For discussion
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Legislative Council Panel on Home Affairs
Subcommittee on Review of the
Building Management Ordinance (Cap. 344)

Purpose

This paper examines a number of issues raised at previous meetings of the Subcommittee on Review of the Building Management Ordinance ("the Subcommittee") of the Legislative Council Panel on Home Affairs concerning building management, including:

(a) tenure of service of the first management company of a new building;
(b) allocation of undivided shares and management shares between owners; and
(c) personal liabilities of members of management committees.

Tenure of service of the first management company of a new building

2. According to paragraph 8(a) of the current Guidelines on Deeds of Mutual Covenant ("the DMC Guidelines"), the initial period of management by the first manager should not exceed two years. The intention of this guideline is to ensure that there would not be a management vacuum during the initial two years' period when the owners of a new private building have yet to organize themselves for the purpose of managing the building. The underlying assumption is that the re-appointment or otherwise of the manager after the initial two years' period should be decided by the owners themselves after they have formed an owners' committee under the Deed of Mutual Covenant (DMC) or an Owners' Corporation (OC) under the Building Management Ordinance (BMO) for the purpose of managing their own building. The

Subcommittee expressed concern that in practice, many management companies simply carry on providing their services for the buildings concerned after the expiry of the initial period without being subject to any review mechanism. Our legal advice is that in the absence of any specific provision for re-appointment of the same management company in the relevant DMC, the initial management company's appointment could continue after the initial period. However, the appointment can be terminated by an OC in accordance with paragraph 7 of the Seventh Schedule to the BMO, i.e. by a resolution of the owners of not less than 50% of the undivided shares, who pay or who are liable to pay the management expenses relating to those shares.

3. We considered the option of including a provision similar to paragraph 7 of the Seventh Schedule to the BMO in the DMC Guidelines or in the BMO specifying the condition for re-appointment of the first manager. We are of the view that it is inappropriate to do so. The reason is that if the re-appointment is to be subject to a resolution of the owners of not less than 50% of the shares (same as in the case of the termination of the manager), it may be more difficult to renew the first manager's appointment than to terminate it, bearing in mind that only those owners who are dissatisfied with the manager's performance would be more willing to attend the general meeting. A management vacuum could arise if there were insufficient owners to pass a resolution for re-appointment of the first manager. Neither do we consider it appropriate to reduce the percentage of shares to facilitate the re-appointment since a resolution by the owners of less than 50% of the shares represents a minority view only. On balance, we propose to maintain the present arrangement, i.e. to let the first manager's appointment continue after the initial period of two years until it is terminated.

Allocation of undivided shares and management shares between owners

4. The Subcommittee raised concern about cases of "unfair" allocation of undivided shares and management shares between the owners of residential portions and owners of non-residential (or

commercial) portions in a building. For some buildings, voting rights are determined on the basis of undivided shares while management expenses are calculated on the basis of management shares. This has given rise to the problem of disproportionate distribution between voting rights and management liability whereby residential owners are shouldering more management expenses while possessing less voting rights, whereas non-residential owners (invariably the developers) hold more voting rights but shoulder less management liability.

5. Research into the relevant provisions of some existing DMCs reveals that the above problem stems mainly from the adoption of different bases for allocating undivided shares and management shares in the same building. In some cases, undivided shares have been allocated on a "value" basis, while management shares have been allocated on a "gross floor area (gfa)" basis. It follows that those premises with a higher value have been allocated more undivided shares, while those premises with a larger size have been allocated more management shares. Since the market value of non-residential or commercial premises tends to be higher (although their floor area could be smaller when compared with the residential premises), owners of non-residential portions (usually developers) could hold more undivided shares and hence greater voting rights but less management shares, hence paying less management expenses. On the other hand, owners of the residential portions could, by virtue of the larger floor area and lower market value of their premises, hold smaller undivided shares (hence less voting rights) but greater management shares (hence paying higher management expenses).

6. We are of the view that the above disproportionate distribution of undivided shares and management shares between the residential and non-residential portions in a building or development would not arise if both types of shares are to be allocated on one and the same basis. We therefore propose to amend the DMC Guidelines to require both the undivided shares and management shares in a building to be allocated on the basis of gfa, rather than "value" , on the following grounds:

a) The market values of different premises or different types of

premises may change over time. Undivided shares allocated on the "current value" basis therefore cannot reflect the actual value of the premises or the actual relative values between different premises at different times. On the other hand, undivided shares allocated on the gfa basis reflect the constant relative sizes between different premises. Moreover, the size of the premises is a major determinant of its value;

b) It is equitable that those owners who use more common areas and facilities should be allocated more management shares and hence pay more management fees. It follows that those paying more should have a greater say in management. However, in the absence of a practicable basis to assess the frequency of use, gfa should be the most objective criterion for the allocation of management shares; and

c) If both the undivided shares and management shares are to be allocated on the basis of gfa, they would be in proportion. It would no longer be necessary to cap the ratio between undivided and management shares.

Personal liabilities of members of management committees

7. Under the existing BMO, the liability of an OC should normally not be transferred to an individual owner or member of a management committee, except in those situations specifically set out in provisions relating to the responsibilities of members of a management committee, or under section 17(1) of the BMO.

8. The Subcommittee was concerned whether an individual member of a management committee, who was being sued solely on the ground that he was a member of the management committee, could apply to strike out legal proceedings under the existing BMO. We have sought legal advice in this respect and the advice is as follows:

(a) if proceedings are brought against an individual member of a management committee in the Lands Tribunal, such a member can apply under rule 11 of the Lands Tribunal Rules (Cap. 17 sub. leg.) to have his name struck out from the proceedings by relying on the authorities of Millap Ltd. & Others v The Incorporated Owners of Fanling Centre & Others (LDMM 260 & 360 of 1999) and 葉大永建築師有限公司對金明閣業主立案法團及黃文賢 (CACV 143/99); and

(b) if proceedings are commenced in the Court of First Instance, the member of the management committee can apply under Order 18 Rule 19 of the Rules of the High Court (Cap. 4 sub. leg.) for an order that those parts of the pleadings relating to him be struck out on the ground that it discloses no reasonable cause of action or otherwise it abuses the process of the Court.

It follows that there is already an established "case law" basis for an individual member of a management committee to apply to strike out legal proceedings brought against him.

9. In view of the Subcommittee's concerns, we have explored the possibility of making the legislative intent clear by adding express provisions to the BMO. One option is to specify in the BMO that individual members of an OC's management committee shall not be held personally liable for an OC's collective decisions made under the BMO which are neither ultra vires nor tortious solely on the ground that they are members of the OC's management committee, except situations covered in specific provisions of the BMO relating to individual members' responsibilities, such as sections 11(3), 12(4), 27(3), 36, 40(A)(2) and 40(B)(2). With such express provisions in place, when a management committee member is being sued on account of the OC's collective decisions solely on the ground that he is a member of the management committee, he can rely on these statutory provisions (instead of case law) as the basis for applying for a striking out order in the courts.

10. While these statutory provisions would make the legislative

intent clear and could form a basis for striking out legal proceedings brought against a management committee member, it could have the effect of restricting the circumstances where a management committee member could apply for a striking out order, which otherwise may be available under case law. This is because "whether a person is being sued solely on the ground that he is a member of the management committee" could become the only factor which the courts would take into account in determining whether to grant a striking out order. In contrast, the courts may consider various factors developed through the evolving case law if there is no relevant express statutory provisions under the BMO.

11. We propose to further consider the pros and cons of this option before coming to a conclusion.

Views Sought

12. Members are invited to comment on the above proposals and viewpoints.

Home Affairs Bureau
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