

Bills Committee on Building Management (Amendment) Bill 2005

Scope of Third Party Risks Insurance for Owners' Corporations

Purpose

1. At the meeting of the Bills Committee on 18 December 2006, Members discussed LC Paper No. CB(2)638/06-07(03) *Various Issues Raised during the Clause by Clause Examination of the Bill*. Members asked whether section 28(1) of the Building Management Ordinance (BMO) (as amended by the Building Management (Amendment) Ordinance 2000) should be amended to require the owners' corporations (OC) to procure third party risks insurance to cover the liability of individual occupiers. This paper sets out the Administration's response to Members' proposal.

Scope of the third party risks insurance to be procured by OCs

2. An OC is formed by owners of a building to maintain the common parts of the building and the property of the OC. The scope of the third party risks insurance to be procured by OCs should cover liabilities that are –

- (a) incurred by the OC; and
- (b) in relation to the common parts of the building.

3. Third party risks insurance is to insure against one's liabilities arising from negligence or other causes of action. Any liabilities that are not incurred by the OC – e.g. liabilities of an individual occupier, an individual owner, the contractor, or the manager, are beyond the control of the OC. They should not be included in the scope of mandatory third party risks insurance for OCs under section 28 of the BMO.

4. Any liabilities that are not related to the common parts of a building should also not be the responsibilities of the OC. They should not be included in the scope of mandatory third party risks insurance for OCs under the BMO.

5. Members' suggestion to require an OC to procure third party risks insurance to cover the liabilities of individual occupiers in relation to common parts of a building deviates from the above principle. We will be imposing on OCs additional liabilities that they should not bear in the first place.

Liabilities of Occupiers

6. “Occupier” is defined under section 2 of the BMO as a tenant, sub-tenant or other person in lawful occupation of a flat, but does not include an owner of that flat. If it is the court’s decision that an occupier (say, a tenant) should be held solely liable (meaning that the OC is not liable) for an accident that happened in a building, then the occupier should be fully responsible for paying the damages determined by the court.

7. The question is why should somebody else (in this case, the OC) help to pay the damages for the occupier. If it is held by the court that the OC is not responsible for the accident, but rather the occupier should be responsible, we see no reason why the OC should be drawn in to pay the damages. As explained in LC Paper No.CB(2)551/06-07(01), in a number of cases¹, although the unauthorized building works (UBW) 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 UBW which caused the accident and the UBW is not a common part of the building. By demonstrating to the court that the UBW concerned is clearly beyond their responsibilities, the OCs in all these cases were able to avoid paying a huge compensation to the third parties. Members’ suggestion will mean the OCs, despite their efforts to do their job properly, will still be responsible for other person’s negligence. If OCs are required to bear the responsibility of individual occupiers, then there is no longer the need for the latter to pay any care to the use of the common parts of the building because the OC will in any case be liable for any damage or personal injury caused by the occupier’s negligence.

8. Furthermore, if the law requires the OC to procure insurance to cover the liabilities of the individual occupiers, it begs the question of whether the OC should be responsible for all the liabilities of the occupiers under all circumstances – what if the OC has not complied with the law in procuring the third party risks insurance: should the OC (which does not have insurance protection) help to pay the damages for the occupier as well? And what if the OC has complied with the law in procuring the third party

¹ *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).

risks insurance but the court held that the occupier's liability is way above the amount procured by the OC: should the OC help the occupier to pay the his share of the damages as well? All these questions show that the OC should be responsible for its own fault and the occupier for his own as well – there should be no cross-sharing of responsibilities.

Liabilities of Other Persons in a Building

9. Similarly, not only an occupier but an individual owner (as opposed to the OC/all owners), a manager, or a contractor, or any other person who happens to be in a building (say, a visitor) could be held liable for the death or injury of a third party that occurs in a building. In fact, 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.

