

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

FINAL APPEAL NO 6 OF 2023 (CIVIL)
(ON APPEAL FROM CACV NO 345 OF 2021)

BETWEEN

DONORA COMPANY LIMITED

Applicant
(Appellant)

and

THE INCORPORATED OWNERS OF
TSUEN KAM CENTRE
(荃錦中心業主立案法團)

Respondent

Before: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Lord Phillips of Worth Matravers NPJ

Date of Hearing: 16 January 2024

Date of Judgment: 8 February 2024

J U D G M E N T

Chief Justice Cheung:

1. I agree with the judgment of Mr Justice Lam PJ.

Mr Justice Ribeiro PJ:

2. I agree with the judgment of Mr Justice Lam PJ.

Mr Justice Fok PJ:

3. I agree with the judgment of Mr Justice Lam PJ.

Mr Justice Lam PJ:

4. Building land is a scarce resource in the urban areas of Hong Kong. Making good use of such resource, we have many property developments by way of blocks of residential units constructed upon a commercial podium. In the podium, there are shop units as well as car-parking spaces. Such developments have been popular amongst homebuyers who enjoy the convenience that a commercial podium offers. Tsuen Kam Centre is one such development. This appeal concerns the incidence of the cost of the repair and maintenance of the external walls of Tsuen Kam Centre as between the co-owners of the building. As explained below, the answer depends on whether the Appellant has the exclusive right to use, occupy and enjoy the external walls in the context of the Building Management Ordinance¹ (“the

¹ Cap 344. Before 1993, the ordinance was intituled the Multi-Storey Buildings (Owners Incorporation) Ordinance.

BMO”) and the deed of mutual covenant² (“the DMC”) governing the mutual rights and obligations of the co-owners of Tsuen Kam Centre.

A. *Tsuen Kam Centre*

5. Tsuen Kam Centre (“the Building”) is a development next to the Tsuen Wan MTR station erected on Tsuen Wan Town Lot No.293 in Castle Peak Road, Tsuen Wan, New Territories. The Appellant, a subsidiary of Sun Hung Kai Properties Limited, was the developer. The development was completed in 1986. Two residential blocks³ were built on top of a three-storey podium (“the Podium”). There are shop units on the Ground Floor and the Second Floor of the podium whilst the First Floor and the Basement are Car Port with many car parking spaces. The Third Floor is a garden on the roof of the podium which also serves as the entrance level for each residential tower. Residents in the domestic units have access to the street level through the Podium.

6. The design of the residential blocks is such that the exterior of each block is largely made up of the windows and window bays of the residential units. Though the Second Floor of the Podium also have large window panels, some of them are blocked by advertisement panels.

² The Deed of Mutual Covenant executed by the Appellant and the First Purchaser of a unit in the residential blocks and the Manager of Tsuen Kam Centre on 10 June 1986.

³ Though the top floor of each residential block is described as the 34th floor in the DMC, the first floor in each block is the 4th floor. Each floor has 8 units described as Flat A to H respectively.

7. The Appellant only retained the “ownership” of one shop on the Ground Floor and the Arcade and Escalator as identified in the DMC. The “ownership” of the other shop units on the Second Floor and the car-parking spaces on the First Floor was transferred to another subsidiary of Sun Hung Kai Properties Limited. Three other shops on the Ground level were sold to different owners. The “ownership” of the units in the residential towers was sold to different individual owners.

8. The first residential unit sold by the Appellant was Flat E on the 26th Floor of Block 1 (“Lee’s Flat”). The First Purchaser was Mr Lee Law Cheong and the First Assignment was executed on 10 June 1986. Mr Lee also executed the DMC as the First Purchaser. In the First Assignment, the Appellant assigned 11 equal undivided 9,000th parts or shares in the Building to Mr Lee together with the exclusive right to hold, use, occupy and enjoy Lee’s Flat. In the Schedule to the First Assignment, the Appellant excepted and reserved to itself and its successors and assigns (other than Mr Lee) the following interests in the Building:

- “(i) the right to the exclusive use occupation and enjoyment of :-
 - (a) The outer walls of the Building (unless otherwise specifically included in the Property);
 - (b) All areas within the Lot not covered by any building or buildings and all open areas under any building or buildings which are not shops or car parking spaces included in the specific reservations contained in the following sub-clauses (c) and (d) save and except such areas as may be designated as common areas (if any) or are intended for common use;
 - (c) The other flats and shops in the Building;
 - (d) All other car parking spaces in the Building;

- (ii) the exclusive right to use affix to and thereafter maintain on the external walls of the Building one or more chimneys or flue pipes;
- (iii) the exclusive right to use the external walls of the Building for advertising purposes.”

B. The system of co-ownership of multi-storey building in Hong Kong

9. “Ownership” of units in multi-storey buildings in Hong Kong has a technical meaning. In *Kung Ming Tak Tong Co Ltd v Park Solid Enterprises Ltd*⁴ this Court analysed at some length the system of such ownership in Hong Kong. Legally speaking all the owners of the units in the building are co-owners as they hold undivided parts or shares in the building as tenants in common. The units are not separate tenements.

10. The judgment in *Kung Ming Tak Tong* also clarified the legal relationship between the co-owners in multi-storey buildings. As a matter of law, no owner has the exclusive possession of any unit. The common law right of each owner arising from the unity in possession is only restricted by mutual covenants which regulate the exercise of their rights inter se. These mutual covenants provide for the “exclusive use, occupation and enjoyment” of the units, the use of the common parts of the building as well as the mutual obligations of the co-owners on the management of the building, including the obligation to pay the charges for such management and how these charges

⁴ (2008) 11 HKCFAR 403.

are to be apportioned between the co-owners. These covenants are typically set out in a deed of mutual covenant⁵. They operate on a contractual plane (underpinned by section 41 of the Conveyancing and Property Ordinance⁶ (“the CPO”)) and some of the rights as between the co-owners are contractual quasi-easements.

11. After reviewing the earlier authorities⁷, this Court set out succinctly the correct legal analysis at [36] in *Kung Ming Tak Tong*⁸:

“... The undivided shares in the property are the subject-matter of the assignment. Their assignment immediately results in the assignor and the assignee becoming co-owners of the property with unity of possession, subject to and with the benefit of the DMC which is executed at the same time. The *apparent grant* of exclusive possession is generally (and in our view correctly) read as a reference to the product --- *purely as a matter of contract* --- of the mutual covenants simultaneously being entered into, *rather than of any proprietary grant* under the deed of assignment. To read such language otherwise would produce an unresolved tension between granting undivided shares in the property carrying the right to possession over all the building in common with all other co-owners on the one hand, and granting exclusive possession over one unit as an interest in land on the other...” (my emphasis)

12. This is a valuable elaboration on the observation of Lord Hoffmann in *Jumbo King Ltd v Faithful Properties Ltd* when His Lordship rejected an argument that a provision in a deed of mutual covenant should be construed against a developer:

⁵ In the earlier years, such covenants could be found in other instruments.

⁶ Cap 219.

⁷ *Lai Wing Ho v Chan Siu Fong* [1993] 1 HKLR 319; *Jumbo King Ltd v Faithful Properties Ltd* [1999] 3 HKLRD 231 (CA) and (1999) 2 HKCFAR 279 (CFA).

⁸ (2008) 11 HKCFAR 403 at p.422.

