considerable in circumstances where the strength of the case hinges upon oral testimony. In such cases, much depends upon the credibility of the witness, which is a highly unreliable factor. Nevertheless, a surprising number of building management disputes rest on such evidence, especially where the manager claims that an owner has broken a covenant in the DMC.

Even if we assume a strong case, such as where there is a clear breach of duty which can be established, the case may be lost on a technicality, or the desired remedy may not be available.[12]

The remedy may be granted but the costs and effort of enforcing it against an uncooperative person may be prohibitive. Even if costs are awarded, they may not be recoverable because the defendant lacks the means to pay. These are just a few of the traps for the unwary.

If we take a long-term view, it is clear that court-imposed solutions are a poor substitute for cooperation, agreement and proper management. The court is ruling on a relatively specific issue, which separates the parties at a particular point in time. Other problems may emerge later. If these cannot be resolved without going to law, owners and occupiers will find life intolerable. Despite this, today's well-informed and well-educated owners are often not deterred from asserting their rights through the risk of bitterness, disharmony and disruption which may result from legal proceedings. Some buildings seem eternally beset by problems.[13]

Non-management

Significant disagreement, a high level of uncertainty and the lack of an effective enforcement machinery may make the most straightforward decisions difficult. One consequence of this is that necessary work does not get done, or is postponed until criminal sanctions are threatened or taken by the authorities. As we shall see, the long-term effects of a strategy of non-management may be financially disastrous.

12 For example, *Guardian Property Management Ltd and Incorporated Owners of Greenville Gardens of Shiu Fai Terrace v Lui Man Ho* [1998] 2 HKC 244, where the incorporated owners sought an injunction, but were granted only a declaration and costs — see Ch 5 for more detail.

13 *Pearl Island* is a case in point. See *Pearl Island Hotel Ltd v Incorporated Owners of Pearl Island Villas Eastern Block (Block B) and Incorporated Owners of Block F1 to F7 of Pearl Island Holiday Flats* (HCA Nos A1628 and 7777–8 of 1987, unreported); *Pearl Island Hotel Ltd v Li Ka-yu* [1986–1988] CPR 73; *The Incorporated Owners of Blocks F1 to F7 of Pearl Island Holiday Flats v Fullwill Property Management Ltd* (2000) LDBM 273 of 2000 and LDBM 130 of 2001 (on appeal CACV 191 of 2001). See also *Holiday Resorts (Management) Co Ltd v The Incorporated Owners of the Sea Ranch* (2001) CA 4978B of 1998; and *Holake (Hong Kong) Ltd v Holiday Resorts (Management) Co Ltd and The Incorporated Owners of the Sea Ranch (Third Party)* (2001) CACV 410 of 2001.

THE LAYOUT OF BUILDING MANAGEMENT IN HONG KONG

Building Management in Hong Kong is an attempt to provide a way through the complexity outlined above. Many law books would begin this process with a discussion of legal rules and procedures. This may seem appropriate for the present subject-matter, especially since every real estate development in Hong Kong is founded on law. The rights and obligations of the government, developer, manager, owners, occupiers and third parties cannot be properly understood without reference to such rules. A large part of this book is devoted to explaining those rules.

However, despite their importance, we prefer to examine the rules within the context of what actually happens when a multi-storey building, erected for the purposes of sale, is owned, occupied and used by a large number of people with different interests. This approach places rules in their proper context, rather than making the context fit the rules. In this way, we hope to explain more clearly the differences between formal and informal rules, how rules operate to influence behaviour and the consequences that follow from breaking the rules.

The first step is to explain the elements of the system in more detail. This is the purpose of Chapter 2. Chapters 3 to 8 break down the system into smaller parts. Each chapter focuses on relationships between specific participants. Chapter 3 concerns the relationship between the government and the developer. This is the primary relationship in two different senses. It is the first in point of time. The developer must acquire the land before he can build. He will usually purchase it from the government in a vendor/purchaser transaction. However, since virtually all privately-owned land in Hong Kong is held from the government on a lease, the transaction also creates a landlord and tenant relationship. This relationship is primary in a different sense: it is the most important. All other relationships derive from it and its terms also bind other people, such as owners, occupiers and managers.

Chapter 4 concerns the developer and the first purchaser of shares in the development. This first sale is an important moment in the formation of the community of owners. The developer ceases to be a sole owner. The system of co-ownership is put into effect by the first sale. In most cases, the rights and duties of the developer, the manager and subsequent owners are fixed by the DMC, which is usually executed at the same time, or shortly after, the assignment completing the first sale of a unit.

Chapter 5 concentrates on relations between the manager (if any) and the owners. These are primarily based on contract, ie the DMC. Rights and duties may also arise from other relations, particularly on the bases of agency and trust.

Chapter 6 looks at individual owners and the owners' corporation. The registration of owners as a corporation under the BMO creates a new legal entity separate from the individual owners, and which can sue and be sued in its own name. The BMO confers rights and imposes management duties on the corporation, which are independent of those arising under the DMC.

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(2) the developer's investment in the project, designed to show that he has a significant stake in the project;[14]
(3) development progress, so that consent will not be given unless the project has reached a certain stage of development;[15]
(4) location of proposed sales office, to ensure that it is large enough to avoid queues in the streets;
(5) a statutory declaration, to be made by a partner of the solicitor's firm dealing with the application, declaring that the contents of the DMC comply with LACO guidelines. In particular, this should specify the basis, as certified by the Architect/Authorised Person/Surveyor, adopted for calculating and allocating undivided shares to the common areas and management shares to each flat/unit;[16]
(6) an agreement for sale and purchase, containing prescribed terms;
(7) documentary evidence of approvals required under the government grant, including approval of the DMC.

Through this scheme, the government is able to exert considerable influence over matters which will affect co-owners, particularly in respect of the contents of the DMC (see 'Phase 4', below).

Phase 3: 1970 onwards — owners' incorporation

In 1970, the Multi-Storey Buildings (Owners' Incorporation) Ordinance (Cap 344) was passed in response to the difficulties of managing the common parts of such buildings. The essential problem was that the owners were collectively responsible but it was difficult for managers or government agencies to enforce obligations, particularly in large developments. Lack of cooperation among owners could also frustrate management, especially where there was no effective sanction for failure to carry out common obligations.[17] The 1970 ordinance therefore empowered, but did not require, owners in most developments to form themselves into a corporation with powers to deal on their behalf with matters of common interest to all the owners.

Despite some important changes in the legislation since 1970, notably in 1993, there is still no system of mandatory incorporation.

14 Currently, 30% of the total cost of the land and proposed development (LACO CM 41A Annex II(3)).
15 Currently, this means that foundation and piling works have been completed, the Building Authority has given consent to commence building works on the superstructure under the Buildings Ordinance s 14 and the Authorised Person's certified estimated date of compliance must not exceed three months from the expiry date of the current building covenant (LACO CM 40A Annex II(4)).
16 LACO CM 40A Annex II(6.2).
17 Mr Roberts, Attorney General, *Proceedings of the Legislative Council*, 1969–1970, p 667.

Phase 4: 1987 onwards — guidelines for the approval of DMCs

Until 1987, the content of DMCs was largely a matter for the developer. The classical theory of freedom of contract assumed that the contract was a voluntary agreement, reached by bargaining between equal parties, who could take care of their own interests. As a matter of form, therefore, the developer and the first purchaser appointed or agreed to appoint a management company to manage the building. In reality, the developer selected the manager and neither the first nor later purchasers had any say over who the manager should be, or any real control over the terms of the DMC.

An increasing number of court cases and complaints from the public led the government to introduce a non-statutory system of approval of DMCs, as part of the Consent Scheme. Government control of the contents of a contract to which the government is not a party is activated by a clause in the government grant, to which the government is a party. The clause, which requires the developer to submit and obtain government approval for a DMC, was first introduced in 1986, in response to public concern about the fairness of certain DMCs. Guidelines for drafting DMCs came into effect from 1 December 1987, as part of the process for obtaining consent under the consent scheme. The 1987 guidelines were published in the form of Land Officer Consent Scheme Circular Memorandum No 91.[18] These guidelines applied only to non-industrial developments.

