

Bills Committee on Building Management (Amendment) Bill 2005

Recovery of Management Fees

1. At the meeting of the Bills Committee on 6 June 2006¹, Members discussed, amongst other issues, the Law Society of Hong Kong's suggestion to disallow owners who default on payment of management fees to attend or vote at any general meetings of owners. Below are the responses of the Administration to these questions.

Suggestion of Law Society of Hong Kong

2. Law Society's suggestion was based on the judgment in *Rightop Investment Limited & Ors and Yu Tsui Sheung & Ors* (HCA 2691/2001). The deed of mutual covenant (DMC) of the building concerned in the case stipulates that the owner who has failed to make any payment payable by him under the DMC shall not be allowed to be present in person or by proxy or vote at any meeting and he shall not be counted for the purpose of any written resolution under the DMC. The plaintiff considered that many of the votes at the owners' meeting concerned were cast by delinquent owners and therefore should have been disqualified. The judge however did not accept the argument. It was held in the judgment that –

“It seems, purely as a matter of construction, that [the clause] was included in the DMC for the benefit of the body of owners or of a sub-class of owners in general meeting.

Enforcing prompt payment of management dues will always be a problem in a multi-storey building. To deal with this problem, it is hardly surprising that a typical DMC should stipulate that, if an owner wishes to have a say in the running of a building or part of it, he should pay his management dues. If an owner does not pay fees, he risks ostracism. The consequence of that is his views will be ignored and his vote disregarded. Provisions such as [the clause] give the general body of owners a stick to goad their members to payment.

But the body of owners, at its discretion, whether through goodwill or other similar reason, must always be able to waive the right to disregard a delinquent member's vote. *Chitty on Contracts* (29th ed.), I, §22-045 states –

¹ LC Paper No. CB(2)222/05-06(03) - The Administration's response to Views of the Professional Bodies in the Building Management Sector

"Where the terms of a contract include a provision which has been inserted solely for the benefit of one party, he may, without the assent of the other party, waive compliance with that provision and enforce the contract as if the provision has been omitted."

Given that [the clause] is solely for its benefit and a change of manager is an important decision affecting all commercial owners, the commercial owners in general meeting can decide to hear a non-paying member and to accept his vote. The "shall not" in [the clause] cannot have been intended as an absolute and immutable prohibition. Absent evidence of an objection from any commercial owner, I do not see how [the plaintiff] can object to the counting of votes from non-paying owners towards the resolution."

3. The judge also doubted whether the DMC provision meant to operate in a situation where amounts invoiced (say) only a few days before the owners' meeting remain outstanding. He commented that it is usual for commercial people to enjoy a credit period of about a month or so from invoicing before an account is treated as overdue.

Legal Advice

4. The Department of Justice advised that there is no express provision in the existing BMO that touches upon the power of an OC to pass a resolution to bar certain class of owners from attending and voting at owners' meetings. Section 34J(2) of the BMO, however, expressly provides that no provision in a DMC (whether such provision is of a procedural nature or otherwise) shall operate to prevent any business relating to the management of a building being conducted at any meeting by any owner or any person managing the building and any such provision shall be void and of no effect. Section 34J(2) serves to safeguard the rights of owners to take part in matters relating to the management of a building and this safeguard is paramount as any provision (not only those of procedural nature) in the DMC in contravention with section 34J(2) shall be void and of no effect. The legislative intent of the BMO, as conveyed in section 34J, is clear, i.e. the rights of the owners to participate in the business of building management is of paramount importance.

5. We have also sought advice from the Department of Justice on the suggestion that a new provision should be included in the BMO to empower the OC to pass resolutions to disqualify the non-paying owners

from voting at the OC meetings. Paragraph 3(5)(a) of Schedule 3 to the BMO provides that at any meeting of the corporation each owner shall, subject to the provisions of any instrument registered in the Land Registry, have one vote in respect of each share which he owns. Section 14(1) of the BMO further provides that a resolution of the OC shall be binding on all the owners. It is clear from the above provisions that the voting rights of property owners at the OC meetings amount to obligations and interest arising out of and incidental to the owners' shares in the building. Hence, whilst the voting rights are not properties as such, they are incident to the owners' property rights in their shares which are protected under Articles 6 and 105 of the Basic Law.