“The grant is the assignment of the undivided share. The DMC is, as its name says, mutual. The parties contract as covenantor and covenantee and ***do not reserve anything.***”⁹ (my emphasis)

13. Having held that the units in a multi-storey building in Hong Kong are not separate tenements, this Court concluded that the rights granted by an owner to other owners over his unit are not easements¹⁰. It further held that there could be quasi-easements which function for all practical purposes as if they were easements.

14. The first type of quasi-easements consist of “rights arising between or among co-owners as a matter of express agreement or contractual implication being rights which mirror ***on a contractual plane*** the rights which the owner of a dominant tenement would enjoy by way of an easement over a servient tenement”¹¹.

15. The second type of quasi-easements arose from the subdivision of a unit and the assignment of part of it or on the assignment of one unit by the owner of two or more units based on the application of the rule in *Wheeldon v Burrows*¹². It is impliedly included in an assignment those continuous and apparent quasi-easements which are at the time of the grant

⁹ (1999) 2 HKCFAR 279 at p.296. This dicta was cited in the judgment of *Kung Ming Tak Tong*. This Court held in favour of this analysis rather than Litton PJ’s theory in *Jumbo King* at p.290 of a proprietary right to the exclusive possession of a part of the building as an incident of common ownership in the building, see the discussion at [28] to [34] in *Kung Ming Tak Tong*.

¹⁰ (2008) 11 HKCFAR 403 at [39].

¹¹ (2008) 11 HKCFAR 403 at [42].

¹² (1879) LR 12 Ch D 31.

obviously necessary for the reasonable enjoyment of the land conveyed¹³. The law attributes to the assignor an implied intention to convey these quasi-easements as part of the transaction.

16. The analysis in *Kung Ming Tak Tong* has a bearing on the effect of a reservation clause in the assignment. Reservation of rights and interests can be effected in an assignment under section 24 of the CPO. In the context of the sale of a unit in a new multi-storey building by a developer, a reservation was thought to be necessary to reflect the position that other than the unit sold to the first purchaser the developer retained the other parts of the building for future disposal¹⁴. In some cases, the reservation was characterized as a “regrant clause”¹⁵. In view of *Kung Ming Tak Tong* it is doubtful if there is any true regrant. As the subject matter of the assignment is the undivided shares in the building, there is nothing to be regranted back to the developer from the shares assigned or the rights attached to it. In conveyancing parlance, a reservation refers to some incorporeal right which the grantor desires to be regranted for his benefit *over the thing granted*¹⁶. As the right to exclusive occupation use and enjoyment of the other units or parts of a building have not been assigned to the first purchaser, they do not form part of the thing granted. As regards the common law right arising from the unity of possession,

¹³ (2008) 11 HKCFAR 403 at [43] to [51].

¹⁴ See *Hartley Bramwell, Conveyancing in Hong Kong* p.252.

¹⁵ *Wui Fung Lee Investment Co Ltd v Hong Kong Mansion, Causeway Bay (IO)* [2019] HKCFI 2739 (Wilson Chan J) and [2021] 1 HKLRD 408 (CA).

¹⁶ *Emmet & Farrand on Title* para 17.039.

it cannot be the subject matter of regrant since the Hong Kong system of multi-storey building ownerships is predicated upon the preservation of such unity.

17. As discussed below, it also impinges upon the argument that the rights of the other owners to use the external walls should be regarded as quasi-easements.

C. The DMC

18. The DMC is a deed of mutual covenant. It was executed by Mr Lee, the Appellant and the manager on the same date as the First Assignment. Because of the effect of section 41 of the CPO, the covenants are enforceable by and against successors in title of the parties to the DMC. The Appellant was “the Registered Owner” in the DMC and Mr Lee was “the First Purchaser”. For present purposes, the following provisions in the DMC are relevant:

(a) In Recital (1)(a), various expressions were defined:

“(1)(a) In this Deed the following expressions shall have the following meanings ascribed to them whenever the context permits:-

...

‘Blocks’

Those parts of the building for domestic use constructed or in the course of construction above the Podium in accordance with the Approved Plans and in the singular means any Block of domestic units on the Lot.

...

‘The
Building
Common
Areas’

At Basement :-

Unexcavated Area;
Access Ramp and Driveway;
Refuse Collection Vehicle Parking Space;
Staircases and landings;
Service Lift Lobby;
Parking space for loading and unloading of
service vehicles as mentioned in Special
Condition No. 22(a) of the Conditions;

At Ground Floor :-

Pedestrian Plaza and Foot Way;
Drive Way;
Service Lift Lobby;
Staircases and landings;
The Building Management Office for the
Building (if any);

At 1st Floor :-

Service Lift Lobby;
Yards, Staircases and landings;

At 2nd Floor :-

Staircases and landings;
Service Lift Lobby;
Flat Roof;

At 3rd Floor :-

Staircases and landings;
Service Lift Lobby;

At Main Roof :-

All Flat Roof Areas;
Staircases and landings;

All other parts of the Building which have
not been specifically assigned to the Owners
and which have not been specifically
reserved by the Registered Owner in
accordance with this Deed.

‘The Building Common Facilities’	Lighting of the Building Common Areas, water pipes, drains, wires, ducts, cables, fire services equipment, refuse rooms, store rooms, service lifts and escalator, transformer room and switch room, BTM room/MDF room, meter room, water tank and pump rooms, Service lift machine room for the service of the Building Common Areas and other facilities installed for the use and benefit of the Building and not for the sole and exclusive use and benefit of a particular Shop or a particular Flat or a particular Car Park.
‘Car Port Common Areas’	Driveway from Ground Floor access ramp to 1 st Floor and driveway on 1 st Floor Car Port.
‘Car Port Common Facilities’	Water pipes, drains and wires and cables in the Car port; Lighting and sprinkler system of the Car Port; Fire fighting installation equipment & installation in the Car port; Any other facilities installed for the use and benefit of the Car Port.
‘Commercial Development’	The shops or commercial units in the Podium intended for commercial use in accordance with the Approved Plans.
‘Commercial Unit’	A unit in the Commercial Development intended for commercial use by an individual owner.
‘The Commercial Common Areas and Facilities’	Shopping Arcade; Covered Pedestrian Arcade; Light Well; Meter Room; Male and Female Toilets; Pedestrian Plaza; The Sprinkler Systems (including sprinkler tank and pump room); The Escalators; Landings and the staircases serving the Commercial Units;

	AHU Rooms and A/C Plant Areas at 1 st floor and Podium Roof; A/C Pump Rooms; All other areas and facilities intended for common use of the Commercial Development.
‘The Domestic Blocks’	Blocks 1 and 2 erected or to be erected on the Podium intended for domestic use in accordance with the Approved Plans.
‘Domestic Blocks Common Areas and Facilities’	The Entrance Halls for the Domestic Blocks; The lift halls on each floor in the Domestic Blocks; The Caretaker’s room in the Domestic Blocks; Staircases and landings for the Domestic Blocks; Light Wells and Yards; Lift Pits, Shafts and Machine Rooms in the Domestic Blocks; Lifts Serving the Domestic Blocks; Meter Room, Hose Reel Cabinet; Communal television antennae for the use and benefit of the Domestic Block; Podium Roof Garden and all other areas and facilities intended for common use of the Domestic Block.
...	
‘The Arcade and the escalator’	The covered pedestrian walkway or arcade to be constructed or constructed already by the Registered Owner connected with the adjoining building known as the Nan Fung Centre standing on the adjoining Tsuen Wan Town Lot No. 258 and the covered pedestrian single directional escalator leading to the said arcade in accordance with Special Condition (10)(a)(i) and (ii) of the Conditions.
...	
‘The Owners’	The Registered Owner, the First Purchaser and any person who may hereafter become the registered owner or mortgagee of any

undivided shares in the Lot and the Building including joint tenants or tenants in common and its or his or their executors, successors and assigns and references to the Owner or Owners for the time being where undivided shares entitle him or them to the exclusive right to hold use occupy and enjoy that part of the Building.

