

**Bills Committee on Interest on Arrears of Maintenance Bill 2001
Matters Arising from the Meeting of 4 November 2002**

**A. Interest to be Calculated Automatically in Case of Default in
Maintenance Payment**

Members opined that arrears of maintenance should be deemed as judgment debts so that interest would be automatically calculated in case of default.

Nature of maintenance payments

2. Under section 50 of the District Court Ordinance (Cap.336) (“DCO”), judgment debts attract statutory interest after the court pronounces a debt as such. It is for consideration whether maintenance payment should be accorded the same treatment as judgment debts.

3. We noted that a maintenance order is different from an ordinary civil debt in that –

- (a) periodical maintenance payments are ongoing payments while debt means a contractual liability that has already incurred;
- (b) a maintenance order can be varied or discharged by an order of the court but not a debt;
- (c) bankruptcy cannot be used as a means to enforce periodical payments whereas it may be used so for civil debts; and
- (d) unsecured periodical payments are not assignable.

4. Section 11 of the Matrimonial Proceedings and Property Ordinance (Cap.192) (“MPPO”), empowers the court “to vary or discharge the order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended”. This provides both the payer and the payee of a maintenance order with a channel to vary or discharge the order should either or both parties feel the need. Although this lends strength to the argument that a maintenance order is not a final judgment, any change to the maintenance order will only ensue

following an application to vary or discharge it. In cases where no such application has been made, the maintenance payee has legitimate and reasonable expectation to receive full and punctual payment(s). As the maintenance payer should be in the best position to assess his/her own financial situation, the onus is on the maintenance payer to apply to vary or discharge a maintenance order when he/she reckons that such an action is necessary. Another court order is the only legal means to vary or discharge the original maintenance order.

5. It follows that a maintenance order is arguably a judgment *until* the court decides to have it varied or discharged. That being the case, the Administration considers it not unreasonable for interest to be calculated automatically in case of default in maintenance payments until the court, on application, makes an order to vary or discharge the original maintenance order.

Arrears become unenforceable when due more than 12 months

6. Section 12 of MPPO provides that a person shall not be entitled, without leave of the court, to enforce through the court the payment of arrears, if the arrears became due more than 12 months before proceedings to enforce the payment are begun. We understood that the provision is to prevent large sums from mounting up, and to avoid the payer from being mistakenly led to believe by the payee's acquiescence that he/she will not enforce the order. We consider that this principle should also apply in the calculation of interest on maintenance arrears.

Illustration

7. The hypothetical example provided by the Law Society of Hong Kong ("Law Society") in its letter to this Bills Committee dated 16 January 2002 (*Annex A*) is used to illustrate the calculation of interest under our proposal. The maintenance payer was ordered to pay the payee periodical payments at the rate of \$5,000 per month from 1 June 2000 onwards. A judgment summons ("JS") was issued against the payer and the case was heard on 25 February 2001. Since less than 12 months have lapsed, the maintenance payee can seek interest on the

maintenance arrears cumulated in the period. The table at *Annex B* shows the calculation of interest, using the formula

$$“A \times B \times C/365”$$

where A presents the maintenance arrears; B represents the judgment rate at the due day of each payment; and C is the number of days in the period concerned. The total amount of arrears and interest the maintenance payer needs to pay are \$30,000 (italicized item in Annex B) and \$1,427 (bold-faced item) respectively.

8. At the JS hearing of 25 February 2001, the judge made a committal order against the maintenance payer and an interest order in favour of the payee. The committal order was suspended on condition that –

“The maintenance payer settles the arrears of periodical payments together with interest thereon at judgment rate from their respective due dates of payment. The payer was also ordered to pay fixed costs for the enforcement proceedings in the sum of \$5,000. The arrears were to be paid by monthly instalments of \$2,000 each commencing from 1 March 2001 and thereafter payment on the 1st day of each and every succeeding month until full payment.”

The monthly instalment of \$2,000 is in addition to the recurrent maintenance payment of \$5,000 per month due under the original maintenance order.

