

UAE Insurance Law Update: Insurance Implications of Building Fires in Dubai

Justin Carroll - Senior Associate - Insurance
j.carroll@tamimi.com - Dubai International Financial Centre

March 2016

Those concerns first surfaced in the wake of the Tamweel Tower fire in Jumeirah Lake Towers in November 2012.

The insurance implications of buildings covered with potentially flammable aluminum cladding are enormous. The cost of insuring such buildings is sure to increase significantly, if it has not done so already. In some cases, it may be difficult to insure such buildings at all.

For the owners, owners' associations and tenants of such buildings, the question of whether they are insured in the event of fire is understandably of prime significance. Yet the responsibilities of owners, developers, owners' associations and tenants to take out insurance and their rights and obligations towards each other as well as to third parties with respect to the parts of the building over which they have this responsibility are often poorly understood.

Third Party Liability of Property Developers and Owners' Associations

As a general rule, property developers and owners' associations remain responsible for all areas of a property over which they maintain control. Where those areas cause harm to third parties, the property developer or the owner's association may be liable to the injured party due to their perceived ability to eliminate or minimise the risk of harm.

To protect themselves against incurring a legal liability to third parties in those circumstances, the property developer or owner's association can take out public liability insurance. This form of insurance will cover the property developer or the owner's association for liability to pay damages or compensation to persons who have suffered loss as a result of a harm flowing from the acts or omissions of the property developer or the owner's association.

However, because public liability insurance only covers an insured person for a legal liability to pay damages or compensation to a third party for loss, this form of insurance will usually not cover an insured person unless:

- the liability is the result of a judicial finding or of an arbitral award; or
- the insured person would have had the liability under the general law rather than under a private agreement or contract.

For a property developer or an owner's association to incur a liability covered by this form of insurance, they will usually need to be found to be legally at fault. In the UAE, the hurdle for the finding of legal fault is, compared to western countries, somewhat higher. The test for causation in particular is considerably more demanding. For that reason, a third party that has suffered harm as a result of an act or omission of a property developer or an owner's association cannot be assured of recovery from them.

Insurance for Owners and Tenants

Owners and tenants of rented properties should always take out insurance covering their respective interests in the property. The usual form of insurance for this is home and contents insurance. This form of insurance will typically cover:

- the policyholder's property and their belongings in the property against accidental damage by risks like fire or flood and against theft by burglary;
- the policyholder against liability to third parties, up to a monetary limit set out in the policy, for loss caused by or arising from the policyholder's own fault;
- the policyholder for any loss of rent where the policyholder's property is leased and the loss of rent is due to an insured event.

Because home and contents insurance only provides cover against accidental loss or damage, this form of insurance will usually not cover the policyholder against loss or damage arising from pre-existing defects in the property. An example of a pre-existing defect in a property would be where the property's foundations were insufficiently firm and the property sustained structural damage as a result of subsidence.

Where the policyholder's property and/or contents are damaged as a result of fire, the policy should cover the resulting damage even if the property consists of materials that do not comply with building safety standards or are later found to have caused or contributed to the fire.

Owners in Jointly Owned Properties

In the case of owners and tenants of jointly owned properties in high-rise apartments in Dubai, the insurance that covers the building and the common areas usually remains in the name of the developer. Legislation exists in Dubai governing jointly owned property but the authorities are yet to grant licenses to owners' associations which gives them full legal capacity. For that reason, the responsibility for insuring the common areas of most apartment buildings in Dubai continues to lie with the original developer. However, this can create problems in the event that the property becomes damaged and the owners suffer loss.

In the case of the Tamweel Tower fire, the fact that the property had to be insured by the original developer rather than in the name of the owners' association meant that the owners' association was not a party to the contract of insurance and the owners individually did not have standing to recover under the policy. This contributed to delays in arranging for the building to be reinstated and consequential costs to the owners, much of which will not be recoverable under the insurance that existed over the building.

Owners, Owners' Associations and Developers Claiming Against Builders and Architects

Perhaps the most complex area for all property stakeholders involves cases where rights are sought to be pressed against builders and designers of a residential building for defects.

Architects and builders are usually required to take out insurance as part of their obligations under the original contract with the property developer. The UAE Civil Code (Federal Law No. 15 of 1985) imposes strict liability on architects or engineers for defects that affect, or threaten to affect, the structural integrity of a building that they have designed. This potential liability applies for 10 years and it cannot be contracted out of. While there is insurance in the market designed to cover architects and engineers for this kind of liability, there are numerous cases where architects and engineers either fail to take out this insurance or take it out for an insufficient duration.

A construction contract will also usually require an architect or engineer to take out professional indemnity insurance. This insurance is designed to cover an architect or engineer for negligent acts or omissions that:

- arise from the discharge of the architect's or the engineer's job in designing the building; and

- cause loss to persons for whom the architect or engineer has a duty of care.

This duty could extend to the owners of apartments in a high-rise building designed by an architect or engineer but that will not always be the case.

This form of insurance also has other limitations. First, it will only respond where the architect or engineer has, or would have if sued, a legal liability to make good the act or omission causative of the loss. Second, the extent to which UAE law provides a remedy for losses flowing from a building or design defect is very limited. Losses that are considered too remote or that are purely economic (like a property's diminution in value as a result of a building or design defect) are often not compensable, even though they may have caused real and quantifiable financial loss to the owner of the apartment concerned. Third, apart from cases based on decennial liability, the availability of a legal remedy for losses caused by building defects is dependent on the finding of legal fault. This requirement can be quite challenging in the UAE as it requires a clear departure by the architect or engineer from accepted professional standards as well as the materialization of actual physical damage.

This means that the prospect of apartment owners successfully recovering against architects or engineers for defects will be very difficult in the absence of actual physical damage. The same applies for apartment owners seeking to recover against a property developer or an owners' association.

Conclusion

Several building fires in Dubai have shone a light on the potential fire hazard posed by certain forms of aluminium cladding used to cover the exteriors of many high-rise buildings in the Emirate.

The insurance covering most jointly owned high-rise properties remains in the name of the original property developer rather than in the name of an owners' association. This is likely to remain the case until such time as owners' associations are vested with full legal capacity on behalf of the property owners. This circumstance has the potential to complicate the recovery of insurance proceeds and the repair of the property in the event of significant accidental damage. In addition, the Jointly Owned Property Law (Law No. 27 of 2007 'Concerning Jointly Owned Property in the Emirate of Dubai') and its Directions do not require or permit owners' associations to take out loss of rent or contents insurance on behalf of their owners and many owners do not take out such insurance. This means that, should a fire occur which damages an owner's apartment and forces an owner out of the building, the owner will not have any clear right to recover under the insurance policy over the building.

Ideally, the steps required to make owners' associations the effective legal entities of the owners in jointly owned buildings ought to be effected as soon as possible. Once that occurs, insurance policies covering jointly owned buildings that remain in the names of the original property developers can be assigned to the relevant owners' association.

In the meantime, owners in jointly owned buildings would be well advised to consult with the property developers of their building and understand the nature of the insurance arrangements in place. If the policies do not cover some of the risks that an owner of an apartment may wish to insure (for example, contents insurance or loss of rent), then the owner should contact the developer or the manager of the owners' association and endeavour to have the policy extended to cover them. Better yet, individual owners should take out those forms of insurance in their own name.