

Bills Committee on Building Management (Amendment) Bill 2005

Building Management (Third Party Risks Insurance) Regulation

Purpose

1. At the Bills Committee meeting on 29 November 2006, when discussing LC Paper No. CB(2)446/06-07(01)¹, Members raised diverse views on whether unauthorized building works (UBWs) should be covered under the mandatory insurance policies of owners' corporations (OCs) under the draft Building Management (Third Party Risks Insurance) Regulation. This paper sets out the Administration's views on the matter.

Scope of the mandatory requirement for OCs

2. The new section 28 (which has yet to come into operation) added by the Building Management (Amendment) Ordinance 2000 requires all OCs to procure and keep in force in relation to the common parts of the building policies of third party risks insurance as complies with any requirement prescribed for the purposes of that section. Section 41(ca) empowers the Chief Executive in Council to make regulations for the effecting of those policies and for the conditions and requirements which are to apply in respect of those policies. Therefore, a Regulation made under section 41(ca) may set out the liabilities required, and not required, to be covered under those policies for the purpose of that section 28. It follows that the issue of whether liabilities relating to UBWs should be covered in the third party risks insurance policies for OCs should be dealt with in the Regulation, and not the main legislation. The matter will not, therefore, affect the drafting and passage of section 28 of the Building Management (Amendment) Ordinance 2000.

Why liabilities relating to UBWs should be excluded

3. The Administration holds a strong view that OCs should not be

¹ *Supplementary Consolidated Response – The Administration's response to Members' Suggestions/Views on the Draft Building Management (Third Party Risks Insurance) Regulation* (LC Paper No. CB(2)446/06-07(01)).

required to procure a third party risks insurance policy which covers liabilities relating to UBWs. Our reasons are set out below –

- (a) Section 3(2)(c) of the draft Regulation stipulates that a policy is not required to cover any liability arising out of a breach of any duty imposed by law in relation to any building erected in contravention of the Buildings Ordinance (Cap.123) or any building works or street works carried out in contravention of Cap.123. UBWs are unlawful by reference to Cap.123. Should we stipulate in the Regulation that the insurance policy has to cover liabilities arising from UBWs, it would imply that the Government condones the existence of these unauthorized structures.
- (b) The Government's policy is that all UBWs should be removed and demolished. If OCs are required by the law to procure third party risks insurance for UBWs, then it would indirectly encourage the continual existence of these UBWs as these UBWs are "protected" under the insurance policies.
- (c) The aim of the Regulation is to offer a buffer for the owners in case they have to settle claims from third parties. It is not to replace their basic duties to properly manage and maintain their own properties, which include removal of UBWs from the building.
- (d) If OCs are required by law to procure third party risks insurance for UBWs, the insurance premium will certainly go up for all the buildings (and not only those buildings which have UBWs). This will mean cross-subsidy of the poorly maintained buildings by those properly maintained ones which is very unfair for the latter.
- (e) In many of the buildings with UBWs, the UBWs are erected or used by individual owners and not the OC (or all the owners). If OCs are required by the law to procure third party risks insurance for UBWs, the insurance premium will certainly be very high. This will, again, mean cross-subsidy of poor risks by good risks, which is unfair for those owners who have no UBWs attached to their units.
- (f) There were views that if OCs have to pay a very high premium so as

to cover the UBWs in their building, they will be encouraged to demolish the UBWs as soon as possible. This may be the case – but the OCs may not be able to procure the insurance in the first place if there are many UBWs in the building.

- (g) If the mandatory insurance on third party risks is not required to cover UBWs, the OCs will know clearly that they will not be protected by the insurance policies for death or injury caused to third parties by the UBWs. This will serve as a strong incentive for the OCs to deal with the UBW problem.
- (h) In a number of cases, although the UBWs concerned were attached to or hung on the common parts (e.g. the outer wall), it was held by the court that the OC of the building should not be held responsible for the claim because the individual owner and/or occupier (the tenant) concerned has the exclusive right to use the UBWs which caused the accident and the UBW is not a common part of the building. These include *Wong Sau Kam and Yeung Kong, the administrators of the estate of Yeung Ki Yee, deceased and Shum Yuk Fong and others* (HCPI 798/1998), *Wong Lai Kai and The Incorporated Owners of Lok Fu Building, Yuen Long* (CACV 189/1999 and CACV 195/1999), *Chan Yan Nam and Hui Ka Ming trading as Kar Lee Engineering and others* (HCPI 1169/2000 and CACV 342/2002), *Leung Tsang Hung and Lee Wai Yu, the administrators of the estate of Liu Ngan Fong Sukey, deceased and The Incorporated Owners of Kwok Wing House* (HCPI 595/2002 and CACV 195/2004).
- (i) It follows that it is unfair if we require OCs to procure third party risks insurance to cover UBWs that are solely used or enjoyed by an individual owner.
- (j) We note Members' view that in order to offer better protection to the third parties, the third party risks insurance policies procured by OCs should cover liabilities relating to UBWs. Whilst a policy for third party risks insurance is generally for the protection of third parties, in the case of OCs, it is more for the protection of owners. Whether the OC concerned is insured or not, if a judgment is made on the OC's liability, all the owners will be jointly and severally liable for