9. To realize the Bill’s legislative intent of compensating the maintenance payee for his/her loss in interest and to facilitate calculation, we propose that the first payment made by the payer should go towards discharging the various payments required of the maintenance payer in the following order –

- (a) the interest as specified in the interest order (i.e. \$1,427 in Annex B);
- (b) the fixed costs (i.e. \$5,000);
- (c) any sums from time to time accruing due under the original maintenance order (i.e. \$5,000); and
- (d) if there is any amount left, the debt in respect of the JS issued (i.e. \$2,000).

10. In calculating the interest on maintenance arrears, we recommend that the following principles should be followed –

- (a) Simple interest should be adopted as provided in section 50 of DCO. In other words, as the arrears of \$30,000 in the JS has already been taxed for interest, they should not be subject to interest again if the payee elects to start another round of enforcement proceedings.
- (b) The arrears of \$30,000 should no longer be subject to the 12-month enforcement rule specified under section 12 of MPPO as this has been affirmed as an item of debt by the court.
- (c) If the court makes a committal order against the maintenance payer and suspends it under rule 87(6) of the Matrimonial Causes Rules, (Cap.179 sub. leg A), any payment made by him/her is subject to the priority call as stipulated under rule 87(8) thereof. The relevant rules read –

“(6) If the judge makes an order of commitment, he may direct its execution to be suspended on terms that the judgment debtor pays to the judgment creditor the amount due, together with the costs of the judgment summons, either at a specified time or by instalments, in addition to any sums accruing due under the original order.

x x x x

(8) Where an order of commitment is suspended on such terms are mentioned in paragraph (6) -

- (a) all payments thereafter made under the said order shall be deemed to be made, first, in or towards the discharge of any sums from time to time accruing due under the original order and, secondly, in or towards the discharge of the debt in respect of which the judgment summons was issued and the costs of the summons; and
- (b) the said order shall not be issued until the judgment creditor has filed an affidavit of default on the part of the judgment debtor.”

11. In the Law Society's example, the payer continues to make irregular payments. The example ends on a specified date of 1 February 2002. *Annex C* illustrates the calculation of interest in favour of the maintenance payee as of 1 February 2002. At of that date, the payer owes the payee a total amount of \$59,035, consisting of –

- (a) maintenance arrears of \$33,927 in the period from 25 February 2001 to 1 February 2002 (*italicized item in Annex C*);
- (b) arrears in monthly instalments ordered by the court in the hearing of the JS at 25 February 2001 of \$24,000 (underlined item); and
- (c) interest of \$1,108 on the \$33,927 at (a) above (**bold-faced item**).

B. Surcharge on Maintenance Arrears as a Further Deterrent

12. Members also considered that as a further deterrent, the court should have discretion to impose a surcharge on maintenance arrears and that consideration could be given to set a surcharge ceiling, say, at 3 times of the amount of the maintenance arrears.

13. A purpose of the Bill is to compensate maintenance payees for the loss in interest on their savings or for the interest payable by them in respect of the loans they have to obtain due to the maintenance payer's default or delay in making maintenance payment. Interest awarded, therefore, is something due to the maintenance payee for not being able to obtain full and punctual payment(s).

14. A surcharge serves a different function. It carries an implication that the payer has been at fault or not been able to fulfill what is required of him/her. In normal circumstances, either interest or surcharge is required of default in payment. However, in recognition of the not insignificant number of cases where the maintenance payer repeatedly makes irregular and partial payments, even after enforcement orders have been made, we consider that a surcharge may be levied in cases where the court finds blameworthy conduct on the part of the maintenance payer.

15. The proposed surcharge is to serve as a further deterrent against the blameworthy conduct of a maintenance payer who repeatedly defaults without reasonable excuse. While maintenance payees should automatically be entitled to interest on arrears at judgment rate unless otherwise determined by the court, a surcharge may be imposed by the court only in deserving cases. We propose that –

- (a) On application from a maintenance payee, the court may impose a surcharge.
- (b) An order for a surcharge should only be made after the court has been satisfied that the payer has defaulted repeatedly without reasonable excuse and that there are reasonable grounds to believe that the payer will not make full and punctual payment in compliance with the maintenance order.
- (c) A maintenance payer may be summoned to the court by a JS and should be given the opportunity to defend himself/herself.