...

‘The Podium’ The Basement, Ground, 1st, 2nd and 3rd Floors of the Building.”

(b) Under Recital (3), the Building was notionally divided into 9,000 equal undivided shares allocated to different units in the two residential towers as well as four Shops on the Ground Floor and the whole of the Second floors, the Car Parks and the Arcade and Escalator.

(c) Recital (5) set out the purpose for entering into the DMC:

“(5) The parties hereto have agreed to enter into this Deed for the purpose of making provisions for the management, maintenance, insuring and servicing of the Lot and the Building and its equipment, services and apparatus and for the purpose of defining and regulating the rights, interests and obligations of the Owners in respect of the Lot and the Building and to provide for a due proportion of the common expenses of the Lot and the Building to be borne by the Owners.”

(d) Section I of the DMC contained, inter alia, these clauses:

“1. The Registered Owner shall at all times hereafter subject to and with the benefit of the Conditions insofar as they relate hereto have the full and exclusive right and privilege to hold use occupy and enjoy to the exclusion of the First Purchaser the entire Building

save and except All Those premises more particularly described in Recital (4) hereof together with the appurtenances thereto and the entire rents and profits thereof.

2. (a) The Building Common Areas shall be deemed to be common areas for the benefit of the Owners of the Building which areas, may, subject to the provisions hereof, be used by each Owner in common with all other Owners and occupiers of the Building or any part thereof.
- (b) The Commercial Common Areas shall be deemed to be common areas for the benefit of the Owners of the Commercial Development which areas may, subject to the provisions hereof, be used by each Owner of the Commercial Development in common with all other Owners and occupiers of the Commercial Development or any part thereof.
- (c) The Domestic Blocks Common Areas shall be deemed to be common areas for the benefit of the Owners of the Domestic Blocks which areas may, subject to the provisions hereof, be used by each Owner in the Domestic Blocks in common with all other Owners and occupiers of the Domestic Blocks or any part thereof.
- (d) The Car Port Common Areas shall be deemed to be common areas for the benefit of the Owners of the Car Port which areas may, subject to the provisions hereof, be used by each Owner of the Car Port in common with all other Owners and occupiers of the car Port or any part thereof.

3. Each Undivided Share and the full and exclusive right and privilege to hold use occupy and enjoy any part of the Building held therewith shall be held by the person or persons from time to time entitled thereto subject to and with the benefit of the easements, rights, privileges and obligations herein contained.

...

5. Every Owner shall have the full right and liberty without reference to other Owners or other persons who may be interested in any other equal Undivided Share or Shares in any way

whatsoever and without the necessity of making such other Owners or other persons a party to the transaction to sell, assign, mortgage, lease, licence or otherwise dispose of or deal with his share or interest in the Lot and the Building together with the exclusive right and privilege to hold, use, occupy and enjoy such part or parts of the Building which may be held therewith but any such sale, assignment, mortgage, lease or licence shall be expressly subject to and with the benefit of this Deed.

6. The right to the exclusive use occupation and enjoyment of any part of the Lot or the Building shall not be sold, assigned, mortgaged, charged, leased or otherwise dealt with separately from the Undivided Share with which the same is held Provided Always that the provisions of this Clause shall not extend to such leases or tenancies the terms of which shall not exceed 10 years.

...

9. There are reserved unto the Registered Owner the following rights and privileges: -

...

- (d) the exclusive right to erect one or more flue pipes or smoke stacks or chimneys at the rear exterior wall or walls of any of the Blocks and/or the Podium from the ground floor or any other level to the Roof thereof together with the right to maintain, replace or remove the same provided such erection, maintenance, replacement or removal shall not unnecessarily interrupt the enjoyment by the Owners of the Building.
- (e) the exclusive right to use all the external walls of all of the Blocks and/or the Podium for advertising purposes and to display, install, erect, affix or permit to be displayed, installed, erected or affixed thereon and thereto such advertising signboards placards, posters and other advertising signs or structures whatsoever (whether illuminated or not) subject to the approval of the said Director or other Government Authorities concerned and with the right to remove, repair, maintain, service or replace the same provided that the same shall not unnecessarily interrupt the enjoyment by the Owners of the Building.”

(e) Section II(D) provides:

“D. Provision Applicable to All Owners

The Owners shall have no right to enter upon any part of the Lot or the Building save as expressly herein provided it being understood that all work necessary for the maintenance and repair of the Building shall be carried out by the Manager who shall have the right to enter into or upon any part of the Lot and/or the Building for that purpose as herein provided.”

(f) Section IV(A) contains covenants, provisions and restrictions to be observed by all the owners, including the following:

“13. Each Owner shall maintain in good repair and condition to the satisfaction of the Manager and in such a manner so as to avoid any loss, damage, nuisance or annoyance to the Owners or occupiers of any other part or parts of the Building that part of the Building owned by him.

...

19. No Owner shall be entitled to connect any installation to any aerial installed by the Manager except with the written permission of the Manager and in accordance with any Building Rules relating to the same. No Owner shall affix or install his own private aerial on the exterior of any part of the Building except with the written consent of the Manager.

20. Except as herein mentioned, no flags, banners, poles, cages, shades, sculptures or other projections or structures or other advertising devices whatsoever extending outside the exterior of the Building shall be erected, installed or otherwise affixed to or projected from the Building or any part thereof except with the written consent of the Manager.

21. No Owner shall do or permit to be done any act or thing which may or will alter the external appearance of the Building subject to the provisions herein mentioned without the prior consent in writing of the Manager.

...

26. No clothing or laundry shall be hung anywhere in the Building Common Areas or outside the Building or any part thereof other than in the spaces specifically provided therefor.

27. No Owner shall install through the windows or external walls of the Building air-conditioning units or plants or any other fixture without the prior written consent of the Manager.”

- (g) Section V(B) sets out the powers and duties of the manager, including the duty:

“4. To paint white-wash tile or otherwise treat as may be appropriate the Exterior Walls and the Building Common Areas at such intervals as the same may reasonably require to be done.”

- (h) Section V(E) and (I) sets out the following with regard to management expenses and preparation of budgets:

“E. Management Expenses

3. (1) Each Owner shall in respect of each Shop or Flat owned by him pay to the Manager an advance payment (hereinafter called ‘the Advance Payment’) equal to 1/12th of the total budgeted Management Expenses for that year (calculated in accordance with the budget prepared by the Manager as herein provided) payable by that Owner on the first day of each calendar month. Provided Always that such Owner shall be personally liable to make such payments whether or not his unit is vacant or occupied and whether it has been 1st or leased to a tenant or is occupied by the Owner himself or any other person.

(2) If the Manager shall in its opinion consider that the aforesaid Advance Payment shall be insufficient to cover the costs and expenses for such management the Manager may in its absolute discretion prepare a revised budget and adjust the Advance Payment payable by all Owners by such percentage

as the Manager shall consider sufficient to cover the estimated deficit likely to occur and such adjusted Advance Payment shall be payable to the Manager monthly in advance PROVIDED ALWAYS THAT any adjustment made pursuant to the above provision shall be notified to all Owners.