The guidelines have been amended from time to time, and now apply also to industrial buildings. The latest guidelines, which are reproduced as Appendix 1, were published as LACO Circular Memorandum No 41[19] on 29 June 1999 and apply to all new grants after that date.

The consequences of the DMC guidelines for building management are considered in the relevant chapters in this book.

IMPLICATIONS OF PIECE-MEAL DEVELOPMENT

The most obvious implication of an evolutionary system is that the participants' rights and duties will differ from one building to another. As will become clear, the same question may have at least five different answers. Questions can only be satisfactorily answered by reference to the rules applicable at the time when the building was erected or, more precisely, when the first sale was completed.

As a practical step, therefore, the first question should always be: 'What was the date of the first sale of shares in the development?' The answer may act as a guide to the relevant historical phase, which will in turn provide clues as to the kinds of questions which need to be asked, and the documents to be consulted, to determine rights and duties. For

18 LOCM 91.
19 LACO CM 41.

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rights and obligations. However, in Chapter 1, the high incidence of cases which necessitate litigation was pointed out. This gives special prominence to issues of liability. Since the parties to any legal relationship will be concerned about whether they are liable, we include some general information on liability in this chapter. It applies to all the relationships in Chapters 3 to 9, inclusive.

The meaning of liability

In its ordinary sense, 'liable to' means 'subject to the risk or reasonable possibility of, rather than likelihood of'.[28] In law, however, liability is the condition of being answerable for something to someone. A person cannot be liable unless he is under a legally enforceable obligation.[29] Legal liability, therefore, requires a connection to be made between two or more legal persons, the 'nexus' of liability. Legal persons include human beings with the capacity to enter into legal relationships and artificial persons on whom the law confers capacity, such as corporations, government departments and the state.

Liability is ultimately established through court proceedings. Civil proceedings are commenced by a plaintiff, applicant or claimant, while the other party is the defendant or respondent. Criminal proceedings are instituted by the prosecution against the accused or defendant.

Much modern legislation contains obligations designed to regulate activities by specifying standards and empowers government departments to take action to ensure compliance. For example, under the Buildings Ordinance (Cap 123), the Building Authority is given wide powers, including the power to take court proceedings for offences committed by persons who do not comply with the ordinance.[30] Liability in such cases is not strictly speaking civil or criminal, but administrative-regulatory.[31] Regulatory liability is especially relevant for dealing with unauthorised or illegal structures.[32]

28 *Squibb United Kingdom Staff Association v Certification Officer* [1979] 2 All ER 452.

29 *Asher v Seaford Court Estates* [1950] 1 All ER 1018. 'Liable' means that a person is responsible at law — *Littlewood v George Wimpey & Co Ltd* [1953] 2 QB 501, at p 515 per Lord Denning; or is under an obligation — *Re Chapman* [1896] 1 Ch 323.

30 See s 40.

31 See R Summers, 'The Technique Element in Law' (1971) 59 *California Law Review* 733, at p 737.

32 See Ch 8.

The foundations of liability

The most common examples of liability arise out of conduct which the law regards as wrong.[33] In popular terms, a wrong is a deviation from what is regarded as morally just or equitable. In certain circumstances, courts may refuse to give effect to a legal right because it fails to conform to what the judge regards as fair.[34] However, in law a wrong usually means behaviour which does not conform to a standard set down by a legal principle or rule.

Legal wrongs consist of the infringement of a right, breach of a duty or improper exercise of a power.[35]

The most important wrongs for our purposes are breach of contract, torts (particularly negligence and nuisance), breach of fiduciary duty and breach of trust.[36]

The conditions of liability

The conditions of liability refer to the combination of facts (the grounds) which must be established before a court or tribunal will hold a person legally responsible. These facts must found a cause of action. A cause of action is a claim which is proved by legally acceptable means. The nature of the wrong dictates what facts must be proved in a particular case. For example, where the cause of action is damages for breach of contract, the plaintiff must prove:

(1) the existence of the contract;
(2) the relevant obligation in the contract;
(3) its breach;
(4) that the breach caused loss and/or damage which is not too remote; and
(5) that he is entitled to recover damages (or other remedy claimed) measured at the appropriate rate.

The broad meaning of the word 'tort' is a wrong. In law, it refers to types of harm caused by a breach of duty primarily fixed by the law, and for

33 Liability may also be based upon conduct which is not in law a wrong, but which results in enrichment of one person at the expense of another. The law imposes a personal obligation on a person who would otherwise be unjustly enriched. The claimant has a cause of action in restitution.

34 See Chs 3 to 5 for examples.

35 It may be important to determine whether the wrong is an infringement of a right or a breach of a duty. For example, in *Stubbings v Webb* [1993] 1 All ER 322, the House of Lords held that a claim for trespass to the person was not a breach of duty within the Limitation Act 1980 and so the plaintiff had six years within which to bring an action. This period could not be extended by the courts. Had it been an action for damages for breach of a duty which consisted of or included a claim for damages for personal injuries, the limitation period would have been three years from the date on which the cause of action accrued, with the possibility of extension of time.

36 See Ch 5.

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CHAPTER 3

The government and developer

In this chapter, we:

(1) explain how the developer acquires land from the government;
(2) summarise the primary rights, powers and duties of the government and the developer under a grant of land held on a lease; and
(3) consider the consequences for owners of failing to comply with the terms of the government grant.

PART 1
THE GOVERNMENT GRANT AND ITS EFFECTS

THE GOVERNMENT GRANT[1]

The Hong Kong Government has a constant influence on building management by virtue of the fact that virtually all privately owned land in Hong Kong is held on leasehold tenure.[2]

The government grants a lease to a purchaser of government land. The expression 'purchaser' normally extends to include persons who claim their interests in the land through the purchaser, such as successors in title and assigns. The original purchaser is usually called the first owner, but we refer to the 'developer', which expresses the reality that land is usually sold by the government for development or redevelopment.

The most common methods of sale of land for development purposes are by public auction or tender. The developer signs a memorandum of agreement under which he agrees to pay the balance of the purchase price within a specified time period (usually one month) and to become the lessee of the lot, subject to conditions of sale.

The general and special conditions of sale impose positive and negative obligations on the developer, which are also enforceable against his successors in title and assigns, including purchasers of undivided shares

1 See Sihombing & Wilkinson (1999), op cit, Chs 1 and 2 for a detailed description of the system of landholding in Hong Kong.

2 The exception is the land on which St John's Cathedral in Central stands, which is freehold. The land is vested in trustees. If it ceases to be used as a church, the land will revert to the government, unless it is sold or otherwise disposed of with the consent in writing of the Chief Executive — Church of England Trust Ordinance (Cap 1014) s 6, as amended by 4 of 2000, s 3.

in the land. The conditions thus limit the owners' freedom to exploit the property.[3] Conditions of Sale are the most important type of conditions. However, the government also disposes of land under other types of conditions such as conditions of exchange, grant, re-grant, or extension.[4] The documents of sale create a binding contract, so that either side may enforce the agreement in the courts.[5]

In the past, the government granted a lease once the conditions had been complied with. Nowadays, a lease is not usually granted. Instead, the purchaser relies on section 14 of the Conveyancing and Property Ordinance (Cap 219) ('CAPO'), under which a lease is presumed to have been granted where all the positive conditions have been performed. To cover both situations, we refer to the conditions and to the lease as the 'government grant'.