16. We noted Members' view that the court should be given the power to impose a surcharge even though the maintenance payer failed to appear before the court, so long as the summons had been served to the correspondence address provided by the payer. We understand that this is to address deliberate evasion of the service of summons by the payer. However, this would mean that the court is asked to find the payer to be of blameworthy conduct without a hearing. This would be against the legal policy principles that the law must be just and that no man is to be condemned unheard. In the circumstances, it is important that the legal policy principles mentioned above should be upheld.

Recipient of the surcharge

17. Members proposed that the surcharge should be made in favour of the maintenance payee. Under the law, most surcharges are payable either to the Government, a statutory body or a specified service provider. There are also cases where a surcharge is paid to an individual, e.g. spouse of the employee under sections 6C and 16A of the Employees' Compensation Ordinance (Cap.282). While the interest on maintenance arrears compensates a maintenance payee for the loss in interest, he/she may have suffered anxiety, mental strain, emotional setback etc. in the

period when the payer defaults. With these in mind, we are amenable to the proposal that the surcharge imposed should go to the maintenance payee concerned.

Ceiling for the surcharge

18. The surcharge to be imposed on a maintenance payer has to be reasonable. This is particularly so when the surcharge received will go to the maintenance payee. As it is, compensation for his/her loss of interest may have already been addressed by the interest to be payable by the maintenance payer. The foremost aim of the surcharge is to deter a maintenance payer from defaulting without reasonable excuse in the future, and not, so to speak, to enrich the payee.

19. In the light of the above, we consider a ceiling for the surcharge at 3 times of the amount of the maintenance arrears as too drastic. After all, the court in deciding on the nature and amount of payment(s) to be provided in the maintenance order has already taken into account a host of factors involved, including the financial position of the maintenance payer. We consider the highest surcharge level proposed in our earlier note on matters arising from the meeting of 2 October, i.e. 30%, a more reasonable ceiling for the surcharge. Taking the hypothetical example of the Law Society at Annex A, the total amount of arrears as at 25 February 2001 was \$30,000 (italicized item in Annex B). Under our proposal, the court would have the power to impose on the maintenance payer a surcharge not exceeding \$9,000. If the maintenance payee applies for surcharge in the proceedings initiated on 1 February 2002, the surcharge to be awarded, if any, would be no more than \$12,878.10 (\$42,927 (italicized item in *Annex D*) x 30%). Annex D tabulates the calculation involved.

20. A single cap on the surcharge to be imposed would be simple and easy to understand. This is to be applied to the cumulative total of the arrears as at the date of hearing, so that the court could make a judgment on the basis of the latest data. The only exception would be in cases –

- (a) where an order has been made for the arrears to be paid in

periodical instalments. In respect of such cases, only the arrears arising from such periodical instalments in the period in question and where a surcharge has not been imposed should be taken into account in considering an application for imposition of surcharge; and

- (b) where the arrears became due more than 12 months before proceedings to enforce the payment are begun as provided in section 12 of MPPO, except in respect of those arrears that have been affirmed by a court order for enforcement.

Home Affairs Bureau
November 2002

Interest on Arrears of Maintenance Bill 2001 ("the Bill")

The Law Society of Hong Kong's Family Law Committee has the following observations on the Bill as follows:

1. Arrears of Maintenance

Arrears of maintenance are not like other judgment debts as the amount of arrears may vary from time to time. These payments are usually paid on a monthly basis and so when arrears occur any payment by the judgment debtor will require an apportionment exercise. The payment will have to be apportioned to repay the arrears on the outstanding maintenance first and then any surplus will be apportioned to subsequent maintenance outstanding. It should be acknowledged that many maintenance payers make irregular payments of maintenance.

The Bill does not contain any provision for apportionment of arrears, only the formula to calculate the interest on the arrears. The following example will serve as an illustration of the difficulties private practitioners and the staff of the Legal Aid Department will face when attempting to calculate interest on arrears of maintenance.

