IN THE LANDS TRIBUNAL OF HONG KONG

BM NO.:80 OF 1997

Between

U Wai Investment Company Limited	First Applicant
Kwai Fong Terrace Estate Management Company Limited	Second Applicant

And

Au Kok Tai	First Respondent
Ho Siu Ling	Second Respondent
Chan Kwok Cheung	Third Respondent
Chan Lap Tak	Fourth Respondent
Cheung Kam Hing	Fifth Respondent
Kam Yun Yin	Sixth Respondent
Kung Cheuk Yiu	Seventh Respondent
Siu Kam Hing	Eighth Respondent
Tam Kam Chun	Ninth Respondent
Wong Yee Ha	Tenth Respondent
Yee Mei Fong	Eleventh Respondent
Kunwich International Limited	Twelfth Respondent
Coexist Industrial Limited	Thirteenth Respondent

Coram: Presiding Officer, Deputy Judge Y W Yung

Date Of Handing Down Judgment: 21 October 1997

Judgment

Background

The respondents are members of the management committee of Kwai Fong Terrace ("the estate"). The estate comprises of three residential blocks and one commercial complex. The second applicant ("the Manager") is the manager appointed under the deed of mutual covenants. The first applicant is

the first owner and was the developer of the estate. The first applicant and the manager are associated companies. At a meeting of owners held on 6 October 1995, two resolutions were passed, one to form the management committee, and the other to incorporate the owners.. The validity of both resolutions was challenged by the first applicant. It took out an application in this tribunal (BM 158 of 1995) to have the resolutions declared void. For reasons best known to the parties, that application was not pursued diligently and after some delay the Land Registrar eventually issued the requisite certificate of registration for the incorporation of the owners on 12 May 1997.

On 24 April 1997, the first applicant together with three other owners issued a request to the chairman of the management committee for a meeting for the purpose of dissolving the management committee and appointing an administrator in its place. The first applicant then owned 204 shares. The aggregate of shares of those who requested the meeting amounted to 3626 shares which exceeded 5% of the total of 16500 shares into which the estate was divided into. No meeting was convened by the chairman. On 16 May 1997 and after the Land Registrar issued the certificate of registration, the same four owners re-issued the request to the chairman for a meeting to be convened for the same purposes.

On 30 May 1997, the chairman on legal advice rejected the request on the ground that the number of owners, being four, did not constitute not less than 5% of the total number of the owners. On 12 June 1997 the first applicant took out the present proceedings seeking, inter alia, an mandatory injunction compelling the chairman to convene a meeting in accordance with their request of 16 May.

On 10 June 1997, owners of forty six flats made a request to the chairman for a meeting for the purposes of terminating the contract with the manager and appointing another in its place. The total number of shares they then owned was 645 and was less than 5% of the total of 16500 shares. Nevertheless the management committee complied with the request and issued a notice for the meeting to be held on 1 August 1997. On 15 July 1997, the management issued another notice of the same meeting only this time it was included in the notice that the meeting was also convened pursuant to the resolution of the management committee on 6 June 1997.

On 24 July, the applicants applied to this tribunal for an injunction restraining the respondents from convening the meeting on 1 August. The application was unsuccessful and the meeting was held as scheduled on 1 August. At the meeting resolutions were passed to terminate the contract of the second applicant and to appoint another in its place. The applicants contended that certain proxies of corporate owners were not under seal and should not be counted. Without the votes of these proxies, the resolution terminating the contract would not be carried as the statutory minimum of 50% of the shares was not reached. They also contended that the meeting was not properly convened because the requisition for a meeting was not made by owners of 5% of the shares and that the resolutions passed at the meeting were null and void. At the hearing the applicants were given leave to re-amend their applications to include these causes of actions which only arose on 1 August 1997.

Issues

The central issue in this case is the correct interpretation of the provision in the Third Schedule of the Ordinance for requisite ownership for requesting meetings. The other issue is the validity of the resolutions passed at the meeting of 1 August. It turns on the question of validity of certain proxies, interpretation of the required majority of the resolutions.

Requisite Ownership For Requesting Meetings

Paragraph 1(2) of the Third Schedule of the Building Management Ordinance ("the Ordinance") provides:

> "The chairman of the management committee shall convene a general meeting of the corporation 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."

Section 2 defines **"owner"** as follows:

> (a) 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; and
> (b) a registered mortgagee in possession of such share.

The definition of **"share"** in section 2 is:

> "the share of an owner in a building determined in accordance with section 39."

Section 39 provides that:

> "An owner's share shall be determined: -
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> (a) in the manner provided in an instrument including a deed of mutual covenant (if any) which is registered in the Land Registry; or
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> (b) if there is no such instrument or the instrument contains no such 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.

The literal meaning of 5% of the owners must refer to the number of owners and not the share they own in aggregate. By sections 2 and 39 the owners' identities are documented and physical numbers can be ascertained. The only possible absurdity or ambiguity arises when we determine the legal meaning of total number of owners. Should a mortgagor and a mortgagee in possession of the same share be counted as two or as one? In the case of joint ownership of an undivided share, should the count of owners be as many as there are joint owners or just one? It would be absurd to count every co-owners. The Ordinance did not provide clearly what is the total number of owners. To this extent, the words "5%" of owners are ambiguous.

