

Bills Committee on Building Management (Amendment) Bill 2005

Alternative Dispute Resolution for Building Management Disputes

Purpose

At the Bills Committee meeting on 17 May 2005, Members requested the Administration to provide responses on –

- (a) the timetable for the implementation of the “Building Affairs Tribunal” (BAT) proposed by the Housing, Planning and Lands Bureau (HPLB) and the proposed ambit of the Tribunal, particularly whether it would handle disputes arising from provisions of the Building Management Ordinance (BMO); and
- (b) the feasibility of introducing a mandatory mechanism of mediation in judicial proceedings for dealing with building management cases.

This paper sets out the Administration’s responses on the above matter.

Proposed Building Affairs Tribunal

2. Since the release of the report on the Public Consultation on Building Management and Maintenance in January 2005, HPLB has been exploring, together with the Hong Kong Institute of Surveyors, the feasibility of establishing a BAT for resolving disputes pertaining to building management and maintenance matters in private buildings.

3. The BAT is intended to serve as an independent arbitration mechanism to deal with disputes in building management and maintenance between individual owners, owners and owners’ corporations (OCs), as well as disputes between owners and management companies or property managers of buildings. The initial thinking is that the BAT would handle disputes in building management and maintenance including those pertaining to water seepage, collection and use of management/maintenance funds, and removal of unauthorised installations in common areas (e.g. roof-top structures, advertising

signboards, etc.).

4. The BAT proposal involves a number of complex policy and legal issues, including the legal status and institutional arrangement of the BAT, its interface with the existing Lands Tribunal which deals with building management disputes; the BAT's jurisdiction over unauthorized building works vis-à-vis that of the Building Authority under the Buildings Ordinance; and the resource implications arising from the setting up of the BAT. It would take some time to resolve the various complex issues.

5. HPLB will have to carefully study the issues involved in consultation with relevant Government departments, including Buildings Department, Home Affairs Department (HAD), Department of Justice, Judiciary Administrator, as well as the relevant professional bodies. HPLB intends to consult the public on the proposed BAT in the second round of consultation on Building Management and Maintenance towards the end of this year. Subject to public views, HPLB will further take forward the proposal.

Lands Tribunal

6. Section 45 of and Schedule 10 to the BMO provide for the settling of building management disputes through adjudication at the Lands Tribunal. We have sought the Judiciary Administrator's views on whether the present mechanism in Lands Tribunal for building management disputes could be simplified. We have also suggested the setting up of a separate Building Management Tribunal to resolve building management disputes.

7. The Judiciary Administrator is of the view that the existing procedures in the Lands Tribunal are already very user-friendly and simple. The Presiding Officer of the Lands Tribunal will give directions for preparation of each case for trial to the litigants in person in accordance with the nature of disputes arising from the case. There is thus no strong justification for the setting up of a separate Building Management Tribunal as it would be likely to function in the same way as the Lands Tribunal. As to whether legal representation could be

disallowed in the Lands Tribunal for building management disputes, the Judiciary Administrator considered that the nature of such disputes could vary a great deal. There are areas where the law is not straight-forward, e.g. the interpretation of deeds is not a matter to be dealt with without legal representation. She therefore considered that it is inappropriate to exclude legal representation in building management cases in the Lands Tribunal.

Mediation

Pilot Scheme in HAD

8. In recent years, there have been calls for using mediation as an alternative mechanism for resolving building management disputes at court. With the assistance of the Hong Kong Mediation Council (the Council) and the Hong Kong Mediation Centre (the Centre), we have launched a pilot scheme on mediation. The two organisations agreed to undertake ten dispute cases under the pilot scheme on a pro bono basis. The maximum number of hours assigned for each case is 3-1/2 hours.

9. A total of 15 dispute cases on building management have been nominated to the Council and the Centre for assessment on whether they could be taken on for mediation under the pilot scheme. The 15 cases are mostly related to the apportionment of maintenance expenses among owners, fees charged by the property manager, repair and maintenance works and the performance of the management committee. After assessing the complexity of the cases, the Council and the Centre took up a total of five cases which they considered feasible to be resolved within the 3-1/2 free mediation session.

10. Two out of the five proceeded cases met with success. They were about water seepage problems and the distribution of repair and maintenance costs in accordance with the deed of mutual covenant.

11. The Council and the Centre have agreed to undertake ten dispute cases to assess the effectiveness of mediation on resolving building management disputes. We will keep the situation under review and further assess the effectiveness of mediation on building management

disputes when more cases have gone through the pilot scheme.

