

## *Mei Foo Sun Chuen* Legal Battle: Is There Any Development Potential Left for Your Land?

### Abstract/Summary

On 29 August 2011, the High Court handed down a judgment in the case *Re: Ho Mei Ling* (HCAL 51/2011), which concerned an application for leave to apply for judicial review taken out by a resident of Stage 8 of Mei Foo Sun Chuen. The action was launched against the decision of the Building Authority (the “BA”) to approve building plans in the estate.

The resident argued that the BA was wrong to approve a set of building plans submitted by a developer, Billion Star Development Limited (“Billion Star”), to construct a 20-storey residential building with the gross floor area (“GFA”) of 4,788.40m<sup>2</sup> on a piece of land at the south-west corner of Stage 8 of Mei Foo Sun Chuen, which was originally used as an LPG gas plant and a private road in the estate.

The High Court refused to grant leave on the major ground that the Appellant’s challenge on the alleged error of law in the BA’s calculation of the permitted plot ratio and site coverage had *no* prospect of success.

The lesson for developers is that, before deciding to acquire land for development purpose, it is important to assess whether the development potential of the land has been in any way “used up” by its surrounding developments.

### What is the story behind this case?

The lot in question is New Kowloon Marine Lot No. 25 (the “Lot”).

When **Stage 8** of Mei Foo Sun Chuen was developed in 1970s, the approved building plans (the “1970 Plans”) covered the **entire Lot**.

However, the 1970 Plans did **not fully utilise** the development potential of the entire Lot.

Before commencing the sale of individual units in the residential towers, the Lot was **carved out** by the developer into the following 4 portions as set out in the table below:

Carved Out Portions	User
Portion 1:	10 residential towers of Stage 8
Portion 2:	Gas Plant
Portion 3:	Road within Mei Fun Sun Chuen
Portion 4:	Road within Mei Fun Sun Chuen

Owners of individual units of the 10 residential towers of Stage 8 only held undivided shares of **Portion 1**.

**Portion 2** was assigned to Mobil Oil and was used as an LPG gas plant until its relocation in 1999.

Billion Star acquired **Portions 2 and 3** in 2009. Building plans for redeveloping the site comprising only Portions 2 and 3 (the “Site”) for a 20-storey residential tower with the GFA of 4,788.40m<sup>2</sup> were approved by the BA in October 2010.

Nine months later, the Applicant applied to the High Court for leave to apply for judicial review of the BA’s decision to approve the building plans.

### What is the nature of the proceedings?

The nature of the application is to obtain leave (i.e. permission) from the Court to apply for judicial review of the BA’s decision. The Court needs to determine whether the Applicant had a *reasonably arguable case* which enjoyed *realistic prospect of success*.

### Any development potential left for Portions 2 and 3?

The key issue is whether the Site (comprising only Portions 2 and 3) can be redeveloped as a *stand-alone* site and, if so, how much development potential was left for the Site when BA approved the building plans.

The Applicant argued the following:

- Once the Lot has been developed in accordance with the 1970 Plans, the development potential is “**locked up**” and the residual development potential cannot be utilised unless consent from all owners of the whole Lot has been obtained. Although Billion Star only redeveloped Portions 2 and 3, since Portions 2 and 3 were covered by the 1970 Plans for the entire Lot, Billion Star is

required to obtain consent from all individual owners of Stage 8 before it can utilise the residual development potential of the Site.

- Alternatively, even if it is not necessary to obtain consent of all owners of the Lot, since the 1970 building plans covered the entire Lot, the residual development potential should be ***distributed proportionately*** among the 4 Portions according to their respective sizes, meaning the Site should only have the GFA of 1,619.36 m<sup>2</sup>.

The Court rejected the Appellant’s arguments. The Court re-confirmed the principles established by the Privy Council in the leading cases ***A-G v Cheng Yick Chi*** (1983) and ***Cinat v A-G*** (1995) regarding the determination of the development potential of a “site” and applied these principles as follows:

- The development potential of a site is determined by reference to its permissible site coverage and plot ratio as prescribed under Building (Planning) Regulations 20 and 21, which gives the maximum permissible GFA of the building allowed to be built on the site.
- A developer is free to carve out a portion from a piece of land for further development in future notwithstanding that the whole land was put forward as a single site supporting an earlier development. The site area shall *prima facie* be the area of the carved out portion (i.e. Portions 2 and 3) and Building (Planning) Regulations 20 and 21 should be applied to such area accordingly.
- There is no issue of “locking up” the carved out portion with the original plot of land. In any event, the owners of the residential towers only acquired the undivided shares of Portion 1 and did not have any interest in other portions of the Lot. Accordingly, it is not necessary for Billion Star to obtain consent from all owners of the whole Lot for its redevelopment of Portions 2 and 3.
- If the earlier development under the 1970 Plans had also used the development potential of the carved out portions (i.e. Portions 2 and 3), then the shortfall shall be deducted from

the development potential of Portions 2 and 3 because such potential had already been “used up” by the earlier development.

- In this case, since the earlier development under the 1970 Plans only used up approximately 590 m<sup>2</sup> of the carved out portions (i.e. Portions 2 and 3), only such 590 m<sup>2</sup> needed to be deducted; no further deduction is required and Portions 2 and 3 can be developed as their own up to the *maximum* site coverage and plot ratio as permitted under Building (Planning) Regulations 20 and 21.
- The exercise is not to work out the residual development potential of the whole lot to see how the residue should be distributed amongst different portions of the land. Since the carved out land can be developed as a standalone site, there is no legal basis to have a *proportionate* distribution of the residual GFA among the 4 portions.

## What is the lesson for developers?

Before developers decide to acquire land for redevelopment other than by Government auction, it is important to assess whether the development potential of the land has been “used up”. For this purpose:

- Developers should search the Buildings Department’s records for the approved building plans of the neighbouring developments, in order

to check whether the development potential of the target land has already been “used up” by the neighbouring developments.

- Developers should also engage land surveyors, authorised persons and solicitors with expertise in building law and building plans applications to advise on the development potential *before* launching the acquisition.

For developers wanting to reserve their rights to develop a portion of its land in future such as the Site in this case, it is important to ensure that (a) such portion can be carved out as a standalone site from the rest of the land and (b) the development potential of such carved out portion is not “used up” in the earlier development.

## Contact Us

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