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Reconfiguring Decision-Making Rights in Hong Kong SAR's Building Maintenance Law

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Abstract. The joint-ownership structure of multi-storey buildings in Hong Kong SAR has long held back maintenance decisions for public safety due to a procedural deadlock. A deadlock results from dispersed ownership votes and is thus a typical collective action problem. This paper holds that, in specific cases where public safety is at risk, the right of repair is to be exercised by the Owners' Corporation (OC). At the same time, the procedural voting rights of individual owners should be reduced from the protection granted by property laws to that provided under liability laws, and thus the OC has a higher priority right to act based on expert assessments. Drawing on the dichotomy of property rules and liability rules by Calabresi and Melamed, this paper first sets out the reasons for such a shift in light of public safety. The article then applies the principle of proportionality to set out a four-part test for manifest risk and places strict limitations on the exercise of the priority right by the OC. Finally, the paper proposes a tiered system of ex post judicial remedies and, most notably, introduces an owner's statutory derivative action modeled on the Companies Ordinance. This offers the minority shareholders who have lost their ex-ante veto effective channels for accountability. This adjustment of rights aims to overcome the problem of fragmented voting, improve the efficiency of building safety governance, and at the same time ensure the bottom line of private property rights protection.

Keywords: Hong Kong SAR building maintenance, reconfiguration of decision-making rights, property rules and liability rules, statutory derivative action

1. Introduction

Hong Kong Special Administrative Region of the People's Republic of China (Hong Kong SAR) is one of the most densely populated urban areas in the world, and management of multi-storey buildings there is based on a co-ownership model. Not all areas under the Hong Kong SAR law recognise exclusive ownership of a specific unit or a definite cubic meter of space within a building [1]. Due to this abnormal structure of ownership, many decisions in public safety renovation have been delayed for a long time due to dispersed voting rights. To address this problem of collective action, this paper puts forward that the right to decide on safety repairs should be partially shifted from individual owners to the OC, and this decision should have a higher priority.

When a buyer purchases a flat in Hong Kong SAR, they are in fact acquiring an undivided share in the land and the building. As Walters and Kent have shown, in this form of ownership, all the

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owners are essentially tenants in common and together they enjoy a unified right of possession over the entire building [2]. Given the problems that have occurred under the system of unified ownership, Hong Kong SAR introduced the Deed of Mutual Covenant (DMC) in the 1950s to protect the exclusive use rights of individual owners in the old contractual system [3].

Therefore, the ownership structure separates rights from obligations; the owner has the exclusive right to use the private part of the building and can clearly exercise this right, but the obligation to maintain the common parts is shared by all co-owners. In the absence of a good institutional arrangement, a rational owner will inevitably free-ride to maximise their own interests. There will be no mandatory legal support, and thus a governance gap in the system.

2. Why the current allocation of rights under Hong Kong SAR's building maintenance law creates procedural deadlock

2.1. Repair decisions under co-ownership: the current framework

Under the Building Management Ordinance (Cap. 344, BMO) and the standard DMC, the common areas of a building are jointly owned by all co-owners. Therefore, no single owner or a small group of owners is responsible for deciding on major repairs or disposal; instead, such maintenance decisions must be made by way of the procedural democracy of the owners' general meeting (OGM). The general maintenance for an OC must be approved by either the Management Committee or the OGM. Crucially, Section 20A(2) of the BMO stipulates that any procurement of supplies, goods, or services whose value exceeds 20% of the OC's annual budget must be approved by a resolution passed at an OGM. Because public safety renovations are highly capital-intensive, their costs almost inevitably breach this 20% statutory threshold, thus mandating collective voting. At the start, this plan was not intended to prevent property misuse and the independent use of public funds. In fact, in practice, the repair decision is subject to complicated procedures and extended interest discussions.

2.2. The anti-commons tragedy and the repair decision deadlock

Although the current system officially promotes contractual freedom and owner democracy, due to dispersed ownership and high transaction costs in practice, it is often non-functional and cannot be implemented.

The deadlock in the repair decision in Hong Kong SAR can be viewed as a tragedy of the anti-commons. According to Heller, the tragedy of the anti-commons occurs when multiple owners each have the right to exclude others from a resource, and thus that resource is underutilised. Under the undivided-ownership system of Hong Kong SAR, each owner has an individual right of opposition, and thus a few owners can block necessary repairs to common areas [4]. The decision-making deadlock in the repair work has been one of the reasons for the fires and falling-object accidents since the 1990s, and the Garley Building fire was partly due to this institutional paralysis [5].

