Building Management (Amendment) Bill 2005 - Preliminary Comments by the Law Society's Working Party on the Bill

The Property Committee of the Law Society has set up a Working Party in May 2005 to consider in details the Building Management (Amendment) Bill 2005 ("the Bill"). Whilst the Law Society is still considering the Bill, the Working Party has its preliminary comments as follows:

(1) Interpretation – Clause 3 of the Bill

S. 2 of the Building Management Ordinance ("the Ordinance"):

Definition of "building"

1.1 It has now become more common for DMCs to provide for the common parts of an estate to be held by a manager on trust for all co-owners. However, the definition of "building" in the Ordinance does not seem to have catered for this situation. The Working Party proposes amending the definition of "building" by inserting after c(ii),

> "(iii) is owned or held by the manager for the common use, enjoyment and benefit of the owners and occupiers of the flats in that building."

1.2 There should be consequential amendments to the definition by deleting "or" after subsection c(i) and inserting "or" after subsection c(ii).

Definition of "convenor"

1.3 Clauses 4, 5, 6 and 19 of the Bill amends S. 3, 3A, 4 and 40C of the Ordinance to make further provisions for the appointment of a Management Committee ("MC") under those sections. A new definition of "convenor" was proposed to be inserted in S. 2 of the Ordinance to define the persons who can convene a meeting under those sections.

1.4 To achieve consistency in drafting, the Working Party proposes that the word "convenor" should also be adopted in Schedule 8 of the Ordinance to replace "the person or persons convening the meeting of the owners' committee" and the proposed definition of "convenor" should be extended by inserting after (d),

"(e) in relation to a meeting of owners convened under paragraph 8 of Schedule 8, means the person appointed under paragraph 8(b)."

1.5 There should be consequential amendments to the proposed definition of "convenor" by deleting "or" after subsection (c); and inserting "or" after subsection (d).

1.6 S. 3(1)(c) of the Ordinance was amended by the Bill to clarify that a meeting of the owners to appoint an MC may be convened by "an owner appointed to convene such a meeting by the owners of not less than 5% of the shares in aggregate" rather than "the owners of not less than 5% of the shares". Again, for the sake of consistency, paragraph 8(b) of Schedule 8 also relating to the convening of a meeting of the owners should be amended along the line of the new S.3(1)(c).

Definition of "member"

1.7 The proposed definition of "member" should take account of the Tenant's Representative who is appointed under S.15(1) of the Ordinance.

(2) Appointment of MC– Clauses 4, 5 6, 19 of the Bill

S.3, 3A, 4, 40C and Schedule 3 of the Ordinance

Percentage of Owners to Convene Meetings and Quorum Requirement

2.1 It was held in *U Wai Investment Co. Ltd & Anor v. Au Kok Tai & ors* [1997] 4 HKC 2000 that the requirement for not less than "5% of the owners" to requisition the chairman of the MC to convene a general meeting of the corporation in paragraph 1(2) of Schedule 3 of the Ordinance means 5% of the owners by reference to "the number of owners" and not "owners' shares". Schedule 11 was subsequently introduced under the Building Management (Amendment) Ordinance 2000 to endorse this interpretation and clarify the method of counting owners.

2.2 However, it is observed that in both the existing and amended versions of S.3, 3A and 4 of the Ordinance, the "5% owners" required to convene a meeting is worked out by reference to shares. The Working Party does not appreciate the rationale behind the law in singling out paragraph (1)(2) of Schedule 3 for different treatment. This will not only confuse the public, but also operate as a trap for the unwary.

2.3 The Working Party also fails to appreciate the rationale behind adopting 10%/20% of owners (by reference to the "number of owners" rather than "owners' shares") for determining the quorum of the meeting for the purpose of S.3, 3A, 4, 40C, paragraphs 5(1)(a) & 5(1)(b) of Schedule 3 and paragraph 11 of the Schedule 8 of the Ordinance. This requirement may create a strange result that owners holding the majority of undivided shares who have successfully procured a meeting to be convened can find that no resolution can be passed because of their failure to meet with the 10% owners (by reference to number) quorum requirement.

2.4 For the sake of clarity, paragraph 3(3) of Schedule 3 should be amended to read:

"Subject to section 10(1), all matters arising at a meeting of the

corporation at which a quorum is present shall be decided by majority of the votes of the owners voting either personally or by proxy at such a meeting.

