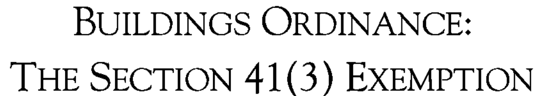

BUILDINGS ORDINANCE: THE SECTION 41(3) EXEMPTION

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The exemption from building controls for construction work inside a building which does not involve the structure of a building or any breach of building regulations is of relevance not just to the immediate question of whether particular work at a property requires permission from the Building Authority but also to the consequential question of whether the work may render title to the property bad. The exemption has recently been considered by both the Court of Appeal and the Court of Final Appeal. This article analyses those decisions and the extent to which they clarify the meaning and scope of the exemption and concludes that, whilst the Court of Final Appeal's decision is helpful, it by no means resolves all difficulties.

1. Introduction

"Illegal structures" are part of the scene in Hong Kong. Despite it being well known that building work requires prior approval from the Government, the commencement and completion of such work without that approval continues to be common. This may be because property owners and builders regard the requirement of prior permission as a tedious bureaucratic imposition, as well as an unwelcome expense and an inconvenient delay, or because they think that permission is unlikely to be forthcoming or will be forthcoming only at a price, or because they view the requirement as an egregious infringement of their property rights. Whatever the reason, the possibility of illegal structures, or to give them their proper name "unauthorised building works", and the requirements of section 14 of the Buildings Ordinance are matters of which purchasers of property and their solicitors have to be keenly aware.

Less well known is the provision which exempts from the requirement of permission certain types of work, including that which is carried out inside a building and which does not involve the structure of the building. This is contained in section 41(3) of the Buildings Ordinance.[1] It provides a

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1 Cap 123.

possible answer to a requisition concerning internal alterations to property: that permission is not required because the work is exempt. Until recently this exemption had received surprisingly little judicial attention, especially from higher courts. Now guidance is available from the very highest level.

The judgment of the Court of Final Appeal in the Tsuen Wan hotel case, *Mariner International Hotels Ltd v Atlas Ltd*,[2] has restored order to this corner of Hong Kong's building law and no doubt brought a sigh of relief at the Building Authority.

2. *Mariner*: The Facts

At stake legally in the case was the proper interpretation of section 41(3), as well as the meaning of "practical completion" in the agreement between the parties. At stake commercially was about HK$300 million paid as deposit by the plaintiff purchaser, Mariner (a member of the Sino group of companies), to the defendant vendor, Atlas (a member of the Hang Lung group), on the sale of the hotel for more than HK$1 billion.

In form the sale was of shares in a BVI company which owned all the shares in another company which owned the land overlooking the Lantau bridge[3] to the west of Tsuen Wan upon which the hotel was being constructed. In substance, what was being sold was the land and the hotel. The 438-room hotel was to be constructed in accordance with an approved plan, to be fitted to stipulated standard, and to be in a state to be able immediately to commence business on completion: on a "turnkey basis" in the argot of estate agents. Atlas agreed to prove title to the land and to procure practical completion of the hotel.

The agreement was made on 19 June 1996. Completion of the sale was to be on or before 30 June 1998. Between these dates, Hong Kong's property market, and with it much of its economic confidence, collapsed.[4] Obviously Mariner would have wanted to escape from the purchase.

Legal manoeuvring began after the collapse. Mariner asked to inspect the building. Atlas refused, so Mariner applied for and obtained a court order.[5] Having inspected the roof in mid-June 1998, Mariner's solicitors raised

2 FACV 3 of 2006; Li CJ, Bokhary, Chan, Ribeiro PJJ, McHugh NPJ; 5 Feb 2007.

3 Also known as the Lantau link or the Lantau Fixed Crossing. The hotel, originally called the Golden Bridge Hotel, came to be known as the Bay Bridge Hotel.

4 In the Court of Appeal CACV 291 of 2004 (30 Dec 2005) Rogers VP was at pains to emphasise that the courts may take judicial notice of the collapse.

