

# Casenotes

## Do Naming Rights Run With Land?

Pak Fah Yeow Investment (Hong Kong) Ltd v Proper Invest Group Ltd [2009] 3 H.K.C. 285; Lamaya Ltd v Supreme Honour Development Ltd [1999] 1 H.K.C. 198; [1989–91] C.P.R. 116

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### Introduction

Recently the Hong Kong Court of Appeal confirmed a decision of the same court made a decade earlier concerning the enforceability of a right to re-name a building. This note considers both decisions and concludes that the court's suggestion that such a right is not enforceable because it does not touch and concern the land is open to doubt.

Many of the high-rise commercial, industrial and mixed-use buildings in Hong Kong are owned on a unit or floor basis. Part of the identity of these buildings is their names, the buildings commonly bearing the name of their original owner-developer, the majority owner or their main tenant. But owners and tenants change from time-to-time; they may move to other buildings which in turn bear their names; they can go into liquidation, sometimes in ignominious circumstances. Then it becomes desirable to change the name of the building. Who is to choose the new name?

To answer that question it is necessary to understand the scheme by which buildings in multiple ownerships are held and governed. The method used for co-ownership of buildings in Hong Kong is the tenancy-in-common in equal, undivided shares. In England this ancient means of communal ownership was abolished at law in 1926: division of land into shares can exist only behind a trust for sale.<sup>1</sup> However, it lives on elsewhere in the common law world and not just in Hong Kong.

The designers of the 1925 property legislation could not have envisaged that the tenancy-in-common might become a means by which strangers could own flats and offices in tall buildings. Inherent in the relationship is that each tenant-in-common is entitled to enjoy the whole of the land and buildings equally with all the other owners. This is of course what the owners do not desire: they want exclusive rights over the part of the building which they are purchasing.

How then did Hong Kong conveyancers overcome the problem? They adapted the rights inherent in tenancy-in-common by means of covenants binding upon the purchasers of units in the building. A deed of mutual covenants (DMC) is made between the original owner of the whole building (typically the developer) and the first purchaser of shares in the land and building from the original owner.

<sup>1</sup> Section 34 of the Law of Property Act 1925 (LPA 1925).

Allocated to those shares is the right to exclusive occupation of a particular part of the building: the part (typically an office, shop, factory unit or domestic flat) is what in practice is being purchased. Each co-owner covenants that each of the other co-owners may exclusively occupy the unit stipulated in the DMC.

The DMC contains many other covenants: in effect it sets out the rules, or local law, governing the community of owners. For the scheme to work, it is imperative that these rules be binding upon all owners and their successors. In order to do so, the covenants must relate to the land so as to run with it, Hong Kong maintaining the law which in England applies to covenants made prior to 1996.

### The right to name the building

Adaptation of the tenancy-in-common by a DMC was not restricted to the element of use and enjoyment of the whole building. The developer or original owner may seek to reserve to itself certain rights of a sole owner, especially those of commercial value. Typically these include the right to use the roof and the walls of the building for the display of advertising or the erection of equipment such as mobile telephone aerials and the right to name and rename the building.

Until 1991 DMCs made in respect of co-owned commercial and industrial buildings commonly reserved to the developer and its successors the power to name and change the name of the building. However in that year the Hong Kong Court of Appeal decided in *Lamaya Ltd v Supreme Honour Development Ltd*<sup>2</sup> that such powers did not run with the land so as to bind successors-in-title to the original parties to the deed, that is to say other and future owners, and those deriving title from them such as their tenants. In consequence only the original parties to the DMC (usually the developer and the first purchaser) were bound, as parties to the deed rather than by virtue of owning shares in the land, to observe the power. This rendered a naming right almost valueless. That decision was unpopular in the property world. Naming rights had previously been valuable commercial assets, bought and sold with a stake in the building. Developers' solicitors attempted to find ways around the decision, without success. Recently when the question again came up for consideration it was affirmed by the same court although without enthusiasm, in *Pak Fah Yeow Investment (Hong Kong) Ltd v Proper Invest Group Ltd*.<sup>3</sup>

The precise basis of the judgment in *Lamaya* was that such a power was not intended to benefit the land of the covenantee, which is one of the pre-requisites for a covenant to run with land.<sup>4</sup> The court did not need to decide the ulterior question of whether the power, in the prosaic statutory wording, related to the land<sup>5</sup>—in more picturesque and memorable older language, whether it “touched and concerned the land”. However, Sir Derek Cons V.P., who delivered the main

<sup>2</sup> *Lamaya Ltd v Supreme Honour Development Ltd* [1991] 1 H.K.C. 198, [1989–91] C.P.R. 116 (CA).

<sup>3</sup> *Pak Fah Yeow Investment (Hong Kong) Ltd v Proper Invest Group Ltd* [2009] 3 H.K.C. 285.