This will help to clarify that the majority of the owners means the majority of owners at a meeting, and not the majority of all the owners in a building. Similar amendments should be made to S. 3(2)(a), 3A(3), 4(4), 40C(3) and paragraph 2(1) of Schedule 2 of the Ordinance.

Election of MC Members

2.5 Under the provisions of the Ordinance, members of the MC are elected by a majority of votes.

2.6 The meaning of "majority" of votes of owners was held by the Court of Appeal in *The Incorporated Owners of Tsuen Wan Garden* v. *Prime Light Ltd* CACV 1/04 [14/3/05] to mean a majority of over 50% of the cast votes. Whilst the case relates to a voting exercise under paragraph 3(3) of Schedule 3, the same principle should likewise apply to other resolutions requiring the majority of the votes of the owners.

2.7 In a meeting for the appointment of MC members, where there are several candidates contesting for a post (e.g. chairman), it is likely that no candidate will receive more than 50% of the votes. Indeed, there can be situations where no single member of MC receives over 50% of the votes.

2.8 That is why in various election legislation (e.g. S. 51(2) of the Legislative Council Ordinance Cap.542; S. 41(2) of the District Council Ordinance, Cap. 547 and the Village Representative Election Ordinance, Cap. 576), the expression "simple or relative majority" was adopted to indicate the winning majority of less than 50%.

2.9 The Working Party therefore suggests that consideration should be given to amend:-

(a) the proposed paragraph 2(1) of Schedule 2;
(b) the proposed S.3(2)(a)
(c) the existing S.3A(3);
(d) the existing S.4(4); and
(e) the proposed S. 40C(3)

to adopt a "simple or relative majority" of votes for passage of the relevant resolutions.

(3) Protection of Members of MC – Clause 15 of the Bill

New 29A of the Ordinance

3.1 The Working Party welcomes the proposed S.29A. However, it is believed that the proposed S.29A shall be supplemented by amendments to other sections.

Litigation by and against MC (S.45(4)(c))

3.2 S. 45(4)(c) of the Ordinance specifically names the MC as a competent person to commence those legal proceedings specified in Schedule 10. In *The Incorporated*

Owners of Kwai Wan Industrial Building v. *Kwai Fung Industrial Ltd* LDBM 208/2002 (17/2/05) (paragraph 21) and *4th MC of the Incorporated Owners of Hanley Villas* v. *2nd MC of the Incorporated Owners of Hanley Villas & anor* LDBM 73/04 (03/08/2004)(paragraph 6), the Lands Tribunal ("LT") held that although S.45 provides that the MC shall be competent to commence legal proceedings, MC is not a legal entity but a group of natural persons, who are the office bearers of OC.

3.3 Paragraphs 21 and 22 of the *Kwai Fung* judgment read as follows:

> "21. *For my part, I am unable to agree that in law, a management committee of an incorporated owners is a legal entity distinct from the incorporated owners. The legal position of a management committee has been succinctly summarized by His Honour Judge L. Chan in the recent decision of 4th MC of the Incorporated Owners of Hanley Villas* v. *2nd MC of the Incorporated Owners of Hanley Villas & anor* (*unreported) LDBM 73 of 2004 at paragraph 6 as follows:*
>
> > *'A management committee of an incorporated owners of a multi-storey building or a housing estate is just like the board of directors of a limited company. The company is a legal person but the board of directors is not. The fact that section 45 of the Building Management Ordinance, Cap. 344 has included a management committee as one of the persons who is competent to commence proceedings in the Tribunal under that section is, without more, insufficient to make the management committee a legal person. When the interest of the company is in issue, it is the company that can sue or be sued in its own name, not the board of directors. The board of directors is not a legal person independent of the company. The same applies to an incorporated owners and its management committee'*
>
> *22. I will additionally point out that a management committee is in essence a body of natural persons who are the officer bearers of the incorporated owners. Their appointments are regulated by the Building Management Ordinance. They are appointed for the purpose of carrying out the powers and duties of, and to make collective decisions for the incorporated owners, through and under the name of the management committee. Insofar as they are intra vires, decisions and acts taken by the members of a management committee are not only the decisions and acts of the management committee, but also those of the incorporated owners. It follows that the mere inclusion of a management committee as one of the persons competent to commence proceedings in the Lands Tribunal under section 45 of the Building Management Ordinance does not make a management committee a legal entity. It is therefore difficult to see the legal basis for a management*

committee being regarded as a legal entity LDBM 73/04 (03/08/2004) (paragraph 22 of the judgment).