5 HCMP No 2407 of 1998, 10 June 1998 (Yuen J). Even before the market collapse Mariner had been voicing concerns about aspects of the construction of the hotel. Burrell J at first instance described both sides as being difficult during the period immediately before completion: HCA No A10714, 2 Aug 2004, para 393.

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requisitions on title on 23 June 1998 to start a "frantic week before the proposed completion".[6] They complained of structures which were not shown on the approved plans and which therefore, they asserted, must have been unauthorised. They also wrote to the Building Authority about these structures, although with no copy to Atlas, saying that they were unauthorised building work.

The alleged unauthorised structures were all on the roof of the hotel. They were, first, concrete plinths; second, gondola posts; and third, an opening in the roof slab.[7] The plinths were a base for an air-conditioning chiller plant. They provided rigid and level support for the plant and spread its weight. The posts were part of the system for cleaning the exterior walls and glass of the building. They were made of steel and were fixed onto the floor slab to support the steel davits from which was suspended the gondola for carrying workers while they were cleaning the windows and maintaining the external surfaces of the building. The opening in the roof slab was for the passage of a chilled water return pipe.

Answers were given by Atlas' solicitors to the requisitions on 27 June 1997. They said that the plinths were not structural and therefore were not shown on the plans and they provided letters from an authorised person[8] and a registered structural engineer confirming that, and also stating that the plinths were exempt from approval under section 41(3) of the Buildings Ordinance. As to the gondola posts, the answer was that they were merely fittings and so were not shown on the plans; the authorised person's letter stated that they were non-structural. On the slab opening, the answer was that it was pipework penetration which was not required to be shown on the plans. None of the works were unauthorised or illegal, they said; the building had been approved by the Building Authority, the occupation permit had been issued; there was no breach of regulations.

Meanwhile, with the completion deadline near and having received no response from the Building Authority, on 29 June 1997 a further copy of Mariner's letter was hand-delivered to the Director of Buildings[9] personally by the chairman of the Sino group. The Buildings Department promptly mobilised a large team of staff who inspected the hotel. They found no contravention of the Buildings Ordinance and wrote to Atlas's solicitors (who after the inspections had sought confirmation that there were no unauthorised works) to say so on 17 July 1997. The department's internal minutes

6 Burrell J, *ibid*, at para 232.

7 Other structures were also complained about but these were ultimately not pursued in the litigation.

8 That is to say an architect, engineer or surveyor whose name is on the register kept under s 3(1) of the Buildings Ordinance, Cap 123. In this instance he was the architect of the building.

9 The Director is the Building Authority, *see* s 2 of the Buildings Ordinance.

recorded its officer's view that it was advisable to treat obvious minor building works outside a building as exempt and that the plinths may come into this category, whilst the air-conditioning plant and gondola installation were not building works but plant and equipment. The minutes also recorded that the department adopted a flexible approach to dealing with certain common unauthorised amenity features and that immediate enforcement action would not be taken against such features.

That of course was too late to affect the position at completion. On 29 June, Mariner's solicitors had sent to Atlas's solicitors a second letter of requisition, accompanied by a 100-page report by an authorised person. That letter essentially reiterated the earlier requisitions. Without waiting for a reply, the following day Mariner terminated the contract.

3. *Mariner*: Judgments Below

Were the answers which relied upon section 41(3) adequate? The subsection provides:

> "Building works other than drainage works, ground investigation in the scheduled areas or site formation works not involving the structure of any building may be carried out in any building without application to or approval of the Building Authority: Provided that nothing in this subsection shall permit any building works to be carried out in contravention of any regulation."