- (3) Notwithstanding anything hereinbefore contained, during the first 24 months from the date of issue of the Occupation Permit the amount of Advance Payment to be made by an Owner shall be in the sum of not exceeding HK\$6.00 per square metre saleable area for each Residential Unit, not exceeding HK\$9.70 per square metre saleable area for each Commercial Unit and not exceeding HK\$150.00 for each car parking space which sums shall not be subject to any increase Provided however that the Registered Owner shall not be required to make such payment but instead the Registered Owner shall as and when demanded by the Manager make up any deficit in the event that the total amount of Advance Payment collected by the Manager shall be insufficient to cover the Management Expenses.
- (4) Each Owner of the Flat or Shop or Car Park shall pay a due proportion (to be determined by the Manager having regard as to the Flat or Shop on saleable area basis and as to the Car Park on the number basis) of shares of the monthly budgeted amount.

...

I. Management Records and Accounts

...

7. (a) Within 42 days after the close of each financial year the Manager shall prepare separate budgets for different groups of units with the Building for the then current financial year which individual budgets shall include all sums which in the opinion of the Manager will be necessary to meet the Management Expenses for that particular groups of units for the then current financial year and shall include an amount for contingencies.”

D. The dispute on the external walls and the determination by the Lands Tribunal

19. The Appellant has used the external walls of the Commercial Development (including the parapet wall of the Podium) for advertising purpose and paid the costs of their repair and maintenance solely.

20. Since 2007, the manager divided the costs for the repair and maintenance of the external walls into four categories and prepared separate budgets for each group of owners:

- (a) Those for the external walls of the Commercial Development;
- (b) Those for the external walls of the Car Port;
- (c) Those for the external walls of the Domestic Blocks;
- (d) Those for the other parts of the Building.

21. The Respondent was incorporated in 2009. It disputed the manager's budgetary treatment of these costs. It took the view that the Appellant should be solely responsible for all the costs of repair and maintenance in light of the Appellant's exclusive right to use the external walls for advertising purpose.

22. The Appellant supported the budgetary approach of the manager. It brought proceedings in the Lands Tribunal to determine who should bear the responsibility for the repair and maintenance of the external walls.

23. On 22 March 2021, Judge M Wong (“the Judge”) sitting as the Presiding Officer in the Lands Tribunal held that the external walls are common parts of the Building and upheld the budgetary treatment of the costs of repair and maintenance by the manager. He granted declarations accordingly, including a declaration that the external walls are sub-divided into four categories which costs of repair and maintenance should accordingly be charged to the relevant account maintained for each category. That declaration was referred to as Declaration (2) in the courts below.

E. The judgment of the Court of Appeal

24. On appeal, the Court of Appeal¹⁷ reversed the Judge’s determination. The Court started its analysis with the statutory definition of common parts under section 2 of the BMO. In light of the reservation in the First Assignment, it held that prima facie the external walls should not be regarded as common parts¹⁸. On the proper construction of the DMC, the Court held that the external walls cannot be regarded as “parts of the Buildings which have not been specifically assigned to the Owners and which have not been specifically reserved by the [the Appellant] in accordance with [the DMC]” within the definition for the Building Common Areas¹⁹. It further held that there is nothing in the DMC which provided that the external walls are

¹⁷ Cheung, Yuen and Chow JJA. The judgment of the court was delivered by Chow JA.

¹⁸ CA Judgment at [32].

¹⁹ CA Judgment at [36].

intended for the common use of the Commercial Development or the Domestic Blocks respectively²⁰.

25. Though the Court accepted that the external wall served the functions of (i) holding and supporting the Building; (ii) preventing damage to the Building's interior; and (iii) enabling the co-owners to have peaceful enjoyment of their respective units as discussed in the earlier case of *Kong Wai Hsien v Tai Wai Glamour Garden (IO)*²¹, it held that it does not follow that the external walls must be common parts. The Court took the view that the specification or designation of the external walls in a registered instrument as being for the exclusive use, occupation and enjoyment of an owner is a separate matter²².

26. The Court agreed with the Judge that the reservation of the exclusive right to the Appellant to use the external walls for specific limited purposes does not give it an exclusive right of possession or use, occupation or enjoyment of the walls²³. However, the Court found that the crucial feature in the present case was the express specification or designation of the external walls in a registered instrument as being for the exclusive use, occupation and enjoyment of the Appellant²⁴. As it is clear from a subsequent paragraph of

²⁰ CA Judgment at [37].

²¹ [2019] 5 HKLRD 672 at [40], a judgment by Au JA sitting in another division of the Court of Appeal.

²² CA Judgment at [39].

²³ As decided in *Kong Wai Hsien*, supra and two earlier cases: *Incorporated Owners of Goa Building v Wui Tat Co Ltd* [2004] 1 HKC 348 and *Incorporated Owners of Shatin New Town v Yeung Kui* [2010] 2 HKC 241.

²⁴ CA Judgment at [44].

the judgment, the Court was referring to such specification or designation in the First Assignment instead of the DMC²⁵.

27. As the Court concluded that the Appellant has the exclusive right to use, occupation or enjoyment of the external walls, it also held that it is under a duty to maintain the same in good repair and condition under section 34H of the BMO²⁶.

28. In the circumstances, the Court did not find it necessary to address the division of the costs for the repair and maintenance of the external walls into four categories.

F. The issues in the Court of Final Appeal

29. The Appellant sought leave to appeal to this Court. On 26 July 2023, the Appeal Committee granted leave to appeal on two questions:

Question 1: Notwithstanding an earlier reservation of exclusive right to use, occupy and enjoy the external walls in the first assignment by the developer, whether and in what circumstances the grant of rights to co-owners for certain uses of the external walls of a building in a deed of mutual covenant is a sufficient manifestation that the developer does not have such exclusive right?

Question 2: Where a deed of mutual covenant contains a definition that common areas mean, inter alia, parts of the building which are “intended for common use”, whether the fact that the external walls of the buildings serve the functions of (i) holding and supporting the building, (ii) preventing damage to the building’s interior and (iii) enabling the co-owners to have

²⁵ CA Judgment at [46] where it was said that the Judge’s concentrating on the DMC in search of such designation is off focus. See also CA Judgment at [50(1)].

²⁶ CA Judgment at [51] to [53].

peaceful enjoyment of their respective units of the building means that the external walls are “intended for common use” and hence common areas notwithstanding an earlier reservation of exclusive right to use, occupy and enjoy the external walls in the first assignment by the developer?”

30. These two questions are pertinent to the determination of the character of the external walls as common parts of the Building. However, even if the Appellant succeeds in establishing that external walls are common parts, there is a second issue in the dispute: whether the costs for the repair and maintenance of the external walls should be divided into four categories in the manner the manager did. At different stages of the proceedings, the alternative positions of the parties were that all the external walls fall within the meaning of the Building Common Areas in the DMC²⁷. Before us, the Respondent advanced this position as their alternative argument (“the alternative argument”).