Despite the fact that the government is a party to the lease, the courts have repeatedly confirmed that it is an ordinary commercial contract. In matters relating to government leases, the Director of Lands acts as the government's land agent in its capacity as a private landlord.[6]

This means that the rights and duties of the parties are substantially the same as under any other lease. However, the government grant also contains provisions on how the land is to be used, what kind of buildings may be erected on the land, environmental protection, and health and safety. Such clauses give the government the option of taking civil action against the purchaser, in addition to the penalties for failure to comply with legislation such as the Buildings Ordinance (Cap 123) and the Town Planning Ordinance (Cap 131).[7]

THE DEVELOPER'S RIGHTS AS A PURCHASER/TENANT

The nature of a lease

The government grant creates a leasehold relationship in which the government is landlord and the developer is the tenant. The tenant, or lessee, obtains an estate in the land, the term of years absolute. Term of years absolute includes a term for less than a year, for a year or years and a fraction of a year and from year to year.[8]

3 See Nigel Bacon, *Conveyancing* (Sweet & Maxwell, 2nd ed, 1995), Ch 1, for an example of modern conditions.

4 See Sihombing & Wilkinson (1999), op cit, pp 72–73.

5 *Attorney General v Tong Iu* [1968] HKLR 603.

6 *Hang Wah Chong Investment Co Ltd v Attorney General* [1981] 1 WLR 1141 (PC), *Canadian Overseas Development Co Ltd v Attorney General* [1991] 1 HKC 288, *Secan Ltd v Attorney General* [1995] 2 HKC 629 and *Polarace Investments Ltd v Director of Lands* [1997] 1 HKC 373.

7 See Ch 8.

8 CAPO, s 2. A lease of a carpark in a multi-storey building was held to be a term of years absolute within s 2 in *Mann Kam-foon Teresa v Top Brain International Ltd* [1997] 3 HKC 689.

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the vendor and his successors in title who take with notice of the purchaser's prior right.[12]

Under section 4(1) of the CAPO, a legal estate in land can generally be created or disposed of only by deed. In the case of sale and purchase, the title is disposed of by a deed of assignment. The assignment must be properly executed. However, failure to specify that the sale is subject to and with the benefit of the DMC will not prevent the vendor from proving title.[13]

Assignments are often very detailed but, generally, have a standard structure.

(1) The opening words describe the nature of the deed, from which we may deduce its purpose and the nature of the transaction. The object of an assignment is to transfer property, whereas a lease grants a term of years, while a mortgage or legal charge provides security for a loan or the performance of some other obligation.
(2) The date of delivery of the executed deed, since deeds take effect only on delivery.
(3) Parties.[14]
(4) Purchase price (consideration).[15]
(5) Acknowledgment of receipt of the purchase price.[16] Where someone other than the payer, such as a successor in title, wishes to rely on the fact that payment has been made, the receipt clause is sufficient evidence that payment has been made.
(6) Covenants for title. These are promises about ownership given by the vendor to the purchaser and his successors. The most important are that he has title to the property he has agreed to sell, that he will do all that is necessary to cure any defect in title and the covenant for quiet enjoyment, which is implied in all leaseholds.[17] The

12 Where the agreement is in writing, as it normally is, it should be registered in the Land Registry. Registration constitutes notice to subsequent purchasers.
13 See *Wong Kam-lan v Well Win Investment Ltd* [1996] 2 HKC 143, where the Court of Appeal was prepared to imply a term in the contract that the sale was subject to and with the benefit of a DMC 'in the usual terms'.
14 The necessary parties to a deed vary with the transaction. The vendor must sign a deed of assignment but the purchaser need not. A legal charge is executed only by the borrower, not by the lender, unless the latter gives covenants. By contrast, where property is released from the burdens of a mortgage or a receipt is given for discharge, only the lender signs.
15 A deed is enforceable at common law without consideration. However, the consideration or purchase price is generally inserted into an assignment to comply with other requirements, such as s 11 of the Stamp Duty Ordinance, which requires all facts and circumstances affecting the liability of any instrument to stamp duty to be set forth truly and fully in the instrument.
16 The phrase 'receipt whereof is acknowledged' in the body of the instrument acts as a sufficient discharge to the person paying the consideration — CAPO, s 18(1).
17 See Ch 2.

covenants are often incorporated by reference, rather than being listed.[18]

(7) Words of grant. These are the phrases chosen to create or transfer interests in land. They vary with the nature of the transaction. In an assignment, the relevant words are 'assigns to the purchaser'. Words of grant announce the operative part of the instrument, the part which carries out the main object of the transaction.
(8) Parcels. The term 'parcels' refers both to parts or portions of land to be acquired by the purchaser and the part of the instrument which follows the operative words, to which the parcels clause refers. The property is usually described in a schedule. It is not sufficient merely to refer to the property by name, eg 'Handsome Gardens', as we have done in our fictional case study. If we take Mrs Chan as the first purchaser and give Handsome Gardens a fictional address, her property would be described for legal purposes as:

> All that 1 equal undivided 25th part or share of and in all that piece or parcel of ground registered in the Land Registry as Inland Lot No 10 and of and in the messuages erections and buildings thereon now known as Handsome Gardens No 4 Ling Ga Street, Wanchai, Hong Kong ('the Building') TOGETHER with the sole and exclusive right and privilege to hold, use, occupy and enjoy all that flat Flat No10A on the 12th floor of the Building.[19]

(9) The description of the property should wherever possible be accompanied by a plan which further describes and delineates the property being assigned. This is especially relevant in Hong Kong, where land is divided up in various different ways such as sectioning and subdivision, and also where only part of the land is being sold. The plan should not be on too small a scale. The verbal description and plan should not conflict with each other. It is usual (and good practice) to use a form of words which shows clearly whether the plan or the verbal description is to prevail in cases of conflict. If the plan is to prevail, the words 'more particularly delineated on the plan annexed to assignment memorial number 123456 and thereon edged red' should be used.[20] If the verbal description is to prevail, the words 'for the purpose of identification only' are used.[21] If no

18 For example, use of the words 'as beneficial owner' implies covenants for title set out in CAPO, s 35, and Pt II of the First Sch.
19 Land in Hong Kong is divided into lots. Each lot is given a number and is designated as a town lot, marine lot, inland lot or rural building lot. In the New Territories, the demarcation or survey district (DD and SD) is also included.
20 *Eastwood v Ashton* [1915] AC 900 (HL).
21 *Wigginton & Milner Ltd v Winster Engineering Ltd* [1978] 3 All ER 436 (CA), followed in *Green Park Properties Ltd v Dorku Ltd* [2000] 4 HKC 538, at pp 546–547. A plan which is said to be for the purpose of identification only 'cannot control the parcels in the body of the deed' — per Jenkins LJ in *Hopgood v Brown* [1955] 1 WLR 213, at p 228.

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particular part of the development, the courts would infer that it was a common area.

The Court of Appeal and the Court of Final Appeal took a different approach in *Jumbo King Ltd v Faithful Properties Ltd & Ors* [1999] 2 HKC 507 (CA); 4 HKC 707 (CFA). The question in that case was whether the developer had successfully reserved the right to exclusive possession of utility rooms and a flat roof in the part of a building intended for commercial use, when the developer sold shares and the right to exclusive possession of a flat in the residential part. As in *Leung Chiu Lam* and *Lorna Villas*, there was no specific reference to these areas and no designation of them as common parts.

Both the Court of Appeal and the Court of Final Appeal held that the developer had retained the right to exclusive possession of the utility rooms and roof, as an incident of ownership of the remaining shares in the building. The purchaser had been granted the right to exclusive use of a specific flat and roof space in the domestic part of the building, but nothing more. The relevant parts had not been designated as common parts. As a matter of construction, the parties could not have intended the first purchaser of a flat in the domestic part to have rights over the commercial part.[141]

Both Litton PJ and Lord Hoffmann thought that the parties' intention was clear, despite the fact that there was no mention of the utility rooms or roof, and notwithstanding the fact that the mutual grant clause in the DMC was identical to that in *Lorna Villa*. The building was divided into two self-contained parts, one for commercial use and the other for residential use. It was true that the schedule to the DMC described the retained areas as shop and office spaces, and made no reference to the utility room and roofs. However, when these words were read in the context of the DMC as a whole, and the assignment which was executed on the same date, it could be deduced that the developer should have the right to exclusive possession of the retained land.

