building is divided.

It can be seen that under section 3(c), there is no reference to undivided shares under the DMC. Each of the owner in the Garden has one undivided share in the land upon which the building is built. However, in matters such as management expenses, voting rights, the percentage required to exercise the power of appointment of a management committee under the DMC and other powers conferred to owners in the meetings of the owners, their share is by reference to the share of the owners in proportion to the number of flats owned by them in the property. In other words, each flat owner will have one out of 48 or 54 shares in the Garden (depending on whether the two other buildings in the Garden which has not been issued with the Certificate of Compliance are counted or not). Thus in section 7, payment of common expenses shall be borne and paid by the owners in proportion to the number of flats owned by them in the property. "Property" is defined as the 18 houses in the Garden. Under Clause 12.7, each flat owner shall be entitled to one vote in respect of each flat owned by him. Under Clause 12.11.4, a resolution in writing, signed by the owners who in the aggregate own not less than 95% of the total number of flats shall be as valid and effectual as it had been passed at a duly convened meeting of the owners. Under Clause 8.4, the first committee shall be appointed by an instrument of appointment signed by owners who own in the aggregate not less than 75% of the flats. Under Clause 10.1.2, the manager may continue for another three years after the first two years of appointment unless a notice of objection is signed by owners who own in the aggregate not less than 75% of the flats. Under Clause 12.2, meetings may be convened by the manager or the management committee of not less than 25% of the flat owners. Under Clause 12.4, the quorum in meetings are determined by the percentage of flat owners.

In the present case, the meeting was in fact convened by owners of not less than 5% of the total number of flats in the Garden. Given what I had said on the legislative intent, the owners were clearly able to convene and hold the meeting in which the Management Committee was appointed.

The building

As we had seen earlier, an owner means the owner of an undivided share in land on which there is a building. It is significant that the meaning of building in the Ordinance has an extended meaning. Under section 2, it means :

(a) any building which consists a number of flats comprising two or more storeys;

(b) any land upon which that building is erected; and

(c) any other land which

(i) is in common ownership with that building or land; or

(ii) in relation to the appointment of a management committee or any application in respect thereof, is owned or held by any person for the common use, enjoyment and benefit of the owners and occupiers of the flats in that building.

The extended meaning of "building" in (c)(ii) is particularly significant because it is specifically applicable to the appointment of a management committee. This is again one of the amendments introduced in 1993. Although for technical reasons one cannot simply substitute the words in (c)(ii) with the word "building" under the definition of an owner, in my view, the extended meaning of the word "building" clearly covers situations such as the present one in which all the other owners in the Garden would qualify as the owners of any one building. Because for the purpose of the appointment of a management committee, each lot in the Garden would have included the other land owned or held by any person for the common use of the owners and occupiers of the flats in that building. Hence the owners who can appoint the Management Committee are the owners of the 18 lots of land in the Garden.

In *Grace International Ltd v. Incorporated Owners of Fontana Gardens & Ors* [1996] 4 HKC 635 at 643, Le Pichon J (as she then was) agreed with the submission of counsel that the absence of common ownership and the existence of different DMCs appeared to be insurmountable obstacles for incorporation under the Ordinance. The learned judge, however, did not actually rule affirmatively on this issue. Hence her observation on the obstacles would not assist the applicant in this case.

The required majority

At a section 3 meeting, a management committee may be appointed either in accordance with the deed of mutual covenant if the

deed provides for the appointment of a management committee or if there is no deed of mutual covenant, or the deed contains no provision for the appointment of a management committee, by a resolution of the owners of not less than 50% of the shares. The percentage has since been lowered to 30% by Ordinance No.69 of 2000.

Under section 5(5)(a) of the Ordinance, at a meeting convened under section 3, each owner shall, save where the deed of mutual covenant otherwise provides, have one vote in respect of each share which he owns. The DMC of the Garden provides for one vote for each flat and that governs the voting at the section 3 meeting. In the present case, it is not disputed that owners of not less than 50% of the shares had voted in favour for the appointment of the Management Committee.

The applicant, however, argued that the required number of shares is 75% as required by the DMC and hence the Management Committee had not been properly appointed in this case. Clause 8.1 of the DMC provides that there shall be a management committee of the property. Clause 8.4 provides that the first committee shall be appointed by **an instrument of appointment signed by owners who own in the aggregate not less than 75% of the flats**. In my view, Clause 8.4 of the DMC does not fit into section 3(2) because the section requires the appointment of a management committee at a meeting, whereas Clause 8.4 provides for the appointment of the committee by an instrument of appointment signed by the owners.

