

## The Devil of Common Parts

### Speakers

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## The Devil of Common Parts

### Outline:

- What is the common part
- Deed of Mutual Covenant
- Building Management Ordinance
- The Importance of the Assignment Plan
- Case Discussion

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## What is the common parts

Judging a certain part, structure or facility of a building as a common part from :-

- DMC ?
- Assignment plan ?
- Building Management Ordinance Cap. 344 [formerly the Multi-storey Buildings (Owners Incorporation) Ordinance Cap. 344] ?
- What about if there is a conflict between the assignment plan and DMC ?



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## Deed of Mutual Covenant

- One must carefully scrutinize the DMC since each DMC is drafted according to the characteristics of that particular building or estate and it turns on its own facts.
- Generalization may not be easy and appropriate
- We shall illustrate the relationship between DMC and BMO and assignment plan by a number of legal cases later



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## Deed of Mutual Covenant

There may be different kinds of common area within the same development:

- Car Park Common Area
- Commercial Common Area
- Residential Common Area
- Estate Common Area

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## Deed of Mutual Covenant

An extract from a genuine DMC of "Car Park Common Area":

All areas within the Car Parking Accommodation other than those specifically designated as "Residential Car Parking Spaces", "Retail Car Parking Spaces", "Disabled Car Parking Spaces", "Motorcycle Parking Spaces" and in particular, shall include but not limited to:-

- (a) shroff office.....
- (b) .....

but EXCLUDING the Estate Common Area, the Residential Common Area, Commercial Common Area and such areas within the Estate in respect of which the exclusive right and privilege to hold use occupy and enjoy the same belongs to any particular Owners.

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## Deed of Mutual Covenant

### Whereas:

- Residential Car Parking Spaces
  - Partly sold to individual owners as exclusive use
- Retail Car Parking Spaces
  - Commercial Common Areas as stipulated in DMC
- Disabled Car Parking Spaces
  - Estate Common Areas as stipulated in DMC
- Motorcycle Parking Spaces
  - Partly sold to individual owners as exclusive use

Who possess the right to use the "shroff office"?

The developer operating hourly or monthly parking for the residual (residential/motorcycle) parking spaces?

The "Manager" of retail premises operating hourly parking for retail space?

The "Manager" of the estate operating monthly parking for disabled space?

*The DMC is silent in this respect.*

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## Common misinterpretation of BMO

- Many building surveyors/facility management professionals will invariably go to Schedule 1 of BMO immediately to see whether their facility or part in question is a common facility/part or not, since Schedule 1 provides that common parts include :-



## First Schedule of BMO



- External walls and load bearing walls, foundations, columns, beams and other structural supports.
- Walls enclosing passageways, corridors and staircases.
- The roofs, chimneys, gables, gutters, lightning conductors, satellite dishes and ancillary equipment, aerials and aerial cables.
- Parapet walls, fences and boundary walls.
- Vents serving 2 or more flats.
- Water tanks, reservoirs, pumps, wells, sewers, sewage treatment plants, drains, soil pipes, waste pipes, channels, water-courses, gutters, ducts, downpipes, cables, conduits, refuse chutes, hoppers and refuse container chambers.

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## First Schedule of BMO



- Cellars, toilets, water closets, wash houses, bathhouses, kitchens and caretakers' flats.
- Passageways, corridors, staircases, landings, light wells, staircase window frames and glazing, hatchways, roofways and outlets to the roofs and doors and gates giving access thereto.
- Lifts, escalators, lift shafts and machinery and apparatus used in connection therewith and the housing thereof.
- Lighting apparatus, air conditioning apparatus, central heating apparatus, fire fighting equipment and installations intended for the use and benefit of all of the owners generally and any room or chamber in which such apparatus, equipment or installation is fitted or installed.

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## First Schedule of BMO

- Fixtures situated in a flat which are used in connection with the enjoyment of any other flat or other portion of the building.
- Lawns, gardens and playgrounds and any other recreational areas.
- Swimming pools, tennis courts, basketball courts, squash courts and premises containing or housing any other sporting or recreational facilities.
- Clubhouses, gymnasiums, sauna rooms and premises containing health or leisure facilities.
- Slopes, gradients and retaining walls including sea walls (if any) comprising or forming part of any land which is in common ownership with the building.



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## Definition of Common Parts under BMO

- But Schedule must be read in conjunction with part (a) of the definition of "common part" under s.2 of BMO :-



"common parts" (公用部分) means :-

- (a) the whole of a building, except such parts as have been specified or designated in an instrument registered in the Land Registry as being for the exclusive use, occupation or enjoyment of an owner;

and

- (b) unless so specified or designated, those parts specified in Schedule 1;

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## The Importance of the Assignment Plan

- “By not causing to be produced to the judge the instrument by which the shop was assigned to the 1st to 4th Defendants or their predecessors-in-title, the Plaintiff has not proved that that part of the external wall to which the awning was attached had not been specified or designated in it as being for the exclusive use, occupation or enjoyment of the owners of the shop for the time being.” (Per Hon Keith JA in the Court of Appeal)



(Wong Lai Kai v The Incorporated Owners of Lok Fu Building, Yuen Long CACV 189/99 and CACV 195/99)

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## The Importance of the Assignment Plan

- “... whatever the Deed of Mutual Covenant may have said about what parts of the building constituted the common parts, the Deed of Mutual Covenant could have been no substitute for what was actually assigned to the ... defendant or their predecessors-in-title.”