Since construction of a legal document always turns on the facts of each individual case, it is possible to reconcile the apparently conflicting decisions in *Leung Chiu Lam*, *Lorna Villa* and *Jumbo King*. The first two cases involved single buildings for residential use, whereas *Jumbo King* concerned a building which was physically divided into two parts intended to be completely separate from each other. Moreover, in *Jumbo King*, the assignment described the developer as having the exclusive right to the use occupation and enjoyment of the basement, ground floor to fourth floor and the piping service floor.

141 The trial judge adopted the conventional approach — see *Jumbo King Ltd v Faithful Properties Ltd & Ors* (HCMP 160 of 1998).

However, there are indications in both the Court of Appeal and the Court of Final Appeal that the principles for construing grants do not apply to multi-unit developments, at least where there is a DMC.[142] If this is correct, then it means that the key question is no longer whether the developer expressly reserved rights in his favour, but whether the purchaser can show that he has rights over those parts. This fundamentally changes the way in which courts have read DMCs in the past.

Following *Jumbo King*, the key questions in interpreting DMCs would appear to be:

(1) Did the developer expressly grant to the purchaser rights of exclusive possession over the retained land? and
(2) Did the developer expressly designate any part of the retained land as common parts?

If the answer to both questions is 'No', then, by implication, the developer has the right to exclusive possession of the whole of the retained land for his sole benefit, even if no words of reservation are used. If this reading of *Jumbo King* is correct, it would appear that it is not legally necessary for the developer to reserve rights in his favour. If the purchaser is unable to point to express terms in his favour, or designation of common parts, the inference is that the developer intended to reserve the parts to himself.

Can the developer pass on the duty to repair under section 34H of the BMO to the other owners if they have rights over his property?

In *Uniland*, above, the judge did not think it was appropriate to decide on counsel's submission that the manager could assume the responsibility to repair the outer wall and flat roof because the developer's rights were subject to easements in favour of the other owners. Since the issue was left open, it is not possible to provide a definitive answer to this question.

If the matter turns only upon the purpose of the provision, the key question would be whether there was an imbalance or inequity built into the DMC.[143] This would seem to be unlikely, given the fact that new DMCs must be approved by LACO, whose guidelines seek to 'strike a fair balance of interest between purchasers and developers'.[144]

On the other hand, the wording of section 34H on this issue is ambiguous. If we refer simply to ownership or the right to exclusive possession of part of a building, then the fact that other people have ancillary rights is irrelevant. It is the exclusivity of ownership or

142 See Lord Hoffmann NPJ at p 726; and Godfrey JA in [1999] 2 HKC 507 at p 522.
143 Deputy Judge To in *Uniland* thought that s 34H, like s 34G, was aimed at redressing such imbalance which arises because, in reality, the other owners have no freedom of contract — see [1999] 4 HKC 141, at p 145.
144 See the preamble to LACO CM 41.

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correct wording for resolutions. It also suggests that corporations would be advised to follow the spirit of paragraph 4(2) and determine the contributions to the special fund at the annual general meeting, rather than wait for someone else to force the work upon them. In any event, if paragraph 4 is read together with the Seventh Schedule, paragraph 2 on accounts (see below), it may be doubted whether it is legally permissible to call for one-off contributions to the special fund during a financial year. Paragraph 2 requires the manager to include an estimate in the yearly accounts of the time when there will be a need to draw on the special fund, and the amount of money that will be needed. A person cannot give such an estimate unless the matter has been considered before the end of the previous financial year. The reference to 'any financial year' in paragraph 1 also suggests that decisions on funds should be taken before the start of each financial year. This would also accord with sound management practice.

(ii) Contingencies

There appears to be no legal duty to establish a separate contingency fund, either in the DMC[97] or under the BMO. The question is whether either the management fund or the special fund may be used for contingencies. The answer will depend on the meaning given to 'contingency'. A contingency may refer to unforeseen or incidental expenses.[98]

It is used in both senses in Part IV, section 20(2) of the BMO, which empowers an owners' corporation to establish and maintain a contingency fund to provide for any expenditure of an unexpected or urgent nature and to top-up the general funds if they are insufficient to meet the expenses of the general fund.[99]

By contrast, there is no reference in the Seventh Schedule to contingencies. The wording of paragraphs 1 and 4 suggest that both the management fund and the special fund are for planned maintenance, that is, to pay for items that the manager and owners know, or can be relatively certain, will be necessary at some time in the future. On this basis, neither fund could be used for unexpected expenses. The Lands Tribunal in *Yee On Court* thought the special fund was within the ambit of the contingency fund under section 20(2) of the BMO, but, for reasons given above, this confuses funds under the DMC with the different funds under Part IV of the BMO.

It may be argued that, since the manager has a power to withdraw money from the special fund in an emergency,[100] the special fund can be

97 The 1987 and 1999 guidelines do not refer explicitly to contingency funds.
98 *The Oxford English Dictionary*.
99 As pointed out in Ch 6, the general fund which a corporation must establish under s 20(1) of the BMO is not in itself a contingency fund.
100 Seventh Sch, para 4(5).

used for contingencies. However, any use of the fund must only be for a purpose which is within the meaning of 'expenditure of a kind not expected' to be incurred annually which, as indicated above, suggests expenditure which is bound to occur at some stage, even though that stage may arrive suddenly.

If the above analysis is correct, there is no power to include a sum for contingencies either within the original budget for management expenses, or as part of the special fund. At first sight, this would appear to conflict with good management practice, although it is comprehensible if placed within the context of the 1993 reforms. Why should owners be required to pay a sum of money in advance for work which may never be required? If circumstances occur which necessitate work which has not been planned, it should be for the owners rather than the manager to determine whether such work should be carried out.

Yet it may be that the funds could be used for expenses which are incidental to those expected to recur. This would be preferable to relying on the provisions of the Seventh Schedule for reviewing and revising budgets which, although consistent with the policy of increasing the control of owners, are impractical. Emergencies require speedy action and cannot wait for an extraordinary general meeting of owners. If the manager was tempted to include an inflated sum for contingencies, remembering that the manager's remuneration forms part of and is based on a percentage of the total management expenses,[101] the owners could reject the budget.

As with our discussion of budgets above, the situation is far from satisfactory. The provisions on corporation funds in Part IV are more explicit, as will be seen in Chapter 6, and, in our view, preferable to those in the poorly drafted Seventh Schedule.

(d) Is there a power to levy increased contributions?

There is nothing in the Seventh Schedule which requires the funds to be maintained at a certain level. If funds are insufficient to cover expenditure, the budget may be revised once during the financial year, provided that the manager follows the procedures set out above.[102] There is no similar provision dealing with special fund expenditure. However, a power to levy increased contributions may be given in the DMC.

(e) Costs of slope maintenance

The Seventh Schedule does not deal specifically with slope maintenance. However, contributions would be payable from the special fund, provided that there is an obligation to pay for such work. As pointed out in Chapter 4, not all government grants contain a duty to maintain and repair slope

101 Seventh Sch, para 1(8).
102 Seventh Sch, paras 1(4) and (5).

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(3) knew that the members placed reliance on that expertise, in that they gave the agents authority 'to bind them to contracts' with third parties and to settle claims.[204]

(iii) Liability for omissions

Once the duty of care is established, it does not matter whether the breach takes the form of an act or an omission — *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1978] 3 All ER 571, p 595 ('*Midland Bank*'); Lord Goff in *Henderson* at p 521. For example, if a solicitor assumes responsibility for the business of his client, he will be liable if he negligently fails to take steps which fall within the responsibility he has assumed. In *Midland Bank*, the solicitor was liable for failing to register an option, despite the fact that the contractual obligation was limited to consultation on whether to exercise the option.[205]

In *White & Anor v Jones & Ors* [1995] 1 All ER 691 ('*White v Jones*'), a majority of the House of Lords held that the principle of assumption of responsibility in *Hedley Byrne* and *Henderson* should be extended to a solicitor who accepted instructions to draw up a will, but who negligently failed to carry out the instructions before the testator's death, resulting in the testator's two daughters not being named as beneficiaries in the will.