the judgment debt. If the OC is insured, the amount to be contributed by individual owners will be reduced correspondingly, causing less financial burden to them. If, however, the OC is not insured, the individual owners will have to share out the whole judgment debt – given that they are property owners, and that in most cases, at least hundreds of owners are involved, it is highly unlikely that they will not be able to come up with the amount of the judgment debt. Hence, there is no need to impose in law a requirement for OCs to procure third party risks insurance to cover liabilities relating to UBWs for the protection of third parties.

- (k) This is a mandatory legal requirement which should not be excessive. For the same reason, we do not require OCs to procure third party risks insurance which cover property damage. OCs who prefer better protection in relation to property damage or UBWs may decide whether they should do so having regard to the particular situation of their buildings and the wish of the majority owners.

Other matters relating to UBWs

4. Members asked whether those UBWs which are erected after the insurance policy has been procured will be covered by the policy. First of all, the draft Regulation does not require OCs to procure third party risks insurance to cover liabilities relating to UBWs. It is therefore up to the OCs whether they would like to have additional protection and whether the insurance company is willing to provide such coverage for a particular building. Assuming that the OC has, on top of the minimum mandatory requirement, procured an insurance policy which covers liabilities relating to UBWs as well, whether liabilities relating to the UBWs that are erected after the policy has been procured (in other words, the insurance company is unaware of the existence of such UBWs) are covered by the policy will depend on the terms of the insurance policy.

5. Members also asked whether it should be the responsibility of the OC (i.e. all owners) or the individual owner concerned if the UBWs are solely owned or used by an individual owner but they fall on the common parts, causing injury or death to a third party. Anyone who suffers loss and damage caused by an accident that occurs in a building may claim

compensation for property damage, bodily injury or death. This is a question of civil liability to be determined by the court taking into account various factors. As explained in paragraph 3(h) above, there were judgments which provided that an OC should not be held responsible for the UBWs that were solely used or enjoyed by a particular owner or occupier.

6. As a related matter, Members further asked about the situation where the OC and the owner/occupier have both procured third party risks insurance and whether this would mean double coverage. A third party who suffers damage may claim compensation from all parties concerned, including the OC, the owner, the occupier or the building manager. If it is held by the court that the OC should be responsible for the accident, then the OC will have to settle the damages determined by the court and the third party risks insurance procured by the OC will be called upon to settle the claim. If, however, the court decides that the individual owner and/or the individual occupier is responsible for the accident, then they should be responsible for settling the damages determined by the court. In such case, the third party risks insurance procured by the individual owner and/or the occupier (if any) will be called upon to settle the claim.

Other matters relating to the Regulation

7. We advised in LC Paper No. CB(2)446/06-07(01) that according to a survey conducted by the Hong Kong Federation of Insurers in June 2006, an average of 6 500 public liability claims were received by its member companies between 2002 and 2004 and there was no single claim reported which exceeded \$10 million. The Federation advised that further breakdown of the claims is not available.

8. The Federation also advised that it is not in a position to comment on the estimated level of insurance premium for buildings. We note that the level of insurance premium depends on a host of factors which include, and not limited to, the age of the building, the maintenance conditions of the building, the use of the building and the number of units of the building, etc. It would be difficult to provide Members with an estimate of the level of insurance premium. For Members' reference,

the Urban Renewal Authority and the Hong Kong Housing Society have both introduced an incentive scheme whereby owners' corporations which have completed the renovation works in the common parts of the buildings will be reimbursed for the third party risks insurance premium of up to \$6,000 per annum for three consecutive years. We understand that this amount is generally sufficient for tenement buildings in procuring third party risks insurance.

Home Affairs Department
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