(per Hon. Keith JA of the Court of Appeal of HK in [Lok Fu Building case](#))

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## (1) Retaining Wall – The IO of Kimberley House v Peace Book Co Ltd

- No assignment plan showed the exclusive possession of the retaining wall
- Item 15 of the 1<sup>st</sup> Schedule of BMO :-

Slopes, gradients and retaining walls including sea walls (if any) comprising or forming part of any land which is in common ownership with the building

組成或形成任何土地的一部分的斜坡、緩坡及護土牆，包括海堤（如有的話），而該土地與建築物乃屬同一共同擁有權者。



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## (1) Retaining Wall



- According to the DMC, clause 4(s), the common parts shall include the following :-



(i) The entrances staircases landings passages and roof which are not included in any part of the said building exclusively owned by one owner or several co-owners as specified in the First Schedule hereto.

(ii) The sewers gutters drains water courses cable wells pipes pumps tanks air-ducts, central air-conditioning system planting wires sanitary fittings fire fighting and refuse disposal equipment and other apparatus and equipment used on installed for the benefit of the said building as part of the amenities thereof and not by any individual owners for his own use or purposes.

(iii) The lifts and the machine-room thereof.”



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## (1) Retaining Wall

- Clause 4(p) of the DMC stipulated that the Manager shall have power and authority to do all or any of the following :

(i) ....  
(ii) ....  
(iii) ....



(iv) To repair renew maintain service clean and paint the exterior of the said building or any of the common areas and common facilities (including the central air-conditioning system) and service thereof and for such purpose to engage and to enter into contracts with any person firm or corporation.

...

(ix) To prevent any person detrimentally altering or injuring any part or parts of the said premises or the said building, or any of the equipment, apparatus, services or facilities thereof.”

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## (1) Retaining Wall

- Here, it was rather clear that the DMC had not provided an exhaustive list of the common parts. It said that the common parts “shall include” the following. **It did not say that only the following shall be common parts.** When one asked whether the Retaining Wall was a common part, there was no express answer in the DMC.



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## (1) Retaining Wall



- The Plaintiff (i.e. IO) argued that when considering whether certain places was a common part, one should **only look at the definition in the DMC** and it would be inappropriate to immediately look beyond the DMC to apply the statutory definitions.
- The IO stressed that the **statutory definitions should not be so readily imported to the DMC** as that would affect its integrity as, after all, it was in effect a private agreement.

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## (1) Retaining Wall



- Decision of the High Court :-
  - (1) The IO's principle only holds if the DMC had provided a complete definition on the basic terms such as the common parts, then one might not need to refer to the BMO. However, the contents of each DMC must be considered individually; and
  - (2) One must bear in mind the purpose behind the legislation concerning the BMO. The legislature saw fit to implement the BMO obviously in view of the ambiguity and uncertainty found in many DMCs, especially the ones drafted a long time ago. The BMO was meant to facilitate the management of buildings and for matters incidental thereto. It must be the correct view that when a particular DMC was incomplete or unclear on the basic terms such as common parts, then the definitions in the BMO should apply.

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## (1) Retaining Wall – The IO of Kimberley House v Peace Book Co Ltd

Lesson learned : -

When

- (a) Assignment is silent on whether a particular area is owned by any owners; and
  - (b) DMC is also silent (incomplete or unclear) on whether that particular area is common area or not,
- then, Schedule 1 of BMO applies

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## (2) Water Pipe in the Floor Slab –

So John v Lau Hon-man

- In that case the court was seized of an appeal where a claim had been made for damages arising out of the escape of water from a pipe in the **common part** of a building which flowed into a flat belonging to another owner.



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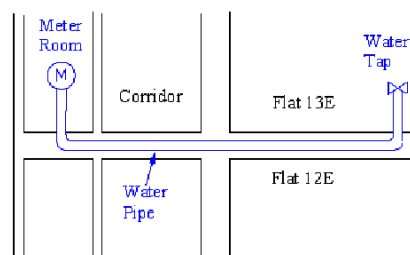
## (2) Water Pipe in the Floor Slab



- On the night of 7th/8th April 1992, a fresh water pipe laid in the concrete slab which served as ceiling for Flat E on the twelfth floor of Broadview Terrace, and floor for E on the thirteenth floor, burst, causing considerable damage to parts of the ceiling and walls of the lower flat. The pipe which burst was used exclusively for the supply of fresh water to Flat E on the thirteenth floor. That pipe had in fact been leaking and causing some damages to the Appellants' flat since about the end of February 1992. Water from the burst pipe continued to drip into Flat E on the twelfth floor up to about the 17th April 1992, the date the Respondents put a plumber to work on the problem.

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## (2) Water Pipe in the Floor Slab



Vertical Section

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## (2) Water Pipe in the Floor Slab

- "Common parts" are defined in Clause 5(1) of the D.M.C. as follows:-
- "(t) the common part services and facilities referred to in this Deed shall include the following :-



- (i) the outer walls, private roads, gardens (if any), children's play ground, staircases, landings, passages, entrance hall, lobby lifts and recreational facilities and any other space or area which are not included in any part of the said premises and the said Buildings exclusively owned by any owner or expressly reserved by the First Owner under this Deed.



