Bills Committee on Building Management (Amendment) Bill 2005

Matters Arising from Meetings on 4 October and 10 October 2005

At the meeting of the Bills Committee on 4 October and 10 October 2005, Members raised a number of questions during discussion of LC Paper No. CB(2)1885/04-05(03) – *Response to Hon CHOY So-yuk's Letter of 25 May 2005* (i.e. LC Paper No. CB(2)1709/04-05(04) [1]) and LC Paper No. CB(2)2017/04-05(01) – *Alternative Dispute Resolution for Building Management Disputes*. Below are the responses of the Administration to these questions.

Power of the Chairman of a Management Committee

2. According to the BMO, the chairman of a management committee has the following powers/duties –

(a) convene meetings of a management committee (paragraph 8(1)(a), Schedule 2);

(b) preside over meetings of a management committee (paragraph 10(1)(a), Schedule 2);

(c) if he is the person presiding over the management committee meeting, have, in addition to a deliberative vote, a casting vote (when there is an equality of votes) (paragraph 10(3), Schedule 2);

(d) convene a general meeting of the owners' corporation (OC) at the request of not less than 5% of the owners for the purposes specified by such owners within 14 days of receiving such request (paragraph 1(2), Schedule 3);

(e) preside at meetings of the OC (paragraph 3(1), Schedule 3);

(f) if he is the person presiding over the owners' meeting, have, in addition to a deliberative vote, a casting vote (when there is an equality of votes) (paragraph 3(4), Schedule 3);

[1] Further to LC Paper No. CB(2)1709/04-05, the Hon Choy So-yuk has raised further questions in LC Paper No. CB(2)2017/04-05(03). The Administration's response is set out in LC Paper No. CB(2)2192/04-05(02).

(g) accept proxy instruments lodged within 24 hours before the owners' meeting (paragraph 4(3), Schedule 3);

(h) if he is the person presiding over the owners' meeting, certify the minutes of the meeting (paragraph 6(2), Schedule 3); and

(i) sign the income and expenditure account and balance sheet of the OC (section 27(1)).

3. While the chairman of the management committee is the ex-officio chairman of the owner's meeting, there is judgment[2] which clearly holds that the chairman has no "usual authority"（通常權限） to enter into contracts on behalf of the OC. It was held in the case concerned that –

> "The Second and the Third Schedules to the Building Management Ordinance, when read together, expressly provide that the powers and duties of the chairman of an incorporated owners are the convening and chairing of meetings, exercising a casting vote when necessary and signing minutes of meetings. In other words, the powers and duties of the chairman of an incorporated owners are limited to matters concerning meetings.
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> When all the above provisions are read together, I believe the highest authority of decision-making of an incorporated owners is vested in the general meeting of the owners, and next in the management committee. Individuals including the chairman of an incorporated owners do not have any authority to make decisions. Section 29 of the Building Management Ordinance provides that the powers and duties of an incorporated owners "shall be" exercised and performed on behalf of the incorporated owners by the management committee. The meaning could not be clearer. It means that an incorporated owners is under collective leadership, and the chairman is merely the chairman of meetings and not the leader or chief executive of a corporation."

4. The above ruling was referred to in a recent judgment of the Lands Tribunal[3], which further confirms that the highest authority of

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[2] *宜高物業管理有限公司 對 新蒲崗大廈業主立案法團* (DCCJ 14835/2000).

[3] *Fung Yuet Hing and the Incorporated Owners of Hing Wong Mansion, Lee Leng Kong and Wong Sik Cham* (LDBM 367/2004).

decision-making of a corporation is vested in the general meeting of owners, and next in the management committee. If the owners in the general meeting do not approve a resolution, the corporation and the management committee will not have the authority to carry out that resolution. The management committee cannot overrule a decision of the owners in the general meeting.

Appropriateness of the Chairman to Preside over Owners' Meetings when there is Conflict of Interest

5. Paragraph 3(1) of Schedule 3 to the BMO provides that the chairman of the management committee shall preside at a meeting of the corporation. Paragraph 3(2) further provides that if the chairman of the management committee is absent, the vice-chairman of the management committee (if any) shall preside at a meeting in his place or, failing him, the owners at a meeting shall appoint an owner as chairman for that meeting. There is no statutory provision stating that under what circumstances should the chairman of the management committee refrain from presiding over the owners' meeting.