Mr Kwok argued that the meeting can be adjourned for the instrument in writing to be signed. In my view, this is not what section 3(2)(b) intended. It clearly envisages the requirement of voting instead of what is contained in Clause 8.4. In my view, the situation is governed by section 3(2)(b). The appointment is to be made by the resolution of the owners of not less than 50% of the shares. The required votes had been fulfilled.

Nature of the committee

There is another reason why Clause 8.4 is not applicable because the committee appointed under the DMC is quite different from the management committee under the Ordinance. This can be seen from Clause 19 of the DMC which provides that if an Owners' Corporation of the Garden shall be formed under the Ordinance, "the Committee of the Owners' Corporation shall take the place of the Owners as the Committee

under this deed". This clearly envisages two kinds of bodies. Further, "management committee" is defined in section 2 of the Ordinance as a management committee appointed under section 3. Hence, unless the DMC specifically refers to the appointment of a management committee under section 3 of the Ordinance, the management committee referred to in the DMC is not the same creature as the one provided for in the Ordinance. As such Clause 8.4 is not relevant.

Mr Mok, counsel for the Land Registrar, had also referred to other arguments showing the difference between the management committee under the DMC and the statutory management committee. For example, a duty is imposed upon the statutory management committee to register the owners as a corporation. There is no similar requirement imposed on the management committee in the DMC. In view of what I had said, it is not necessary for me to deal with these other arguments.

Failure to consider objections raised by the applicant

The applicant further argued that the Registrar had failed to consider the objections raised by the applicant that there had been no or no sufficient verification of identity of those voting at the meeting who appointed the management committee.

The inquiry by the Land Registrar

After the meeting of 5 June 1999, the Management Committee on 12 July 1999 applied to the Land Registrar for the registration of the owners of the Garden as a corporation. The documents lodged for the application included the resolution for the appointment of the Management Committee and the affirmation of the secretary of the Management Committee, in which he stated that the provisions of sections 3 and 5 of the Ordinance had been complied with.

On 14 August 1999, the applicant's solicitors wrote to the Land Registrar stating that at the meeting no step was taken by any party to verify the identity of the voters at the meeting. Further, some of the owners who might have signed did not physically attend the meeting. The letter asked the Land Registrar to withhold the registration process pending the clarification of the controversy.

Upon receiving this letter, the Land Registrar enquired with the chairman of the Management Committee and also with the District

Office who had a representative present at the meeting. The response of the District Office was that there was no complaint or objection raised during the meeting. The lawyer for the chairman replied stating that there was no legal requirement for any formal verification of the identity of the voters. There was also no evidence indicating there was any doubt on the identity of the voters at the meeting. Furthermore, as the Garden is a small community consisting of 48 flats and the owners were well acquainted with each other, it was unnecessary to verify the identify of the owners. No complaints had been received from any of the owners for any procedural irregularity of the meeting.

The Land Registrar on 1 November 1999 responded to the applicant's complaint by referring them to these two letters. On 10 November 1999, the applicant's solicitors wrote again stating that the applicant "did query on lack of step/procedure taken on the verification of the identity of the voter at the meeting". The letter further referred to two lists of attendance of owners on the meetings of 24 February 1999 and 25 June 1999 respectively. The letters stated that "doubts arises as to the identity of the owners".

On 12 November 1999, the Land Registrar informed the applicant's solicitors that "It is not the stance of the Land Registrar nor his duty to attend and witness the owners' meeting, thereby assuring the regularity of all procedures. The District Officer (Yuen Long) and the convenors should be in a better position to take care of such matters." The Land Registrar further stated that since all papers in this case appeared to be in order, he shall have the application approved in the usual manner pursuant to section 8 of the Ordinance.

Further complaints

At the hearing, Mr Kwok further argued that the provisions of section 5 of the Ordinance had not been complied with. Specifically, section 5(2) deals with the mode of service of the notice of the meeting, it is submitted that there is no evidence showing that this provision had been observed. Section 5(4) requires the notice to specify the resolution which is to be proposed and in particular, the resolution for the appointment of a management committee. It is submitted that the notice merely set out the agenda which stated that :

(1) to form an incorporation of owners and appoint a management committee for the incorporated owners of the Garden; and

(2) to elect a chairman, secretary and other members of the management committee.