<sup>4</sup> In Hong Kong this is laid down by s 41(2)(c) of the Conveyancing and Property Ordinance, Cap 219 Laws of Hong Kong, (CPO) which attempts to codify the rules of law and equity regarding the pre-requisites and to extend them to positive covenants and to land in common ownership. *Sky Heart Ltd v Lee Hysan Estate Co Ltd* [1999] 1 H.K.C. 18 at 38–40 CFA per Lord Hoffmann.

<sup>5</sup> Section 41(2)(a) of the CPO; LPA 1925 s 79(1).

judgment, said that the judges found the latter concept difficult to distinguish from that of intention to benefit the land, so the unavoidable implication is that the court considered that the power did not touch and concern, or relate to, the land either.

The Hong Kong Court of Appeal's conclusions have been followed without demur in subsequent cases and have taken on the appearance of settled law. But are they justified?

### **Intention to benefit the land**

The common practice was for developers to sell the naming rights with the exclusive right to occupy some part of the building, which might be a substantial portion such as several floors or a small or peripheral part such as a roof, wall or parking space. In either event the portion would be attached to a number of shares in the land, thus linking the naming right with a proprietary interest. This was essential if the right was to be conveyed, for in tenancy-in-common in undivided shares, rights cannot be binding upon co-owners or transferred to a purchaser without being attached to shares in the land. The division of the land into shares and the attachment of stipulated parts of the building to certain numbers of shares is usually declared in the DMC.<sup>6</sup>

The naming right in *Lamaya* concerned a multi-storey office building known as Fung House in the central business district. The building had been divided into 3,888 shares by the original owner and parts of it had been sold off. The right to name and change the name of the building without reference to other owners had been transferred to *Lamaya Ltd*, together with the exclusive right to occupy the roof and other subsidiary parts, along with 30 of the shares. *Lamaya Ltd* was part of the Seapower group of companies which, through other subsidiaries, had other shares in and the use of the top three floors of the building. Seapower purported to exercise the naming right and to change the name of the building to Seapower Centre.

Supreme Honour Development Ltd, the plaintiff, objected to the change. It held a majority of the shares in the building, 2,978, together with the right to exclusive occupation of 17 floors and the basement. So the courts were faced with a minority owner who had attempted to alter the name of the building in the teeth of opposition from the owner of an overwhelming majority of the shares in the building. At first instance the majority owner succeeded, the naming privilege being held not to relate to the land. *Lamaya Ltd* appealed.

The reason for the Court of Appeal's conclusion that the covenant (the naming right) was not intended to benefit the land itself was that the court could not accept that the right to name the whole building "in any way benefits the exclusive occupation of any particular floor or the roof above it". The commercial value, asserted Cons V.P.:

"... is intrinsic in the right itself and would remain the same whether the person holding it had the right to any occupation at all."

<sup>6</sup> Alternatively they might be declared by the developer original owner by separate deed poll.

The court's analysis equates "the land" with the right to occupy part of the building. This is a practical approach in that the reality is that what a purchaser regards himself as buying and seeks to enjoy is a flat or floor in, or other portion of, the building rather than the shares to which it is attached, but the theory of tenancy-in-common is that it is the shares in the land which are the proprietary interest and which therefore constitute "the land".<sup>7</sup> The Court of Final Appeal of Hong Kong has since confirmed that the proprietary interest is in the shares rather than the right to occupy a part within a building and has described the right to exclusive occupation of part of the building as an incident of the ownership of the shares.<sup>8</sup> So instead of asking whether the naming right benefited the exclusive occupation of a particular floor enjoyed by the covenantee, the Court of Appeal in *Lamaya* ought more properly to have asked whether it benefited the shares in the land held by the covenantee.

The answer to this question, it is suggested, is that the shares do benefit from the naming right. Shares in land upon which a building is situate usually have modest intrinsic value: it is only in the rare event that the whole building is sold or compulsorily acquired by public authorities for compensation that the full value of the shares is unlocked. In the ordinary course, the value of the shares lies in the rights that are attached to them rather than the shares themselves. Those rights are typically rights to use particular parts of the building but there is no reason that they may not include other rights such as the right to display advertisements or to erect chimneys (rights frequently reserved to developers in DMCs of commercial and industrial buildings in Hong Kong) or to give the building a new name. The value of the shares is enhanced by their association with such a right.

Why did the Court of Appeal ignore the shares in the land when considering whether the covenantee's land was intended to benefit from the naming right? It may be because the defendant's counsel had conceded that a naming right was not an interest in land. Of course such a right in isolation is not an interest in land, so to that extent the concession may have been justified, but when the right is linked to shares, which are interests in land, the right becomes an incident of those shares.