Transaction costs for negotiating repair work in a very high-rise building are extremely high. According to the formula $t = n(n-1)/2$, as the number of owners (n) increases, the number of bilateral transactions needed for agreement rises exponentially. A building of 200 units would need to arrange about 19,900 individual negotiations in theory, and spontaneous market coordination would be virtually unachievable [6]. Although an OC has been established under the BMO, the vague wording of the DMC provisions still makes it difficult for owners and the OC members themselves to

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understand their statutory contribution liabilities, and practitioners also interpret these provisions in vastly different ways [7].

These problems are likely to result in an inability to implement public-safety repair plans under OGM. As of 2017, the non-compliance rate for Mandatory Building Inspection Scheme notices in common areas was 88% [8]. This was significantly higher than that for private parts; by 2024, the overdue non-compliance rate for windows in common areas had dropped to 27%, far from the 4% rate in private units [9]. Based on the above data, it can be observed that all repairs requiring dispersed voting at the OGM have a significantly lower compliance rate compared to independent decision-making for private parts. The OGM decision cycle, from engaging consultants to selecting a contractor, is about 21 months long [10]. As a result, a backlog of roughly 2,700 buildings has accumulated whose statutory inspection notices have expired without compliance [11]. In other words, the need to reconcile these differing wishes repeatedly has been delayed for years. This is the procedural deadlock of the current system; as a result, the public safety repair project has failed due to collective action problems.

3. A way out of the procedural deadlock: from property rules to liability rules

3.1. Existing solutions: review and evaluation

Scholars have put forward the following three general ways to improve building management in Hong Kong SAR. However, none have fully addressed the main problem mentioned above: the structural tendency of dispersed owner voting to cause a collective-action failure in public safety repairs.

The first way of doing this is to change the property-rights system, as proposed by Walters and Kent. They put forward that Hong Kong SAR adopt a Singaporean-style strata title system, which would compulsorily define co-ownership and participatory management rights around a trinity of unit entitlement, co-ownership and membership [12]. Theoretically, this view is the most comprehensive, but it does not address the problem of procedural deadlock. A wholesale replacement of Hong Kong SAR's leasehold system would lead to high costs of title confirmation and administrative disorder. At this time, there is an urgent need to renovate hundreds of thousands of old buildings. Fundamentally speaking, even if fully implemented, a strata title regime would still have to resort to owner voting for the resolution of common-part repair disputes, and thus would not alleviate the anti-commons deadlock caused by dispersed voting.

The second way is to motivate the management team more strongly. Gao and Ho hired a third-party property management company to implement an incentives for the selected, selective incentive mode [13]. This way has offered some genuine managerial ideas, but not solved the basic legal issue. In the older buildings of Hong Kong SAR, the owner's apathy may be rational ignorance, where the marginal benefit of taking part in a repair decision is deemed far less than the marginal cost. Unless the incentive covers the repair cost that the owner would otherwise have to bear, apathy is still reasonable. Although a good incentive system cannot address the root cause of corruption in bid-rigging and opaque procurement, it will also be unable to restrict the decision-making authority of a leading enterprise. In both cases, the way to do so will not create the procedural deadlock that allows either the minority's objection or the majority's rule to prevent the safety repair.

The third is the system of professional regulations. Wong and Lai are among the scholars who have focused on the Property Management Services Ordinance and proposed licensing for property managers to improve the professional ethics standards [14]. A licence system can reduce the rent dissipation in a manager-dominated setting, but it cannot address the rights conflicts among the

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owners themselves. No matter how professional the manager is, if the quorum for a repair decision cannot be met, or if the terms of the DMC are themselves unreasonable, the manager will be powerless [15]. Ex post professional supervision, in short, cannot resolve the ex ante procedural deadlock that prevents a decision from being taken in the first place.

Each of the above is a particular case of the problem, but none address the root cause. Only a specific legal mechanism needs to be established that can, under certain public-safety conditions, overcome the procedural deadlock at the OGM without making significant changes to the property system in Hong Kong SAR.

3.2. Shifting the right to initiate repairs from property rules to liability rules

If there are competing claims over the same property rights, then the rights of the different parties need to be protected. Calabresi and Melamed proposed a division of the rights protection in their well-known work The Cathedral [16]. Therefore, this paper applies the aforementioned framework to modify the right of repair initiation in Hong Kong SAR buildings.

