

In Perspective – Fair Handling of UBWs in Leasing

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1. Introduction

- 1.1 On 29th April, 2010 the Estate Agents Authority ('EAA') announced the issue of Practice Circular 10-01¹ ('the Circular') entitled '*Unauthorised Building Works (2)*' with a press release². The latter gives the rationale for the Circular as follows: '*The tragic collapse of an old building in Tokwawan³ has sparked public concern about the safety of old buildings, especially old tenements with illegal structures.*'⁴
- 1.2 While the concern may be legitimate and the objective of the Circular laudable, one must see things in perspective⁵. Building safety should best be handled by experts in the Buildings Department ('BD').
- 1.3 This article will highlight a few difficulties that a trainer may face in teaching compliance with the Circular. First it will address certain legal issues relating to building management and tenancy, then it will discuss the duties of estate agent handling leasing of properties with UBWs.

¹ http://www.eaa.org.hk/practice/documents/10-01_CRE.pdf

² <http://www.eaa.org.hk/prdoc/2010-04-29e.pdf.pdf>

³ On 29.1.2010 the front portion of the building at No. 45J Ma Tau Wai Road collapsed killing a few residents.

⁴ 'Illegal structures' are officially known as unauthorized building works ('UBW')

⁵ On 26.4.2010 the Buildings Department ('BD') issued a press release attributing the collapse to external forces (news reports suggest by damage to support columns) rather than the presence of UBWs - <http://www.bd.gov.hk/english/documents/news/20100426ae.htm>. BD's investigation report says its staff inspected the building in November and December 2009 when '*no imminent structural danger*' was noted and removal of UBWs were in progress before the collapse - http://www.bd.gov.hk/english/BuildingCollapseReport_e.pdf.

2. Legal issues

2.1 Responsibility for repair to the building structure

2.1.1. The Circular begins saying ‘*it is the owners’ duty to keep the structure of the properties in good repair and condition*’. It may have over-simplified this complicated issue.

2.1.2. Firstly, the maintenance of the *common parts* of a building is the responsibility of the owners’ corporation, and the *structure* of a building is part of the *common parts*⁶. An owner cannot do anything about the building structure except in the name of the owners’ corporation.

2.1.3. Secondly, even for the internal parts of a property, the common law imposes very limited repair duty on the landlord⁷, unless they are spelt out in the tenancy agreement⁸. Basically the tenant takes the property in the state as he finds it, unless the landlord agrees to improve it.

2.2 The risks of UBWs

2.2.1 The Circular later outlined the risks of UBWs as mentioned in an earlier circular (Cir 07-05 – on risks facing a purchaser). They include:

- (a) the registration of building orders, and their consequences;
- (b) Government exercising its right of re-entry rendering title defective;

⁶ Licensees are assumed to know matters covered in the examination syllabus therefore detail explanations are omitted. Reference to recent versions of the Property Practice Training Course manuals are mentioned below only in case former students wish to refresh their memory - Green Bundle 4#17; 2#10. ‘4#17’ means Topic 4, slide no. 17.

⁷ Green bundle 3#59, 3#63 – 64

⁸ Even if they are spelt out, the terms need to be closely scrutinized. One restaurant lease allowed for suspension of payment of rent when the shop was ‘damaged or destroyed’. Concrete was falling from the ceiling of the dining area, toilet and kitchen, so the tenant suspended payment of rent. The court said the tenant could not rely on the clause because they were only ‘*ordinary types of problems arising from want of repair or dilapidation*’, not ‘damage’ – Green Bundle [360A], referring to the article beginning with the stamped number ‘360A’ in Topic 3.

(c) The purchaser unable to obtain mortgages.

2.2.2 As the Buildings Department has the technical expertise to determine whether a building is safe for habitation, and estate agents are not trained to do so, it is not unreasonable to infer from the fact that *only* a building order is issued that the building is still safe. If there is imminent danger then a closure order will be issued sealing off the building, as happened to the buildings adjacent to the collapsed Tokwawan building.

2.2.3 The section below on ‘duties of estate agents’ will address risks (a) and (b), and also physical dangers perceived by the estate agent even when no enforcement notice has been issued. Risk (c) does not affect tenants.

2.3 The Utility of UBWs

2.3.1 While UBWs may have a bad name, they may also serve a useful purpose in the crowded living environment of Hong Kong. Some UBWs may be professionally done and even considered by the court to be ‘positive attributes’⁹, and small families may welcome the extra living space that they can provide without costing the full square footage price¹⁰.

