

For hearing before the Honourable Mr. Justice Wong at 11.15am on 12 April, 2008

**RE: HCMP NO. 1234 OF 2008**

**APPLICANT'S SKELETON SUBMISSIONS**

**I. The Application**

1. The Plaintiff, Profit Limited, files this submission pursuant to s.12 of the Conveyancing and Property Ordinance for the following:
  - (a) a declaration that requisition 2 in the letter dated 12 Jan 2008 from Messrs. Wilkinson and Wu, solicitors for the Plaintiff to Messrs. Chan and Chan, solicitors for the Defendant in respect of the title to the Property in question was not sufficiently answered by the Defendant;
  - (b) a declaration that good title to the Property has not been shown and given at or before the completion date of 5pm, 7 Mar 2008 in accordance with the Formal Sale and Purchase Agreement (the Agreement);
  - (c) An order that the defendants pay to the Plaintiff the sum of \$23,086,560 being the amount of deposit paid by the Plaintiff to the Defendant pursuant to the Agreement together with interest at such rate and period as the Court thinks fit;
  - (d) an order that the Defendant pays to the Plaintiff its costs of investigating title to the Property of \$20,000, the estate agent's commission of \$2,308,656 payable by the Plaintiff and the costs of and incidental to this application; and
  - (e) a declaration that the plaintiff is entitled to a lien on the Property given the said deposit.

**II. Chronology of requisition 2**

2. Having received the title deeds from the Defendant's solicitors on 5 Feb 08, the Plaintiff's solicitors, Messrs. Wilkinson and Wu observed that the occupation permit ("OP") permitted the said Property only to be used for "offices with ancillary accommodation for non-domestic use", which was inconsistent with the current use by the tenant of the Defendant, who used the Property for a karaoke bar.

3. The Plaintiff's solicitors therefore raised a requisition to that effect in a letter dated 12 Feb 08 (see p.32 of the bundle).
4. On 21 Feb 08, the Defendant's solicitors replied in respect of that requisition that: "an occupation permit is merely permission to occupy the building and does not restrict the use of the premises. The use as a karaoke establishment is commercial and not in breach of the government lease." (see p.33)
5. On 25 Feb 08, the Plaintiff's solicitors replied and did not accept that the OP does not restrict the use of the premises. It was further pointed out that a karaoke bar was inconsistent with the OP's designated use (see p.34).
6. On 27 Feb 08, the Defendant's solicitors replied that a breach of the OP does not go to title, referring to *Summit Investment Ltd. v Shia Ning Enterprises Ltd. [1999] 2 HKLRD 798* and therefore the requisition raised was unnecessary (see p.36).
7. On 3 Mar 08, the Plaintiff's solicitors replied that there was a material change in use and that the breach of the OP also resulted in breach of the deed of mutual covenant ("DMC") which provided that the covenantees were: "not to use the Building or any part thereof for any purposes which is in contravention of the terms and conditions contained in the ... Occupation Permit and to comply with the terms of the Occupation Permit." (see pp.38 and 41).
8. On 4 Mar 08, the Defendant's solicitors replied that the fitting-out of the Property did not involve the structure of the building and therefore there was no material change of use; it followed that there was neither breach of the OP nor the DMC (see p.42).
9. On 5 Mar 08, the Plaintiff's solicitors replied that they were unable to advise their client that title to the Property was secure (see p.45).
10. On 7 Mar 08, which was the day of completion, the Defendant solicitors replied to reiterate that the OP allowed non-domestic use generally and there was no material change of use and no risk of any enforcement by the Building Authority. The Defendant's solicitors also enclosed a club liquor license and stated further emphasised that there was no risk of enforcement because "the Building Authority would have been consulted as to the suitability of the premises for club use prior to the issue of the license" (see pp.46-47).