Under a property right, any modification or restriction of the right to use it requires obtaining the permission of the original right holder voluntarily. In other words, it is a complete pre-emptive right of refusal for the owner. Under traditional Hong Kong SAR building maintenance, the procedural voting rights and blocking rights that individual owners are entitled to under the law receive full protection as a property rule. If the OC makes repairs without proper voting procedures, an individual owner can apply to the court for an injunction to stop the work. In an old building with hundreds or thousands of owners, this action directly causes the tragedy of the anti-commons.

On the other hand, an entitlement protected by a liability rule allows another party (such as the OC) to take or disregard the entitlement without the holder's prior consent for the purpose of a higher-order legal interest, provided that objectively determined compensation is paid subsequently (e.g., refunding overcharged repair fees or paying damages).

To alleviate the repair deadlock, this paper puts forward that the law should shift the status of the contractual rights of minority shareholders in the event of public-safety repairs from property-rule protection to liability-rule protection. It should give the OC a priority right of action, and under certain circumstances, the OC may bypass the voting requirements of the DMC to initiate repairs without the owner's prior consent. Individual minority owners would lose their ex ante right of veto in the form of an injunction to stop the work, and afterwards could only demand monetary compensation.

3.3. The justification for shifting from property-rule to liability-rule protection in the public safety context

Strong property-rule protection should not be applied in the context of public security. For safety-critical repairs, the procedural rights of a minority of owners should no longer be protected by an ex ante veto; instead, they can be exceptionally converted to a liability-rule protection.

The damage to a key part, such as spalling concrete on the exterior wall of one floor, will inevitably harm the structural stability and safety of the whole building. In a safety-critical repair, a minority shareholder's self-interested veto will delay the work for all shareholders and expose the public—such as tenants and pedestrians—to a serious risk of death. Therefore, the law should make the duty of public safety mandatory and cannot be excluded by a party's contract.

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4. The boundaries of exceptional intervention: when the liability-rule model may be activated – introducing the proportionality principle

The OC's preemptive right proposed in this article will remove the procedural voting rights that minority owners are entitled to under the DMC and thus constitutes an excessive encroachment on their private autonomy; therefore, manifest risk must be designated by a high legal standard and not left to the discretion of officials. Currently, only financial indicators are used by BMO to define major repair; there are no normative standards for the level of risk.

The first is a general limitation on the exercise of fundamental rights imposed by public authorities. It needs to prevent the excessive exercise of any single right to be dominant. Once an OC obtains a priority right to act in case of a safety repair, it can disregard dispersed voting and proceed directly to such action, thus reducing the procedural rights of minority shareholders. In practice, the preemptive right of the OC can decide unilaterally whether to carry out repairs; therefore, although this distribution of rights has a legitimate goal of protecting public safety, there is also a risk of abuse. It is precisely for this reason that the logic of review in the proportionality principle, which requires a reasonable connection between purposes and means, can be transferred to this private-law system of governance to set out the conditions for applying the OC's preemptive right.

Based on the theoretical analysis above, this paper attempts to apply the principle of proportionality to define manifest risk. Although the principle has traditionally been used to restrict the exercise of public power, here, given that public safety is at stake and the OC is granted a certain degree of priority in action, this right still needs to be limited, and the principle of proportionality remains a useful reference for identifying manifest risk.

Based on the proportionality review framework established by the Court of Final Appeal in Hong Kong SAR, this article proposes a four-tier test for manifest risk, and only a defect that meets all four of the following conditions can be considered a manifest risk triggering the OC's priority right of action.

First, in accordance with the rule of proportionality, the infringement should have a lawful aim. The scope of manifest risk includes only the most serious dangers to human life and physical safety, as well as threats to the structure of the building. Not all instances of damage or disrepair are considered significant risks.

Secondly, there must be a rational connection between the measure and the aim. The OC's action must logically contribute to preventing the safety hazard.

Thirdly, according to the necessity test, the interference should be the least invasive way to reach the purpose. In applying the concept of manifest risk, it is understood that if the path of a defect indicates a high likelihood of rapid and irreversible deterioration that could result in serious harm, and the usual OGM decision-making process is too slow, then granting the OC the right to act urgently becomes necessary to prevent disaster. The urgency of this breakdown of normal procedures constitutes the necessity element of manifest risk.