The example is hypothetical but in fact is a rather typical situation assuming that the provisions in the current Bill has been in force at all material times:

- i) The Maintenance Payer (JD) was ordered to pay the Maintenance Payee (JC) periodical payments at the rate of \$5000 per month commencing from 1.6.2000 and thereafter payment on the 1st day of each and every succeeding month.**
- ii) JD has failed to make adequate payments since the date of the Order. A Judgment Summons was issued against JD and was heard on 25.2.2001. Payments made by JD from 1.6.2000 to 25.2.2001 were as follows:**

Dates of payment	13.6.2000	\$3000
	26.8.2000	\$2000
	9.10.2000	\$8000
	23.12.2000	\$2000
Total amount paid:		\$15,000
Amount due:		\$45,000
Total arrears		\$30,000
Interest:		?

- iii) Upon hearing the Judgment Summons on 25.2.2001 the Judge made a committal order against JD, and an interest order in favour of the JC.

The committal order was suspended on condition that:

JD settle the arrears of periodical payments together with interest thereon at judgement rate from their respective due dates of payment. The JD was also ordered to pay fixed costs for the enforcement proceedings in the sum of \$5000. The arrears were to be paid by monthly instalments of \$2000 each commencing from 1.3.2001 and thereafter payment on the 1st day of each and every succeeding month until full payment.

The Judge reminded JD that the \$2000 per month was to be paid by him on top on the recurring maintenance of \$5000 per month due under the original maintenance order.

- iv) JD made the following payments during the period from 1.3.2001 to 1.2.2002:

Dates and amount of payment:

1.3.2001	\$7000
3.4.2001	\$5000
6.5.2001	\$7500
3.7.2001	\$8000
1.9.2001	\$3000
15.10.2001	\$2000

- v) Questions for consideration:
- a. What is the amount of arrears of maintenance and interest payable by JD as at 25.2.2001?
 - b. What is the amount of arrears of maintenance and interest owing by JD as at 1.2.2002?
2. The Law Society considers that further consideration is required on the practical problem of apportionment which the current Bill has failed to address.

The Law Society of Hong Kong
Family Law Committee
15 January 2002
55697

Calculation of Maintenance Arrears and Interest thereon

Date (a)	Maintenance due (b)	Amount paid (c)	Outstanding maintenance subject to interest (cumulative) (d) <i>[Note]</i>	Judgment rate (e)	Number of days (f)	Amount of interest (g) <i>g = d x e x f / 365 or 366</i>
1-Jun-00	5,000	0	5,000	11.54%	12	19
13-Jun-00	0	3,000	2,000	11.54%	18	11
1-Jul-00	5,000	0	7,000	11.98%	31	71
1-Aug-00	5,000	0	12,000	11.98%	25	98
26-Aug-00	0	2,000	10,000	11.98%	6	20
1-Sep-00	5,000	0	15,000	11.98%	30	147
1-Oct-00	5,000	0	20,000	12.50%	8	55
9-Oct-00	0	8,000	12,000	12.50%	23	94
1-Nov-00	5,000	0	17,000	12.50%	30	174
1-Dec-00	5,000	0	22,000	12.50%	22	165
23-Dec-00	0	2,000	20,000	12.50%	9	61
1-Jan-01	5,000	0	25,000	12.50%	31	265
1-Feb-01	5,000	0	30,000	12.50%	24	247
						1,427

[Note] d = c - b - (the previous entry of d, if any).

Calculation of Maintenance Arrears and Interest thereon

Date	Interest payable	Fixed cost	Maintenance due	Amount due (instalment of arrears)	Amount paid	Outstanding maintenance subject to interest	Outstanding arrears of (e) (cumulative)	Judgment rate	Number of days	Amount of interest
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)
	[Note 1]	[Note 2]				[Note 3]	[Note 4]			$k = g \times i \times j / 365 \text{ or } 366$
1-Mar-01	1,427	5,000	5,000	2,000	7,000	4,427	2,000	12.50%	31	47
1-Apr-01	0	0	5,000	2,000	0	9,427	4,000	12.08%	2	6
3-Apr-01	0	0	0	0	5,000	4,427	4,000	12.08%	28	41
1-May-01	0	0	5,000	2,000	0	9,427	6,000	12.08%	5	16
6-May-01	0	0	0	0	7,500	1,927	6,000	12.08%	26	17
1-Jun-01	0	0	5,000	2,000	0	6,927	8,000	12.08%	30	69
1-Jul-01	0	0	5,000	2,000	0	11,927	10,000	10.86%	2	7
3-Jul-01	0	0	0	0	8,000	3,927	10,000	10.86%	29	34
1-Aug-01	0	0	5,000	2,000	0	8,927	12,000	10.86%	31	82
1-Sep-01	0	0	5,000	2,000	3,000	10,927	14,000	10.86%	30	98
1-Oct-01	0	0	5,000	2,000	0	15,927	16,000	9.82%	14	60
15-Oct-01	0	0	0	0	2,000	13,927	16,000	9.82%	17	64
1-Nov-01	0	0	5,000	2,000	0	18,927	18,000	9.82%	30	153
1-Dec-01	0	0	5,000	2,000	0	23,927	20,000	9.82%	31	200
1-Jan-02	0	0	5,000	2,000	0	28,927	22,000	8.72%	31	214
1-Feb-02	0	0	5,000	2,000	0	33,927	<u>24,000</u>			1,108