10. Members' suggestion therefore begs the question of whether we should require an OC to procure third party risks insurance for all accidents that occur in a building, regardless of who is the culprit. If we were to require an OC to procure insurance to cover the liabilities of individual occupiers because the occupiers may not have the financial capability to settle the judgment compensation to the injured third party, then one might wonder if an OC should also procure insurance for all other persons in respect of any accident in the common parts of a building (even if the OC is determined by the court to have nothing to do with the accident).

Buildings with OCs

11. As the BMO only requires OCs to procure third party risks insurance and the requirement does not apply to buildings without an OC, it follows that such proposal (which is supposed to offer more protection to third parties but is very unfair to OCs and the collective owners) will be imposed on OCs only, making the whole arrangement even more unfair.

Joint and Several Liability

12. Members further asked if an OC is held jointly and severally responsible for an accident together with an occupier, then the OC may in the end be liable for the whole judgment compensation since the other party may go bankrupt. Members suggested therefore that in order to offer the best protection for third parties, the insurance policy of the OC should cover the liability of the individual occupiers as well.

13. Section 3(1) of the Civil Liability (Contribution) Ordinance (Cap.377) provides that any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

14. If it is held by the court that an OC, an owner and an occupier (e.g. a tenant) are jointly and severally liable to a third party's injury in tort, the injured third party may opt to enforce his award of judgment compensation against any of the three parties (the OC, the owner or the occupier, depending on their financial capability). Each of the parties will be liable to the injured third party for the whole damage in the first place, but may recover contribution from the other parties under section 3(1) of Cap.377. In other words, the OC will be insured against its liabilities for the whole damage – subject to the maximum amount prescribed by the respective insurance policy.

15. In the case where the injured third party opts to seek the entire compensation from the OC, the insurance company of the OC will have to pay the damages for the OC up to the policy amount in accordance with section 3(1)² of the draft Building Management (Third Party Risks Insurance) Regulation. The insurance company may then subrogate to the OC's rights to recover contribution from the other parties (in this case, the owner and the occupier).

16. In the case where the injured party opts to seek the entire compensation from the owner (instead of the OC or the occupier), the owner, after having settled the full amount, will recover contribution from the OC and the occupier under section 3(1) of Cap.377. If the occupier goes bankrupt, meaning that the owner could only get the share from the OC and not the occupier, the owner will likely go to the court to seek an order and the issue of contribution will be determined by the court. In *Aberdeen Winner Investment Company Limited and The Incorporated Owners of Albert House* (HCA 3408/2003), it was held that –

“There is no direct authority on the effect of a contributor's insolvency on other contributors. But research by Mr Chain, Mr Chan's junior counsel, has come up with the following passage in the late Professor Glanville William's Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions (1951) (at §48

² Section 3(1) of the draft Building Management (Third Party Risks Insurance) Regulation provides that a policy is required to insure the assured in respect of any liability that may be incurred by the assured corporation, or the assured owners, in respect of the death of, or the bodily injury to, any person.

(pp.170-2)).....

The thrust of Professor William's analysis is that solvent defendants should bear the burden of an insolvent defendant's contribution in proportion to the solvent defendants' respective shares of liability.....

The distribution of the burden of insolvent defendants among the solvent ones as proposed by Professor Williams not only makes good commonsense, but is also just and equitable in the circumstances. A division of the damages payable by insolvent defendants along the lines suggested, removes the unfairness inherent in one defendant, here Aberdeen, having to bear all or the bulk of damages for which other defendants are liable, simply because those other defendants happen to be solvent.....”

In *Aberdeen Winner Investment Company Limited and The Incorporated Owners of Albert House* (CACV 42/2004 & CACV 236/2004), it was further held that –

“The effect of a contributor's insolvency on other contributors was considered by the late Professor Glanville Williams in his book on *Joint Torts and Contributory Negligence*, 1951 edition at §48. The judge referred to this in his judgment and noted that the upshot of Professor Williams's analysis was that solvent defendants should bear the burden of an insolvent defendant's contribution in proportion to the solvent defendants' respective shares of liability.....