Finally, according to the proportionality stricto sensu test, the harm caused by the measure should not be grossly excessive in relation to the benefit it intends to promote. Given the definition of a manifest risk, experts need to determine whether the likely harm in the event of a risk materialisation will significantly exceed the limitation on owners' procedural rights. The judge or other authorised party will weigh the negative impact on the voting rights of minority shareholders against the broader interest in preventing harm to make a decision on manifest risks. Only when the

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expected damage substantially exceeds the limitation on owners' voting rights does it legally qualify as a manifest risk.

5. Procedural checks and ex post remedies

5.1. Procedural thresholds and the scope of the priority right

The OC's right of priority is not based on the Management Committee's subjective judgment. In accordance with Sections 30B and 30C of the Buildings Ordinance (Cap. 123), the OC shall have an inspection by a registered inspector or a qualified person conducted prior to any mandatory repair works, and such an inspection and issuing of a legally binding certificate must take place. The certificate is required to exercise the priority right of action and must be displayed prominently in a public area of the building. Therefore, the specialist shall be consulted to conduct an unbiased risk assessment and prevent the expansion of the powers of the OC under the name of safety.

At the same time, the scope of preemptive repairs should be limited to a small area, such as safety-critical common-part repairs (e.g., strengthening of load-bearing walls, repair of spalled external facades, urgent restoration of a paralysed fire-service system). The use of the relevant funds will not be allowed for general improvement works. If the OC, in carrying out repairs to a dangerous facade, unilaterally decided to replace it with more expensive imported tiles for the purpose of increasing the property's value, the affected owners may have the right to file a lawsuit.

5.2. Ex post judicial remedies for minority owners: challenging costs, procedural defects, ultra vires acts, and corruption

Under a liability system, the remedies for minority shareholders are inevitably in the future. After the OC exercises its priority right of action for the public interest, the minority shareholder will no longer be entitled to stop the project in advance. If the rights of the individuals are infringed during the process, there should be effective ways to seek legal recourse. Based on the nature and severity of the violation, this paper puts forward a two-tier remedial system and primarily divides the relevant judicial venues.

5.2.1. Ordinary remedies: cost apportionment disputes and procedural defects

For a typical case of an unfair distribution of repair costs or failure by the OC to maintain proper records in the DMC, other procedural problems can be addressed within the current legal system. In accordance with Section 45 and Schedule 10 of the Building Management Ordinance (Cap. 344), disputes that fall within the scope of this Ordinance and the DMC shall be the exclusive or first-instance jurisdiction of the Lands Tribunal. In such cases, the dispute is in fact about the interpretation of the contract or application of laws, and the Lands Tribunal can apply its professional experience to provide appropriate remedies, such as issuing an injunction, clarifying a term in the DMC, or dividing costs. This tier does not involve accusations of bad faith towards OC management, and therefore does not require leaving the current jurisdictional framework.

5.2.2. Derivative proceedings for bid-rigging, corruption, or ultra vires acts

Given the current institutional arrangement, when a dispute reaches the level of a breach of fiduciary duty by members of the Management Committee involving malicious collusion in bid-rigging, fraud or manifestly ultra vires acts, the remedies available and the statutory jurisdiction of the Lands

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Tribunal may be inadequate. Such disputes go beyond the narrow scope of management prescribed in Schedule 10 to the BMO and violate the boundary set by section 45(3), thus often having to be transferred to the High Court for handling by way of inherent jurisdiction.

Even though it has been established as a body corporate, the minority owners still cannot file legal actions at the bottom level. According to section 8 of the Building Management Ordinance (Cap. 344, BMO), an owners' corporation shall be a body corporate upon registration, and it has been devised to enable the collective exercise of owners' rights. However, if the members of the Management Committee are suspected of corruption or other serious misconduct, this separate legal entity may be used to protect the wrongdoers. Under the well-known Rule in Foss v Harbottle, if the corporation itself has suffered an internal wrong, such as the misuse of maintenance funds or bid-rigging by its Management Committee, then the proper plaintiff is the corporation, not an individual member. The rule is to give weight to the will of the owners; if the behaviour can be justified by the majority of the owners' approval or leniency, the court generally will not interfere [17]. In practice, high-value repair contracts involving bid-rigging are often accompanied by the Management Committee's manipulation of proxies, and as a result, even when owners discover such irregularities, they are unable to have the OC file a lawsuit against its own agents. The above is compounded by the problem of reflective loss: the reduction in income experienced by individual owners, such as a larger proportion of maintenance expenses, is only a reflection of the losses in the OC's common fund. In accordance with the principle set out in Prudential Assurance Co Ltd v Newman Industries, such reflective loss is not, in principle, recoverable by individual members, and only the party with the direct right of action—the OC itself—may seek remedy. Although section 16 of the BMO provides that the OC may represent owners in matters concerning the common parts, the courts have made it clear in See Wah Fan v Ki Tat Garden that this provision is administrative in nature and does not grant minority owners a right of subrogation to bring proceedings in the name of the OC against third parties. As a result, there will be a power vacuum and the corrupt Management Committee can use the corporate personality of the OC to shield itself and exercise its control over the administrative resources of the OC to impose a de facto stifling effect on minority dissent through litigation barriers.