12. The biggest difficulty we have encountered in the pilot scheme is to convince parties concerned to join voluntarily (even when the scheme is free). The scheme will surely attract a higher take-up rate if mediation is mandatory. However, both the Hong Kong Mediation Council and the Hong Kong Mediation Centre are of the view that for mediation to succeed, we must encourage the disputing parties to participate on a voluntary basis. In this regard, we have widely distributed pamphlets publicizing the work of Hong Kong Mediation Council and Hong Kong Mediation Centre and continued to organise workshops introducing the pilot scheme at our Building Management Resource Centres (BMRCs). A poster publicizing the pilot scheme was also posted up at each of the BMRCs and District Offices. All our staff in the building management teams in the District Offices have been briefed on the pilot scheme on mediation and asked to introduce the scheme to the OCs/owners in their district during their regular liaison work. Appeal letters have also been issued to all District Councillors to promote the scheme and to encourage them to make referrals.

Albert House

13. In addition to the pilot scheme, we have also used mediation to help resolve the Albert House case¹. With the assistance of the Hong Kong Housing Society, all Albert House owners were provided with a special interest-free loan (with a flexible repayment period varying from one year to life) to meet with their civil liabilities. In parallel, the Hong Kong Mediation Council has rendered assistance by providing pro bono mediation services to the creditor (who is the major owner of Albert House) and individual Albert House owners. The Council has, through mediation, facilitated communications between the two sides, allowing

¹ A fatal accident occurred in Albert House, Aberdeen in 1994 and the court ruled in 1999 that six parties (one being the OC) should be held liable for paying damages to the plaintiffs. The major owner of the building, being one of the parties remaining solvent, had already paid the full damages for itself and on behalf of the other five defendants. The major owner then applied to the court to seek contribution from the OC of Albert House. The court ruled in January 2004 that the remaining solvent parties, i.e. the major owner and the OC of Albert House, had to contribute to the whole sum of compensation in their respective share. For the OC, the share together with legal costs is approximately \$25 million. On 8 November 2004, the High Court ordered the OC of Albert House to wind up as it was unable to pay the judgment debts. Since the OC was wound up, each individual owner of Albert House has become personally liable for the debt.

them to reach a consensus on the questions of clearing debts and discharging civil liabilities of owners.

Preliminary Views

14. While we note that mediation had turned out to be rather successful in resolving family disputes in overseas countries, the situation in building management is quite different. In fact, unlike family disputes, mediation has not been widely used as a dispute resolution mechanism for building management disputes around the world.

15. For mediation to be effective in resolving family disputes, the parties should have a history of cooperation and problem-solving and do not have a long history of adversarial relations or prior litigation. It is also preferable if the parties have some leverage on each other (e.g. ability to reward or harm). These factors do not seem to be applicable in most building management disputes. Moreover, while OC and its management committee are legally representing all owners of a building, whenever it comes to disputes, it is difficult for a small group to make decisions on behalf of all owners at the mediation table. We therefore consider that mediation may work better in disputes between two individual owners, like water seepage cases, nuisance cases, or trespassing cases.

16. That said, we are still open to the idea of using mediation to resolving building management disputes. We will continue to promote mediation among owners and OCs, so as to encourage more participation in the scheme. A fair assessment of the effectiveness of mediation in building management matters would then be derived after conclusion of the pilot scheme.

17. As a related matter, we are aware of some old DMCs that contain a provision to the effect that disputes are to be settled through arbitration. If disputes arise in these buildings, the disputing parties will have to appoint an arbitrator in accordance with the DMC.

Training for District Staff

18. Other than formal mediation by trained mediators, we also place

emphasis on training our Liaison Officers on mediation skills. Since 2003, we have engaged a tertiary institution to provide mediation course for all Liaison Officers involved in building management work.

Views of the Judiciary Administrator

19. From May 2000 to July 2003, the Judiciary has launched a three-year pilot scheme on family mediation to help separating/divorcing couples to reach their own mutually acceptable agreements regarding their arrangements for their children and/or any other issues. It was a voluntary process in which a trained and impartial mediator would assist both parties in communicating and negotiating issues in a confidential setting. Under the pilot scheme, a Family Mediation Co-ordinator's Office was set up to disseminate information on family mediation services and to assist couples in seeking family mediators. The fees for the mediation service under the pilot scheme were borne by the Judiciary subject to a maximum of \$9,000 per case. All mediators serving the pilot scheme were out-stationed and not annexed to the Family Court.

20. The Judiciary Administrator considered the idea of testing mediation for building management cases could be explored, subject to discussion of issues like the interface between mediation and litigation, qualifications of the mediators, resource implications, legislative framework, etc. We will discuss further with the Judiciary Administrator on conclusion of the pilot scheme of mediation.

Home Affairs Department
June 2005