3.4 Whilst S. 45(4)(c) of the Ordinance may enable legal proceedings to be conveniently commenced in the name of the MC, the Administration should perhaps, in the light of the concern expressed by the courts on the appropriateness of MC to be a party of the proceedings, clarify the policy intention behind S. 45(4)(c) and review whether the provision is appropriate.

3.5 For completeness, the Working Party would like to mention the case of *Wong Wai Chun* v. *Shing Sau Wan* CACV 174/04 [28/1/05], where it was held that in any litigation where OC was an interested and necessary party in the sense that the LT was asked to make orders that would affect the OC, OC should be made a party. In the premises, the Working Party proposes to insert a subsection (2A) after the existing Section 45 (2) to reflect the necessity of the Joinder.

(4) Qualification of MC Members – Clauses 23 of the Bill

Schedule 2 of the Ordinance

4.1 Paragraphs 4(1) and 4(2) of Schedule 2 of the Ordinance do not provide for the retirement or disqualification of Secretary and Treasurer who are not members of MC. The Working Party is of the view that similar requirements as those imposed under paragraph 4(1) and 4(2) should apply to non-member Secretary & Treasurer, save that those of paragraph 4(2)(d)(da) and (e) of Schedule 2 may need necessary modifications.

4.2 S.14(2) of the Ordinance should also be amended to include "any office bearer or" immediate before "any member" so that an OC may at any time by resolution remove non-member office-bearers. Similar amendments to the proposed paragraph 4(3) of Schedule 2 and the proposed S. 7(3)(e) of the Ordinance should also be considered.

4.3 The proposed paragraph 4(1)(a) of Schedule 2 of the Ordinance should be amended by substituting the word "that" for "the" immediately after "Bankruptcy Ordinance (Cap.6) with".

(5) Appointment of Proxy by Owners – Clauses 4, 5, 6, 19 & 24 of the Bill

S. 3, 3A, 4, 40C & Schedule 3 of the Ordinance

5.1 Proxy is one of the most litigation-prone matters in the Ordinance. It is somewhat surprising that the Administration does not see fit to dispel all the doubts besetting this area of the law at one go.

24 - hours Rule

5.2 Before the relevant amendment and relaxation in May 1993, the Ordinance required all proxies to be lodged not less than 48 hours before the meeting. (see Amendment

Ordinance (Ord. No.27 of 1992)). Since May 1993, the 48 hours rule was relaxed and reduced to 24 hours before the meeting, and that the chairman of the meeting has the right to relax the 24 hours deadline (see paragraph 4(3) of Schedule 3 and S.5(6) of the Ordinance).

5.3 The Working Party notes the present proposal to take away the discretion of the chairman to relax the 24 hours' requirement. However, it should be borne in mind that members of the MC are a group of volunteers and laymen with little legal knowledge and that the Ordinance already posts many traps for the unwary. The proposed deletion of the right for the chairman to relax the deadline for submitting proxy runs counter to the legislative intent to encourage keen participation in the management of buildings by owners. The Administration should provide justifications for the proposed deletion.

Sealing Requirement

5.4 There are several conflicting authorities on the necessity of applying a seal by a corporate owner to a proxy form, see, for example:-

(a) *U Wai Investment Co. Ltd & Anor v. Au Kok Tai & ors* [1997] 4 HKC 2000
(b) *Triumphal Fountain Ltd & Anor. v. Chan Chi Lun & Anor* LDBM 309/2001 (19/10/01)
(c) *嘉居樂物業管理有限公司 v. 家安花園業主立案法團* LDBM188/2004 (21/10/2004)
(d) *Rightop Investment Ltd & anor v. Yu Tsui Sheung & anor* HCA 2691/01 (10/3/05)

5.5 The Working Party welcomes the proposed amendment to clarify that application of the company seal by a corporate owner onto the proxy form is not strictly necessary but regrets to note that the language adopted in the proposed amendment is loosely expressed.