(iv) Does the principle in *Hedley Byrne*, as extended by *Henderson* and *White v Jones*, apply to the manager/owner relationship?

Liability for omissions may arise on a case-by-case basis. For example, in *Hui Kay-cheong v Chi Wo Properties* [1992] HKDCLR 51 ('*Hui Kay-cheong*') and *Reebok Trading (Far East) Ltd v Pokfulam Property Management Ltd* [1994] 3 HKC 1 ('*Reebok Trading*'), the courts accepted that the manager owes a duty of care to prevent theft of owners' property from areas within the control of the manager. The question we are concerned with here is whether the manager's assumption of responsibility under the contract is sufficiently wide to cover losses which are purely financial, whether the losses are caused by acts or by omissions?

There appears to be no reason in principle why *Henderson* should not apply to the relationship between the manager and owners. It is not limited to professionals,[206] but even if it were, building managers perform

204 Per Lord Goff in [1994] 3 All ER 506, at p 522.

205 Cf *Wong Chick-keung & Anor v Woo Man-sang & Ors* [2001] HKCU 104, where solicitors were liable for failing to do a second search of the Land Registry just before completion of the transaction; and *Feerni Development Ltd v Daniel Wong & Partners* [2001] 1 HKC 373, where solicitors failed to raise a requisition on title, thereby allowing a transaction to be completed where there was a defect, making it difficult for the purchasers to sell the property later.

206 Such as lawyers, doctors, dentists, architects and surveyors.

services 'of a professional or quasi-professional nature'[207] as did the managing agents in *Henderson*.

Liability in fact depends on whether:

(1) the courts would conclude that in agreeing to manage the development the manager is assuming responsibility towards the owners, and that they rely on him; or

(2) the duty of care in tort is excluded by the contract between the parties (see above).

In relation to the first issue, is there any material difference between agents who manage risks for underwriters and agents who manage buildings? If the answer to this question is 'no', as we believe it is, the managers will be liable for negligent acts and omissions which fall within the responsibility which they have assumed. For example, the manager would owe the owners a duty to remove or prevent risks arising from the condition of the premises. This makes sense, since the manager owes such a duty as an occupier to visitors under the Occupiers Liability Ordinance (Cap 314).[208] This contrasts with the obligation under the general duty of care in tort which requires the manager to act reasonably so as not to cause injury.[209]

Assuming that the principle in *Hedley Byrne* does apply to the overall management of the development, the manager may argue that it is not fair, just and reasonable to impose the duty. It is unclear whether this factor is relevant to the *Hedley Byrne* principle. In *Henderson*, Lord Goff stated that, once the principle in *Hedley Byrne* was satisfied, it was unnecessary to embark on any inquiry about whether it was fair or not to impose the duty.[210] On the other hand, it may be that the courts would follow the trend since 1970 of requiring evidence of the fairness of imposing the duty.[211]

The issue is also complicated by the true meaning of the phrase 'assumption of responsibility'. Does it mean conscious assumption of responsibility for a task,[212] in which case it should apply to managers who voluntarily undertake to manage the development, or does it mean conscious assumption of legal liability for the careful performance of the tasks,[213] in which case it will be more difficult for the owners to hold the manager liable for omissions.

207 Per Lord Goff in *Henderson v Merrett Syndicates* [1994] 3 All ER 506 at p 521.

208 See Ch 9.

209 See Tony Weir, *A Casebook on Tort* (Sweet & Maxwell, 8th ed, 1996), p 154.

210 See *Henderson* at p 521.

211 See *Home Office v Dorset Yacht Co* [1970] 2 All ER 294 and other cases cited under the section entitled 'The general duty of care', above.

212 As Lord Browne-Wilkinson believes — see *White v Jones* [1995] 1 All ER 691, p 716.

213 See Tony Weir, (1995) Vol 111 *Law Quarterly Review* 357.

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Where the owners are claiming pure financial loss for breach of a duty of care, the measure of damages ought to be the same, whether they are suing in contract or tort or both.[252]

(c) Time for assessing damages

To ensure that the plaintiff is properly compensated, the amount awarded must be adequate. Normally this is achieved by assessing damages at the date of breach, but if this would give rise to injustice, such other date as the court thinks appropriate may be chosen.[253]

(d) Deductions

The general rule is that damages will not be reduced because the plaintiff has private insurance or is in receipt of state benefits.[254] However, the plaintiff will not be able to recover any part of the damage which is due to his failure to take all reasonable steps to mitigate his loss.[255] Expenses which are incurred unreasonably in attempting to reduce the loss cannot be recovered.

Damages may also be reduced because the plaintiff was guilty of contributory negligence in that he was partly at fault for his injuries, or that his conduct contributed to the nature and extent of his injuries.[256] It is a partial defence which the defendant must specifically plead[257] and prove.[258]

The test is whether the plaintiff 'ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself.'[259] Where there is an existing danger, the plaintiff's conduct would constitute contributory negligence if he knew or ought to have known of the danger and acted unreasonably in the circumstances. For instance, if there are two alternative means of escaping a fire, one more dangerous than the other, the owners' conduct would not amount to contributory negligence unless a reasonable person would have realised the danger involved in taking the more dangerous route. On the other

252 This follows from cases like *Henderson* and *White v Jones*, above.
253 *Johnson v Agnew* [1980] AC 367.
254 *Bradburn v Great Western Railway Co Ltd* (1874) LR 10 Ex 1, *Perry v Cleaver* [1969] 1 All ER 555 and *Smoker v London Fire Authority* [1991] 2 All ER 449.
255 *British Westinghouse Electric v Underground Electric Railways Co of London Ltd* [1912] AC 673 (contract) and *Anderson v Hoen* (1865) 3 Moo PCCNS 77 (tort).
256 *O'Connell v Jackson* [1971] 3 All ER 129.
257 *Fookes v Slator* [1979] 1 All ER 137.
258 *Wakelin v London and South Western Railway Co* (1886) 12 App Cas 41.
259 Per Denning LJ in *Jones v Livox Quarries Ltd* [1952] 2 QB 608, at p 615.

hand, if there were a less dangerous means of escape, the owners might be liable if they did not take it simply because it was inconvenient.[260]

If the plea is successful, the plaintiff's damages will be reduced 'to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage' — Law Amendment and Reform (Consolidation) Ordinance (Cap 23), section 21(1).[261] For example, in *Hsu* above, the plaintiff's damages were reduced by 75% because he was responsible for the design and placement of the switch box. As an experienced electrician, he ought to have realised the risks of installing it directly above a water tank. In *Rainfield Design*, above, the court found the plaintiff 50% to blame for failing to comply with safety regulations in climbing down from the scaffold.

The court decides both the issue of whether the plaintiff's negligence did contribute to the accident and, if so, by how much his damages should be reduced. The defence applies to common law actions in tort and to those brought under the Fatal Accidents Ordinance (Cap 22)[262] and the Law Amendment and Reform (Consolidation) Ordinance (Cap 23).[263]

Contributory negligence is not available in an action for breach of a strict duty in contract, but it can apply where the defendant owes a duty to exercise reasonable care and skill in the performance of his duties under the contract. In *Barclays Bank plc v Fairclough Building Ltd & Ors* [1995] 1 All ER 289, the defendant had broken two strict contractual duties, namely, to execute the work in an expeditious, efficient and workmanlike manner, and to comply with statutory provisions applicable to the work. These obligations did not relate to any failure to exercise reasonable care, and so the fact that the plaintiff was negligent in failing to supervise how the work was done was irrelevant. Where the duty of care is the same in tort as in contract, the plea of contributory negligence will apply if the plaintiff takes the unusual step of suing only in contract.[264]

AVOIDANCE OF LIABILITY

The manager cannot avoid liability simply by claiming that he was acting as an agent.