31. The determination of the issue depends solely on the construction of the DMC. The Judge also addressed it fully in his judgment²⁸ before granting Declaration (2). The printed cases of the parties alluded to this part of the dispute²⁹. Counsel addressed us fully on the alternative argument at the hearing. The parties would not suffer any prejudice if this Court entertains these submissions. In the circumstances, the due administration of justice

²⁷ That was originally the alternative position of the Appellant in the Lands Tribunal. After it had been abandoned by the Appellant, the alternative position was taken up by the Respondent.

²⁸ LT Judgment at [93] to [105].

²⁹ The Appellant’s Case at paras 9, 41, 46; The Respondent’s Case at paras 5, 11, 76 to 81; The Appellant’s Supplemental Case at paras 24, 27 to 29.

demands a determination by this Court on this issue in order to achieve a full resolution of the dispute between the parties.

32. Mr Yu SC³⁰ sought to raise an argument in his Supplemental Case by reference to the discretion of the manager under Clause 1 of Section V(E) of the DMC³¹. Since the second issue can be determined by reference to the other provisions in the DMC concerning the duty of the manager in the preparation of budgets and the Owner's obligation to pay management expenses, I do not find it necessary to address this aspect of Mr Yu's argument.

33. At the hearing before us, after Mr Yu had completed his opening submissions, Mr Chang SC³² sought to advance an objection to the restoration of Declaration (1) regarding the Appellant's obligation to repair and maintain such part of the external walls to which it has exercised its right of advertising under Section I Clause 9(e) of the DMC. As submitted by Mr Yu, such objection was not foreshadowed in the printed case of the Respondent and no leave had ever been granted to the Respondent to mount a cross-appeal against Declaration (1). In the circumstances, such late attempt by the Respondent to revisit Declaration (1) should not be entertained.

34. Hence, the issues in this appeal are as follows:

³⁰ Mr Yu SC appears with Mr Man and Mr Ng for the Appellant in this appeal.

³¹ Appellant's Supplemental Case at paras 25, 26 and 30. The Respondent objected to this argument alleging it to be a new point, see Respondent's List of Alleged New Points of 28 December 2023.

³² Appearing together with Ms Wu and Mr Cheung for the Respondent.

- (a) Whether the external walls are common parts;
- (b) Whether the external walls are properly sub-divided in the DMC into four categories with the costs for repair and maintenance for the walls charged to the respective account kept by the manager for that category (“the apportionment issue”). The alternative argument would be considered in the context of the apportionment issue.

G. Are the external walls common parts?

G.1 The primacy of the DMC

35. The Judge and the Court of Appeal started their respective analyses on this issue by referring to the statutory definition of “common parts” in section 2 of the BMO but reached different conclusions. Section 2 and the relevant parts of Schedule 1 are in the following terms:

“common parts 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.

...

Schedule 1 - Common Parts

1. External walls and load bearing walls, foundations, columns, beams and other structural supports.
2. Walls enclosing passageways, corridors and staircases

...

4. Parapet walls, fences and boundary walls.”

36. The major difference between the Court of Appeal and the Judge lies in the significance attached to the First Assignment. In the application of the statutory definition, the Judge held that the “registered instrument” must be the DMC, not the First Assignment since it was the DMC which serves the function of designating the common parts in a building³³. On the other hand, the Court of Appeal held that there is no reason in principle why a registered First Assignment may not qualify as the registered instrument in the statutory definition³⁴. Though the Court of Appeal accepted that the position in the First Assignment could have been altered by a DMC, it has to be demonstrated that the specification or designation of the external walls as being for the exclusive use, occupation or enjoyment of the Appellant in the First Assignment (“the Earlier Reservation”) has been superseded by the terms of the DMC³⁵. The Court of Appeal held that the DMC did not achieve that result.

37. Whilst both approaches ultimately depend on the proper construction of the DMC, I respectfully differ from the Court of Appeal. The approach of the Court of Appeal erroneously treated the First Assignment and the DMC as if they were instruments effecting two different transactions when

³³ LT Judgment at [33].

³⁴ CA Judgment at [31].

³⁵ CA Judgment at [34].

in reality they were instruments executed for the purposes of one single transaction. In a transaction effected by more than one instruments, all the covenants in the instruments should be construed in light of the overall objectives the parties intended to achieve. When the First Assignment is read together with the DMC, it is plain from Recital (5) of the DMC that the parties' intention was that the rights and obligations in respect of common areas and facilities are regulated by the provisions in the DMC.

38. This is borne out by the context and the circumstances in which the First Assignment and the DMC were executed:

- a. The conveyancing mechanism adopted in Hong Kong to effect the sale of the first unit in a new multi-storey building from a developer involved the execution of a first assignment by conveying some equal undivided shares or parts in the land to a first purchaser together with the exclusive right to occupy, use and enjoy the unit. After the execution of the assignment in his favour, the first purchaser would also execute a deed of mutual covenant to provide for the regulation of all the rights of the co-owners in the building;
- b. In the present case, the First Assignment and the DMC were executed on the same occasion for the completion of the sale and purchase of Lee's Flat. Both instruments were essential for the transaction because Mr Lee could not have purchased the flat

without the DMC being in place to regulate the common parts and the management of the Building;

- c. The First Assignment primarily served the function of transferring the interest of the Appellant to Mr Lee in respect of Lee's Flat. The intention of the parties, as reflected in Recital (5) of the DMC, was to regulate the common parts and the management of the Building by the provisions in the DMC;
- d. The Earlier Reservation was not included in the First Assignment for the purpose of setting out the mutual covenants between all the co-owners of the Building. In line with the conveyancing practice adopted in Hong Kong, as clearly set out in Recital (5), the mutual rights and obligations of the co-owners were intended to be governed by the DMC. Whatever rights and interests reserved by the Appellant as developer in the Earlier Reservation could be subject to further alterations in the DMC where common parts are identified and regulated;
- e. Clause 1 in Section I of the DMC (which stated that the Appellant has the full and exclusive right and privilege to hold the entire Building except Lee's Flat) operated similarly. That clause must be read together with the other provisions, in particular Clause 2 in Section I in the DMC which cut down the exclusive right and privilege of the Appellant with regards to areas and facilities identified as "The Building Common Areas", "The Building Common Facilities", "Car Port Common Areas", "Car Port Common Facilities", "The Commercial Common Areas and

Facilities” and “Domestic Blocks Common Areas and Facilities”. To the extent that such exclusive enjoyment has been cut down, the Earlier Reservation and the position as stated at Section I Clause 1 has been altered by the DMC.

39. Therefore, the crucial question is not whether the DMC has superseded the Earlier Reservation in the First Assignment. Instead, the correct approach is to read the DMC together with the First Assignment in discerning the common intention of the parties with regard to the external walls. Applying the statutory definition in section 2 of the BMO, the question is when these documents are read together whether they manifest a common intention to specify or designate the external walls as being for the exclusive use, occupation or enjoyment of an owner. These documents should be construed together contextually and purposively in a coherent fashion.

40. Further, in the application of the statutory definition, the court must examine all the relevant provisions instead of narrowly confining itself to one single provision. There are cases where notwithstanding that a relevant instrument contained a provision suggesting the exclusive right to use occupation or enjoyment of a part of a building be given to a party the courts came to the conclusion (and in my view correctly) that such parts were common parts in view of the overall effect of the relevant instruments³⁶.

³⁶ *Incorporated Owners of Hong Leong Industrial Complex v HK Resources Ltd* [2010] 4 HKC 463; *Incorporated Owners of KK Mansion v Jade Water Group Ltd* [2010] 3 HKLRD 195.