6. The Department of Justice advised that it appears that the (temporary) removal of voting rights at the OC meeting is unlikely to have the effect of extinguishing all the owners' legal rights in respect of their properties. Therefore, the proposal is unlikely to be regarded as a "deprivation" for the purpose of Article 105 of the Basic Law. However, the proposed measure is likely to be regarded as an "interference"/"control" of the properties which has to satisfy the "fair balance" test, should local court applies it in the light of European jurisprudence (i.e. whether it strikes a fair balance between the demands of the general interest of the community and the requirement of the protection of the owner's rights). In assessing the "fair balance" test in the present case, the Department of Justice advised that the following factors should be taken into consideration –

- (a) What amount of management fees and what length of period in default would trigger the application of the proposed measure?
- (b) For how long will the voting rights be taken away?
- (c) What procedures will be taken by the OC to collect the management fees from the owner before the OC applies the proposed measure?
- (d) Will the owner be disqualified from voting at any resolution of the OC or only in respect of certain specified resolutions (bearing in mind that a resolution of the OC may substantially affect the property rights of the owners and/or their financial contribution)?
- (e) Would the proposed measure be effective in achieving the objective of deterring non-payment of management fees? Even if this measure would be effective, is there any other effective

alternative measure of achieving the same objective?

7. In short, the proposal will raise an issue of property right protection under Articles 6 and 105 of the Basic Law and all aspects of the proposal have to be carefully considered in order to strike a fair balance.

Existing Provisions in the BMO

8. There are already a number of provisions under the BMO which assist an OC to collect payment from owners.

9. Section 22 of the BMO provides that the amount to be contributed by an owner towards the amount determined under section 21 shall be payable at such times and in such manner as the management committee may determine. Section 22(3) clearly stipulates that the amount payable by an owner under section 22 shall be a debt due from him to the corporation at the time when it is payable.

10. Under section 19 of the BMO, if a DMC provides that if an owner fails to pay any sum which is payable under the DMC, a person may sell that owner's interest in the land or register a charge against such interest in the Land Registry, then the corporation may, to the exclusion of such person, exercise such power of sale or register such charge in the same manner and subject to the same conditions as if it were the person referred to in the DMC.

11. Section 23(1) provides that if any amount payable by an owner under section 22 who is not occupying a flat remains unpaid for a period of one month after it has become due to the corporation, the corporation may by notice in writing addressed to the occupier of the flat demand such amount from the occupier, who shall thereupon be liable to pay the same to the OC. Section 24 provides that Part III of the Landlord and Tenant (Consolidation) Ordinance (Cap. 7) shall apply to an amount payable by the owner under section 22 or 23 as if the amount were rent payable to the OC as landlord of the owner's flat.

12. Section 25 of the BMO further provides that if an owner fails to pay any amount payable under section 22 within one month of it becoming due and a registered mortgagee of the flat in respect of which the owner is in default has paid such amount on the owner's behalf, such payment shall be recoverable by the registered mortgagee from the owner as if the amount of such payment formed part of the principal sum due

under the registered mortgage of the flat.

13. In most cases, the OC will file a claim to the Small Claims Tribunal (for claims up to \$50,000) or the District Court (for claims over \$50,000 but not exceeding \$1,000,000) for an order demanding payment of outstanding management fees from defaulting owners. The crux of the matter is for the OC to establish the liability of the defaulting owner. When a judgment is entered against the defaulting owner, various orders may be made to execute the judgment debt namely writ of fieri facias, garnishee proceedings, a charging order, the appointment of a receiver, order of committal, or writ of sequestration.

14. There are numerous precedents of OCs successfully using these channels to deal with defaulting owners. In particular, Members may like to note the judgment in *甄沾記大廈業主立案法團 訴 何桂儀* (DCMP 4124/2004), *Urban Property Management Ltd & Ors 及 Tsang Wing Lam* (DCMP 2185/2004) and *平安大廈業主立案法團 訴 姚賽清* (HCMP 520/2005), in which court orders were given for the sale of the flats of the owners concerned given their persistent failure to pay management fees.