Given the barrier to legal standing created by this, a reasonable path for reconstructing the ex post remedial rights of minority shareholders is to adapt, by analogy, the statutory derivative action system in Hong Kong SAR's Companies Ordinance (Cap. 622). The degree of organisational isomorphism between an owners' corporation and a business company is relatively high: Members of the Management Committee function similarly to company directors and have fiduciary duties to the entire entity, whereas minority owners are in a similar position to minority shareholders, suffering from information asymmetry and a weak voting right. Under Part 14 (sections 731-738) of the Companies Ordinance, where a company is wrongfully prevented from suing due to being controlled by the defaulting directors, a shareholder may bring a derivative action on behalf of the company with the permission of the court. As scholars have shown, the introduction of a statutory derivative action is the only reliable way to address the problem of unruly ghosts in Foss v Harbottle, and the statutory leave mechanism can be used to strike a balance between protecting minority shareholders and avoiding excessive litigation risk [18].

This paper puts forward the proposal to amend the BMO and establish an owner's statutory derivative action expressly. The reason is as follows. Firstly, at the level of doctrine, a derivative action is an expression in statute of an equitable remedy intended to prevent fiduciaries from using the corporate name to shield themselves from liability for other conduct. Upon application, a minority shareholder is entitled to bring a claim in the interests of the OC only if four conditions are

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met: the action serves the interests of the OC, there is a reasonable prospect of success, prior notice has been provided, and the OC has declined to act. Secondly, to alleviate the financial disincentive for derivative litigation, a Wallersteiner order can be issued to permit an owner proceeding in good faith to be compensated from the OC's assets for reasonable legal expenses by the court. This addresses the incentive failure in derivative proceedings; that is to say, although the costs are borne by individuals, the benefits are realised by a group. This institutional reform addresses the procedural gap that arose because the Lands Tribunal was unable to handle equitable duties; at the same time, it activates a logic of privatised external monitoring, and every owner can be considered a possible monitor of the OC's integrity to create a standing legal deterrent against large-scale bid-rigging and corruption. Based on the inherent jurisdiction of the High Court, the path for derivative proceedings can be used to address the accountability gap caused by the corporate personality of the OC and ensure fundamental fairness and accountability in the construction of governance for building management.

6. Conclusion

At its core, the maintenance problem of Hong Kong SAR's multi-storey buildings stems from a discrepancy between the property regime and social conditions. The rearrangement of decision-making powers put forward in this paper is not to eliminate the right of private property by owners. Instead, it holds that in the event of an imminent threat to public safety, the procedural rights of minority shareholders should be transformed from an absolute property right into a conditional liability rule. The right of priority for the start of repair is still a right, not a discretionary power, but rather based on private law entitlements.

Under this design, the OC has received an exceptional priority right of action for expert certification, but it is still subject to scrutiny in light of the proportionality principle and, at the end of the day, to ex post accountability through a statutory derivative action modelled on company law. The purpose of a rule of liability is not to deny rights but to reduce the scope of their application. By eliminating the deadlock in ex-ante voting, the design will improve the speed of decision-making for building safety hazards significantly. Owners' private property rights are finally protected by ex post remedies, and the overall public safety of Hong Kong SAR society is also guaranteed at the same time.

In the future, the reforms put forward in this paper will also be pursued to some extent. First, the standard for applying the proportionality rule in private-law governance needs to be further specified. The four-tier test for manifest risk presented here is a theoretical system, and its application to operational guidance for registered professionals will need to be coordinated more closely with engineering standards and judicial precedents. Second, the specific Design of the owner's statutory derivative action has not been elaborated upon. This paper has only discussed the justification for adding this type of arrangement; other issues, such as how to get leave, how to cover the costs of a lawsuit, and what to prevent frivolous lawsuits, need to be further specified by rules based on the practical experience of the Companies Ordinance.

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