The subsection therefore has two main elements which must be satisfied if the exemption of building works from approval is to apply: the works must be *in* the building; and they must *not involve the structure* of the building.[10]

At first instance in 2004 Burrell J, after a 64-day trial, held that the three structures were "in" the building because they could be reached only by entering the hotel.[11] This came as something of a surprise to those who, like Bewley J when he had to consider air-conditioning plant attached to the underside of an external concrete canopy, had assumed that "in" meant "inside" or "within".[12] The Court of Appeal also thought the structures to be in the building, though for more complex reasons. The view of Le Pichon JA, who gave the only judgment to deal with section 41(3), was

[10] The words "not involving the structure of any building" qualify "building works" rather than "site formation works": *Dei Chuen Ho Industrial Ltd v Leung Yin Por* [1993] 2 HKC 495.
[11] HCA No 10714 of 1998 (2 Aug 2004), paras 235–236.
[12] *Good Think Consultants Ltd v Attorney General* [1996] 4 HKC 782.

that "in" could be used in a broad sense, to denote a physical juxtaposition which may not necessarily include a complete enveloping. The word was capable, she said, of encompassing works which are not carried out inside the existing building, so works which were within the parapet walls or the external envelope of the building could be "in" the building. To support this view Le Pichon JA referred to the text of a bill to amend the Buildings Ordinance which proposed to change the exemption to "works which are to be carried out inside an existing building": this, she said, showed that the government thought that at present "in" did not mean "inside".[13]

This interpretation was certainly liberal and large[14] but the reasoning was hardly purposive or contextual. The aim of the ordinance is to control construction work and section 41(3) is an exception to, or exemption from, that aim. The consequences of the Court of Appeal's interpretation seemed to be that all structures on roofs or balconies which did not protrude outside the building line would fall within the exemption, unless they involved the structure of the building or the breach of a regulation.

How did the judges interpret the other main requirement of section 41(3)? Burrell J thought "involving the structure of the building" meant affecting the structure adversely. "How else", he asked rhetorically, "could the 'affecting' be relevant other than 'adversely' for it to 'involve' the structure".[15] The judge also seemed to conclude that to affect or involve the structure, building work had to be a structural element. So, he said, placing a heavy weight on the roof, or bolting it to the roof, did not mean it had become part of the structure, even though the weight had to be taken into account in loading calculations. Indeed Burrell J thought that the plinths and the posts were not even building work, for the plinths took the weight of the machinery on top of them and became an integral part of the machinery, not the building, whilst the posts were part of the gondola system and were not a structural element.

Le Pichon JA essentially agreed with this analysis. She felt that to involve the structure, building work must involve changes to the building's design or its structural members: columns, beams, floors, floor slabs, steel reinforcement – those parts which provide rigidity, stability, robustness and load-carrying. The plinths were load-spreading devices which supported plant and equipment; the fact that they transmitted that load did not render them structural. As for the gondola posts, it was doubtful whether

[13] CACV 291/2004, para 77.
[14] *See* Cap 1, s 19.
[15] *Ibid*, paras 235–236.

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they constituted building works, a view which appeared to be taken by the Building Authority.[16]

In equating "involving the structure" with "structural", the judges were effectively taking the same approach as previous judges who have had to consider the issue. So in *Dei Chuen Ho Industrial Ltd v Leung Yin Por*,[17] a case concerning answers to requisitions about the division of the ground floor of a building into more shops than were shown on the approved plan, Rhind J observed that if the only reason for the existence of the extra shops had been the mere erection of partitions, the work would have fallen within section 41(3) because the putting up of partitions would not involve the structure, but there was no evidence before him that the work was confined to the erection of partitions and so the vendors had failed to show that the partitioning did not involve any alteration to the structure of the building. Similarly in *Great Billion Enterprises Ltd v Perfect Count Ltd*[18] where the purchaser had raised a question about a false ceiling inside a shop, Reyes J said that there was no evidence from the purchaser (whose architect had inspected the shop only from the outside) that the false ceiling was structural and so there was no basis for the requisition. In another conveyancing dispute about the partitioning of ground floor shops, *Silver Pioneer International Ltd v Good Onwards Co Ltd*,[19] To DJ[20] held that a certificate from the vendor's architect stating that the partitions were not structural was sufficient to engage the exception. It may be that the judges and experts in those cases were using the description "structural" (and "non-structural") simply as convenient approximations of the requirement in section 41(3) that the work not involve the structure of a building. In any event, the reasoning in those cases, it is submitted, must be treated with caution in the light of the view of the subsection taken by the Court of Final Appeal.