- (ii) the sewers gutters, drains, water-courses, cables, pump, tanks, wires, sanitary fittings, fire fighting and refuse disposal equipment and fire-prevention apparatuses and security system used or installed for the benefit of the said Buildings as part of the amenities thereof and not by any individual owner for his own use or purposes."

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## (2) Water Pipe in the Floor Slab

- Rhind J in the Court of First Instance ruled that :-



- (a) the floor slab is a common part; and
- (b) the water pipes exclusively feeding outlets within Flat 13E are not common parts : "I am concerned with a space within that slab occupied by water pipes exclusively feeding outlets within Flat 13E. For howsoever long that pipe, serving that purpose, occupies that space, I am driven, in the absence of any authority to the contrary, to conclude that that **exclusive space cannot be anything but 'his part of the said buildings'**, whatever may be the position regarding the rest of the slab mass."

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## (2) Water Pipe in the Floor Slab

- The court of Appeal (HK) confirmed the decision of Rhind J.
- Principle applied by the Court of Appeal - (Wheeldon v Burrows (1877) 12 Ch.D. 31) :-
  - James LJ suggested that where water is brought to a house by a pipe laid under the land of another the pipe can be regarded as **a corporeal part of the house if used exclusively to serve the house.** [followed in Simmons v Midford (1969)]



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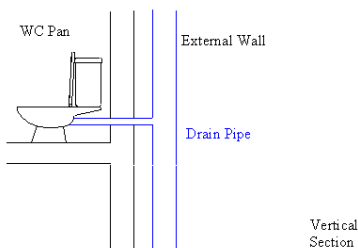
## (2) Water Pipe in the Floor Slab – So John v Lau Hon-man

Lesson learned :-

Whenever there is common main pipe / stack which goes through common areas and it branches out into individual flats serving each particular unit separately, that branch pipe is not a common part / area of the multi-storey building

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## (2) Water Pipe in the Floor Slab



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## (3) Shaft Walls of a Lift – Growth Bright Limited v The IO of Grandview Building

- The subject building Grandview Building, which is situated in Mongkok, has 22 floors and two separate ground entrances, one at Fa Yuen Street and the other at Nelson Street.
- On the G/F to the 3/F are shops and commercial units. The remaining floors from the 4/F to the 22/F contain residential units.



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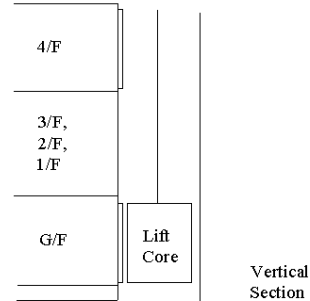
### (3) Shaft Walls of a Lift

- The building is served by 3 lifts.
- 2 of them run from the G/F entrance at Fa Yuen Street to the 22/F and serve the residential floors ("residential lifts").
- The residential lifts do not stop on the 1st, 2nd and 3rd floors.
- At these floor levels there are no openings in the lift shaft walls, and the lift shaft walls were made of two layers of building materials, the inner layer being a brick wall and the outer layer being a concrete wall.
- The remaining lift ("commercial lift") runs from the ground floor entrance at Nelson Street to the 1st, 2nd and 3rd floors. This lift serves the commercial units.



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### (3) Shaft Walls of a Lift – Growth Bright Limited v The IO of Grandview Building



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### (3) Shaft Walls of a Lift

- The appellant has a plan to break open shaft walls of a residential lift and install lift doors at the openings so that ..... the commercial floors can also use this lift. The proposed plan has been **approved by the BD** and the Respondent IO opposed the plan.



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### (3) Shaft Walls of a Lift

- The respondent (IO) resisted on the ground that the appellant has no such right under the Deed of Mutual Covenant ("the DMC").

The relevant clauses of the DMC provide as follows :

*\*3. Each owner shall hold his part of the said building and the said premises subject to and with the benefit of the following rights privileges and obligations namely :-*

*(a) Full right and liberty to go pass and repass over along the entrances, staircases, landings and passages in the said Building and the footpaths with the said premises and to use the lifts for all purposes connected with the proper use and enjoyment of his part of the said Building.*

*(e) The right for the owner or occupiers for the time being of any part of the said Building with or without servants, workmen and others at all reasonable times on notice (except in case of emergency) to enter into and upon the other parts of the said Building and the common areas thereof for the purpose of carrying out any work necessary for the maintenance and repair of the said Building or any part thereof causing as little disturbance as possible and making good any damage caused thereby.*

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### (3) Shaft Walls of a Lift

4. Each owner shall be bound by and shall observe and perform the following covenants provisions and restrictions :-

*(f)b. The Costs of operating servicing repairing and renewing the lifts serving the units on the 4th to top floors (inclusive of the said building) (hereinafter referred to as 'the main lifts') shall be borne and paid by the owners of units on the 4th to the top floors (inclusive) of the said building in proportion to the respective shares in the said land attributable to such units for the time being owned by them PROVIDED ALWAYS that the owners of the Restaurant, Ground Floor and External Wall shall be exempt from and shall not be liable to contribute towards such costs charged and expenses.*

