

畢架山一號業主立案法團

網址: www.onebeaconhill.com

致：各業主

就法團向發展商的訴訟案件被上訴庭推翻原判後，我們已向我方大律師尋求進一步的法律意見，以供各業主參考，請見附表（一）。我們亦已要求律師翻譯成中文，並會盡快派發給各業主。

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管理委員會

2012年10月27日

COUNSEL ADVICE

Q1. Given we lost the court of appeal 3:0 what is the chance of us winning at CFA?

It is not uncommon for the Court of Appeal to have a unanimous judgment. We should not read too much into the fact that we lost 3:0 at the Court of Appeal and judge the chance of appeal at the CFA from this perspective. Although the CFA will give weight to the Court of Appeal's judgment, the CFA will review again from scratch the arguments of both sides. The chance of winning at the CFA will ultimately depend on whether the CFA accepts our argument as the CFI did. Quantification of the prospects of success is difficult. No guarantee of success can be given. If, however, leave to appeal is obtained we believe that we have respectable arguments which have a reasonable prospect of success in the CFA.

Q2. Given we lost primarily on undue enrichment, are we changing direction?

No, although there may be a different emphasis if we proceed to the CFA, the basic direction of our argument should remain the same. Ultimately, it is a question of statutory interpretation of sections 16 and 18 of the BMO. As to the argument of undue enrichment, as one of the possible counter-arguments, Calvin cited the example of a company who has a civil claim against another. If you buy shares of the company the price may be down because of the damage caused, but no one would argue that the chance of you being unjustly enriched should block the company's claim. But whether this argument will work is subject to further consideration of the case.

Also, while conventionally it is held that post completion flats have knowledge of the defects built into the price and the purchaser has the ability to inspect them, how is this true in reality for common areas where they need the IOs permission to inspect the defects or fix them.

Nonetheless, should the IO decide to appeal to the CFA, counsel will need more time to consider all of these arguments in more depth.

Q3. Should we be refiling as a representative action?

It will involve complicated legal issues and some practical difficulties. Not only may we need to identify all of the owners and get their agreement to sue, we would also need to deal with the issue of funding. In the event that damages are awarded, there will be issues on how the damages should be allocated. Further, the fact that different owners have different no. of shares in the development may further complicate the matter, in particular, regarding the relief to be claimed in the action. Having said that however, it might be worth doing this to show the CFA just how difficult it would be. There could be some strategic benefit in our appeal. However, this move will not be straightforward.

Q4. Should we have assigned the rights to sue from the owners?

Complicated and may be too late now as there may be a time-bar issue.

Q5. What are the timelines?

If we file for leave to appeal, it will take a couple of months for it to be heard. If we are granted leave to appeal it would probably take another year after that. The cost of the leave to appeal hearing in the Court of Appeal is about 250K-300K.

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以下為早前有關訴訟法律意見的中文版翻譯供各業主參考

問：我們在上訴法院被三名法官一致裁定敗訴，我們在終審法院的勝算有多少？

上訴法院頒下一致裁決並不罕見，我方不應太過著眼於被上訴法院三名法官一致裁定敗訴，來判斷在終審法院的勝算。雖然終審法院會考慮上訴法院的裁決，但仍會從頭開始審視雙方的論點。終審的勝算最終將視乎終審法院會否像原訟法庭一樣接納我方的論點。勝算多少很難量化，亦無法保證勝訴；但如果我方獲法院批准上訴，那麼我們相信我方具有不錯的論點，在終審法院將有合理的勝算。

問：我們基於「不當獲利」而敗訴，是否應改變方向？

不是。如我們上訴至終審法院，雖然可能有不同的著眼點，但基本爭論方向應維持不變。歸根究底，案件是在於如何詮釋《建築物管理條例》第 16 及 18 條。至於「不當獲利」的這論點，Calvin 舉了一個可作為其中一個反駁這論點的例子，例如你買了一間公司的股份，而該公司正向他人作民事索償，雖然公司股價可能因為公司蒙受損害而下跌，但沒有人會認為因為你有機會「不當獲利」而禁止公司進行索償。但這個論點是否可行，仍須進一步研究案情才能判斷。

而且，雖然法庭一般認為，落成後的單位售價，已把其缺陷計算在內，因買家能夠檢查缺陷。但這觀點現實上是否能套用於公用地方，當買家是需要業主立案法團的許可，才能檢查或處理公用地方的缺陷。

但是，如果業主立案法團決定上訴至終審法院，大律師需要更多時間，更深入地研究這些論點。

問：我們應否以代表訴訟的形式重新入稟？

這方法牽涉複雜的法律問題和一些實際困難，我方不但需要確定所有業主的身分和得到他們同意去提出起訴，還需要處理資金問題。假如獲得賠償，亦需要處理如何分配賠償金的問題。此外，不同業主在發展項目中擁有不同數目的份額，也會令情況更為複雜，尤其在訴訟中申索賠償這方面。雖然如此，這樣做可能仍是值得的，因可以藉此向終審法院顯示其難度，從而令我們在上訴時可能在策略上獲得優勢。但這方法並不簡單。

問：我們是否應將業主的起訴權利轉讓？

很複雜，現在也可能太遲，因為可能有時效問題。

問：案件需時多久？

如果申請上訴許可，會在約數個月才進行上訴許可之聆訊。如果我方獲准上訴，則終審聆訊可能在再一年後進行。在上訴法院申請批准上訴的聆訊，訟費約為 250,000-300,000 元。

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2012 年 10 月 29 日