4. *Mariner*: Court of Final Appeal

Giving the principal judgment of the Court of Final Appeal, Bokhary PJ accepted the submission of counsel for Mariner that the legislation should be interpreted purposively and that the exemption in section 41(3) had to be construed narrowly in a manner consistent with the statutory scheme of which it formed part. One purpose of the approval scheme of the building legislation was to protect the public by subjecting structural acceptability to

16 CACV 291/2004, paras 70–79.
17 [1993] 2 HKC 495.
18 HCA No 11181 of 1998.
19 [2004] 4 HKC 253.
20 Sitting as a deputy judge of the Court of First Instance.

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the scrutiny of the Building Authority, said Bokhary PJ, and to widen the exemption would reduce that scrutiny. Derived from that, building works which were added to buildings involved their structure if they served a structural function or were capable for some reason of affecting the integrity of the structure, he held. He accepted that. linguistically, "involving" was one of the broadest words of association known to the English language.[21]

As regards "in the building" Bokhary PJ's view was that works on the roof of a building are not "in" it. There was, he observed, a purposive difference, relevant to safety, between building works protected from the elements by being in the building and those exposed to the elements. Le Pichon JA's use of the amendment bill in support of her wider interpretation was diplomatically dealt with. Bokhary PJ said that he would not cut down the meaning of the word "in" by recourse to the proposed amendment by which "inside" would be substituted for "in". "One view of the proposed amendment – and I am inclined to think it is the best view – is that it is meant to avoid doubt."[22]

So the Court of Final Appeal was not persuaded that the plinths and posts satisfied either of the main requirements of section 41(3): that they neither were in the building, nor involve its structure. As for the openings in the floor slab, they had been made at the time of casting and therefore had been covered by the Building Authority's approval of standard detail.

The Court of Final Appeal's views on the interpretation of section 41(3) strictly are *obiter dicta* since the appeal was disposed of on the question of whether the there had been practical completion of the hotel by 30 June 1998.[23] However, those views are cogent. Had the interpretation of the courts below prevailed, any rooftop structure within the parapet of the building which was not itself part of the structural members of the building would have been exempt from Building Authority control, unless the building or presence of the structure happened to be in breach of regulations. This would have included many of the additions upon roofs of older buildings which incur particular attention from the Authority.

[21] FACV No 3 of 2006, para 51.

[22] *Ibid*, para 52.

[23] There had not been: the hotel suffered from numerous water leakages which were more than trivial. The dispute on this point centred upon the question of the definition of practical completion.

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5. Other Requirements for Exemption

The other requirements of section 41(3) are that the matter in question be building works, that they not be drainage works, ground investigation in the scheduled areas or site formation works, and that there be no contravention of any regulation. In most cases there will be no dispute as to whether there are building works. This is because "building works" are very widely defined in section 2 of the Ordinance. They include any kind of building construction and every kind of building operation.[24]

Nevertheless there may be an issue as to whether an item constitutes building works. A limitation seems inherent in the notion of "works" and of "building". This is probably what led Bewley J in *Good Think Consultants v Attorney General*[25] to say that it was a matter of circumstance and degree. It is also probably what led the Building Authority and both first instance and appeal judges in *Mariner* to think that the gondola posts and the plinths were not building work. It is difficult to accept that equipment and machinery, even if installed at and attached to a building, are building work.[26] Likewise, minor temporary structures hardly fit most notions of building work.

The exclusion from the exemption of drainage works, ground investigation in the scheduled areas and site formation works is readily understandable. These works are expressly embraced by the definition of building works in section 2 of the Buildings Ordinance.[27] The underlying emphasis upon safety dictates that such works have Building Authority approval even though they do not involve the structure of a building. Problems arising from improper connection of drains can be calamitous. Site formation works are fundamental to the integrity of buildings. The scheduled areas[28] are those, such as the Mid Levels district and the vicinity of underground railway lines, where particular concerns require that all site investigation be approved by the authority.