Of course, to interpret the words "5% of the owners" as meaning owners of 5% of the shares as argued by the applicants, would solve this problem. Indeed elsewhere in the Ordinance, whenever % of ownership is referred to, it is referred to as owners of x% of the shares. Such interpretation would certainly make the various parts of the Ordinance and schedules more consistent with each other. The question is what is the intent of the legislature. The court should not try to improve the legislation when interpreting a difficult part of the Ordinance. It must try its utmost to give effect to the legislative intent. If the legislature intended the words "5% of the owners" to mean "owners of 5% of the shares", it would simply use those words as it did in other sections and schedules. Not much, if any, in economy

of words or improvement of style is gained in using a different expression to mean the same thing. I am not convinced that it was the legislative intent that "5% of the owners" means "owners of 5% of the shares." The legislative intent was clear from the Ordinance itself and from the words used. The Chines text which is not a translation but is equally authentic. Mr. James To's remarks in the Legislative Council is of little assistance. The words used in the Chinese text are clear and unambiguous. Paragraphs 5(a) and (b) of the same schedule also contain similar expressions relating to quorums, "20% of the owners" and "10% of the owners". The corresponding Chinese text makes it even clearer and put it beyond doubt that the "%" refers to number of owners and not owners' shares.

As to the meaning of the total number of owners in the land, sections 2 and section 39 provide the solution. Section 2 provides that an owner must own **an undivided share.** The size of this undivided share varies from owner to owner and section 39 acknowledges this. In the instant case a typical small flat owner owns 12 shares. The total number of shares the estate is divided into is 16500. The size of this owner's **undivided share** is therefore 12/16500. If he acquires another flat, his undivided share would increase in size, for example, to 24/16500. However he would be counted only once in the determining the total number of owners for the time being despite the increase in size of his **undivided share.** What happens in this case is two undivided shares merge into one. The converse situation takes place when a developer starts to sell off his units. At the very early stage he owns the whole lot of the land. When he sells a flat to the first buyer, he would only retain a share of the land and the balance goes to the first buyer. After this first sale there would be two owners each owning an undivided share of unequal sizes in the land. As the developer continues to sell off his flats, his undivided shares diminishes in size while the total number of undivided shares so created increases. In the case of co-ownership of an undivided share, they would be collectively counted as one owner toward the total number of owners. The total number of owners envisaged in the third schedule must be the same as the **total number of undivided shares. One undivided share** of land has one single owner or a group of owners.

Therefore when provisions for % of owners in the Third Schedule are looked at in the context of the Ordinance, it can be interpreted in the above manner reconciling both the English and the Chinese text. There is no compelling reason to strain the meaning of the words in the English text and in the Chinese text the way submitted by the Applicants. On the proper construction of paragraph 1(2) of the Third Schedule, the requisite ownership to request a meeting is 5% of the total number of owners.

Validity Of 1 August Meeting

Owners of 46 flats requested the meeting. Looking at the deed of mutual covenants and the request form of these owners, I have no doubt these owners must exceed in number 5% of the total number of owners.

Even if I were wrong in interpreting provision in the Third Schedule for the requisite ownership, the meeting held on 1 August was still properly convened and valid on the ground that it was convened pursuant to the resolution of the management committee. I do not see any reason why the management committee could not convene the meeting pursuant to its resolution to be held on the same day.

Validity of Proxies of Corporate Owners/Validity of Resolutions.

Eleven instruments appointing proxies were not under the common seal of the company. All but one were affixed with a stamp impression in blue ink and a signature. Paragraph 4(2) of the Third Schedule requires that instruments appointing proxies must be under the seal of the body corporate. There is no requirement that it must be under the common seal of the company. Sealing a instrument is no more than a solemn expression of consent to the instrument. Attesting a rubber stamp to it with the authorised signature is sufficient sealing. Ten out of these eleven documents, I find, were under seal within the meaning of paragraph 4(2). The remaining one with no authorised signature could not be said to be under seal in the absence of evidence of the manner in which the stamp impression was affixed. That instrument related to the owner of flat 10H in Block 2 which carried 13 shares. Therefore the resolution voting for the dismissal of the manager still exceeds 50% of the shares and remains valid.

If, contrary to my finding, the ten instruments were not under seal, I would hold that the appointment of proxies could not be ratified after the meeting as the respondents purported to achieve in six cases. I accept that an instrument or an act of a body corporate, can be ratified in many situations. However Paragraph 4 of the Third Schedule requires two things before a proxy could be accepted. Firstly it requires a valid instrument and secondly it requires its deposit with the secretary of the management committee not less than 24 hours. I do not think the Secretary or any officer of owners corporation can extend the time for the deposit of the instrument. If the proxies were invalid, the resolutions would have been passed by a majority of less than 50% of the shares. In that event I would have also held that resolution was ineffective in terminating the contract of the manager without compensation. I do not think there is any merit in Mr. Ho argument that 50% of the shares means the quorum of the meeting. Though paragraph 7(1) of the Seventh Schedule is not phrased in the clearest way, "50% of the shares" must refer to the required majority of the resolution.

Conclusions

The chairman was right in not complying with the request of the first applicant for a meeting. The meeting on 1 August was properly convened and the resolutions passed are valid. In the premises I refused all the reliefs sought by the applicants and make a nisi order for cost against the applicants to be made absolute in 14 days. There be liberty to apply.

Y W Yung
Deputy Judge

Mr. Paul Carolan instructed by Richards Butler for the applicants
Mr. Albert Ho Chun Yan of Ho, Tse, Wai & Partners for the respondents