### **III. Whether the permitted use stipulated in the OP can include karaoke bars**

11. There is no dispute that the tenant currently occupying the Property (the "Tenant") is using the Property as a karaoke bar (see ¶6 of the affirmation of Yeung Sai Lok at p.54).
12. The OP only allows the Property to be used for "offices with ancillary accommodation for non-domestic use" (see p.51).
13. According to *Smartful International Ltd. v The Incorporated Owners of Wah Ming Centre Block C LDBM 152/2006* at ¶22, the permitted use stipulated on occupation permits must be construed narrowly.
14. In *Smartful International*, the occupation permit allowed the property to only be used for 'shops'. It was argued by the respondents that a residential care home for the elderly was not permitted by the occupation permit. Judge Wong of the Lands Tribunal adopted that argument and refused to construe 'shop' to include such a home for the elderly even if it did sell some goods and services because he thought it would be "plainly wrong to have such a loose definition in the context of an occupation permit".
15. In *Max Smart Ltd. v First Super Investment Ltd. [1999] 1 HKLRD 519* at ¶9, it was held that in construing the user, the court looks at the natural meaning of the words. The court held in that case that an 'office' was quite different from a 'shop'.
16. According to the New Oxford English Dictionary, an 'office' means "a room, set of rooms, or building used as a place for commercial, professional, or bureaucratic work".
17. Given the above, it is therefore submitted that use of the Property for primarily club or karaoke purposes is inconsistent with the meaning of 'office', neither does it fall into the meaning of 'ancillary non-domestic use'.

### **IV. Defendant vendor's duty to show good title**

18. It is a vendor's obligation to answer requisitions with candour so to avoid the situation whereby he fails to show good title even though he had good title – *Active Keen Industries Ltd. v Fok Chi Keong [1994] 1 HKLR 396*.
19. The Plaintiff raised a requisition citing its concern that there was a material change in use of the Property that was in breach of the OP and consequently was in breach of the DMC.

20. The best that the Defendant did to allay the Plaintiff's concerns of material change has been to produce an Authorised Person's letter (the "AP Letter") and a club liquor license (the liquor license) (see pp.48-49).
21. It is submitted that neither document properly answers the Plaintiff's requisition.

*AP Letter does not assist*

22. The Defendant contends that the AP Letter confirms that the OP allows non-domestic use.
23. Closer scrutiny of the AP Letter reveals that its author only wrote that the uses stated on the OP were taken from approved plans. The author then proceeded to say that the concern of the Building Authority in a commercial building is that the use continue to be commercial and that any alterations involving the structure be approved.
24. Nowhere in the AP Letter is it stated that the OP allows non-domestic use. Its author had only assumed, without giving reasons, that the building concerned was a commercial building and that it is the same as an office building. That assumption must be wrong because a commercial building would consist of both shops and offices. Since the OP explicitly provides for office use but not shop use, the building is not merely a general commercial building but an office building.
25. The AP Letter does not in any way confirm that the OP allows non-domestic use.

*Club liquor license does not assist*

26. The Defendant contends that the liquor license means that there would be no risk of the Building Authority objecting to the Property's present use as a karaoke bar because "the building authority would have been consulted as to the suitability of the premises for club use prior to the issue of the license".
27. It is submitted that such a bare assertion without any supporting evidence cannot constitute a sufficient answer to the requisition raised. In *Smartful International* at ¶31, Judge Wong decided that the applicant could not ignore the restrictions in an occupation permit merely because he had a license to operate a residential care home for the elderly. It is noted that the applicant in that case had already obtained a letter of "no in-principle objection" from the Building Department. The Judge decided that without formal approval, the license to operate was insufficient to override the use permitted by the OP.

Plaintiff's requisitions not sufficiently answered

28. It is submitted that because the Defendant has not sufficiently answered the Plaintiff's requisitions concerning material change in use, the Defendant is in breach of its obligations to show title and therefore, the Plaintiff is entitled not to complete.

**V. Agreement by Defendant to give good title**

29. The Defendant had agreed to give good title under clause 17 of the Agreement which incorporated clause 9 of Part A of the CPO which provides:

“The vendor shall give good title to the property. The vendor shall prove his title to the property at the vendor's own expense and shall at the like expense make and furnish to the purchaser such copies of any deeds or documents of title, wills and matters of public record as may be necessary to prove such title. ...”

30. Good title in the context of conveyancing means facts and circumstances so compelling that a court would conclude beyond reasonable doubt that the purchaser will not be at risk of a successful assertion against him of any encumbrance.

**VI. Whether breach of the OP constitutes a blot on title**

31. According to Judge Jerome Chan in Worldfull Investments Ltd. v Young King Ltd. [1997] HKLY 505 at ¶2, the use of premises inconsistent with that provided by an occupation permit amounts to an encumbrance on title as it would entitle the government to take enforcement action against the said premises.

32. SS.25(1), (2) and (3) of the Building Ordinance provide:

(1) One month's notice in the specified form shall be given to the Building Authority of any intended material change in the use of a building by the person intending to carry out or authorising the carrying out of such change.

(2) Where in the opinion of the Building Authority any building is not suitable by reason of its construction for its present or intended use, he may by order in writing served on the owner or occupier-

(a) ...