5.6 If the legislative intention is as stated by His Honour Deputy Judge Mak in the *Triumphal* case (paragraph 38), namely, that "the purpose of using any common seal is to serve as evidence of authenticity", the Working Party suggests that the cumbersome language adopted in the proposed amendments be substituted by succinct and clear language appearing in S.36 of the Companies Ordinance with necessary modifications so that the relevant provision, wherever appearing, shall read as follows:-

> "the proxy shall if the owner is a body corporate, be signed by a director, secretary, or other authorized officer of that body corporate, and need not be under its common seal."

Additional Provisions

5.7 As the validity of a resolution would depend on the validity of the votes and the proxy, it may also be worth considering inserting additional provision in the Ordinance to provide for the safe keeping of the proxy forms for a period of time.

(6) Termination of the Appointment of Manager – Clause 28 of the Bill

Schedule 7 of the Ordinance

6.1 The Working Party notes the amendment to limit the application of paragraph 7 of Schedule 7 of the Ordinance to DMC Manager. However, it should be considered as a matter of policy whether Schedules 7 or 8 should also apply to Sub-DMCs.

6.2 In *Rightop Investment Ltd & anor v. Yu Tsui Sheung & anor* HCA 2691/01 (10/3/05), it was held that as both S. 34E and 34F falls within Part VIA of the Ordinance, by virtue of S.34C, these sections as well as Schedules 7 and 8 only apply to "a building" in respect of which a DMC is in force" A sub-DMC regulating only the commercial area of a building, which represents only a discrete area of a building, does not fall within any limb of the definition of "building" in S. 2 of the Ordinance. It follows that these sections as well as Schedules 7 and 8 of the Ordinance do not apply to such a sub-DMC.

6.3 The Working Party proposes that the Administration should give consideration to amending Part VIA of the Ordinance so that S. 34E and 34F as well as Schedules 7 and 8 will apply to the case of Sub-DMCs.

6.4 The proposed amendments should have the effect of:-

(a) requiring a Sub-DMC Manager to comply with the provisions of Schedules 7 and 8 and Part VIA, in general; and

(b) allowing owners to terminate the employment of Sub-manager under paragraph 7 of Schedule 7, in particular.

(7) Procurement by OCs and managers – Clause 13 of the Bill

S. 20A of the Ordinance

7.1 The Working Party notes the proposal to delete the relevant provisions from the Code of Practice on Procurement of Supplies, Goods and Supplies ("Procurement Code") to make clear the policy intent of the Administration that any procurement with a value exceeding the thresholds prescribed in the Ordinance has to be done in accordance with the Ordinance.

7.2 Such proposal is considered to be a good response to the comments made by Her Honourable Yuen JA in *Wong Tak Keung, Stanley v. The Management Committee of the Incorporated Owners of Grenville House* CACV 244/03 (17/12/03). The case [an interlocutory appeal decision] held that whilst most parts of the Procurement Code may be directory, paragraphs 1 and 9 which have been incorporated into the Ordinance (under S.20A(2) and 20A(4)), acquire the force of law as primary legislation. As such, these parts are mandatory rather than merely directory (paragraphs 31 and 32 of the Judgment).

7.3 To make things clear, the Administration should perhaps make clear which requirements in the Procurement Code will be deleted under the present proposal.

Tender Requirements

7.4 Whilst the intention is to make clear that S.20A(2) mandatorily requires supplies, goods or services with value exceeding certain thresholds to be procured by invitation to tender, the exact obligations of the OC or MC in this regard is far from clear.

7.5 Detailed requirements of the tender process are laid down in the Procurement Code. According to paragraph 4 of the Procurement Code:

> "the minimum of tenders to be ***sought*** [emphasis added] shall be as follows:-
>
> a 3 in the case…. exceeding a value of $10,000 but not exceeding a value of $100,000;
>
> b. 5 in the case of …..exceeding a value of HK$100,000"

7.6 The Procurement Code further laid down the procedure to be followed in the tendering exercise:

(a) the OC/MC invites suppliers to provide quote by way of tender,

(b) the tenders submitted by the suppliers will be placed in a tender box,

(c) at the designated time and place and in front of designed persons, the tender box will be opened and the tenders will be collected from the tender box,

(d) all tenders will then be opened in front of designated persons.