*(m) The Ground, First, Second and Third Floors of the said Building shall be used for commercial purposes only and the units on the 4th to top floors (inclusive) shall be used for private residential purposes only."*

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### (3) Shaft Walls of a Lift

The appellant's case is that :-



- (a) clause 3(a) of the DMC gives the appellant the right to use the residential lifts for purposes connected with its proper use and enjoyment of the commercial units and for that purpose, the appellant has an implied right to break open the residential lift shaft walls and install lift doors there so that residential lift can also serve the commercial floors.
- (b) there is also a similar right under clause 3(e) to do the same
- (c) Or alternatively, although no openings had been made in the lift shaft walls on the 1st, 2nd and 3rd floors when the building was built, the building design caters for such openings to be made at some time after completion of the building.

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### (3) Shaft Walls of a Lift

- (d) the exemption afforded to commercial owners and owners of the external wall under clause 4(f)b from contributing towards the costs of servicing and renewal of the residential lifts does not prevent the appellant from using the residential lift "A" in the manner proposed. Its argument is that if lift A serves the 1st, 2nd and 3rd floors as well, it ceases to be a lift serving the 4th to the 22nd floors **only** and the exemption in clause 4 will no longer apply. In that case, the appellant as a user of one of the residential lifts will contribute to the lift expenses and this is not unfair to the residential owners.

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### (3) Shaft Walls of a Lift



- The Court of Appeal adopted the speech of Lord Hoffman NPJ in *Jumbo King Ltd v Faithful Properties Ltd and Others* (1999) 3 HKLRD 757 where he said that :-
  - *"The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. **And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve.** Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometime be careless and they may have said things which, if taken literally, mean something different from what they obviously intended.*

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### (3) Shaft Walls of a Lift

- *In ordinary life people often express themselves infelicitously without leaving any doubt about what they meant. Of course in serious utterances such as legal documents, in which people may be supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. **If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other.**" (Emphasis added)*



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### (3) Shaft Walls of a Lift



- The Court of Appeal held that following *Jumbo King* it requires that in construing clause 3(a) of the DMC, regard must be had to the factual and legal background and the practical object it was intended to achieve. The court agreed with the Lands Tribunal that when construing the intention expressed in clause 3(a), one has to take into consideration the physical state of the building in 1978 and the construction of the building that separated commercial use from residential use.

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### (3) Shaft Walls of a Lift

- The Court ruled that the building was so constructed that the residential lifts at the Fa Yuen Street entrance were not constructed with a view of being used by the commercial owners for commercial purposes including access to the commercial floors by visitors thereto.
- That no openings on the lift shaft walls on the commercial floors were made and the walls were constructed of double layers of material is indicative of the restrictive use of the residential lifts contemplated, which is the factual background against which clause 3(a) should be construed.

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### (3) Shaft Walls of a Lift

- Besides, clause 4(f)b of the DMC clearly draws a distinction between the obligations of the owners of the residential units and those of the owners on the commercial units regarding service and renewal of the residential lifts in the building. **The parties to the DMC must be taken to be aware of this distinction when they entered into the agreement.** The commercial owners, shop owners and external wall owners must have known of the exemption afforded to them under this clause because they were not the normal user of the residential lifts. It is implicit that they knew the residential lifts were not for access to the commercial floors or for other commercial purposes otherwise they would not have been exempted.



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### (3) Shaft Walls of a Lift

- It cannot be right that so long as the appellant is willing to contribute to the residential lift expenses, it can make openings on the lift shaft walls. It must be remembered that if the appellant has to contribute to the residential lift expenses as a result of the alterations the appellant made to residential lift A, taking away the exemption in clause 4(f)b, **other commercial or shop owners and the owners of the external wall would be similarly affected**. They would be forced to contribute at the whim of any owner for the time being of any of the units on the 1st to 3rd floors.

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### (3) Shaft Walls of a Lift



- Finally, the Court of Appeal ruled that the appellant's right to use the residential lifts is no more than for the purpose of inspection, maintenance and repairs of the service facilities installed on the upper floors and does not extend to using them for the appellant's commercial purposes.

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### (3) Shaft Walls of a Lift – Growth Bright Limited v The IO of Grandview Building

Lesson learned :-

In interpreting the DMC, if the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other.

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### (4) External Wall and Roof – Uniland

Investment Enterprises Ltd v IO of Sea View Estate & Another

- The issue for the determination of the court was whether the provisions of DMC as to **liability for maintenance of the outer wall and flat roof** had been rendered void by the combined effect of ss. 34H and 34C(2) of the Building Management Ordinance Cap. 344.
- s.34H of BMO provides :-
  - Where a person who **owns any part of a building**, has the right to the exclusive possession of any part of a building or has the **exclusive right to the use, occupation or enjoyment of that part**, as the case may be, but the **deed of mutual covenant in respect of the building does not impose an obligation** on that person to maintain the part in good repair and condition, that person shall maintain that part in good repair and condition. (Amended 69 of 2000 s. 14)
  - The obligation in subsection (1) shall be **deemed to be an obligation** owed to all owners of the building under the deed of mutual covenant.
- s.34C(2) of BMO provides :-  
In the event of any **inconsistency between this Part and the terms of a deed of mutual covenant** or any other agreement, **this Part shall prevail**.

