

**Legislative Council Panel on Home Affairs
Subcommittee on Review of the
Building Management Ordinance (Cap. 344)
Meeting on 20 March 2002**

Purpose

This paper sets out the Administration's views on the following issues raised at the past meetings of the Subcommittee on Review of the Building Management Ordinance ("the Subcommittee") of the Legislative Council Panel on Home Affairs:

- a) formation of owners' corporations (OCs) by owners of house developments consisting of independent houses built on individual land lots;
- b) liabilities of individual members of OCs, i.e. members of management committees and individual owners;
- c) procedures for formation of OCs; and
- d) Establishment of a non-statutory mediation mechanism to resolve building management disputes.

Formation of OCs by owners of house developments consisting of independent houses built on individual land lots

2. As a matter of principle, we have no objection to amending the Building Management Ordinance (BMO) to enable owners of house developments to form OCs. To this end, we have sought legal advice on whether the scope of the BMO can be expanded to accommodate house developments, and whether OCs for house developments can be formed on the basis of area of land or number of houses owned by individual owners in particular.

3. Our preliminary legal advice is that the ownership structure and the nature of the title of flats in multi-storey buildings and independent houses built on individual land lots are quite different. A mere amendment to the provision relating to determination of owner's shares,

i.e. section 39 of the BMO, by providing an alternative way to determine shares on the basis of area of land or number of houses owned will not be sufficient to make the BMO applicable to house developments.

4. According to legal advice, since most of the provisions and fundamental concepts in the BMO are construed specifically to cater for the management of flats in multi-storey buildings, it is difficult to apply them to house developments which have an entirely different nature of title and ownership from flats and which do not have common ownership of undivided shares in land. Some examples are set out below for illustration:

- a) “Flat” is defined in the BMO to mean any premises in a building which are referred to in a deed of mutual covenant whether described therein as a flat or by any other name and whether used as a dwelling, shop, factory, office or for any other purpose, of which the owner, as between himself and owners or occupiers of other parts of the same building, is entitled to the exclusive possession. For house developments, owners own land lots with their individual houses erected thereon. It is unlikely that those individual houses would fall within the definition of “flat” and it follows that all provisions in the BMO which have reference to “flat” will not be applicable to house developments;
- b) “Common parts” in the BMO means the whole of a building, except such parts as have been specified or designated in an instrument registered in the Land Registry as being for the exclusive use, occupation or enjoyment of an owner. It appears that “common parts” so defined refers to the common areas and facilities shared among the owners of a multi-storey building. It is difficult to ascertain the “common parts” in house developments as there is no building with common parts shared among the owners. This may hamper an OC from discharging its duty under section 18 of the BMO which stipulates that an OC shall maintain the common parts in a state of good and serviceable repair and clean condition; and

- c) Sections 40B and 40C of the BMO provide that where no person is managing the building, Secretary for Home Affairs or the Lands Tribunal may order that the management committee or the owners should convene a meeting to appoint a building management agent. It may be practically difficult to determine whether there is any person managing the buildings of a house development for the purpose of invoking these provisions as it will be subject to argument whether sections 40B and 40C require all the houses in a house development not being managed or only a majority of the houses not being managed will be sufficient.

5. In view of the above, it appears that mere replacement of the concept of undivided shares with that of shares based on areas of land or number of houses owned is not sufficient. Rather, detailed and substantial revisions to and adaptation of the provisions in the BMO are necessary in order to make the BMO applicable to the management of house developments. Alternatively, as the nature of title for individual houses and flats in multi-storey buildings are fundamentally different and these two different types of properties have different management concerns and requirements, a new piece of legislation may need to be drawn up for the purpose. In any case, we will continue to explore with the Department of Justice on how best to provide a proper legal framework to enable owners of house developments to manage their buildings through the formation of OCs.

Liabilities of individual members of OCs, i.e. members of management committees and individual owners

6. The Subcommittee suggested that the BMO should be amended to allow an OC to operate as a body corporate, so those members of an OC could have a status similar to that of directors of a limited company. Specifically, the liabilities of an OC could not be transferred to individual members of the management committee of an OC.