The absence of punctuation in the first part of section 41(3) renders it unclear whether the phrase "not involving the structure of any building" qualifies "site formation works" or "building works". The proximity of the phrase to "site formation works" suggests, grammatically, that it is the former. But this would make little sense, since site formation works would

[24] Expressly mentioned are repairs, demolition, alterations and additions. "Building" is likewise extensively defined.

[25] [1996] 4 HKC 782.

[26] Perhaps the method of attachment may involve minor building works, but then that may be tolerated by the Building Authority. The lines here are murky.

[27] Cap 123. Drainage works, ground investigation and site formation works are each defined in s 2 also.

[28] That is, areas listed in the Fifth Schedule to Cap 123.

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never involve the structure of the building, no building existing at the site formation stage. It has been settled, after a suggestion to the contrary,[29] that it is "building works" that is qualified by the phrase.[30]

The final limitation upon the application of the exemption is potentially the greatest. This is that there must be no contravention of any regulation by the internal work. The effect of this is to claw back a substantial amount of the alterations that an owner is likely to want to make inside his premises. This is because of the range and width of regulations made under the Buildings Ordinance. There is not space here for a detailed account but an example will illustrate the point. A householder may wish to enlarge a room by removing a non-load-bearing wall within his property. This is clearly "in" the building and does not seem to involve its structure. Yet there may well be an infringement of fire regulations since the wall which is to be demolished may be resistant to fire and serve to contain any fire which breaks out.[31] Conversely, and somewhat ironically, if the householder wishes to erect a partition thus creating an extra room inside the property, he may fall foul of regulations concerning means of escape in case of fire or other emergency.[32]

Apart from fire regulations, the construction regulations may have an impact upon internal changes to buildings. This is especially so in the case of heavy additions which concern the load-bearing capacity of floors.[33]

6. Conclusion

Solicitors for vendors who are faced with a requisition concerning whether internal alterations have been approved by the Building Authority will be well advised to secure a reasoned expert report from an authorised person before relying upon section 41(3) in their answer. It will not be enough for the report to assert that the alterations are "not structural". At best this addresses only the first part of the two-fold test suggested by the Court of Final Appeal, namely whether any of the altered parts serve a structural function. The expert will have to go further and assess whether the alterations are capable of affecting the integrity of the structure.

[29] By Wesley Wong DJ, sitting as a deputy High Court judge, in *Octorich Ltd v Liu Sin Ming* HCMP No 477 of 1992.

[30] *Dei Chuen Ho Industrial Ltd v Leung Yin Por* [1993] 2 HKC 495; *Kok Chong-ho v Double Value Developments Ltd* [1993] 2 HKLR 423, CA.

[31] *See* Building (Construction) Regulations, Cap 123B, Part XV.

[32] *See* Building (Planning) Regulations, Cap 123F, reg 41.

[33] *See* Building (Construction) Regulations, Cap 123B, regs 4, 5, 6 and 17. These were in issue in *Mariner* at first instance.

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There will, inevitably, continue to be cases in which it is debateable whether interior work involves the structure of the building. Whilst it should be tolerably clear whether an item is a structural member, whether alternatively it is capable for some reason of affecting the integrity of the structure is a more difficult proposition. No doubt each case will depend upon its facts, and the views of authorised persons, the Building Authority and judges, will differ. One can envisage that in future the courts will be called upon to impose some control or limiting device upon the vagueness of "capable for some reason of affecting": perhaps the capability will need to be a reasonable or realistic capability and the reason a sensible and not a far-fetched reason. It will, however, probably require another market collapse before this will be tested.

The issue of whether particular building works inside a building are in contravention of regulations is as prone to be contentious as that of whether they involve the structure of the building. So, despite the guidance of our highest court on the scope of the exemption which it contains, one can confidently predict that there will continue to be employment for experts and lawyers arising out of section 41(3).

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