Section 5(5) states that the vote may either be cast personally or by proxy, appointed in accordance with paragraph 4(2) of the Third Schedule of the Ordinance. This paragraph provides that "the instrument appointing a proxy shall be in writing signed by the owner, or if the owner is a body corporate, under the seal of that body". It is submitted that the proxy is defective.

The failure to observe the provisions of section 5 had not been drawn to the attention of the Land Registrar before. It was only raised for the first time at the hearing. Mr Kwok's submission was considered on *de bene esse* basis. Mr Mok objected to the raising of these matters at this late stage.

Overview

In considering the submissions on procedural impropriety, it is necessary to take an overview of the matter. The applicant is not an owner of the Garden. After the meeting in June 1999, no owners had complained of any procedural irregularity of the meeting in which the Management Committee was formed. It was obviously the desire of the owners to form themselves into an owner's corporation. Under the DMC, the owners had expressly agreed that they are to be incorporated into an owner's corporation under the Ordinance. It is submitted that the applicant had a financial interest in this case because she was appointed to be the manager of the Garden and her status to challenge the decision arises because the owner's corporation had terminated her appointment. In my view, if the applicant was really concerned about whether the incorporated owners was properly formed or not, she could well have commenced proceedings after the meeting of 22 June 1999 to challenge the validity of the meeting. This she had not done. In my view, the Land Registrar had clearly considered the objections raised by the applicant's lawyer and made enquiries before deciding to approve the application for incorporation. There is no procedural impropriety.

In *Computer Land Ltd v. Registrar of Companies & Anor* [1986] HKC 49, Rhind J in considering the role of the Registrar of Companies held that it would not be reasonable to expect the Registrar to follow a procedure akin to a judge conducting a trial. As he had no

power of receiving evidence on oath or resolving conflicts in the evidence of competing parties, it is inconceivable that he is expected to do more than take note of the observations that an interested party choose to make to him.

In my view, this observation applies equally to the role of the Land Registrar in the present case. Furthermore, a judicial review is not concerned with the merits of the decision. Unless the Registrar has been specifically drawn to the complaints under section 5, otherwise, I fail to see how it can be said that he had failed to properly take such objections into account when granting the application. Under section 8 of the Ordinance, the Land Registrar, if satisfied that the provisions of section 3 had been complied with, shall then issue the Certificate of Registration. There is clearly evidence that the section 3 requirement had been complied with and it is clear that the Ordinance does not require the Land Registrar to consider the procedural matters relating to the notice and voting at meetings under section 5.

Furthermore, this is clearly a case where section 13 of the Ordinance comes into play. This section provides that the Certificate of Registration shall be conclusive evidence that such corporation is incorporated under this Ordinance. In *R. v. Registrar of Companies, Ex parte Central Bank of India* [1986] 2 WLR 177 at 192 to 193, Lawton LJ adopted the submission of counsel that the conclusive evidence clause excluded the admission of evidence but not the jurisdiction of the court to grant judicial review. In my view, this clause specifically excludes evidence relating to any alleged procedural irregularity of the meeting.

Mr Mok further referred to *Incorporated Owners of Million Fortune Industrial Centre v. Jikan Development Limited*, CACV 122 of 2000, the Court of Appeal had to construe section 6 and the Second Schedule of the Ordinance. Rogers JA stated that Clause 10 of the Second Schedule imposed mandatory requirements to ensure that the owners are kept informed of the transactions of the management committee, however, the failure by the chairman of the management committee to comply with this provision does not render the resolutions which had been passed invalid or unprovable, but it does open up parties perhaps to the sanction of applications for their removal and, perhaps, for the appointment of an administrator. In view of my decision, it is not necessary for me to consider whether the same approach should be adopted to a suggestion there had been breach of the provisions of section 5.

Conclusion

Accordingly, the application for judicial review is dismissed with costs *nisi* to the Land Registrar.

(P. Cheung)
Judge of the Court of First Instance,
High Court

Mr Tim Kwok, instructed by Messrs Quan & Co., for the Applicant

Mr Y.C. Mok, instructed by Department of Justice, for the Respondent

Mr Sammy Ho, instructed by Messrs Ivan Tang & Co.,
for the Incorporated Owners of Chun Fai Garden, as Observer