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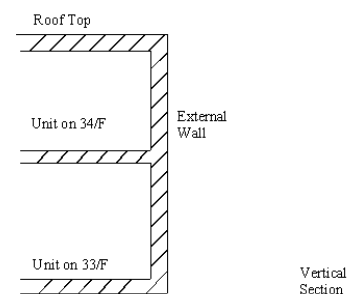
### (4) External Wall and Roof

- In 1998, the plaintiff (a subsidiary of the developer) was served with a building order requiring it to carry out the same repair works in respect of the outer wall and the flat roof. The plaintiff claimed against both defendants (including IO) for breach of the covenant to repair under the DMC.

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### (4) External Wall and Roof – Uniland

Investment Enterprises Ltd v IO of Sea View Estate & Another



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#### (4) External Wall and Roof

- It was not disputed that under the DMC, the plaintiff was entitled to the **exclusive possession, use and enjoyment of the outer wall and flat roof**, subject to certain easements and rights of the other owners, while the **management company was responsible for the maintenance** at no costs to the plaintiff, which costs were to be shared by the other owners of the buildings.

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#### (4) External Wall and Roof

- Held : giving judgment to the defendants.
- The purpose of s.34H of the BMO was not to make sure that 'someone' would maintain a particular part of the building, but to provide that **'that person' who owned any part of a building, had the right to the exclusive right to the use, occupation or enjoyment of that part, had the duty to maintain that part in good repair and condition.** The use of the words 'that person' was specifically aimed at redressing the situation where a developer created for itself, its successor, or anybody, in the DMC a right to exclusive possession of any part of the building without a corresponding obligation to maintain that part of the building.

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#### (4) External Wall and Roof

- s.34H did not admit of an interpretation that imposed only a statutory duty to maintain and repair upon the owner of a part of a building while permitting him to recover the cost of maintenance from all the other owners under the deed of mutual. The obligation to pay in discharge of one's duty went with that duty. To divorce from the obligation to maintain, the inherent obligation to pay for the costs of discharging that obligation would be straining common sense beyond its limits and render the obligation to maintain meaningless. Further, s.34H(2) deemed the obligation to be one owned to all the owners. The subsection would be rendered nugatory if the owners to whom the obligation was owed had to pay for the discharge of that obligation.

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#### (4) External Wall and Roof

- s.34H imposed on the plaintiff as owner, occupier or user, the obligation to maintain the outer wall and the flat roof, notwithstanding that under the DMC the obligation fell fairly and squarely on the shoulders of the second defendant and hence the first defendant upon its incorporation. The provision to that effect in the DMC was therefore void as being inconsistent with s.34H.

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#### (4) External Wall and Roof – Uniland

Investment Enterprises Ltd v IO of Sea View Estate & Another

Lesson learned :-

- If the assignment shows that a certain area/part of the building belongs to an owner, he shall be responsible for the repair of that area/part; and
- If DMC is inconsistent with the principle (a) above, the obligations by reason of the assignment shall prevail

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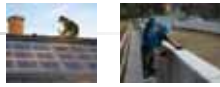
#### (5) Roof and its parapet wall – Shine

Empire Ltd v The IO of San Po Kong Mansion and Hutchinson Telephone Ltd & Others

- The 1st Defendant, the Incorporated Owners of the building ("the IO") started in 1995 to give licences to telecommunications companies (the 2nd to 6th Defendants) to install equipment on the roof.
- The Plaintiff subsequently learnt that the structures were telecommunications equipment and that the 1st Defendant had been receiving very substantial licence fees from telecommunication companies for the right to install their equipment on the parapet walls and roofs.
- The Plaintiff thus asked for the licence fees so obtained by the IO from the telecommunication companies.

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## (5) Roof and its parapet wall



- Under the DMC, the owner of the relevant shares is entitled to **exclusive possession of the roof**, subject to a right of way for management to have access to water tanks, cooling towers and pipes located on the roof. There are also two machine rooms and two lift shafts with machine rooms above them.

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## (5) Roof and its parapet wall

- The owner of those shares also has the right to build "one or more additional floor or penthouse ... and extend the lift to serve floor or penthouse ... (all of which shall be its exclusive property) if and when the plans thereof are approved by the Building Authority" - clause 19, DMC.

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## (5) Roof and its parapet wall

- The roof is bounded by parapet walls 255 millimetres (approximately 10 inches) wide. 16/800 shares had been specifically allocated for the roof, with exclusive possession of the roof reserved to the developer and its assigns.



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## (5) Roof and its parapet wall

- Is the Parapet Wall a common part ?
- The parapet wall was 255 mm and that the width of the exterior wall of the flat immediately below the parapet wall was 100 mm. The parapet wall was of different construction to the exterior wall beneath it and expert opinion asserted that it could be considered physically as being separate from the external wall.

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## (5) Roof and its parapet wall

- In the **Assignment of the roof** which was coloured pink, it referred to the **Building Authority plan**. The **measurements** on this plan exactly coincided with the measurements of the roof which included the width of the parapet walls.




