

(29) in HAD HQ IV/20/5/30

LS/S/41/06-07

2123 8391

2147 0984

24 September 2007

Mr Stephen LAM
Assistant Legal Adviser
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Mr Lam,

**Building Management (Third Party Risks Insurance) Regulation
(L.N. 146)**

Thank you for your letter of 17 August 2007.

Our comments on the questions raised in your letter about the Building Management (Third Party Risks Insurance) Regulation (the Regulation) are set out below.

Section 3(1)

Section 3(1) of the Regulation requires a policy to insure the assured owners' corporations (OCs) in respect of any liability that may be incurred by the OC in respect of the death of, or the bodily injury to, any person. Thus, in the case of a death or bodily injury, the crux of the matter is whether the OC has incurred liability and this depends on the circumstances of each case.

In your example, in determining whether the OC is liable for the bodily injury of the visitor, one would have to consider whether the visitor's injury is

attributable to the employee's negligences and if so, whether the OC is vicariously liable to the visitor for the employee's negligence. Various factors may affect the liability of the OC under this hypothetical case, for example, whether the visitor himself has been acting negligently or whether the OC has taken measures to remind its employees the importance of observing safety guidelines.

Section 3(2)(d)(i)–(iv)

These provisions were proposed by the Hong Kong Federation of Insurers (HKFI) to elaborate on section 3(2)(d)(i) of the draft Regulation. The wording is modelled on the standard exclusion clause adopted in the insurance market as advised by HKFI. According to HKFI, the liabilities stipulated in these provisions are invariably excluded from liability insurance policies and it is not realistic for the Regulation to require an OC to take out insurance that cover these liabilities. Therefore, although it is unlikely for an OC to incur these liabilities, it is advisable to expressly set out that the Regulation does not require a policy to cover them.

Section 7(4)

Section 7 is modelled on section 12(2) and (3)(b) of the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 272). It provides that an agreement that purports to negate or restrict any prescribed liability of an OC towards a third party is of no effect.

An OC may try to qualify its prescribed liability towards a third party by reference to say a contract term or notice. For example, an OC may put up a notice in the lobby of the building that says "Everyone enters into this building at his own risks and the OC is not liable for death of or bodily injury to such person." In this example, it is more the case that the OC qualifies its liability by reference to an understanding, rather than an agreement. Section 7(4) makes it clear that such an understanding should be of no effect.

Section 6(7) and (8)

These provisions are modelled on section 9 of the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 272). They deal with post-event conduct.

Section 6(7) provides that if a policy provision restricts the insurance in the event of the OC's failure to comply with a condition after the event has taken place, such as to inform the insurance company within certain days or make the claim within a specified period, such provision is of no effect. The

insurance company cannot rely on such provision to escape its liability under the policy.

Section 6(8), on the other hand, provides that if a policy stipulates that the insurance company may reclaim from the OC any sum paid by the insurance company under the policy to satisfy a third party's claim, such a provision is not rendered void by section 6(7). This provision, if any, in the policy would still be valid even if section 6(7) applies.

In other words, if an insurance company is liable to settle a claim of the third party under the policy because of section 6(7), provided that there is another provision in the policy which specifies that it may reclaim from the OC the amount paid, it can rely on such provision to recover the amount. However, if there is no such provision in the policy, the insurance company cannot reclaim from the OC the sum paid.

Section 8(1)(b)

Section 8(1) and (2) is modelled on section 10(1) of the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 272).

An example that the insurance company may avoid a policy is that the policy was obtained by the non-disclosure of a material fact or by a representation of fact that was false in some material particulars. The insurance company may cancel the policy in accordance with the policy provisions.

Section 8(3)

Section 8(3) is modelled on section 10(4) of the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 272).

This provision stipulates that if by virtue of section 8(2) an insurance company becomes liable to pay the third party a sum in excess of what it would be liable to pay the OC under the policy, the insurance company is entitled to recover the excess from the OC. In other words, section 8(3) is giving a power to the insurance company to recover the excess amount that it is liable to pay only because of the provision in the Regulation. Section 8(3) is not giving the insurance company a power to recover from the OC what it would be liable to pay under the policy.

Section 8(4)

Section 6 provides that a policy provision that purports to restrict the insurance of the OC by reference to certain matters specified in the Regulation (such as the number of claims within a certain period or the age of the building) is of no effect.

Assuming that a policy does not cover a liability because of a restriction on the number of claims that may be made within a year, by virtue of section 6, such restriction is of no effect. Yet, it may be subject to question as to whether such liability is covered by the policy for the purposes of section 8(1)(b). Section 8(4) intends to make it clear that liability covered by the policy only by virtue of section 6 is regarded as being covered by a policy for the purposes of section 8(1)(b) and thus section 8 is applicable to such situation.

Section 9(1)

Section 9(1) is modelled on section 10(2)(a) of the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 272).

It is worth explaining that section 8 deals with the relationship between the insurance company and the third party. It stipulates that if a third party has obtained judgement against an OC in respect of a prescribed liability covered by a policy, the insurance company is required to pay to the third party any sum payable under the judgement up to the amount covered by the policy. In other words, this section gives the third party a direct right of action against the insurance company upon obtaining judgement against the OC. Such direct right of action is not dependent on the OC's insolvency.

Section 9(1) then provides that the insurance company is not required to pay to the third party under section 8 if it is not given notice of the bringing of the proceedings within the specified period, Section 9(1) does not require any particular person to give notice of the proceedings to the insurance company. The key issue in section 9(1) is that if the insurance company is not given the notice of the bringing of the proceedings within the specified period, the third party has no direct right against the insurance company. As such, it is likely that the third party will give notice of the proceedings to the insurance company if it wants to take benefit under section 8.

Section 6(7), on the other hand, affects the relationship between the OC and the insurance company. It provides that the insurance company cannot escape liability under the policy even if the OC has not complied with a

condition in a policy after the happening of the event, such as to give notice of proceedings to the insurance company.

Section 9(3)

Section 9(3) is modelled on section 10(2)(c) of the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 272).

There may be a number of circumstances where a policy is cancelled by virtue of any provision contained in it. For example, a policy may contain a provision which stipulates that if the OC fails to pay the premium for three consecutive months, then the policy will be cancelled with immediate effect. Another example may be that a policy provision provides that either party may cancel the policy unilaterally with one month notice.

Yours sincerely,

(Miss Linda SO)
for Director of Home Affairs

c.c. DoJ (Attn: Mr Lawrence PENG, SALD) (Fax: 2869 1302)
(Attn: Ms Lonnie NG, SGC) (Fax: 2845 2215)
(Attn: Miss Grace LAM, GC) (Fax: 2136 8277)