7.7. It is unclear what the word "sought" means in the context of the Procurement Code. The problem is that it will be difficult in reality for the OC/MC to make sure that a sufficient number of suppliers will submit tenders in a particular tendering exercise. If the word "sought" means "attempted to find", an OC/MC should have discharged its duty by having "invited" 5 suppliers to submit tenders in a particular tendering exercise. However, if it should mean "to actually obtain", the OC/MC would have to show that it has chosen a supplier out of a list of 5 or more suppliers who have submitted tenders in a particular tendering exercise.

7.8. It is also unclear if a "no offer" tender from a supplier will be counted as a tender, assuming that in some cases the supplier may give a "no offer" tender.

7.9. The court had regarded the Procurement Code to be "merely directory and not mandatory". However, a question remains as to how the OC/MC could have said to have discharged its obligations under S. 20A(2) of the Ordinance. In the event that there have been invitations to tender but there is no tender submitted or only one or two tenders received in a particular tendering exercise, it is unclear whether the OC/MC will be obliged to conduct a fresh tendering exercise again.

7.10 The Working Party proposes that the extent of obligation of the OC/MC to invite tender should be clarified and in particular, consideration be given to:

(a) amending paragraph 4 of the Procurement Code to the effect that, "The minimum of <u>tenderers from a relevant class of suppliers (be defined as the supplier who normally provides goods or service of such class)</u> to be <u>approached</u> shall be as follows:-

a. 3 in the case…. exceeding a value of $10,000.00 but not exceeding a value of $100,000; and

b. 5 in the case of …..exceeding a value of HK$100,000.00."

(b) clarifying whether a "no offer" tender could be counted as a tender

(c) clarifying in S. 20A(3) that an OC in general meeting may by majority decision accept any tender obtained in a tendering exercise notwithstanding that the number of tenders provided in the Procurement Code.

Exemption from Tendering Exercise in case of emergency

7.11. The Working Party notes the proposal to allow OCs to formulate, at their own discretion, their own list of urgent matters that need not go through the required procurement procedures under the BMO.

7.12 Whilst it is appreciated that the proposal to have an urgent list can work to the convenience of owners, as whether any matter should be treated as "urgent" should very much depend more on the circumstances of the case rather than the nature of the matter, providing a general list of urgent matters that will be exempted from the tendering requirement may not work to the best interests of the owners.

7.13 The Working Party proposes that instead of the urgent list proposal, the owners should be given the right to exempt any matters from the tender requirement by way of a resolution in general meetings, with perhaps, limitation on the maximum term and value of the contract to be entered into by the OC/MC in urgent situations.

(8) Financial arrangements for OCs and managers

8.1 No adverse comments.

(9) Building Management (Third Party Risks Insurance) Regulation ("the Regulation")

Insurance Coverage

9.1 The Working Party notes that the Regulation defines the liabilities to be covered under the mandatory third party risks insurance to be procured by an OC under S. 28(1) of the Ordinance (not yet in operation). It is noted that the Regulation as presently drafted will not cover the assured owners, the assured corporations and their employees. It is further noted that the insurance policy required to be taken out under the Regulation will not cover liabilities arising out of a breach of any duty imposed by law in relation to any building or works carried out in contravention of the Buildings Ordinance.

9.2 It is unclear whether the principal intention of the Regulation is to protect third party victims or lessen the burden of owners in meeting claims for any liability arising out of the common parts of the building. However, as owners and employees are among the groups which are most likely to suffer injury as a result of any problem with the common parts of a building and given that the number of buildings with unauthorized building works is voluminous, it would appear that only minimal

protection will be afforded by the Regulation.

9.3 The Working Party appreciates that at the end of the day, it is a matter of the Administration policy as to where the line should be drawn between competing interests and to what extent any liabilities should be covered by this compulsory insurance policy. However, the scope of liabilities to be covered should be clearly defined. The Administration should make their policy very clear to the owners or OC not only so that they will understand the extent of their statutory obligations for the purpose of compliance but also so that they could appreciate the kind of protections afforded by the law and decide on the need to take out separate insurance policy for their own protection and to cover their potential liabilities to others.