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## (5) Roof and its parapet wall

- Finally, the judge said that it would not make much sense to reserve to oneself the exclusive right to the roof and not at the same time to include the parapet walls. Unless these walls were included, it would be unsafe to use the roof for most purposes. .... Thus, the judge ruled that the parapet wall is not a common part.

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## (5) Roof and its parapet wall

- Is the roof a common part of the building ? 
- Clause 19 of the Deed of Mutual Covenant reads:-

" 19. The **sole right and privilege to the use of the open yard space (if any) subject to clause 6 hereof and of the roof of the said building (other than the roof of the Theatre) shall be reserved to the Vendor of the building and/or its assigns** who may at their own cost and expense erect on the roof one or more additional floor or penthouse or attic and extend the lift to serve floor or penthouse or attic (all of which shall be its exclusive property) if and when the plans thereof are approved by the Building Authority.

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## (5) Roof and its parapet wall

*In the erection of any additional floor the Vendor of the building or its assigns and all contractors workmen artisans and labourers engaged by it shall have the full and uninterrupted right to use the staircases and landings lifts and other common passage-ways serving the said building and to store building materials required for such construction in the open yard of the premises and to erect and use a hoist for the purpose of conveying the said building materials to the said roof. **Only the Vendor of the building or its assigns shall have the right of access to or to use the roof of the said building** with or without such additional floor or floors as aforesaid save that the Manager for the time being of the said building and workmen and artisans employed by him may have access thereto for the purpose only of repairing cleaning and maintaining the water tanks cooling towers if any and pipes thereon."*

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## (5) Roof and its parapet wall

- The relevant part of the Assignment is in this form:-

*"AND THIS INDENTURE FURTHER WITNESSETH that in pursuance of the said Agreement (a) the Vendor in consideration of the grant next hereinafter contained HEREBY GRANTS unto the Purchaser full right and privilege to hold use occupy and enjoy all the main Roofs ..."*

Thus, Justice Mayo ruled that the plaintiff has the title to both the roof and the parapet walls, i.e. they are not common parts of the building.



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## (5) Roof and its parapet wall

Lesson learned :-

- (a) The assignment plan shall decide whether a certain area is a common area or not; and
- (b) Surveyors may need to see if the assignment plan tallies with the BD approved building plan to see if the parapet wall is owned by someone or it is a common part / area of the building.

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## (6) Part of the external wall to which an awning is attached — Wong Lai Kai v The IO of Lok Fu Building, Yuen Long (1999)

- On 22 July 1994 the plaintiff was walking on the pavement outside shop 5B on the Ground Floor of Lok Fu Building at Fuk Tin Path, Yuen Long ("the shop") when the awning erected outside the premises collapsed and he received quite serious injuries.
- The shop was **owned jointly** by D1 to D4 in the proceedings which were taken by the plaintiff to recover damages in respect of the injuries he sustained. D5 in the proceedings was the **tenant** of the shop pursuant to a Tenancy Agreement. D6 in the proceedings was the **incorporated owners** of the building.

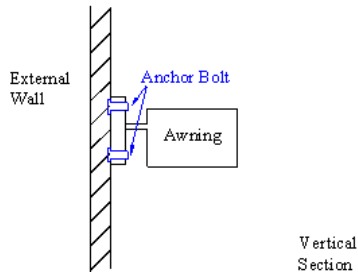
65

## (6) Part of the external wall to which an awning is attached

- One of the issues in this case was whether the external wall to this awning attached to before its collapse was a common part or not ?
- The Court of First Instance ruled that it was not a common part and it belonged to the owners of the shop
- The Importance of the Assignment : Ct. of Appeal
  - the question is whether the trial judge in the Court of First Instance was right to conclude that the external wall of the building at that height below the ceiling level of the shop was not part of the common parts of the building, but was part of the shop which the 1st to 4th Defendants had had the exclusive right to occupy before letting the shop to the 5th Defendant.

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## (6) Part of the external wall to which an awning is attached



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## (6) Part of the external wall to which an awning is attached

- Whether that part of the external wall was part of the shop which the 1st to 4th Defendants had had the **exclusive right to occupy** depended on what was originally **assigned** to them or their predecessors-in-title.
- Unfortunately, that **assignment** was not before the judge. What was before the judge was the **Deed of Mutual Covenant** defining the rights and obligations of the various co-owners of the units in the building as between themselves.
- But whatever the Deed of Mutual Covenant may have said about what parts of the building constituted the common parts, the **Deed of Mutual Covenant could have been no substitute for what was actually assigned to the 1st to 4th Defendants or their predecessors-in-title.**

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## (6) Part of the external wall to which an awning is attached

- The DMC does not help :-
  - cl. 4(f)(vi) it treats "all external parts of the .... building" as common parts, but that phrase has to be construed as subject to the external parts of the building which may have been assigned to the owners of the individual units.
  - cl. 4(n) does not purport to contain an exhaustive list of those parts of the building which are common parts. It begins: "The common parts .... referred to [in] this deed **shall include** ...." (Emphasis supplied).

Though external walls are not referred in clause 4(n), it is not conclusive.