Even if one takes a practical approach and views the real interest of a covenantee as lying in the exclusive right to occupy part of the building, that right benefits from association with the right to name the building. The right of occupation is rendered more valuable, in the sense that it will command a greater price on sale, if accompanied by the naming right, both rights being allocated to the same shares in the land. It follows that, even on the Court of Appeal's own terms, its conclusion that the exclusive right of occupation (in lay language, ownership of a unit) does not benefit from the naming right is flawed. The court took too narrow a view of the right of occupation, viewing its value as lying only in its enjoyment and disregarding its transfer value.

The court's justification for its view is itself questionable. Cons V.P. asserted that the commercial value of the naming right was intrinsic in the right itself and "would remain the same whether [or not] the person holding it had the right to any occupation at all". This reasoning is hard to accept. A person who had a mere right

<sup>7</sup> For example, the "land" referred to in CPO s 41(2)(c). Consistent with this, the definition of "land" in s 2 CPO includes an undivided share in land.

<sup>8</sup> *King Ming Tak Tong Co Ltd v Park Solid Enterprises Ltd* (2008) 11 H.K.C.F.A.R. 403. [2008] 5 H.K.L.R.D. 441. [2008] 6 H.K.C. 42.

to name but no right to occupy any part of a building would have at best a contractual licence to name the building from whomever (presumably the developer or some other owner) granted that right. This would not be binding on other owners and would not be transferable. Accordingly it would be of very limited value. If that right were coupled with a right of exclusive occupation of some part of the building, that right would be alienable since perforce it would, through the allocation of the occupation right to shares, carry ownership of shares in the land. Being alienable with the shares and occupation right, the naming right would have greater value than would a simple licence. This value is not inherent in the right itself, or somehow collateral to the ownership of shares. It is an incident of the ownership of the shares and only by being incident to that ownership does the right acquire real value.

### Touching and concerning the land

Perhaps in giving this justification the Hong Kong Court of Appeal was not directing its mind to the issue of whether the covenant was intended to benefit the land of the covenantee and his successors but rather to the test for whether a covenant touches and concerns the land. This would be understandable since the court said that it had difficulty in distinguishing the notion of intention to benefit the land from that of touching and concerning the land. Having found that a naming privilege was not intended to benefit the land, the judges naturally thought that the privilege also did not touch and concern the land. Does their view stand up to analysis?

The doctrine that a covenant must touch and concern the land of the covenantee (or have reference to the subject matter of the grant) is long established yet the test to be applied is astonishingly vague and general. The test has been put in various ways. The classic formulation is that:

“The covenant must either affect the land as regards mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land.”<sup>9</sup>

But it seems that this approach is not comprehensive of the circumstances in which a covenant may touch and concern land. More recently and higher in the judicial hierarchy a working test has been suggested by Lord Oliver in the *P&A Swift Investments Ltd v Combined English Stores Group Plc* case that to touch and concern land the covenant must “affect the nature, quality, mode of user or value of the land”.<sup>10</sup>

The second formula, unlike the first, mentions the nature and quality of the premises. Both formulations refer to value although the second appears to be wider since it lacks the qualification “per se, and not merely from collateral circumstances”.

<sup>9</sup> *Congleton Corp v Pattison* (1808) 10 East 130 per Bailey J., adopted by Farwell J. in *Rogers v Hosegood* [1900] 2 Ch 388 CA at 395

<sup>10</sup> *P&A Swift Investments Ltd v Combined English Stores Group Plc* [1989] 1 A C 633, [1988] 3 W L R 313 HL at 642 per Lord Oliver.

The problem with these single-sentence tests, and indeed with any test for “touch and concern” that may be attempted, lies in their application to particular facts. As Rogers V.P. pointed out in *Pak Fah Yeow* “the application of the underlying legal principle is somewhat fraught”.<sup>11</sup> Lord Browne-Wilkinson has said “although the test is certain, its exact meaning when applied to different sets of circumstances is very obscure”.<sup>12</sup> In consequence we have Romer L.J.’s observation:

“In connection with the subject of covenants running with land, it is impossible to reason by analogy. The established rules concerning it are purely arbitrary, and the distinctions, for the most part, quite illogical.”<sup>13</sup>

The leading practitioners’ texts are therefore reduced to producing tables summarising which covenants have and which have not been held to refer to the land.