41. Though the First Assignment forms part of the context in the construction of the DMC, the weight to be placed upon the Earlier Reservation depends on the purpose served by the clause when the parties executed these instruments and its intended impact on the regime set out in the DMC.

42. Mr Chang submitted that by the Earlier Reservation the Appellant had reserved from the interest assigned to Mr Lee the “ownership” of the external walls for itself and such “ownership” remained with the Appellant since the DMC contains no provision divesting the Appellant of such “ownership”. By “ownership”, counsel referred to the right to exclusive occupation use and enjoyment of the external walls.

43. As held in *Kung Ming Tak Tong*, the provisions regarding the rights to exclusive occupation use and enjoyment in a multi-storey building operate in law by way of covenants instead of a proprietary grant. In this respect, a covenant contained in a first assignment is not different from a covenant contained in a deed of mutual covenant. As far as the right to exclusive occupation use and enjoyment is concerned, the Earlier Reservation could not operate as a grant of proprietary interest.

44. Even assuming that the Earlier Reservation can be regarded as a covenant by Mr Lee in favour of the Appellant in respect of the exclusive right to occupy use and enjoy the external walls, it is at most only a covenant by Mr Lee to restrict the exercise of his right of possession regarding the areas or

parts specified in the Earlier Reservation. There is no covenant by the Appellant as to how those specified areas or parts were to be used. Therefore the Earlier Reservation could not be construed as a covenant excluding the possibility of the external walls being demarcated as common parts or areas in the DMC.

45. In contrast, apart from imposing restrictions on the exercise of right of possession in respect of the domestic or shop units intended to be privately “owned”, the mutual covenants in the DMC also demarcate the common areas and facilities and set out the duties of the Manager as well as the obligations and rights of the co-owners in relation thereto. These covenants are *mutual covenants* by every co-owner to other co-owners *on common areas and facilities*.

46. For these reasons, the relevant character of the external walls is to be determined by reference to the DMC though the First Assignment may be referred to as an aid to construction in case of ambiguity in the DMC.

47. Mr Chang tried to persuade us that the Earlier Reservation was meticulously drafted to specifically reserve the external walls for the exclusive use occupation and enjoyment of the Appellant. He placed great reliance on the reference to specific reservations in para (i)(b) of the Earlier Reservation and linked that with parts “specifically reserved by the Registered Owner” in the catchall provision in the definition of “The Building Common Areas” in the DMC. He submitted that these references were the key to the

construction of the DMC. Counsel cited *Wui Fung Lee Investment Co Ltd v Hong Kong Mansion, Causeway Bay (IO)*³⁷ and *Wing Hong Investment Co Ltd v Fung Sok Han*³⁸ for the proposition that the Earlier Reservation should be given as much prominence as the DMC in determining the character of the external walls.

48. With respect, counsel read too much into these references to specific reservations. It should be noted that the reference in the Earlier Reservation is about the items in sub-paragraphs (c) and (d), viz the other flats and shops and car parking spaces in the Building and has nothing to do with the external walls. As regard the definition of “The Building Common Areas” in the DMC, as explained later in my discussion on the construction of the DMC and apportionment, it is not the only definition of common areas and facilities which applied to the external walls. In any event, I do not accept that these references provide the interpretative key to the proper construction of the DMC. In light of my above analysis concerning the purpose and function of the Earlier Reservation in the context of the whole transaction, I am not persuaded that it had the effect counsel claimed it to have. In short, I maintain the view that the Appellant did not by that Earlier Reservation covenant that the external walls would not be common parts. That was an issue left to be resolved by the DMC.

³⁷ [2021] 1 HKLRD 408 at [40].

³⁸ [2016] 1 HKLRD 1 at [127].

49. *Wui Fung Lee Investment Co Ltd v Hong Kong Mansion, Causeway Bay (IO)*³⁹ is a case where the relevant clause in the DMC was not well drafted and not clear. The court therefore had to use the First Assignment as an aid to construe the DMC. The approach is perfectly consistent with my above analysis. The document to be construed is still the DMC, the First Assignment was referred to as an aid only. It is against such background that Godfrey Lam J (as Godfrey Lam JA then was) made the observation that the Regrant Clause in the First Assignment and the provision in the DMC could not have meanings inconsistent with each other⁴⁰. It depends very much on the facts and context of that particular case and I do not read that dictum as suggesting that there could not be any variation from a reservation in a first assignment in the demarcation of common areas and facilities in a deed of mutual covenants.

50. Insofar as the judge in *Wing Hong Investment Co Ltd v Fung Sok Han*⁴¹ suggested an approach which is inconsistent with the primacy of a deed of mutual covenant, I respectfully differ for the reasons I canvassed above.

51. Thus, in the application of the statutory definition of “common parts” in section 2 of the BMO, the statutory definition should not be applied by simply asking if there is any clause in a registered instrument which stipulated that the exclusive use, occupation or enjoyment of a particular part

³⁹ Supra.

⁴⁰ Supra at [40].

⁴¹ Supra at [127].

of the building be given to an owner. One must pay regards to the overall context of the transaction and the other relevant provisions in the instruments effecting the same transaction. Otherwise, a provision like Section I Clause 1 would have the effect of excluding the entire building from the statutory definition of common parts.

52. Construing the statutory definition purposively, the specification or designation in an instrument referred to in that definition must refer to *the relevant and effective* specification or designation in the transaction. A specification or designation in the First Assignment which was not intended by the parties to reflect the overall position could not be a relevant and effective specification or designation for the purpose of that definition.

53. In this connection, the statutory definition refers to an instrument registered in the Land Registry instead of a deed of mutual covenant because at the time when the definition was first introduced in 1970⁴² there were buildings for which no deed of mutual covenant had been executed and the relevant mutual covenants were contained in other instruments⁴³. Since then, with the predominance of the practice of executing deeds of mutual covenant, the above analysis on the primacy of the deed of mutual covenant should provide a guide as to the application of the statutory definition in most of the cases.

⁴² As section 2 of the Multi-Storey Buildings (Owners Incorporation) Ordinance Cap 344.

⁴³ In *Hartley Bramwell, Conveyancing in Hong Kong* p.269, the learned author referred to cases where the specifications or designations were found in deeds of mutual grant.

54. With respect, the Court of Appeal fell into error by failing to pay sufficient regard to the primacy of the DMC as the instrument regulating the common parts and the rights and obligations between the co-owners in the management of the Building. Such erroneous approach led the Court to hold that the Judge was off focus by examining whether the DMC has designated the exclusive right of use, occupation and enjoyment of the external walls to the Appellant⁴⁴. The Court of Appeal's application of the statutory definition for common parts cannot be supported.

G.2 Construction of the DMC

55. In line with the modern approach to construction, the DMC should be read as a whole in light of the factual and legal context of its making and the practical objects which it was intended to achieve. Textual analysis and contextualism are tools in the construction exercise and the utility of each tool vary according to the circumstances of the particular document or documents. To arrive at a proper construction, the court has to conduct a unitary exercise in each case going through an iterative process⁴⁵. In light of that, one cannot place too much reliance on cases decided in respect of another deed of mutual covenant designed for another building.

⁴⁴ CA Judgment at [45] to [48].

⁴⁵ See *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279 at p.296; *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR 351 at [15]; *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [13]; *Achieve Goal Holdings Ltd v Zhong Xin Ore-Material Holding Co Ltd* [2020] HKCA 51 at [16].