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## (6) Part of the external wall to which an awning is attached

- Cl. 9 provides:-
  - "... each owner may place and erect in his own part of the .... building at his own expense any additions ... and may make alterations thereto and shall have the right to remove the same at his own expense."
- Cl. 9 merely permits owners of each unit in the building to erect structures in their own units, but it does not identify where those units end and where the common parts begin.



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## (6) External wall to which an awning is attached

- Cl. 10 provides:-
  - "Each owner of the .... building hereby covenants with the other .... (e) [n]ot to erect or affix or permit or suffer to be erected or affixed any signboard, signs, notices, posters, signal, advertisement, illumination flag or sunshade bracket fitting or thing to the exterior of the .... building or to common areas within the .... building or any part thereof or to any exterior wall door or window of the .... building **PROVIDED** that the owner or owners for the time being of the ground floor of the .... building shall have the right to erect or affix signboard to the exterior of his part of the .... building but the height of such signboard shall not exceed the ceiling level of such part of the .... building."

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## (6) Part of the external wall to which an awning is attached

- Cl. 10 permits owners of units on the ground floor to erect signboards on the exterior of the building, but it does not state whether that part of the exterior of the building on which signboards can be erected constitute the common parts of the building.
- Save for that, cl. 10 prohibits owners of all units in the building from erecting structures of all kinds on the exterior of the building or in any of the common parts of the building, but that does not equate every part of the exterior of the building with the common parts

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## (6) Part of the external wall to which an awning is attached

- Following *So John v Lau Hon Man (1993)*, the Court of Appeal ruled that :-
  - the part of the building to which the awning was attached should be treated as part of the shop in the circumstances of this case, and as such, the 1st to 4th Defendant as the owners or the 5th Defendant as the tenant had the **exclusive right to use, occupy and enjoy that part of the building**.
  - the part of the building to which the awning was attached, by reason of the use, occupation and enjoyment of the awning, realistically no one else including the 6th Defendant apart from the 1st to 4th Defendants as owners and the 5th Defendant as tenant of the shop, could possibly use, occupy and enjoy that part of the building.
  - The 1st to 4th Defendants or the 5th Defendant should be treated as having the **exclusive right to use, occupy and enjoy that part of the building**. In the circumstances, they had the obligation to maintain that part in good repair and condition, and the 6th Defendant should not properly be held responsible.

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## (6) Part of the external wall to which an awning is attached

Lesson learned :-

- (a) Assignment plan is most important; and
- (b) If it is not in contrary to DMC (or DMC is silent), the exclusive use principle of John So case applies

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## (7) Carpark – Jikan Development Ltd & Plotio Property and Management Co Ltd v The IO of Million Fortune Industrial Centre (2003)

This appeal is concerned with the management of a multi-storey industrial building in Tsuen Wan. A number of issues arose. Amongst them, one of the issues was :-

- Whether the right to assign a lorry parking space by the vendor (a subsidiary of the developer) to a purchaser can also include the assignment of the ramp leading to the carpark (which is the common area under DMC) together ?

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## (7) Carpark



Per Justice Litton NPJ of the Court of Final Appeal :-

- "As the lorry parking spaces had been bought by the (purchaser) and they had been designated as parking spaces on the ground by the developer, the assignment of the "exclusive right and privilege to hold, use, occupy and enjoy" those spaces was, of course, proper and effective : There is no conflict here with the DMC. But the deed of assignment purported to do more : It purported to convey to the (purchaser) the exclusive right to use the whole of the Common Parts (the ramp) : To the exclusion, that is to say, of the co-owners. This was nonsensical ..."*

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## (7) Carpark



- "The expression "Common Parts" as used by conveyancers in Hong Kong means those parts of premises designated for the common use of the co-owners, and persons deriving rights under them. But this is not the end of the story.*
- The DMC in a particular case may contain provisions whereby areas constituting the common parts might lawfully be re-designated for the exclusive use of individual owners. But where parts of premises have been designated as Common Parts it goes without saying that they cannot be arrogated unilaterally to the exclusive use of a sole owner."*

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## (7) Carpark

- This is an echo of s.34I Of BMO :-

- "34I. Common parts

(1) No person may -

- (a) convert any part of the common parts of a building to his own use unless such conversion is approved by a resolution of the owners' committee (if any);"



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## (7) Carpark – Jikan Development Ltd & Plotio Property and Management Co Ltd v The IO of Million Fortune Industrial Centre (2003)

Lesson learned :-

Once the areas have been assigned as the common areas/parts in the DMC, no person may convert any part of the common areas/parts of a building to his own use unless such conversion is approved by a resolution of the owners' committee.

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## (8) Loadbearing partition wall – Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

- An owner of 2 adjoining units, Flat C and Flat D, of Chi Fu Fa Yuen wanted to make an opening at the load-bearing wall so as to convert the 2 flats into a single unit.
- He engaged an architect and a RSE to make submissions/applications to the BD and to supervise such building work.

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## (8) Loadbearing partition wall

- Plans were approved by BD and consent to the commencement and carrying out of building works was granted.
- During the construction work, excessive noise was emanating from the flats and his neighbours complained to the Property Manager.