The most significant means of avoiding liability is the exemption clause in the DMC. DMCs executed or approved before 1999 normally exempt the manager, his servants, agents and contractors from liability, unless their acts or omissions involve criminal liability, dishonesty or

260 Cf *AC Billings & Sons Ltd v Riden* [1957] 3 All ER 1, where the plaintiff was 50% at fault for taking a route which a reasonable person would have realised was dangerous.
261 *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291.
262 Action brought by dependants of the deceased.
263 Action brought on behalf of the estate of the deceased.
264 *Forsikringsaktieselskapet Vesta v Butcher* [1988] 2 All ER 43.

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circumstances.[356] However, where 'the defendant's negligence has put the plaintiff in a position from which he can only escape substantial inconvenience by taking a risk, the reasonableness of the plaintiff's actions must be ascertained by weighing risk against inconvenience.'[357]

Limitation and delay

The policy of the law is that a person should not be at risk of litigation forever. 'The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is a claim with which he never expected to have to deal.'[358] There are also practical reasons which support a limitation on commencement of actions. For example, witnesses may have difficulty recalling and testifying to the truth of events which occurred a long time ago. The policy against stale actions is implemented through statutory periods of limitation and the courts' equitable jurisdiction to refuse relief, particularly for excessive delay.

(a) Statutory periods of limitation

The Limitation Ordinance (Cap 347) specifies periods of time within which an action must be commenced. Actions normally begin when a writ or other originating document is issued out of the court registry. If proceedings are not commenced within the specified time, the defendant has a complete defence to the plaintiff's cause of action.[359] In most cases, it is the right to bring the action which is lost ('statute-barred') and not the right itself, which the plaintiff can enforce by means other than by court action.[360] In these cases, the defendant must plead the defence of limitation if he is to rely upon it.[361] The right of the claimant itself is extinguished at the expiration of the time limit in the cases of:

(1) conversion of goods, unless the owner has re-possessed the goods before the expiration of six years from the date of the first conversion;[362] and
(2) actions to recover land, where the owner's title is extinguished after 12 years, if the action accrues after 1 July 1991, or 20 years if it accrued before that date.[363]

356 *Clayards v Dethick & Davis* (1848) 12 QB 439.
357 *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 9th ed, 1997), 3-115, p 245.
358 Lord Griffiths in *Donovan v Gwentoys Ltd* [1990] 1 WLR 472.
359 See Ch 2 for the meaning of a cause of action.
360 *Poole v Poole* (1871) 7 Ch App 17. 'Action' here includes a defence or set-off.
361 Rules of the High Court (Cap 4A), O 18 r 8(1).
362 Section 5(2).
363 Sections 7(1) and 17. See Ch 7 for further information on actions to recover land. Against the Government, the period is 60 years.

(i) Actions in contract and tort[364]

The limitation period for an action founded on a simple contract, that is one which is not made by deed, and torts not involving personal injury, is six years from the date on which the cause of action accrued.[365] For actions founded upon a specialty, the limitation period is 12 years.[366] A specialty contract includes a contract under seal,[367] such as the DMC, or an obligation under seal securing a debt.[368] An action will not be 'founded on' a specialty if the plaintiff is not seeking to enforce any obligation created by the deed. For example, if he is claiming damages in tort for fraudulent misrepresentation which induced him to enter into the contract.[369]

Where the plaintiff claims damages for negligence, nuisance or breach of duty[370] which 'consist of or include damages in respect of personal injuries to the plaintiff or any other person', the time-limit is three years from the date on which the cause of action accrued, or the date (if later) of the plaintiff's knowledge.[371] The alternative date is designed to deal with those cases where either the plaintiff does not know he has been injured until after the date of accrual, or is unaware of the extent of the injury.[372]

The fact that the plaintiff did not know that the acts or omissions amounted in law to negligence, nuisance or breach of duty is irrelevant. If it appears to the court that it would be equitable to allow an action to proceed, the plaintiff may be given permission to bring proceedings for personal injury despite the expiration of the above time limits.[373]

(ii) Accrual of the cause of action

Time begins to run against the plaintiff from the date on which the cause of action accrued. A cause of action accrues on the occurrence of every

364 See Chs 7 and 9 for limitation periods in respect of other causes of action.
365 Section 4(1)(a).
366 Section 4(3).
367 *Alliance Bank of Simla v Casey* (1880) 5 CPD 429 and *Aiken v Stewart Wrightson Member's Agency* [1995] 3 All ER 449.
368 *R v Williams* [1942] 2 All ER 95.
369 *Chiu Ming-sun v Ma Wing Michael & Ors* [1986] 1 HKC 217.
370 The duty may arise under a contract, legislation or under the general law.
371 Section 27(4).
372 Time begins to run in such a case from the date on which the plaintiff first had knowledge of the following facts: that the injury in question was significant, that it was attributable in whole or in part to the act or omission which is alleged to constitute the negligence, nuisance or breach of duty; the identity of the defendant; and if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant — s 27(6)(a) to (d). The same provisions apply to actions brought under the Fatal Accidents Ordinance (Cap 22), the three-year period running from the date of death or the date of knowledge of the deceased's personal representatives or dependants of the specified facts — s 28.
373 Section 30(1).

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termination may be the subject of an express agreement. For example, the owners may unanimously resolve to forgive or tolerate breaches, either by a resolution to that effect or, if there is an owners' committee, by empowering the committee to accept or ratify the breach. In practice, toleration may occur simply because neither the manager nor the owners do anything about the breach.

Can an owner rely on consent by an authorised employee as a defence to breach of covenant in the DMC?

The court or tribunal may be prepared to accept that an employee has been authorised to deal with complaints and to make decisions as to whether a breach of the DMC is to be tolerated, although it is arguable that this is a discretion which cannot be delegated.[458] A forbearance against one owner for breach of a particular covenant may amount to a representation to another owner that no action would be taken against him for a similar breach.[459] This is because mutuality is the basis for enforcement of covenants in the DMC, which should not be enforced capriciously against one owner to the exclusion of all the others: it is a case of enforcement of all breaches of the same type and extent or none.

Reliance on a representation is most commonly encountered in relation to instructions made by employees, but the claims have usually failed. The possibility of the claim was recognised in *Lee On Management,* above, but the court found on the facts that there was no representation. A supervisor of caretakers employed by the managers requested the defendant owner to find an alternative way of directing smoke away from the building. The defendant installed a new steam box, costing $75,000. While accepting that the supervisor had at least apparent authority to relieve an owner from the effects of breach of covenant, the court nevertheless rejected the defendant's claim that the manager was estopped from taking enforcement proceedings. Nothing said by the supervisor amounted to an undertaking to discontinue proceedings, which had already been commenced against the defendant. An invitation to submit proposals for modification did not amount to an undertaking that those proposals would be approved. A mistaken belief generated by hope was not capable of creating a representation.

In *Hong Yip Service Co Ltd v Candela Co Ltd* [1997] 1 HKC 273, the court ordered an owner to remove air-conditioning condensers which had been fitted to an external wall in breach of covenant. The condensers were supported by a frame, part of which rested on the rear bay window of the flat below. The court rejected the defences of waiver, acquiescence and estoppel. Acquiescence was not established simply because other owners had also broken the covenant and the corporation had not taken action

458 See the section entitled 'Avoidance of Liability' in Pt 1, above.
459 *Hong Kong Land Ltd v Chung Chi-moon* [1976] HKLR 214 and *Cheung Yuet & Anor v The Incorporated Owners Of Oriental Gardens* [1978] HKLR 536.

against them and, in any event, only six out of 60 other owners had broken the covenant. There was no evidence that the employee had the power to bind the manager.

If the manager wishes to authorise others to act on his behalf, it is advisable to do so explicitly and in writing, rather than to leave it to the uncertainties of proof by oral evidence after the event. As Evans Dep J commented in *Incorporated Owners of Golden Crown Court v Chow Shun-yung* (HCA No 4322 of 1986, unreported), no reasonable businessman would act to his detriment on casual words from a caretaker charged with no more than showing him the premises.

Can an owner avoid liability for breach of covenant in the DMC by claiming that the covenant no longer serves any useful purpose?

