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Our Ref. No.: KKY/LR/BM/10-22307
Your Ref. No.:

20th September 2010

Lei King Wan (Management) Limited,
Shop GB21, Ground Floor,
45 Tai Hong Street,
Lei King Wan,
Sai Wan Ho,
Hong Kong.

BY FAX AND BY POST
(fax no.2567 5257)

Attn.: Ms. Fion Chen

Dear Sirs,

Re: issues arising from proposed renovation works – Lei King Wan

We refer to our previous email correspondence and the subsequent telephone conversation. We understand that we were asked to advise on various issues arising from the proposed renovation works, as follows :-

(A) Liability for repair and maintenance of external wall.

(B) Propriety of relocating public pipes from interior of a unit to the external walls.

(C) Propriety of removal of pipe duct and reinstatement of the areas concerned.

(D) Responsibility for repair and maintenance of interior part of flat roof.

(E) Manager's power to use the flat roof for temporary storage.

Please note as follows:-

A. Liability for repair and maintenance of external wall

At the time when the developer was still holding the undivided shares of the Retained Areas

1. Under clause 3.01 of the Deed of Mutual Covenant (we have taken the DMC for Site B for the illustration purpose and is hereafter referred to as "the DMC"), the developer is having the exclusive right to hold, use, occupy and enjoy the whole of the land except the Unit and the common areas. Reading this clause alone, "Retained Areas" (which includes external walls) should fall within area held by the developer, and the developer should be responsible for the repair and maintenance of the Retained Areas pursuant to section 34H of the Building Management Ordinance ("the BMO").

2. It is also noted that under clause 4.01(c) of the DMC, the Developer is also having the sole and absolute right to affix and maintain advertisements, aerials, lighting etc. on any part of the land including the external walls, and these rights may be exercised

whether with or without the manager's consent.

3. Despite the above provision, "exclusive right" may not be considered as the exclusive right in the context of 34H of the BMO (which cast upon a corresponding obligation on the developer to repair and maintain the external walls at its sole expenses), since under clause 8.01(bb) of the DMC, the owners covenanted not to erect advertising sign, hung clothing or other articles upon, inter alia, flat roof and external walls which in the opinion of the manager shall be undersirable or constitute a nuisance to other occupiers. This clause may be construed to mean that the manager may allow other owners to use the external wall.

4. In The Incorporated Owners of Hong Leong Industrial Complex & Anor. v HL Resources Ltd., CACV 189 of 2009, clause similar to clause 3.01 mentioned above can be found in the deed of mutual covenant of that building, and the appellant also relied on that clause in asserting the developer's liability under 34H of the BMO. However, the Court of Appeal took into account of the following and held that 34H of the BMO does not apply :-

   (a) In the said case, clause (j) of 4th Schedule to the deed of mutual covenant of that building provides "No owner other than the First Owner shall exhibit or paint or permit any person or persons to exhibit or paint any advertisement of any description or design whether or not illuminated or otherwise or affix any thing or structure on in or at any portion of the roof, the upper roof (if any) or the external walls of the said building".

   (b) On the other hand, the owners agreed not to put anything on the external wall except with manager's written approval and subject to such conditions as manager may approve.

   (c) Under clause 12(a) of the deed of mutual covenant in that case, the first owner or the manager may in writing allow owners to erect sign or advertisement on the external wall.

   (d) The Court of Appeal held that reading the above clauses together, the right of the developer is subject to anything which the manager may permit, and the manager may permit others to make use of the external walls. And because of the right of the other owners, it brings the developer out of section 34H's context.

5. In our case, although there is no clause to the effect that manager's approval has to be sought before putting up anything on the external wall, arguably clause 8.01(bb) of the DMC may be construed to mean that the manager may allow others to use the external wall by not taking action against those owners if in the opinion of the manager such user are not undesirable and would not constitute nuisance to other occupiers. The argument in Hong Leong Industrial Complex may apply as in our case as the other owners' right may not be weaker or less than those in that case, and the developer may not be caught by 34H of the BMO before the assignment of the Retained Areas to the manager.

6. Arguments in support of the developer's liability

(a) In the tenancy agreement of the flat roof in favour of the owner of the corresponding flat, the developer indicated it has exclusive possession of the same. This should also apply to the external walls which form part of the Retained Areas.

However, if the argument in paras.4 and 5 above subsists, i.e. the DMC does not confer exclusive possession of external wall on the developer, then the argument based on the terms in the tenancy agreement should not succeed.

(b) Reading 34H of the BMO disjunctively, the developer should be caught as a party who "owns" the Retained Areas.

However, please note the observations made by the Court of Appeal in The Incorporated Owners of Shatin New Town v. Yeung Kui, CACV 45 of 2009 in response to such argument, i.e. a party who owns a part must be entitled to the exclusive possession or have an exclusive right over that part. What the judge is saying may be that even if the words were to be read disjunctively, "owns any part" would include exclusive possession or exclusive use of that part, so that the developer is not caught by section 34H of the BMO.