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## (8) Loadbearing partition wall

- District Councilor, the police and many residents of that block negotiated with the owner's contractor to stop demolishing the structural partition wall, but in vain.
- Solicitors of the Property Manager demanded the wall to be reinstated, alleging that such removal of any portion of the said wall was a breach of the DMC and s.341 of the BMO.

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## (8) Loadbearing partition wall

### DMC :-

- Clause 5 of the DMC provides that:-
  - "The owner or owners shall at all times hereafter be bound by and shall observe and perform the covenants provisions and restrictions contained herein and in the **Second Schedule** hereto."



Paragraph 4 of the **Second Schedule** of the DMC provides that:-

- "Save as provided in Clause 16(d) hereof, **not to make any structural alteration** to any flat or shop of which he is the owner which may damage, or affect or interfere with the use and enjoyment of any other part of any building on the Estate whether in separate or common occupation or use, **nor cut, injure, damage, alter or interfere with any part or parts of any building in common use** or any of the sewers, drains, water-courses, conduits, pipes, cable, wiring, fixtures, equipment apparatus or services of any building on the Estate."

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## (8) Loadbearing partition wall

### Clause 17(b) of the DMC provides that:-

- "The **House Rules** set out in the Third Schedule hereto shall come into force on the date of these presents and shall remain in force until expressly revoked or amended by the Company. ... Such **House Rules shall be binding on all the owners** and may be enforced as herein provided."

Paragraph 4 of the **House Rules** provides that:-

- "**Not to make any structural alteration** to any flat or shop of which he is the owner which may damage, or affect or interfere with the use and enjoyment of any other part of any building on the Estate whether in separate or common occupation or use, nor cut, injure, damage, alter or interfere with any part of parts of any building in common use or any of the sewers, drains, water-courses, conduits, pipes, cable, wiring, fixtures, equipment apparatus or services of any building on the Estate."

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## (8) Loadbearing partition wall

- Clause 20 of the DMC provides that:-
  - "Each owner may place in his own flat or shop at his own expense any additions, improvements, fixtures, fittings and decoration Provided the same may be installed fixed and removed **without structural damage** to or interference with the enjoyment of any of the buildings on the land or any parts thereof or any of the services apparatus and equipment of any of such buildings and each such owner shall have the right to remove the same at his own expense"



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## (8) Loadbearing partition wall

- The owner argued that according to the Code of Measuring Practice (1999) issued by the HKIS, the saleable area contained within the enclosing walls of an unit should be measured up to the exterior face of an external wall or "the centre line of a separating wall between adjoining units".

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## (8) Loadbearing partition wall

- One of the main issues was : whether the wall is a common part of the building ?
- Held :-
  - Since there is no definition of "common part" or "common area" in the DMC; and
  - There is no assignment designating the wall is for the exclusive use, occupation or enjoyment of any owner,

therefore, Schedule 1 of BMO, namely "load bearing wall" is applicable.



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## (8) Loadbearing partition wall

- HH Judge Wong rejected such arguments of saleable area.
- He then ruled that the partition wall is a common part of the building and the owner has breached the DMC and s.34I of BMO.
- Though he also agreed that the opening at the wall, the wall and the building was still structurally safe, he considered the real question should be whether the opening has damaged, affected or interfered with the use and enjoyment of the building.
- Injunction was granted to reinstate the wall



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## (8) Loadbearing partition wall – Chi Fu Fa Yuen Ltd v Cho Wai Man Raymond (2007)

Lesson learned :-

- (a) The saleable area argument would not be accepted by the court;
- (b) The structural safety argument would not support the demolition of the "common" partition wall; and
- (c) The BD approval also does not support the owner either.

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## Conclusions

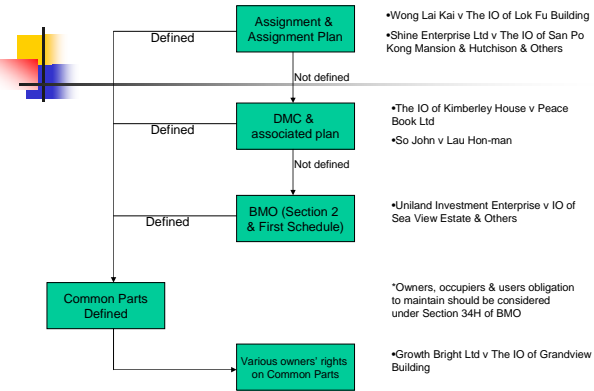
When determining whether a certain area/part is a common area/part of the building, one should :-

- (a) study the assignment and its plan. If it is within the "coloured pink" area, that area/part is not a common area/part; and the liability of maintenance goes with the ownership even though it is in conflict with DMC (s.34H & s.34C(2) of BMO)
- (b) If there is no ownership from the assignments, study the DMC and its plan;
- (c) If the DMC is silent, the principle of **So John** case applies;
- (d) In interpreting the wording of DMC, **Jumbo King** principle applies
- (e) If both the ownership under assignments as well as the DMC are silent, and **So John** principle inapplicable, Schedule 1 of BMO applies; and
- (e) An area originally allocated as common area/part cannot be assigned further without the consent of all the co-owners (Jikan case). This is in line with s.34I of BMO



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Recommended Procedures in judging Common Parts of a building



*Legal advice should always be sought whenever in doubt*

The Devil of "Common Area"

Q & A