This was one of the issues in *The Incorporated Owners of Hamilton Mansion v Yu Kien Chiu and Others* [1998] 1 HKLRD 62. The corporation applied for permanent injunctions to restrain owners and tenants of flats from committing or further committing a breach of a covenant 'not to use his flat otherwise than for private residential purpose'. The breaches alleged, and proved, were use of flats as guesthouses and as a photographer's studio. For a residence to be a private residence, someone must live there.[460] The primary user of the guesthouses was found to be a business user.[461] The fact that an employee could sleep in the flat used as a photo studio was not sufficient to prove that it was a residence.

The respondents' main defence was that the property had been either entirely or so substantially changed that the whole character of the place or neighbourhood had been altered. As a result, the original object of the covenant no longer existed. Since the covenants were now valueless, any action to enforce them 'would be unmeritorious, not bona fide at all, and merely brought for some ulterior purposes'.[462]

This ground was recognised in Hong Kong in *Lee Hysan Estate Company Ltd v Sky Heart Ltd* [1997] 1 HKC 313,[463] but it is difficult to prove. The court will presume that the covenant continues to confer a benefit,[464] and it must be established that the change has been brought about by acts or omissions of the covenantee, the person for whose benefit the covenant exists. If the changes are beyond the control and independent action of the covenantee, the defence will not apply.[465] This means, in effect, that the defence will be virtually impossible to establish in multiple-ownership cases, because all the other owners, as

460 *German v Chapman* (1877) 7 Ch D 271.
461 Cf *Thorn v Madden* [1925] Ch 847.
462 Per Farwell J in *Chatsworth Estates Co v Fewell* [1931] 1 Ch 224.
463 See Ch 7.
464 *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321.
465 *Sayers v Collyer* (1884) 28 Ch D 103.

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incorporation.[47] Where the arrears arose before incorporation, action must be taken against the owners at the time the arrears arose — *Hang Yick Properties Management Ltd v The Incorporated Owners of Winner Building* [1999] 3 HKC 574.[48] A third party who is injured because of the condition of the common parts must sue the corporation, not the owners, as in *Ta Xuong* (above), where the corporation was liable to pay damages for negligence.

The corporation will not be liable, even if the injury is caused by the condition of what is technically part of the common areas, if that part of the building is exclusively for the benefit of an individual owner or occupier — *So John v Lau Hon-man* [1993] 2 HKC 356.[49] Thus, in *Wong Lai Kai v Incorporated Owners of Lok Fu Building, Yuen Long,* [2000] 3 HKC 633, a pedestrian who was seriously injured when an awning erected on the external wall of a building collapsed could not recover damages from the corporation by virtue of section 16. The awning, which had been erected above a shop held on a lease from the owners, benefited the tenant and his customers, not the other owners. The tenant was liable because the injuries resulted from his failure to keep the premises in good repair.

Liability of owners to contribute to a judgment against the corporation — BMO, section 17

Where the manager or other person obtains an order against the corporation, he may obtain an order for the execution of the judgment against any property of the corporation or, with permission of the tribunal, against any owner — BMO, s17(1)(a)–(b).[50]

In *Chi Kit Co Ltd and Loong Hock Ltd v Lucky Health International Enterprise Ltd* [2000] 3 HKC 143 ('*Chi Kit*'), the Court of Final Appeal held that 'owner' in this section has the same meaning as owner in section 2 of the BMO, namely, a person who for the time being appears from the records in the Land Registry to be the owner of an undivided share. This means that if the owner of the flat agrees to sell the property *after* a liability has been incurred but *before* the execution of judgment, it is the new owner who would be liable to contribute to the debt, not the former owner. The reason for this is that liability for the purposes of section 17 is not personal but proprietary. It attaches to the undivided shares and is an encumbrance[51] which binds successors in title of the property

47 See *Roth & Sons Estates Management Ltd v The Incorporated Owners of Carson Mansion, King's Road* (1997) HCA 11511 of 1995; and *Holiday Resorts (Management) Co Ltd v The Incorporated Owners of the Sea Ranch* (2001) CA No 4978B of 2000.

48 See Pt 2 below.

49 See Ch 2.

50 The application for leave must be made by summons served personally on the owner against whom execution is sought — s 17(2).

51 An encumbrance is a claim, lien or liability attached to property — per Romer J in *Jones v Barnett* [1899] 1 Ch 611, at p 620.

affected.[52] The encumbrance was a latent defect on title which the vendor was under a duty to disclose to the purchaser. Failure to disclose it meant that the intending purchaser could withdraw from a sale and purchase agreement and recover the $11.8m deposit, which was 10% of the purchase price of $118m, plus interest and costs against the vendor.

The wording of section 17 leaves it open to the judgment creditor to select any owner to meet the debt, even one who is in no way to blame for debts incurred by the corporation. There is nothing in section 17 to limit an individual owner's liability to his proportionate share. In *Chi Kit* (above), the court held, by analogy with section 34 of the BMO, that an individual owner could be liable for the whole of the judgment debt. This is because if the corporation is wound up under Part VI of the BMO, the owners are individually and jointly liable[53] to contribute, according to their respective shares, to the assets of the corporation to an amount sufficient to discharge its debts and liabilities. The proportionate liability may merge into the joint and several liability so that, for instance, permission might be granted to enforce the judgment against one owner where some owners were not able to meet their proportionate liability.

Golden Chance (Hang Cheong) Properties Ltd v Incorporated Owners of Gold Mine Building & Anor (HCA No 6749 of 1983, unreported) ('*Golden Chance*') suggests that it will often be very difficult for the creditor to enforce judgment against an individual owner, at least where that owner has complied with his financial obligations under the Ordinance and the DMC.

In deciding whether to grant leave to enforce judgment against an owner, the tribunal will consider all the circumstances, including whether the owner was in default. The burden is on the plaintiff to establish that it is a proper case for granting leave. Leave will be refused where the tribunal considers that greater injustice will be done to an owner if leave is granted than will be done to the plaintiff if leave is refused. Power J refused leave in *Golden Chance* on this ground, stating that it would be manifestly unjust to enforce a judgment against an owner who was not only not in default, but who would be required to meet a debt which was entirely disproportionate to his liability under the BMO.

His Lordship also referred to other factors which might affect whether to grant or refuse leave, such as whether the owner was a recent purchaser and whether there was actual or possible collusion between the management committee and the manager against the owner.

Power J also refused leave on the ground that the plaintiff had failed to show that the debt arose out of proceedings in respect of the common parts. Reading section 17 together with section 16, enforcement was limited to proceedings in respect of the common parts. This would appear

52 *Rignall Developments Ltd v Halil* [1988] 1 Ch 190 — improvement grant repayable on demand more than a personal liability. It seems from the reasoning in *Chi Kit* that the *amount* of the potential liability is relevant, indeed vital.

53 'Joint and several liability'.

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courts have repeatedly held that section 3(2) does not operate to override a prior unregistrable instrument, even if a later instrument is registered. Thus, in *Ho See-shing & Ors v Wan Ying-him & Ors* [1959] HKLR 482, registration of an assignment of land did not allow the assignees to gain priority over a prior equitable lien of which they had notice. Section 3(2) applies to confer priority only where the interests are created by instruments, both of which are registrable. If neither instrument is registered, priority is governed by ordinary equitable principles. Applying those principles, a restrictive covenant is enforceable against everyone except a bona fide purchaser of a legal estate without notice. A mere occupier will therefore be bound, irrespective of whether the covenant is registered, since he is not a purchaser.[121] An under-lessee, mortgagee or adverse possessor will also be bound if they have notice of the covenant.[122]

Is a subsequent purchaser liable for arrears of management fees?

In *Discovery Bay Services Management Ltd v Buxhaum* [1995] HKDCLR 7, it was held that section 41 of the CAPO could not be construed to mean that a person was liable for breach of covenant which occurred before he became an owner. The manager could not, therefore, recover arrears of management fees from the current owner of a flat, even though they had accrued while he was occupying the property as a lessee. By contrast, in *AIE Co Ltd v Kay Kam Yu* [1996] 1 HKC 239, it was held that unpaid management fees constituted an encumbrance which would be a defect on title if the manager registered a charge against the flat. If this was done, the fees could be recovered since the purchaser would buy subject to the charge.