9.4 In this regard, the Working Party believes that the following ambiguities in the Regulation should need to be clarified:

S. 3(2)(b)

9.5 S. 3(2) of the Regulation lists out the liabilities that the policy is "not" required to cover and subsection 2(b) refers to liabilities to person employed by "assured owners" or "assured corporations". Arguably, S.3(2)(b) may not cover manager or persons employed by the manager as the relationship between an OC and a manager may not be one of employment but contractual. The Working party believes that the policy behind S. 3(2)(b) should be clarified and managers and employees of OC should be treated alike. To otherwise discriminate against employees of an OC would only deter owners from forming into OCs and taking up the management of the building, which will defeat the main purpose of the Ordinance.

S. 3(2)(c)

9.6 S. 3(2)(c) refers to "any liability arising out of a breach of any duty imposed by law in relation to:

(i) any building within the meaning of the Buildings Ordinance (Cap. 123) erected in contravention of that Ordinance; or

(ii) any building works, or street works, carried out in contravention of the Buildings Ordinance (Cap. 123")

9.7 It is unclear whether "breach of any duty imposed by law" should be read alone or together with "contravention of the Buildings Ordinance" The Working Party also fails to see the need for S. 3(2)(c)(i) to refer to building as "defined in the Buildings Ordinance" when the term "building" has already been defined under the Ordinance.

S. 6

9.8 The Working Party notes that S. 6(5) seeks to enable the insurance companies to recover any payment made under the policy from the assured or assured corporations, where the insurance companies have in fact restrict their liabilities in the policy regarding such payment but was nonetheless required to pay up because of S. 6(1).

9.9 It seems that the proposed subsidiary legislation will on the one hand allow the insurance industry to contractually impose certain restrictions in the policy vis-à-vis the owners and OC but on the other hand render such restrictions to be of no effect so far as the third party victims are concerned. This may be considered fair if in

negotiating the terms of the contract of insurance policy, the parties have agreed not to cover certain risks so that the insurance company will not have taken into account such risks in the calculation of the amount of premium payable.

9.10 However, it should be noted that the wider the scope of recovery allowed to an insurance company under S. 6(5), the less will be the protection to the owners. The Working Party is also concerned that in reality, in the light of S. 6(1) and 6(5), the insurance industry will tend to restrict their liabilities in the policy but nevertheless take into account the risks mentioned in S. 6(2) in calculating the premium payment. This will clearly work to the detriment of the owners.

9.11 To make things simple, instead of allowing the insurance company to impose restrictions in the policy which are considered to be unacceptable so far as third party victims are concerned, the Working Party believes it will be more appropriate for the Regulation to require the policy to cover the stated risks.

9.12 As a matter of drafting, the Working Party finds the provision of S.6 difficult to comprehend. The following should need to be clarified:

(a) Could the insurance company avoid liability under S. 6(3)(a)(ii) where only one owner of a building has breached the user requirement?

(b) What is meant by "relevant documents" in S. 6(3)(iii)?

(c) Instead of the various cross references made within S. 6, the S. 6(1) restrictions should be spelt out in more express terms so that the owners and the OC would know clearly the extent of their liabilities under S. 6(5).

S. 4 - Amount to be covered

9.13 In view that the case of *Albert House* involves a sum exceeding HK$33,000,000, the Working Party has reservation whether the proposed minimum amount of insurance that a policy is required to provide under S. 4 of the Regulation, i.e. HK$10 million, bearing in mind that the prescribed sum under the Motor Vehicles Insurance (Third Party Risks) Regulation is HK$100 million.

S. 5

9.14 The Working Party does not see the need to require the office bearers of an MC to make a SD under S.5(5) in case of loss or destruction of a notice of insurance when the insurance company could simply be asked to re-issue the notice or provide a certified or duplicate copy thereof. In this regard, reference should perhaps be made to S. 12 of the Motor Vehicles Insurance (Third Party) Risks Regulation requiring an insurance company being satisfied that a certificate of insurance has become defaced or has been lost or destroyed to issue a fresh certificate.

(10) Others

Votes by non-paying owners

10.1 It was held in the *Rightop* case HCA 2691/01 (10/3/05) by His Honour Judge Reyes (paragraph 77) that notwithstanding the provisions of a Sub-DMC disentitling delinquent owners to vote, the owners in general meeting can decide to hear a non-paying member and to accept his vote.