We may surmise that the reason the Court of Appeal in *Lamaya* felt that the naming right did not refer to the land lay in the assertion that the commercial value of the right is intrinsic in the right and would remain the same whether the person holding it had the right to any occupation at all. The origin of this idea appears to be another part of the working test postulated in *P&A Swift Investments*. Immediately before the words quoted above Lord Oliver said that for the covenant to touch and concern the land the covenant must also benefit only the reversioner for the time being and if separated from the reversion cease to be of benefit to the covenantee. The case being considered by the House of Lords there concerned a covenant between landlord and tenant, rather than one between co-owners, which the landlord was seeking to enforce, so the landlord’s reversion in that instance was the covenantee’s relevant interest in land. Translating this part of Lord Oliver’s test to the context of co-ownership by tenancy-in-common in undivided shares, the suggestion is that a covenant cannot touch and concern the land if the covenant continues to benefit the covenantee after he has parted with all shares in the land and related rights of occupation. The Hong Kong Court of Appeal evidently considered that a naming privilege continued to have value (indeed to have the same value) even if the holder of the privilege had no right to enjoy any part of the land.

The same points may be made about this as have been made concerning the intention to benefit the land: the land is not, or not only, the right to occupation of part of a building but is also the undivided shares in the land; and the value of the shares (and of the accompanying right to occupation) is enhanced by the right which they alone carry to name the building. The commercial value of the right is not intrinsic to the right, entirely or at all, for without being attached to shares in the land the right is not enforceable against co-owners of the building and is not capable of sale and assignment to another person. The naming right, in the words of the classic test, per se, and not merely from collateral circumstances, affects the value of the land.

<sup>11</sup> *Pak Fah Yeow* [2009] 3 H.K.C. 285 at 290.

<sup>12</sup> *Kumar v Dunning* [1989] Q.B. 193; [1987] 3 W.L.R. 1167 CA (Civ Div).

<sup>13</sup> *Grant v Edmondson* [1931] 1 Ch. 1 CA at 28.

### Limited repentance

In *Pak Fah Yeow* the Court of Appeal was plainly uncomfortable with its decision 18 years earlier in *Lamaya*. The objecting owner, Pak Fah Yeow Investment Ltd, held only one floor of the building and a few shares in the land. By the time of the hearing of the appeal, it was the only owner who was maintaining opposition to the proposal by Proper Invest Group Ltd (to which the naming power had been assigned and which also owned one car parking space and the external wall, plus associated shares) to alter the name of the building from The Sun's Group Centre to Silver Base Centre. Rogers V.P., who gave the only reasoned judgment, seemed to accept that (as had been submitted by counsel for the covenantee) the persuasiveness of *Lamaya* was diminished by the concession of counsel there that the right to name a building was not an interest in land capable of passing directly by assignment, that the observations in *Lamaya* about whether the right related to the land were obiter and therefore not binding, and that there was force in the argument that the naming right must of its nature affect the value of the land. What held Rogers V.P. back from overruling (or, more precisely, not following) *Lamaya* was that the decision had been followed for years and the settled conveyancing practice should not be disturbed.<sup>14</sup> Leave to appeal to the Court of Final Appeal was however given.

The attitude of the Court of Appeal in *Pak Fah Yeow* is not altogether surprising. One Court of Appeal is naturally reluctant to differ from another even concerning obiter dicta. The dicta in *Lamaya* have indeed been followed in subsequent cases<sup>15</sup> so that it may be said that the law is settled at first instance level. It is however an exaggeration to say that the point is one of conveyancing practice: it is rather one of law which, as the facts of those subsequent cases testify, may have effect on title.

More alarming is the suggestion by Rogers V.P. towards the end of the judgment that all owners must consent to a change in name. Where, as is often the case, a building or development is co-owned by dozens, perhaps hundreds, of persons the composition of whom frequently changes and some of whom may be difficult or impossible to contact, the prospects of obtaining the positive support of every owner to amend its name to a certain alternative are slim indeed. No authority or reasoning was given for the suggestion, which appears to have been a gratuitous afterthought. At least in cases in which the DMC stipulates that matters concerning the building are to be decided by majority vote at owners' meetings, it is to be hoped that a court would give preference to that stipulation over the judge's suggestion.<sup>16</sup>

<sup>14</sup> *Pak Fah Yeow Investment (Hong Kong) Ltd v Proper Invest Group Ltd* [2009] 3 H.K.C. 285 at 289.

<sup>15</sup> *Incorporated Owners of Nine Queen's Road Central v Minkind Development Ltd* [2004] 1 H.K.C. 270 (CFI and CA); *Yazhou Travel Investment Co Ltd v Bateson* [2004] 1 H.K.L.R.D. 969; [2004] 1 H.K.C. 292 (CFI); *Pak Fah Yeow Investment (Hong Kong) Ltd v Proper Invest Group Ltd* [2008] 5 H.K.C. 474 (CFI).

<sup>16</sup> This assumes that the clause stating that a majority vote suffices is a covenant that touches and concerns the land.

The grant of leave to appeal further the *Pak Fah Yeow* decision held out the prospect that the reasoning of the Court of Appeal would be tested at the highest level. Notice to appeal was given in June 2009. However, one month later the notice was withdrawn. So final determination of the question of whether the right to name a building runs with the land must await another day.

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