2.3.2 UBWs of the Tokwawan sort do not of course provide such amenities, but old buildings in run-down districts do serve the housing needs of under-privileged residents, say those who do not qualify for public rental house and cannot afford to rent a decent place. Their dilapidated state, bereft of basic facilities (e.g. no lifts), are compensated for by their low rent. And UBWs did not cause the collapse of the building featured.

3. Duties of Estate Agents

3.1 Duties of the Landlord’s Estate Agent

⁹ Green Bundle [365]

¹⁰ Green Bundle [356]

- 3.1.1 The landlord's estate agent should alert him to the consequences of any building orders or enforcement notices, but should guard against usurping the functions of enforcement agencies. Estate agents are not trained on the physical aspects of building safety.
- 3.1.2 To protect the landlord's interest, the estate agent should know the limits of the landlord's common law duties and do not commit him to obligations beyond what he is obliged to bear. He should negotiate terms that may minimize the harm to the landlord in case enforcement action is taken by government.

3.2 Duties of the Tenant's Estate Agent

- 3.2.1 If an enforcement notice has been issued, the tenant's estate agent should warn the tenant that his right to quiet enjoyment may be interrupted when remedial work is done by the landlord or enforcement agencies, and should negotiate a term commensurate with such interruption or the state of the premises. As said above, it is not for him to pre-empt the professional judgment of enforcement agencies on building safety.
- 3.2.2 If there is no enforcement notice, but the estate agent suspects *inherent dangers*, he should tell the tenant client not to rent the place. If the client insists on proceeding then he should cease to act for the tenant explaining the reasons. An estate agent should not arrange his client to sign his own death warrant. Advising the client in the circumstances to see a lawyer then go ahead with arranging execution of the lease DOES NOT protect client interest, if he knows his client is too poor to see a lawyer, has never seen one before and will unlikely act on the advice, i.e. the Matauwai tenants sort. Any feeling of *déjà vu*?

4. Duties of the Regulator

4.1 Disclosure is passive mode of enforcement

- 4.1.1 The Circular may be inadequate in two aspects – reliance on disclosure and putting the burden on the estate agent.
- 4.1.2 The suggestion to ask the client to seek legal advice and secure his written acknowledgement, then go ahead with the lease in spite of '*being alerted to the inherent dangers*', is enforcement by disclosure. As the

recent mini-bond saga has revealed, enforcement by disclosure cannot offer the public adequate protection.

4.2 Duty to report inherent dangers

4.2.1 The Circular fails to address the question of, having suspected inherent dangers when there is no enforcement notice, what should the tenant's estate agent do? Should he :

- a. make the disclosure, secure the client's acknowledgement, then arrange the lease as suggested by the Circular?
- b. cease to act and explain the reasons why, as this article suggests?
- c. inform the Buildings Department on the inherent dangers so as to protect the public?

4.2.2 This articles further suggests that, irrespective of whether (a) or (b) course is adopted or which side the estate agent acts for, (c) course should be taken so that Governmental authorities can ensure public safety. The tenant's estate agent could do it without qualms, as he owes the landlord no duty. The same could be said of the landlord's estate agent as physical danger is patent to the eye and not involving confidential communication.

4.2.3 To remove any doubts on the part of the landlord's estate agent, EAA should mandate such disclosure the same way that anti-money laundering measures are mandated¹¹. This will protect the landlord's estate agent from action by the landlord if the landlord later faces enforcement action. Alternatively, the reporting could be made to EAA which then maintains a register for licensees to check before they act for a tenant client.

5. Concluding Remarks

5.1 In the immediate aftermath of the Matauwai building collapse, the heightened concern for building safety is appropriate. But when the cause of the collapse is known, remedial measures should be more targeted¹². The

¹¹ Practice Circular No. 08-05 http://www.eaa.org.hk/practice/documents/08-05_CRE.pdf

¹² EAA should also clarify whether a land search is required for a property that is not self-contained, i.e. the Mautauwai sort, even when the prescribed forms do not apply to them.

breadth of issues involved cannot be adequately addressed in a two-page practice circular.

- 5.2 While the focus on protection for the tenant client is understandable, one must not lose sight of the fact that the landlord may also be an estate agent's client. A property in a run-down district may be the only asset of any value to him. His principal income may be the rent generated by letting out unused cubicles of his flat. He may have hardly any spare cash to maintain his flat, and the price for that is depressed rental income¹³. Any added hurdle can only aggravate the vicious circle. That may accelerate urban decay to the delight of developers prowling for old properties for redevelopment.

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¹³ The Hong Kong Housing Society has recently introduced certain financial assistance schemes to help to alleviate the problem: http://www.hkhs.com/eng/business/pm_bmm.asp.