[Note 1] This is the first item to be discharged in the priority call on payments effected by the maintenance payer.

[Note 2] This is the second item to be discharged in the priority call on payments effected by the maintenance payer.

[Note 3] $g = f - b - c - d -$ (the previous entry of g , if any).

[Note 4] This item has the last priority call on payments effected by the maintenance payer.

When column g shows a negative figure, this means that there is a balance from the payment to meet the cumulative arrears in this column, i.e. the arrears in the first JS. In the event of such a situation, $h = h$ as at the date $- g$.

Calculation of Maintenance Arrears and Interest and Surcharge thereon

Date	Interest payable	Surcharge due	Fixed cost	Maintenance due	Amount due (instalment of arrears)	Amount paid	maintenance subject to interest/surcharge (cumulative)	Outstanding arrears of (e) (cumulative)	Judgment rate	Number of days	Amount of interest
(a)	(b)	(b1)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)
	[Note 1]	[Note 2]	[Note 3]				[Note 4]	[Note 5]			$k = g \times i \times j / 365 \text{ or } 366$
1-Mar-01	1,427	9,000	5,000	5,000	2,000	7,000	13,427	2,000	12.50%	31	143
1-Apr-01	0	0	0	5,000	2,000	0	18,427	4,000	12.08%	2	12
3-Apr-01	0	0	0	0	0	5,000	13,427	4,000	12.08%	28	124
1-May-01	0	0	0	5,000	2,000	0	18,427	6,000	12.08%	5	30
6-May-01	0	0	0	0	0	7,500	10,927	6,000	12.08%	26	94
1-Jun-01	0	0	0	5,000	2,000	0	15,927	8,000	12.08%	30	158
1-Jul-01	0	0	0	5,000	2,000	0	20,927	10,000	10.86%	2	12
3-Jul-01	0	0	0	0	0	8,000	12,927	10,000	10.86%	29	112
1-Aug-01	0	0	0	5,000	2,000	0	17,927	12,000	10.86%	31	165
1-Sep-01	0	0	0	5,000	2,000	3,000	19,927	14,000	10.86%	30	178
1-Oct-01	0	0	0	5,000	2,000	0	24,927	16,000	9.82%	14	94
15-Oct-01	0	0	0	0	0	2,000	22,927	16,000	9.82%	17	105
1-Nov-01	0	0	0	5,000	2,000	0	27,927	18,000	9.82%	30	225
1-Dec-01	0	0	0	5,000	2,000	0	32,927	20,000	9.82%	31	275
1-Jan-02	0	0	0	5,000	2,000	0	37,927	22,000	8.72%	31	281
1-Feb-02	0	0	0	5,000	2,000	0	42,927	<u>24,000</u>			2,008

[Note 1] This is the first item to be discharged in the priority call on payments effected by the maintenance payer.

[Note 2] This is the second item to be discharged in the priority call on payments effected by the maintenance payer.

[Note 3] This is the third item to be discharged in the priority call on payments effected by the maintenance payer.

[Note 4] $g = f - b - b1 - c - d -$ (the previous entry of g, if any).

[Note 5] This item has the last priority call on payments effected by the maintenance payer.

When column g shows a negative figure, this means that there is a balance from the payment to meet the cumulative arrears in this column, i.e. the arrears in the first JS. In the event of such a situation, $h = h$ as at the date $- g$.