Provisions in the Guidelines for Deeds of Mutual Covenant

15. There are also provisions in the Guidelines for DMC issued by the Legal Advisory and Conveyancing Office (LACO) of the Lands Department. They are set out below –

“Interest at a rate not exceeding 2% per annum above the prime rate from time to time specified by the Hong Kong and Shanghai Banking Corporation Limited and a collection charge not exceeding 10% of the amount due may be imposed on any owner failing to pay sums due under the provisions of the DMC within 30 days of demand and the amounts of such interest and collection charge plus any legal costs (on a solicitor and own client basis) involved in recovering them may be the subject of a charge on the owner’s undivided shares. All interest and collection charges received shall be credited to the management account.” (Guideline No.16)

“There shall be no provision in the DMC for interrupting the supply of electricity, water, gas or other utilities which are provided by public utility companies to any unit or to prevent access to the unit by reason of the owner of that unit failing to

pay any fees or to comply with any other provisions under the DMC.” (Guideline No.20(a))

“The manager may discontinue providing management services to owners who fail to pay fees or to comply with any other provisions under the DMC and the manager may, if the DMC so provides, register and enforce a charge against the interest of an owner who fails to pay any sum which is payable to the manager under the DMC.” (Guideline No.20(b))

16. There may be some harsher or stronger terms in older DMCs (i.e. before the first issuance of the DMC Guidelines in 1989) to deal with owners who default on payment of management fees. However, it is doubtful whether these provisions are enforceable. In this regard, Members may like to note the judgment in *Grace International Ltd and The Incorporated Owners of Fontana Gardens & Ors* (HCA 13338/1995) which concerns the validity of the power of the manager under the DMC to cut off an owner’s water supply for non-payment of management charges.

Administration’s Views

17. We do not think that the Law Society of Hong Kong’s suggestion of disallowing non-paying owners to attend or vote at any general meetings of owners should be adopted because –

- (a) There are already existing provisions in the BMO and the DMC Guidelines to deal with problems of non-payment of management fees.
- (b) While some old DMCs may provide for such a measure to deal with the problems of non-payment of management fees, it is clearly shown from the *Rightop* judgment (HCA 2691/2001) that such provision cannot have been intended as an absolute and immutable prohibition.
- (c) The judge has also commented in the *Rightop* judgment about the practical difficulties on a strict application of the provision. In the *Rightop* case, the owners’ meeting was held on 29 September 2000. The judge commented that it is conceivable that some owners owed fees for (say) the month of August or even September 2000, but were fully paid up otherwise. In such case, non-payment of August or September 2000 management fees by the date of the owners’ meeting might not constitute a "failure" to

pay triggering the sanction in the DMC. He doubted that the DMC clause was meant to operate in a situation where amounts invoiced (say) only a few days before the owners' meeting, remain outstanding.

- (d) The Department of Justice has advised that the proposal is not in line with the spirit of section 34J(2) of the BMO and will also raise an issue of property right protection under Articles 6 and 105 of the Basic Law. All aspects of the proposal have to be carefully considered in order to strike a fair balance.
- (e) The existing provisions in the BMO and the DMC Guidelines are all targeted directly at immediate payment by the owners. The Law Society's suggestion, however, is a very indirect measure in that the voting rights of the owner will be taken away (to make him lose his face), rather than requiring the owner to pay the management dues immediately. We do not see this as a very effective measure.
- (f) Most owners who do not pay management fees do not care about the management of the building. Taking away their voting rights at owners' meeting is hardly a strong stick for them.
- (g) There may be a valid reason for the owner concerned not to pay the management dues (e.g. whether a budget has been properly prepared, whether the management fees are calculated in accordance with the DMC, whether the renovation works concerned have been endorsed by a valid general owners' meeting, etc.). These concerns should best be discussed at the general meetings of owners. It will be unfair to these owners if they are denied attendance and voting rights at the owners' meetings.

Views Sought

- 18. Members' views are invited on the above.

Home Affairs Department
September 2006