6. It is useful to make reference to Table A in the First Schedule to the Companies Ordinance (Cap.32). Regulation 57 of Table A provides that the chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company, or if there is no such chairman, or if he shall not be present within 15 minutes after the time appointed for the holding of the meeting or is unwilling to act or is absent from Hong Kong or has given notice to the company of his intention not to attend the meeting, the directors present shall elect one of their number to be chairman of the meeting. Regulation 58 provides that at any meeting no director is willing to act as chairman or if no director is present within 15 minutes after the time appointed for holding the meeting, the members present shall choose one of their number to be chairman of the meeting. Neither are there any express provisions in the Companies Ordinance which state the circumstances under which the chairman of the board of directors should refrain from presiding over the shareholders' meeting.

7. Some Members were concerned that it may not be appropriate for the chairman of a management committee to continue to preside over the owners' meeting if he has conflict of interests in the agenda item concerned. Members were particularly concerned about the situation where the matter to be discussed at the owners' meeting is the dissolution of the management committee, appointment of an administrator, or the removal of the chairman from office.

8. A chairman of meeting should possess a sense of fairness and make his decision with strict impartiality. There is, however, no direct authorities on whether a chairman should vacate the chair if he is facing a resolution to remove him from office at the OC's meeting. It is up to the chairman to exercise his good sense of fairness and impartiality and decide whether he should vacate from the chair in such circumstances.

9. In actual practice, we have seen numerous examples where the incumbent chairman was requested to convene an owners' meeting under paragraph 1(3) of Schedule 3 to consider the dissolution of the management committee or simply his removal from office – and the resolutions were successfully passed. In fact, when the incumbent management committee retires from office under paragraph 5 of Schedule 2, there may also be the possibility that some owners may come forth to seek appointment to replace the incumbent chairman (who also seeks re-appointment at the same meeting). There is so far no insurmountable problem with the present arrangement.

10. That said, in the event of the chairman vacating the chair from an owners' meeting or if the owners so wish, the matter as to who is going to chair the meeting should be determined by the corporation in accordance with paragraph 7 of Schedule 3, which stipulates that the procedure at a general meeting shall be as is determined by the corporation. The existing paragraph 3(2) of Schedule 3 is not applicable as it is only applicable to situation where the chairman is absent. In this particular situation, while the chairman may not continue to chair the meeting, he will still be present at the meeting and can exercise his voting rights as an owner or member of the OC.

11. On disclosure of conflict of interests by a member of the management committee, please refer to paragraph 9 of LC Paper CB(2)2192/04-05(01)(revised) – *Matters Arising from Meeting on 14 June 2005*.

Minority Owners to Sue the OC or Members of a Management Committee

12. Members asked whether an individual owner could sue the OC or members of a management committee, and if confirmative, the circumstances under which an owner could resort to OC funds to meet the legal costs incurred to him suing individual members of a management committee for failing to perform his statutory duties and the

circumstances under which a chairman of a management committee or member could resort to OC funds to meet the legal cost of litigation involving that member in his capacity as chairman or member. Members asked whether such decision should be made by the OC concerned or by the court. Members also suggested that reference should be made to the company law.

13. Any members of an OC, i.e. any owner, could always apply to the Lands Tribunal for an order under section 31 of the BMO to dissolve the management committee and appoint an administrator. According to section 32, an administrator shall have all the powers and duties of a management committee and of the chairman, secretary and treasurer thereof. In *Tony Sai Kwong Chan and The Incorporated Owners of Great George Building and All Its Executive Members for 1997/99* (LDBM 194/1998), an owner successfully applied for an order from the Lands Tribunal to dissolve the management committee on the ground that it was no longer fit to hold office because it had allowed or caused to allow breaches of the deed of mutual covenant to take place causing damage to him as well as other owners and occupiers. In this case, the court ordered that the members of the management committee shall bear their own legal costs and the costs of the applicant owner on party to party basis. The court also ordered that the costs of the applicant owner on indemnity basis in excess of party to party basis be borne by the OC.