(b) require the owner or occupier to discontinue such present use of the building within 1 month from the service of the order: Provided that the Building Authority may permit by notice in writing such building works as he deems necessary for the purpose of rendering the building suitable for its present or intended use.

(3) The use of a building shall be deemed to be materially changed-

(a) where the carrying out of building works for the erection of a building intended for such use would have contravened the provisions of this Ordinance; or

(b) where the Building Authority could have refused to give approval to plans of such building works under section 16(1)(g).

33. S.16(1)(g) of the BO provides:

(1) The Building Authority may refuse to give his approval of any plans of building works where-

(g) the carrying out of the building works shown thereon would result in a building differing in height, design, type or intended use from buildings in the immediate neighbourhood or previously existing on the same site;

34. S.40(1B) of the BO provides:

Any person who-

(a) ...

(b) without reasonable excuse, fails to comply with an order served on him under section ... 25(2) ... shall be guilty of an offence and shall be liable on conviction-

(i) to a fine of \$50,000 and to imprisonment for 1 year; and

(ii) in the case of an offence consisting of a failure to comply with an order served on him under section ... 25(2), ... to a further fine of \$5,000 for each day during which it is proved to the satisfaction of the court that the failure to comply with the order has continued.

35. It is submitted that the Defendant had not adequately answered the Plaintiff's requisitions voicing their concern that there was a material change in use. Where there is a material change in use from what was originally permitted by the OP and how the Property is being used now, is therefore a risk that the Building Authority may, under s.25, order the owner of the Property to discontinue the present use of the building or make other structural adjustments.

36. A material change may be deemed by virtue of s.16(1)(g) simply because the Building Authority has power to refuse approval by reason of the user.

37. Such a risk would constitute a blot on title because the owner of the Property would then be ordered to do something which may potentially exceed his reasonable expectations when he agreed to be bound by the sale and purchase agreement. That order further carries with it the threat of a daily \$5,000 fine under s.40 should the owner not comply with it.

*Breach of OP equates to breach of DMC*

38. Even if the breach of the OP is not held to constitute a blot on title, the fact of the breach would mean that the DMC is breached (see §4(6) and (9) of the DMC at p.41).

39. In *Smartful International* at ¶25, Judge Wong decided that the applicant, in contravening the occupation permit, was also in breach of the deed of mutual covenant which provided that the owner was not to use the said building for any purpose which is in contravention of the occupation permit.
40. In *Incorporated Owners of Wing Ming Industrial Centre v Mantex Supplies Co. Ltd. [2007] HKEC 1972* at ¶9, Judge Chu studied the case of *Summit Investment* and found that the observations that an occupation permit does not by itself impose a restrictive covenant and that the Buildings Ordinance did not contain provision specifying the consequences of a use that is inconsistent with an occupation permit not to be determinative of the issue in his case. That was because the plaintiff's claim was for breach of negative restriction in the DMC, not for a mere breach of occupation permit.
41. Breach of the DMC is a blot on title because it might give rise to enforcement action by the management committee, e.g. by mandatory injunction under s.41 Conveyancing and Property Ordinance.

## **VII. Conclusion**

42. It is submitted that the Plaintiff was entitled to refuse to complete because:
  - (a) the Defendant is obliged to show good title, but had failed to do so since it had not sufficiently answered the Plaintiff's requisitions regarding the consequences of a material change in the use of the Property.
  - (b) the Defendant had agreed to give good title, but failed to do so since:
    - (i) there was a breach of the OP; and
    - (ii) there was consequently a breach of the DMC (whether or not breach of the OP constituted a blot on title).

Dated this 8<sup>th</sup> day of April, 2008

*Cliff Lui*

Counsel for the Applicants

For hearing before the Honourable Mr. Justice Wong at 11.15am on 12 April, 2008

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**APPLICANT'S LIST OF AUTHORITIES**

1. *Summit Investment Ltd. v Shia Ning Enterprises Ltd. [1999] 2 HKLRD 798*
2. *Smartful International Ltd. v The Incorporated Owners of Wah Ming Centre Block C LDBM 152/2006*
3. *Max Smart Ltd. v First Super Investment Ltd. [1999] 1 HKLRD 519*
4. *Worldfull Investments Ltd. v Young King Ltd. [1997] HKLY 505*
5. *Incorporated Owners of Wing Ming Industrial Centre v Mantex Supplies Co. Ltd. [2007] HKEC 1972*

Dated this 8<sup>th</sup> day of April, 2008

*Cliff Lui*

Counsel for the Applicants