Alternatively, it may be that the successor would be liable under the principle in *Halsall v Brizell* [1956] Ch 169, namely, that a person who takes the benefit of a deed is bound by a condition contained in the deed, though he does not execute it. This was relied on in *Pearl Island Hotel Ltd v Li Ka-yu* [1988] 2 HKLR 87, where it was held that a manager could recover management fees from an owner who was not a party to the DMC. However, the rule applies only where the benefit is conditional on accepting the burden. This requires some correlation between the benefit and the burden which the successor has chosen to take, and the successors must have the opportunity to elect whether to accept the benefit or, having taken it, to renounce it and thereby to escape the burden.[123] The covenants

121 *Mander v Falcke* [1891] 2 Ch 554.
122 *Clements v Welles* (1865) LR 1 Eq 200, *Hall v Ewin* (1887) 37 Ch D 74 and *Re Nisbet & Potts Contract* [1906] 1 Ch 386.
123 See Peter Gibson LJ in *Thamesmead Town v Allotey* (2000) 79 P & CR 557, at pp 563–564. See also Kevin Gray & Susan Francis Gray, *Elements of Land Law* (Butterworths, 3rd ed, 2001), pp 1157–1159. See also Nield (1997), op cit, pp 368–369, 411.

in the DMC are not usually connected in this way and, in reality, the purchaser has no opportunity to reject the benefits — if he buys, he must buy subject to and with the benefit of the DMC.

Is a tenant or occupier liable to pay management fees?

Positive covenants are not directly enforceable against tenants or occupiers — CAPO, section 41(5). However, a tenant may be liable by virtue of the terms and conditions of his lease.

Where the owners have incorporated and the sum due as a contribution to corporation funds from an owner who is not in occupation, has remained unpaid for a period of one month after it became due, the corporation may serve a notice in writing on the occupier of the flat, demanding the amount due.[124] The tenant is liable to pay but only up to the amount of rent or other charge payable by him (excluding rates).[125] It is presumed in favour of the corporation that the amount of the contribution does not exceed the rent payable.[126] The occupier may deduct the amount paid from the sum due from him to his landlord, the deduction operating as a discharge of that liability.[127]

Who may enforce the covenants in a DMC?

Section 41(3) of the CAPO enables successors in title and persons who 'derive title' from the covenantee to enforce land covenants. This extends to assignees,[128] tenants and mortgagees, but not to an occupier who has no title to any land.

However, any person who wishes to enforce a covenant to which he was not a party must show that he has acquired land which is benefited by the covenant. A person who has disposed of the whole interest in the land cannot enforce a land covenant against subsequent purchasers of the burdened land.[129] It is not enough to show that he has acquired land, such as shares in a multi-unit development. He must also show that he is entitled to the benefit of the covenant. Since in most cases an assignee of the benefited land will need to enforce covenants against successors in title of the original covenantor, he must rely upon the equitable rules, developed from the mid-19th century.[130]

124 BMO, s 23(1).
125 BMO, s 23(2).
126 BMO, s 23(3).
127 BMO, s 23(4)(5).
128 An assignee is a person who acquires the whole interest of the assignor. The assignee need not possess the same legal estate as the covenantee — *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 and *Federated Homes Ltd v Mill Lodge Properties* [1980] 1 WLR 594.
129 *Sky Heart Ltd v Lee Hysan Estate Co Ltd* [1999] 1 HKC 18 (CFA).
130 At common law, the benefit of a covenant could run with the land but the burden could not, except in the case of a lease — *Spencer's Case* (1583) 5 Co Rep 16.

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PART 2
PRACTICAL QUESTIONS

Does a warning of danger discharge the common duty of care of an occupier under the Occupiers Liability Ordinance (Cap 314)?

A warning of danger is not by itself sufficient to discharge the duty, 'unless in all the circumstances it was enough to enable the visitor to be reasonably safe' — section 3(4)(a). Whether a warning is necessary and, if so, sufficient, will depend on the facts of each case. For example, in *Kimber v Gas Light & Coke Co* [1918] 1 KB 439, a warning should have been given where gas fitters had removed a floorboard and the lighting was not good. By contrast, there was no need for a warning in *Tse Hoi Cheung*, above, where an air-conditioning duct was sufficiently high above the floor to prevent any casual fall. Danger would only arise if someone chose to climb up to or sit on the duct.

The notice must actually warn of the danger. A general notice, reminding workers of the need for safety on a construction site, was not sufficient in *Wood*, above, where holes were left uncovered and unfenced. In *Chan Kwai-ngor v Leung Fat-hang* [1992] 1 HKC 408, the notice warned of wet floors in a restaurant kitchen, but not that the floor might be greasy. That case also shows that the notice will not be effective unless it is posted in a place where it is visible to the visitor.[59] It should also be comprehensible so it ought to be in an appropriate language or languages.[60]

A visitor who enters a part of the premises contrary to a clear prohibition will be a trespasser, to whom the occupier will owe a lesser duty (see below).

In what circumstances will the appointment of an independent contractor discharge an occupier's duty under the Occupiers Liability Ordinance (Cap 314)?

An occupier is not answerable for damage caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier if, in all the circumstances:

(1) he had acted reasonably in entrusting the work to an independent contractor; and

59 It was on the wall of the kitchen, whereas it should have been in the main part of the restaurant.

60 The particular languages may depend on the type of restaurant but, as Glofcheski advises, op cit, at p 79, in Hong Kong the notice ought to be in both English and Chinese.

(2) had taken such steps (if any) as he reasonably ought to have taken in order to satisfy himself that the contractor was competent and that the work had been properly done — section 3(4)(b).[61]

In *Hsu*, above, it was reasonable to entrust the installation of an electrical switch box to an electrician who had the necessary experience to do the job and to rely upon his technical expertise. It was not, therefore, appropriate for the corporation to supervise the work. However, the corporation had failed to use reasonable care to check that the work had been properly done. It was obvious, even to the untrained eye, that the glass fibre cover over the water tank was not a suitable one to stand on, and that if it would collapse if someone stood on it causing the risk of electrocution. Furthermore, it was unreasonable not to do anything about the situation for five years, when the corporation must have known that it was dangerous. The Court of Appeal upheld the finding of the trial judge that the corporation had failed to discharge its duty of care, either by failing to appreciate the potential source of danger to anyone seeking access to the switch box and control panels above the water tank or, if they did appreciate it, by failing to remove the danger.[62] The occupier would not be liable, however, if the danger was caused by the contractor choosing to perform the work in a dangerous manner as, for example, by placing a ladder against an unsafe part of the building.[63]

The independent contractor defence does not apply unless the injury is due to faulty execution of work, so it would not apply to the collapse of a balcony, canopy or awning unless some work was also going on at the time.[64] It was not available in *Ting Kam-yuen*, above, where the injuries resulted from the unsafe nature of the premises.

Can an occupier of premises be liable for injuries to an employee of a contractor resulting from an unsafe system of work?

The general rule is that an occupier is under no duty to take reasonable care to see that an employer performs his duty to his employee to provide a safe system of work. However, in special circumstances where the occupier knew or had reason to suspect that the contractor was using an unsafe system of work, a duty of care might be imposed on the occupier to require that a safe system of work be used. Liability is as a joint tortfeasor not as an occupier — *Ferguson v Welsh* [1987] 3 All ER 777. The rule is unlikely to apply in many cases, but where an obviously

61 He may be liable, even if he satisfies these criteria, if his own conduct causes or contributes to the injury or damage.

62 See *Hsu* (2000) CACV 16 of 2000 per Keith JA at p 7.

63 See Lord Goddard in *Bates v Parker* [1953] 2 QB 231, at pp 235–236.

64 For example, it might have been available in *Lily Tse Lai-yin & Ors v The Incorporated Owners of Albert House & Ors* (HCPI 828B of 1997) if the injuries had been done to a visitor instead of to a passer-by — see Ch 8.

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