14. We have also conducted research into case law. It was held in an English case *Wallersteiner v Moir* (No.2) [1975]1 All ER 849 that it was open to the court in a minority shareholder's action to order that the company should indemnify the plaintiff against the costs incurred in the action. This indemnity arises out of the principle of equity – thus even if the minority shareholder fails in the action, he should still be indemnified by the company in respect of his costs, provided that he has a reasonable ground for bringing the action. As a general rule, the plaintiff should apply at the commencement of the action for sanction in order to be entitled to this indemnity. The *Wallersteiner* rule was referred to and adopted in a local case *Chung Sau Ling v Asia Women's League Ltd* [2001]3 HKC 410, where two minority shareholders claimed against a company and some members of the company in a derivative action. The Court of First Instance held that section 52A of the High Court Ordinance (Cap.4) gives the court wide discretion to deal with litigation costs. The jurisdiction of the court extends to the making of a prospective pre-emptive costs order in favour of minority shareholders. In accordance with the *Wallersteiner* rule, the discretion of the High Court may also be exercised in favour of minority shareholders.

Whether such discretion should be exercised by the court depends on the test that whether an independent board exercising the standard of care which a prudent businessman would exercise in his own affairs would have decided to bring the action. Moreover, the court will consider the wish of the genuinely independent shareholders, whether the action is for the benefit of the shareholders, and the impecuniosity or the financial strength of the plaintiff.

15. While there is no relevant case law in building management matters, we are of the view that the common law principles under *Wallersteiner v Moir* above is applicable to the context of a litigation against an OC. It will be at the discretion of the court whether to grant such an order regarding the award of costs. In this regard, section 12 of the Lands Tribunal Ordinance (Cap.17) gives the Tribunal jurisdiction to award costs to and against any party to any proceedings. Members may also wish to note in the case *梁淑兒 and 鄭沛濂* (LDBM 268 of 2003), both parties had declined the judge's invitation at call-over meetings to join the OC as a party. If either party in the case had accepted the judge's suggestion, the judge considered that an option might be to order costs to be paid by the OC.

16. As a related matter, Members may like to note the rule in *Foss v Harbottle*[4], which was held by the Lands Tribunal to be applicable to OCs under the BMO[5]. The principle under the case is that the majority have the right to rule a company and an action by a single shareholder on behalf of a company will usually not be entertained by the court. This rule applies whether the wrong is done by a stranger to the company or by a member of the board of directors. Exceptions to the rule are, amongst others, when the act complained of is *ultra vires* or those in control have not acted in accordance with the company's memorandum and articles, where a right has been infringed which affects all or a number of shareholders in a similar way, where the alleged wrongdoers are in control of the company, and where the same act is both a wrong done to the company and to the individual shareholder[6].

17. Having regard to the above, we consider that there are already

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[4] *Foss v Harbottle* (1843): Two shareholders in The Victoria Park Company, which was formed to buy land for use as a pleasure park, brought an action against the company's directors and other shareholders on the grounds that the defendants had defrauded the company in a number of ways, notably by selling land owned by some of the defendants to the company at an exorbitant profit. The action did not succeed since the court decided that the company should seek redress for any wrongs through the normal channel of a general meeting.

[5] *CHAU Chun-wai Against Incorporated Owners of Joyful Villas* (LDBM 177/1995).

[6] Please see Vanessa Stott, *Hong Kong Company Law* (8th ed, 1998), pp 161-166.

common law principles for the court to grant an order at the beginning of the trial to indemnify minority shareholders (in the context of an OC, the owners) the litigation costs. However, we would like to caution Members of the followings when interpreting such principles –

(a) Applying the rule in *Foss and Harbottle*[7], if the action of some individual owners or members of the management committee is detrimental to the OC and all owners, then it should be the OC, which is a legal entity having the right to sue, to bring an action to the court. This is reinforced by section 16 of the BMO which states that the rights, powers, privileges and duties of the owners in relation to the common parts of the building shall be exercised and performed by the corporation to the exclusion of the owners. Unless an individual's right is affected, it is more appropriate for the OC to be the plaintiff in court.

(b) If it is only the individual owner's right being affected, then there is no reason why the OC has to bear his legal costs.

(c) From our experience, many of the building management disputes are simply misunderstandings among neighbours living under the same roof. A loose interpretation of the *Wallersteiner* rule above might lead to a multiplicity of legal actions brought by individual owners (hoping that the OC will foot the bill). We do not think it is conducive to nurturing a harmonious relationship among property owners and occupiers.