56. The statutory definition of “common parts” in section 2 of the BMO has two limbs. Sub-paragraph (b) and the items listed in Schedule 1 are probably covered by the more general expression “the whole of a building” in sub-paragraph (a). In *Westlands Garden (IO) v Oey Chiou Ling*⁴⁶, Tang Acting CJHC (as he then was) held that Schedule 1 serves as a non-exhaustive pointer to what might commonly be regarded as common parts and if a part has been specified in that schedule a stronger indication is required before the court can come to the conclusion that it is not a common part. External walls appear as the first item in Schedule 1.

57. There is no provision in the DMC which specifies or designates the external walls as being for the exclusive use, occupation or enjoyment of the Appellant. The closest to that are Clauses 9(d) and (e) of Section I in respect of the exclusive right to use of the external walls (or exterior walls) for erection of flue pipes or smoke stacks or chimneys and for advertising purposes respectively. However, such prescribed limited uses do not constitute a specification or designation of the external walls “for the exclusive use, occupation or enjoyment” of the Appellant⁴⁷.

58. The DMC itself provides for other potential uses of the external walls by other owners, albeit only permissible with the prior written consent

⁴⁶ [2011] 2 HKLRD 421, see in particular [20].

⁴⁷ See *Kong Wai Hsien v Tai Wai Glamour Garden (IO)* [2019] 5 HKLRD 672; *Incorporated Owners of Goa Building v Wui Tat Co Ltd* [2004] 1 HKC 348 and *Incorporated Owners of Shatin New Town v Yeung Kui* [2010] 2 HKC 241.

of the manager. Under Section IV(A), an owner may use the external walls for affixing or installing a private aerial (Clause 19); for installing or affixing flags, banners, poles, cages, shades, sculptures or other projections or structures or advertising devices (Clause 20); hanging of clothing or laundry (Clause 26) and installing air-conditioning units or plants or any other fixture (Clause 27).

59. Such other usages show that the right of the Appellant to use the external walls is not exclusive. Putting aside the possible conflicts between Clause 9(e) and Clause 20 on advertising uses, there is no basis for discounting the potential uses under Clauses 19, 20, 26 and 27 in assessing whether the DMC specifies or designates the external walls “for the exclusive use, occupation or enjoyment” of the Appellant. Exclusive use, occupation or enjoyment of the external walls should not be confined to the exclusive use of the walls by way of advertising purposes.

60. Mr Yu submitted that Clause 9(d) and (e) would be otiose if the Appellant had already had all the exclusive right to use, occupy or enjoy the external walls. I agree. When the DMC contains no provision conferring a general exclusive right on the Appellant to use, occupy or enjoy the external walls but only provides for limited prescribed uses by the Appellant as per these clauses, the Earlier Reservation could not be prayed in aid to expand the latter so that they could be read as conferring a general exclusive right on the Appellant under the DMC.

61. Mr Chang submitted that the other potential uses by the other owners should be characterized as quasi-easements in their favour grafted upon the general exclusive right of the Appellant on the use of the external walls. For present purposes, I would not exclude the viability of such analysis in respect of the exclusive right to occupy part of a building (like a utility room) with some less intrusive rights (like the right of passing through it for specified purposes) grafted onto it by way of quasi-easement. But such analysis cannot be applied to a structure or facility like the external walls in the present case in which no person enjoys any exclusive occupation. When one speaks of the use or enjoyment of a wall, the right to use it for advertising purpose is not so physically different from the use of it for installation of aerials or air-conditioners or other structures. If different persons could use the walls for different purposes, it must follow that no person has any exclusive right to the use or enjoyment of them.

62. Having regard to the configuration of the external walls and the bay windows at the Domestic Blocks, the walls are practically more suitable for uses under Clauses 19, 20, 26 and 27 than for uses under Clause 9(d) and (e). It is noteworthy that under Clauses 9(d) and (e) the right of the Appellant to use the walls are expressly subject to the requirement that it should “not unnecessarily interrupt the enjoyment by the Owners of the Building”.

63. Thus, it is impossible to regard the Appellant's right under Clauses 9(d) and (e) as being akin to a servient tenement and the other owners' rights under Clauses 19, 20, 26 and 27 as being akin to a dominant tenement. It is also noteworthy that Clauses 19, 20, 26 and 27 were set out in the DMC in Section IV as "Covenants, Provisions and Restrictions to be observed and performed by the Owners" as opposed to Sections II and III where "Easements, Rights and Privileges" were set out. The drafter of the DMC plainly regarded these clauses as covenants having effect in parallel with the covenants in favour of the Appellant on the use of the external walls under Section I.

64. As stated earlier, the external walls also served the functions of (i) holding and supporting the Building; (ii) preventing damage to the Building's interior; and (iii) enabling the co-owners to have peaceful enjoyment of their respective units. Mr Chang submitted that such structural or architectural functions of the external walls could not negate the Appellant's exclusive right to use the walls. Counsel urged this Court to consider such functions as quasi-easements akin to "the right to subjacent and lateral support" provided in Section II of the DMC⁴⁸.

65. In advancing that submission, Mr Chang relied principally on the Earlier Reservation in the First Assignment. For reasons already canvassed in Section G.1 above, the Earlier Reservation is not determinative as to whether the external walls are common parts. If the DMC itself does not contain any

⁴⁸ Clauses 2 and 3 of Section II(A), Clauses 3 and 4 of Section II(B) and Clause 2 of Section II(C).

provision specifying or designating the external walls for the exclusive use, occupation or enjoyment of the Appellant, the Earlier Reservation is of no avail to the Respondent.

66. Though I can see the plausibility of an argument based on *Wheeldon v Burrows* in respect of the structural or architectural functions of the external walls if the DMC clearly provides for the full “ownership” of the Appellant by way of the exclusive use and enjoyment of the walls, this is not the case here. Given the non-exclusive nature of the right of the Appellant to use the external walls, Mr Chang’s quasi-easement argument is not sustainable. Because of that, there is no justification for disregarding the structural or architectural functions of the external walls as uses of the walls. Actually, these uses are their primary uses and all the owners of the Building enjoy the benefit of such uses. Therefore, the external walls fall within the definitions for “Car Port Common Facilities”, “The Commercial Common Areas and Facilities” and “Domestic Blocks Common Areas and Facilities” in the DMC as facilities “for the use and benefit of the Car Port”, “intended for common use of the Commercial Development” and “intended for common use of the Domestic Block” respectively.

67. From the above analysis, it is clear that the DMC does not contain any provision specifying or designating the external walls for the exclusive use, occupation or enjoyment of the Appellant.

68. Moreover, the other provision in the DMC making reference to the external walls is Clause 4 in Section V(B). That clause imposes a duty on the manager to “paint white-wash tile or otherwise treat as may be appropriate the Exterior Walls”. Such duty encompasses all the works necessary for the repair and maintenance of the walls. Though there is no definition for Exterior Walls in the DMC, it cannot be referring to any other walls than the external walls of the Building. This is an indication that within the framework of the DMC, the external walls are regarded as common parts with the duty to repair and maintain the same falling on the manager as opposed to the Appellant.