10.2 Although the case was decided in the context of the provisions of a Sub-DMC outside the parameters of Schedules 3, 7 and 8, the same principle applies, and His Honour Judge Reyes comments that (in paragraph 83)

"it is usual for commercial people to enjoy a credit period of about a month or so from invoicing before an account is treated as overdue."

10.3 The Working Party supports His Honour Judge Reyes' view that a credit period of ONE MONTH should be allowed before an owner should be defined as a non-paying owners as to disallow him to attend or vote at any meetings of OC or of, owners. It is proposed that appropriate amendments should be made to S. 19(2) and paragraph 8(5A) of Schedule 7 of the Ordinance for the purpose of determining the meaning of "failure by an owner to pay".

Jurisdiction of LT

10.4 It seems clear now after the decision of *Wong Hing Cheong & anor v. Wah E. Investment Ltd & anor* CACV 908/01 (2574/02) that the LT does not have exclusive jurisdiction arising out of matters set out in S.45 of the Ordinance.

10.5 Even in the case of winding up of an OC, it was held in *Re the Incorporated Owners of Foremost Building* HCCW 47/04 (28/10/04) that the High Court does have jurisdiction to wind up OC (paragraph 8). But the definition of "commencement of winding up" under S.34B of the Ordinance is at odds with the ruling in the *Foremost* Building case, because it is defined as "the time of the presentation of the petition to the tribunal for the winding up of the corporation". S.34A(1)(a) of the Ordinance also provides that "a winding up order in respect of a corporation is made by the tribunal".

10.6 If the Legislative intention is for the LT and the High Court to have concurrent jurisdiction, the Working Party suggests that S.34A(1)(a) and S.34B should be amended to tally with the situation.

Failure/Delay of the MC Chairman to Convene Meetings of an OC – Schedule 3

10.7 Paragraph 1(2) of Schedule 3 of the Ordinance does not specify within what period after the requisition by the owners the members' general meeting of an OC should be held. Paragraphs 1(2) and 2(1) of the Schedule 3 only specify that the Chairman of the OC has to convene a general meeting within 14 days of receiving such notice. .

10.8 It would seem that members of the OC could not convene a general meeting themselves if the chairman refuses to convene the meeting, or the date of holding of the general meeting is fixed for too long. What they could do is to apply to the High Court or LT (under S. 45 and Paragraph 1 of the Schedule 10 of the Ordinance) to compel the Chairman to act according to the provisions of the Ordinance or apply to the LT to dissolve the MC and appoint an administrator under S. 31(1).

10.9 There is no penalty or fine imposed by the Ordinance on the chairman and/or members of the MC of the I/O in case of default in this respect.

10.10 By way of contrast, S. 111 of the Companies Ordinance (Cap.32) concerns calling of AGM of a limited company and in case of default, members of the company can apply to the court for an order calling for an AGM, and that the company and every officer of the company shall be liable to a fine and daily default fine.

10.11 S. 113 of the Companies Ordinance concerns calling of EGM on members requisition and provides that:-

(a) the board of the directors of the company shall forthwith proceed to convene an EGM; and

(b) if the board of directors shall not within 21 days call for an EGM which shall be held on a day of not more than 28 days after the date on which the said members' notice of requisition of meeting is given, the members who requisitioned the EGM may themselves convene a meeting which shall be held within 3 months and the expenses incurred is to be deducted ultimately from the directors' fee or remunerations.

10.12 The Working Party reiterates its previous submissions on the Building Management (Amendment) Bill 2000 that Schedule 3 should incorporate a clause giving owners holding a minimum percentage of shares a right to convene a general meeting of the OC. Alternatively, it is proposed:-

(a) for there to a new paragraph 1(2A) to Schedule 3 as follows:

"If the chairman of the management committee shall not within [21] days convene a general meeting which shall be held on a day of not more than [28 or 60] days after the date on which the said owners' notice of request of general meeting is given, the owners may apply for an order from the Court or the LT to convene a general meeting.

(b) In such event, a new section similar to that of S. 40C (1) of the Ordinance should be inserted so as to give power to the Court and the LT to convene a general meeting.

The Working Party on Building Management (Amendment) Bill 2005
(set up under the Property Committee)
The Law Society of Hong Kong

29 June 2005