7. On balance and on the basis of the decision in Hong Leong Industrial Complex's case concerning the other owner's right to use a part which was said to be exclusively owned by the developer under the DMC, although not entirely without any room of argument, we are inclined to the view that 34H of the BMO does not apply and the responsibility to repair and maintain the external wall should be determined in accordance with the DMC provision.

When the undivided shares of the Retained Areas were assigned to the manager

After the assignment of the Retained Areas from the developer to the manager in 1994, the manager holds the Retained Areas as trustee for all owners. Irrespective of the nature of the Retained Areas before such assignment, such areas, now being held on trust by the manager for all owners, will unlikely be construed as something other than in the nature of common parts. There should be little doubt as to the nature of the Retained Areas as common part after such assignment.

B. Whether relocation of the public pipes from the interior of a unit to the external walls constitute breach of DMC/BMO, both in cases where

(a) the developer is still holding the shares for Retained Areas; and
(b) in cases where the shares have been assigned to the manager

1. For scenario (a), if our observation in A above is wrong, and the developer is having exclusive right to use the external wall, then the manager cannot relocate the pipes to the external walls.

2. If our observation in A above is correct, i.e. the developer does not have exclusive right

over the external wall, then one should look at the DMC clause to see whether the relocation would constitute a breach of the DMC.

3. On the face of it, the proposed relocation would contravene at least the following DMC provisions :-

   (a) not to make external alterations in or additions to any part of the building or the land (cl.8.01(c))

   (b) not to make or permit to be made alterations to the existing design or external appearance of the façade or elevations of the buildings (cl.8.01(e))

4. Even if the proposed relocation is to be backed up by an owners' resolution (which we understand that such resolution is yet to be passed), from the legal point of view, the validity of the resolution may still be subject to challenge if the work contravenes the DMC provision.

5. Under cl.4.01(f) of the DMC, the developer has reserved (so long as it is still an owner of an undivided share) the absolute right to lay, remove and reroute pipes within the Land and to grant licence or permit any person to do the same. The developer's consent should be sought before the relocation of the pipes take place.

C. Whether removing the pipe duct and reinstate the area concerned as part of the flat would contravene DMC/BMO provision, say, by altering the plot ratio

1. Generally speaking, pipe duct inside a building would be excluded from calculation of the gross floor area, and the reinstatement of the pipe duct into part of the flat may have the following results :-

   (a) utilizing some of the remaining plot ratio of the site;

   (b) exceeding the permitted plot ratio

   However, as to whether the plot ratio would be affected and if so, the implications thereof, is a matter for architect to advise.

D. Responsibility for the repair and maintenance costs of flat roof already let to individual owner, and whether the manager may use the flat roof concerned for temporary storage during the renovation period

1. We have been provided with a sample tenancy agreement signed between the manager and the owner in respect of letting of flat roof of the corresponding flat. Under the said tenancy agreement (paragraph 2(b)), the tenant shall keep the structure, fabric and the interior of the flat roof including the flooring and interior finishes or other finishes or rendering to walls and floors in good, clean tenantable repair and condition.

2. In many cases of water leakage, the source was originated from a defective waterproofing layer. While a number of cases have held that waterproofing layer (roof

and external wall) is a common part (e.g. 梁有勝 v. 馮源禧 LDBM 249/2000 and Hong Leong Industrial Complex's case mentioned above) and the responsibility to repair and maintenance falls on all owners, it does not appear that there is any legal objection to impose such obligation on another by agreement. The question is, however, whether the said paragraph 2(b) in the tenancy agreement covers waterproofing layer. By construing the words literally, we are inclined to the view that waterproofing layer is not so covered with reference to the literal meaning of the words employed under the said paragraph 2(b) of the agreement.

3. On the other hand, if the water leakage problem was due to some other reason, e.g. structural part of the flat roof falls into disrepair, then the relevant owner should be caught by the agreement.

4. For the manager's power to use the flat roof for temporary storage, the most relevant clause is clause (j) in the Fifth Schedule to the tenancy agreement, which authorizes the manager to make use of all or any part of the Land and the building for carrying on building operations and for that purpose to utilize all or any part of the land and the building for storage and conveyance of building or other materials. Under the DMC (clause 9.07), the manager is empowered to enter into (with or without tools, equipment, etc.) and to remain therein each part of the buildings for the purpose of altering the common services and facilities or for the exercise and carrying out of any of its powers and duties under the DMC. Coupled with the Court of Appeal's decision in Citybase Property Management Ltd. v. Crystal Arm Ltd. (CACV 6 of 2007) in interpreting the manager's power of entry under a similar clause as including the right to place tools inside the property, the manager should be able to rely on the said clause 9.07 for temporary storage during the renovation period.

Should you have any queries, please do not hesitate to let us know.

Yours faithfully,

Li, Kwok & Law