69. This clause has to be read together with Clause 13 of Section IV(A) which imposes on the Owners the duty to maintain the parts “owned by him” in good repair and condition. The meaning of ownership in the context of the DMC should be considered in light of the definition of “Owners” in Recital (1)(a). To recap, an Owner or Owners who own “undivided shares entitle him or them to the exclusive right to hold use occupy and enjoy that part of the Building”. In other words, if the Appellant is the owner who has “the exclusive right to hold use occupy and enjoy” the external walls, the duty to repair and maintain should fall on it as opposed to the manager. But Clause 4 in Section V(B) explicitly provides otherwise.

70. Viewed thus, these clauses reinforce the construction that though the Appellant has exclusive right to use the external walls for specified purposes, such right is not “the exclusive right to hold use occupy and enjoy”

the external walls for defining ownership and the obligation to maintain and repair within the framework of the DMC.

71. In terms of ownership of a part of the Building, the scheme of the DMC is to tie the exclusive right to hold use occupy and enjoy a particular part with the holding of the undivided shares. Apart from the definition of “Owners” which refers to the entitlement to such exclusive right with reference to the undivided shares, Clauses 3, 5 and 6 of Section I refer to such exclusive right ***held with*** the undivided shares⁴⁹. To ascertain which particular parts of the Building are held with the respective undivided shares, the relevant allocation appears at Recital (3) of the DMC. The point to note for present purposes is that no undivided share is allocated to the external walls. The implication is that the external walls are not “owned” by any individual owner; they are common areas or facilities as provided under Clause 2 of Section I of the DMC.

72. Further, under Section II(D) of the DMC, only the manager has the right to enter into the units owned exclusively by Owners to carry out maintenance and repair works. The Appellant has no right to do so. If the DMC were to impose an obligation on the Appellant to maintain and repair

⁴⁹ Clause 3 refers to the undivided shares and the full and exclusive right and privilege to hold use occupy and enjoy any part of the Building ***held therewith***. Clause 5 contains a similar reference. Clause 6 refers to the undivided shares ***with which*** the right to exclusive use occupation and enjoyment of any part of the Building is held.

the external walls, such right of entry is necessary for such works to be executed properly. Yet Section II(D) explicitly provides otherwise.

73. The only features in the DMC which Mr Chang can pinpoint to support the argument that the external walls are subject to the exclusive occupation, use and enjoyment of the Appellant are:

- a. The references to the First Assignment under Recital (4) and Clause 1 of Section I; and
- b. The reservation for exclusive use for limited purposes under Clauses 9(d) and (e).

74. For the reasons already given, these features carry little weight in determining whether the external walls are common areas or facilities in the context of the DMC.

75. My conclusion on the proper construction of the DMC is that the external walls are common areas or facilities and the Appellant does not have the exclusive right to hold use occupy and enjoy the same. It follows that applying section 2 of the BMO in accordance with the correct approach set out in Section G.1 above, the external walls are common parts as the relevant instrument, viz the DMC, does not specify or designate them as being for the exclusive use, occupation or enjoyment of the Appellant.

H. Separate budgets or one single set of costs for the repair and maintenance of the external walls?

76. As mentioned, the alternative argument of the Respondent concerns the apportionment issue. In a nutshell, Mr Chang submitted that even if the external walls are common parts, they fall within the definition of “The Building Common Areas” instead of being divided into four categories. Consequently, the costs for the repair and maintenance of all the external walls should be borne by all the owners.

77. On the other hand, Mr Yu supported the manager’s budgetary treatment of such costs and asked this Court to restore the Tribunal’s Declaration (2) accordingly.

78. Section 34E of the BMO stipulates that the provisions in Schedule 7 shall be impliedly incorporated into every deed of mutual covenant and those provisions shall bind the owners and manager of the building. Under paragraph 1 of Schedule 7, the amount of management expenses payable by the owners shall be fixed by reference to the budget prepared by the manager.

79. Further, under section 22(1) of the BMO, the amount to be contributed by each owner shall be fixed in accordance with the deed of mutual covenant.

80. As set out in [18] above, the DMC contains provisions with regard to the preparation of the budgets by the manager and the manner in which the amount payable by each Owner is calculated by reference to such budgets. In particular, Clause 7(a) of Section V(I) directed the manager to prepare separate budgets for different groups of units. In light of the definitions for “Car Port Common Facilities”, “The Commercial Common Areas and Facilities” and “Domestic Blocks Common Areas and Facilities”, the different groups of units in Clause 7(a) obviously refers to the residential units as one group, the shop units as a second group and the car parking spaces as a third group. The costs in respect of the external walls which do not fall within any of these three definitions would be budgeted to “The Building Common Areas” to be shared amongst all the Owners.

81. In this connection, the duty of the manager in respect of the maintenance and repair of the external walls under Section V(B) refers to “the Exterior Walls” separately from “The Building Common Areas”. This is an indication, though not conclusive indication, that the manager’s duty regarding the external walls is to be considered separately from that regarding “The Building Common Areas”.

82. The obligation of each Owner to pay management expenses under Clause 3 of Section V(E) is to pay the amount “calculated in accordance with the budget prepared by the Manager”. Reading this clause together with Clause 7(a) of Section V(I), the apportionment of the costs for the repair and maintenance of the external walls is required under the DMC. Thus, an Owner

of a domestic unit has to pay an amount calculated by reference to the budget in respect of Domestic Blocks Common Areas and Facilities. An owner of a shop unit has to pay an amount calculated by reference to the budget in respect of The Commercial Common Areas and Facilities. An owner of a car parking space has to pay an amount calculated by reference to the budget in respect of Car Port Common Facilities.

83. I reject Mr Chang's alternative argument because it does not pay regard to Clause 7(a) of Section V(I). Also, Mr Chang did not explain the specific reference to Exterior Walls in Section V(B) if they are all within the meaning of "The Building Common Areas". Further, the alternative argument does not take account of the physical configuration of the Building and the different uses of the different parts of the external walls according to the findings of the Tribunal⁵⁰.

84. In my view, the above analysis as to the effects of the relevant provisions of the DMC support the budgetary treatment of the external walls by the manager and Declaration (2) should be restored accordingly.

85. In so holding, I must also state that I respectfully differ from the Judge in his reliance on section 34H of the BMO⁵¹ in coming to his determination on the issue relating to Declaration (2). For the reasons set out in the earlier parts of this judgment, section 34H has no application to the

⁵⁰ LT Judgment at [95] to [98].

⁵¹ LT Judgment at [101] to [102].

external walls as they are common parts. Also for reasons already stated, I do not agree with the Judge⁵² that the quasi-easements in Section II of the DMC have any relevance in respect of the external walls.

I. Outcome

86. For the reasons given above, I would allow the appeal and restore the declarations granted by the Judge in the Tribunal.

Lord Phillips of Worth Matravers NPJ:

87. I agree with the judgment of Mr Justice Lam PJ.

Chief Justice Cheung:

88. Accordingly, the Court unanimously allows the appeal and restores the declarations granted by the Judge in the Lands Tribunal. The Court further makes an order *nisi* that the Respondent pay the costs before us and before the Court of Appeal to the Appellant, and the parties be at liberty to lodge written submissions on costs within 14 days of the date of this judgment, such submissions to be dealt with on the papers.

⁵² LT Judgment at [103].

(Andrew Cheung)
Chief Justice

(R A V Ribeiro)
Permanent Judge

(Joseph Fok)
Permanent Judge

(M H Lam)
Permanent Judge

(Lord Phillips of Worth Matravers)
Non-Permanent Judge

Mr Benjamin Yu SC, Mr James Man and Mr Jonathan Ng, instructed by Mayer
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