(d) According to the Judiciary, some 80% of the building management cases in the Lands Tribunal involved unrepresented litigants. A loose interpretation of the *Wallersteiner* rule might lead to a multiplicity of actions brought by individual owners (hoping that the OC will foot the bill) against the OC or members of the management committee.

(e) It was held in a number of judgments[8] relating to building management that if one was seeking relief that would bind the OC, the proceedings should be brought against the OC (or at least as a Joinder) rather than any individual member of a management committee. This is especially the case when the court was asked

[7] It was held in *Chung Sau Ling v Asia Women's League Ltd* [2001]3 HKC that the application of the *Wallersteiner* rule is subject to the Foss v Harbottle rule.

[8] *CHAU Chun-wai Against Incorporated Owners of Joyful Villas* (LDBM 177/1995), *Wong Wai Chun and Shing Sau Wan* (CACV 173/2004).

to make orders that would affect the OC. It follows that if an OC is ordered to bear the legal costs of any individual owner for lawsuits brought against the OC, then it will create the ridiculous situation of the OC (who has to financially support the owner) suing itself (i.e. the same OC who is the respondent in the case). This is basically a lose-lose situation for all owners.

(f) As explained in paragraph 16 of LC Paper No. CB(2)2617/04-05(05) – *Procurement by Owners' Corporations and Managers*, we have received complaints from owners that the OC or the building manager has engaged lawyers in lawsuits without their prior knowledge. As the litigation fee could be a very huge amount, the owners have every right to know about and have a say on the procurement of the legal service. If an individual owner considered that a wrong is done to the OC which affects all owners, then he should raise this for discussion at the general meetings of owners and seek the OC's views for putting a case to the court. If it is the majority view that the case should not be put to the court, then we see no reason why the OC should be financially supporting this individual owner.

(g) There are judgments[9] in the Lands Tribunal where the court had ruled in favour of the owner suing the OC and that the OC had to bear the full or part of the legal costs of the owner.

Libel Cases

18. On whether it is feasible to provide for privilege which specifically applies to libel cases arising from discussion of affairs of OCs, please refer to paragraphs 35 – 37 of LC Paper No. CB(2)2617/04-05(01) – *Replies to Questions Raised by Hon Wong Kwok-hing*.

19. On whether the proposed Building Affairs Tribunal[10] could handle libel cases arising from disputes in building management and

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[9] *Tony Sai Kwong Chan and The Incorporated Owners of Great George Building and All Its Executive Members for 1997/99* (LDBM 194/1998), *Kentfund (Asia) Limited and The Incorporated Owners of Fu Kar Court* (LDBM 209/1998), *Chan Lit Hung對The Incorporated Owners of Belvedere Garden Phase II* (LDBM 577/2001), *Oscar Toys Manufactory Ltd 對 嘉威大廈業主立案法團* (LDBM 192/2002), *洗維平及另十八人 訴 萬豐大廈業主立案法團* (LDBM 282/2002), *The Incorporated Owners of Wah Yuen Chuen and Leung Ching Hong Norman* (LDBM 189/2004), *Gordon Tso & Co 對The Incorporated Owners of the Colonnades* (LDBM 254/2004), *Fung Yuet Hing and the Incorporated Owners of Hing Wong Mansion and Others* (LDBM 367/2004), etc.

[10] Please refer to LC Paper No. CB(2)2017/04-05(01).

maintenance, we have passed on the request to the Housing, Planning and Lands Bureau, which is now seeking public views on its second round of consultation on Building Management and Maintenance.

Regulation of Property Management Companies

20. There is at present no licensing/regulatory system for the property management industry in Hong Kong. In order to have a more informed deliberation on the matter, we will launch a two-phase study on the feasibility of introducing a regulatory scheme for the property management industry.

21. In the first phase of the study, we will –

(a) study the present situation of the property management industry in Hong Kong;

(b) study the overseas practices in regulating property management companies; and

(c) study the regulatory regime for other comparable industries/professions (like estate agents and travel agents) in Hong Kong.

22. We aim to complete the first phase of the study in mid-2006. We will, base on the result of this study, conduct a second stage of the study, objective of which will be to assess the need for a regulatory scheme, and if confirmative, the most appropriate one for the property management industry in Hong Kong.

Home Affairs Department
October 2005