7. According to legal advice, the existing BMO contains adequate provisions to give effect to the above objective. The relevant provisions are analysed below:

- a) Section 8(2)(a) of the BMO provides that as from the date of issue of the certificate of registration of the OC under section 8(1) of the BMO, the owners shall be a body corporate and shall be capable of suing and being sued and, subject to the provisions of the BMO, of doing and suffering all such other acts and things as bodies corporate may lawfully do and suffer. The whole purpose of section 8(2)(a) is to equate an OC with other bodies corporate subject to the provisions of the BMO. Therefore, OCs are already operating as bodies corporate.
- b) Under section 16 of the BMO, the liabilities of the owners in relation to the common parts of the building shall, subject to the provisions of the BMO, be enforceable against the OC to the exclusion of the owners. Section 29 of the BMO provides that the statutory powers and duties conferred or imposed on an OC shall be exercised and performed on behalf of the OC by the management committee. Members of the management committee are merely agents of the OC. As the OC is a body corporate with a separate legal entity and is capable of being sued, the liabilities of an OC would not be shifted to individual owners or members of the management committee who act within their authority as agents in exercising the statutory powers and duties of the OC in normal circumstances.
- c) In general, the situations under which a member of an OC may be liable are only restricted to those specified under the BMO. These specific provisions cover mainly situations where the management committee or specified members of the management committee fail to exercise due diligence to comply with particular prescribed requirements under the BMO. Examples of such provisions include failure to display copy certificate of registration (section 11(3)), failure to prepare and maintain OC's accounts (section 27(3)), and failure to comply with an order from the Government to appoint a building management agent (section 40B(2)).
- d) Section 17(1) provides that if a judgement is given or an order

is made against an OC, execution to enforce the judgement or order may issue against the property of the OC; or with leave of the Lands Tribunal, against any owner, provided that an application for such leave is made by summons served personally upon the particular owner against whom execution is sought. It should be noted that the Lands Tribunal's jurisdiction in relation to building management is clearly restricted under section 45 and Schedule 10 of the BMO. According to relevant case laws, no application for leave to execute any judgement or order against any individual owner would be granted if it relates to matters outside the Lands Tribunal's jurisdiction under the BMO. When considering whether to grant leave under section 17(1) of the BMO, the Court will consider various factors before granting the leave and such factors include whether the individual owner has received special benefits from the services provided by the judgment creditor and the reason why the judgment or order is to be enforced against a specific individual owner and not against other owners of the building. If a decision is made by the management committee as a collective decision, the legal responsibility of such decision would be borne by the OC and not by the management committee or its members.

8. To sum up, under the existing BMO, the liability of an OC should normally not be transferred to an individual owner or member of a management committee, except in those situations specifically set out in the provisions of the BMO relating to the responsibilities of members of a management committee, or under section 17(1)(b) of the BMO. This has also been reinforced by judgements on two recent cases where leave applications were filed by development companies or building contractors against both the OC and members of a management committee on certain building management issues under the BMO. The crucial points have been extracted as follows:

- a) In Millap Ltd. & Others v The Incorporated Owners of Fanling Centre & Others (香港特別行政區土地審裁處建築物管理申請編號 1999 年第 LDBM 260 宗及第 LDBM 360 宗), it was held that:

“《建築物管理條例》的第 16 條規定，除條例另有規定外，業主所負有與建築物公用部份的法律責任，須針對法團執行……條例的第 29 條闡明法團與管理委員會的關係：第 29 條規定“除本條另有規定外，本條例授予法團的權力及職責，須由管理委員會代表法團行使及執行”。故此，就第 16 條與第 29 條而言，管理委員會祇是代表法團行使及執行它的權力及職責，而條例並無規定管理委員會須負上法團的法律責任，既然管理委員會無須負上法團的責任，個別委員在執行管理委員會的職責時當然亦無須負上法團的法律責任。”

“如條例賦予管理委員會的個別委員法律上的責任，並強制他必須執行該責任，條例會清楚作出規定，如該委員違反此規定，則有關人士可向該委員提出起訴。”

“申請人辯稱第三至第十一答辯人，以他們為管理委員會的委員之故，所以他們分別是法團的代理人，因而他們可因合約（因違反公契或破壞受信責任）、衡平法（破壞受信責任）或侵權行為（侵入、疏忽或滋擾），以個人身份（而不是管理委員會委員的身份）而被申請人控告。本席無法接納此論點。在本案，申請人是以他們為管理委員會的個別成員而向他們提出訴訟，除上述有關第三答辯人拒絕召開業主大會一事外，本席無司法權審訊個別委員是否須就別些事項負上法律責任。”

“管理委員會祇是行使法團的權力及執行它的職責。它本身並不用負起法團的責任。負起與建築物公用部份有關的法律責任，須由法團負起。在本案的委員，即使指控是事實，第三答辯人以至各個別委員都是作出集體的決定(亦即管理委員會的決定)，或根據管理委員會的集體決定而有所作為，他們的決定或作為即屬於管理委員會的決定或作為，故此即使該些決定或作為是錯誤的決定或作為，法律的責任亦須由法團所負起。就申請人的指控而言，條例並無任何部份賦予

他們向管理委員會或它的個別會員提出訴訟的法律根基。”

- b) In 葉大永建築師有限公司對金明閣業主立案法團及黃文賢(CACV143/99), it was held that:

“《建築物管理條例》第 17 條 (1)(b) 款之規定，目的在於保障個別業主，防止法團判決之債權人濫用執行權力，任意選擇無辜業主以承擔法團債項”“該條例 (即《建築物管理條例》第 17 條) 的目的是既要保障債權人亦要保障個別業主，就是如果債權人未能向立案法團追討欠款，可在某些情況下向大廈的個別業主追討，但必須得到土地審裁處批准。由於債權人是向整座大廈提供服務，照常理是應該先向立案法團追討。如果立案法團沒有資產而未能清還法庭所判之欠款，才需要向個別業主追討.....法庭在決定應否根據條例第 17 條(1)批准債權人向個別業主追討時，應考慮的情況包括：債權人曾經採取了何種步驟向立案法團追討和執行法庭的判決；立案法團的經濟狀況如何及有何資產；債權人向大廈所提供的服務，是否使某一位業主特別受惠；為何選擇某一位業主而不是其他業主作出追討等。如果沒有充份理由隨意批准債權人向任何個別業主追討，可能會造成不公平的現象。假如立案法團的主席或其他負責人很容易受個別追討，試問那會有人接受義務公職？這決不是第 17 條的立法原意。”

The above judgements illustrate that there is no need to amend the BMO for the sake of making clear this legislative intent.

9. As regards Members' suggestion of amending the BMO for the purpose of preventing the transfer of an OC's liabilities to individual members of the OC's management committee by making reference to provisions of the Companies Ordinance relating to the liabilities of individual directors of companies, having sought legal advice, we do not consider it necessary or appropriate to do so, for the following reasons:

- a) The existing Companies Ordinance does not contain any

provisions exempting directors of a company from personal liabilities. On the contrary, section 159 provides that the liability of directors, may, if so provided by the memorandum of association, be unlimited.

- b) As a matter of corporate governance and in order to protect the interest of shareholders, creditors, employees, transaction counter-parties and the investing public as a whole, the Companies Ordinance contains a number of provisions imposing personal liabilities, both civil and criminal on directors. To name a few,
- Section 40 – civil liability to compensate subscribers for misstatement in prospectus
 - Section 42 – civil liability to repay subscription monies if they fall below minimum subscription
 - Section 44 – civil liability to compensate the company and the allottee for loss suffered as a result of irregular allotment
 - Section 129B – criminal liability if balance sheet not properly signed
 - Section 157J – criminal liability for authorising prohibited loans to directors
 - Section 275 – personal responsibility without any limitation for all debts of the company if business of the company carried on with intent to defraud creditors

10. As regards another suggestion from some Members that there should be clear provisions to exempt owners and members of the management committees of OCs from certain civil liabilities, such as liabilities for libel arising from the performance of OC duties, we consider it inappropriate to do so, on the following grounds:

- a) The BMO is an Ordinance dealing with the management of multi-storey buildings. It is inappropriate to deal with exemption for libel in the BMO, which is a personal action for the protection of reputation, dignity and privacy and is totally unrelated to the objective of the BMO and the management of buildings. Under section 16 of the BMO, the liabilities of the

owners in relation to the common parts of the building shall be enforceable against OCs to the exclusion of the owners. Section 16 mainly deals with the liabilities relating to the management of the common parts of a building, which is the major function of an OC. Therefore, *the expression “to the exclusion of the owners” already excludes the possibility of an OC member being personally sued in respect of any matter relating to the common parts of a building.*

- b) It would appear to be inappropriate that a member of a management committee of an OC can be exempted from his personal responsibilities and liabilities under a libel action by the mere fact that he is a member of a management committee of an OC.

Procedures for formation of OCs

11. As mentioned in paragraph 10 of the Administration’s paper for the meeting of the Subcommittee on 18 December 2001, we intend to add a schedule to the BMO setting out the appropriate procedures for formation of OCs, so as to make the provisions clearer and more user-friendly to owners. We are also considering whether it is appropriate, by way of legislative amendments, to prescribe certain forms of notice and proxy forms to be used for formation of an OC in the BMO. These are intended to reduce the number of building management disputes arising from interpretation of procedural requirements under the BMO.

Establishment of a non-statutory mediation mechanism to resolve building management disputes

12. We are considering the feasibility of establishing a non-statutory mediation mechanism through making arrangements for mediation bodies to provide voluntary services at the Building Management Resource Centres under Home Affairs Department. The objective is to provide a quicker and cheaper way to resolve building management disputes, thereby reducing the number of cases referred to the Lands Tribunal.

Epilogue

13. The Administration is consulting the relevant professional bodies and trade associations on the above four issues. We intend to proceed with legislative amendments to the BMO if they are warranted and acceptable to all the parties concerned. In the meantime, we are prepared to consider any other views put forward by the Subcommittee.

Home Affairs Bureau
March 2002