I am unable to discern any good reason for not adopting this approach. Leaving only one of several solvent defendants to shoulder virtually the entire burden of damages arising from the insolvency of one or more of the defendants would be contrary to the rationale underlying the statutory provisions for contribution.”

If such principle is followed in our example and the court held that the OC has to share the extra with the owner, then the insurance company of the OC will have to pay the OC's share of the damages for the OC up to the policy amount in accordance with section 8(2)³ of the draft Building Management

³ Section 8(2) of the draft Building Management (Third Party Risks Insurance) Regulation provides that the insurance company that issued the policy shall, notwithstanding the fact that it may avoid or cancel, or has avoided or cancelled, the policy, pay to the person entitled to the benefit of the judgment any sum payable under the judgment in respect of the liability, including any amount payable in respect of costs and

(Third Party Risks Insurance) Regulation. The insurance company will then subrogate to the OC's rights and recover contribution from the occupier.

17. In other words, in either case (whether the injured third party opts to seek payment from the OC first or not), the liability of the OC will be covered by the insurance policy required under the section 28 of the BMO and the draft Building Management (Third Party Risks Insurance) Regulation. It follows that there is no need for an OC to procure additional third party risks insurance to cover the liabilities of occupiers for the concern that an OC may be held jointly and severally liable for an accident together with an occupier.

Views of the Insurance Industry

18. We have consulted the Hong Kong Federation of Insurers on Members' proposal. Having consulted its own legal adviser, the Federation advised that OCs should not be required to procure third party risks insurance to cover the liability of occupiers in relation to the common parts of the building. The Federation was also doubtful if any insurance company would provide cover to individual occupiers under the third party risks insurance policy procured by OCs.

Revised Section 28 of the BMO

19. The revised section 28 of the BMO is at Annex A.

ADVICE SOUGHT

20. Members' views are invited on the above.

Home Affairs Department
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any sum payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any law relating to interest on judgments.

Building Management (Amendment) Ordinance 2000 (69 of 2000)

Section 28 Matters regarding insurance (not yet in operation)

- (1) A corporation shall procure and keep in force in relation to the common parts of the building and the property of the corporation, such policy of insurance with an insurance company in respect of third party risks as complies with any requirement prescribed for the purposes of this section.
- (2) In the event of a contravention of subsection (1), every member of the management committee shall be guilty of an offence and shall be liable on conviction to a fine at level 5 unless he proves —
 - (a) that the offence was committed without his consent or connivance; and
 - (b) that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised in the circumstances.
- (3) A corporation may insure and keep insured with an insurance company the common parts of the building and the property of the corporation to the reinstatement value thereof against fire and other risks.
- (4) Where a corporation has effected any policy of insurance with an insurance company by virtue of this section the management committee shall permit the Authority, an authorized officer, the tenants' representative, an occupier, an owner, a registered mortgagee or any person duly authorized in writing in that behalf by an occupier, an owner or registered mortgagee, to inspect the policy of insurance and any receipt for the premium in respect thereof at any reasonable time.
- (5) Where any person (other than the Authority or an authorized officer) referred to in subsection (4) requests the corporation to supply him with copies of the policy of insurance and any receipt for the premium in respect of that policy, the treasurer of the management committee shall, on the payment of such reasonable copying charge as the management committee may determine, supply such copies to that person.
- (6) The treasurer of the management committee shall, if requested by the Authority or an authorized officer and without raising any charge, supply the copies referred to in subsection (5) to the Authority or that officer.

(6A) The secretary of the management committee shall, within 28 days after the corporation has effected a policy of insurance under subsection (1), give notice of the name and address of the insurance company and the period covered by the policy of insurance to the Land Registrar in such form as the Land Registrar may specify.

(7) In this section and in section 41, "insurance company" (保險公司)—

(a) means an insurer authorized under section 8 of the Insurance Companies Ordinance (Cap. 41) or deemed under section 61(1) or (2) of that Ordinance to be so authorized, to carry on insurance business;

(b) means the society of underwriters known in the United Kingdom as Lloyd's; and

(c) means an association of underwriters approved by the Insurance Authority."
