

**Paper for the Panel on  
Administration of Justice and Legal Services (AJLS)**

**Requirement of Counsel's Certificate in the District Court**

**Purpose**

The Judiciary has completed the review on whether the existing requirement of counsel's certificate in the District Court should be maintained; and if so, whether there should be any revision to paragraph 2(3) of Part II to Schedule 1 of Order 62 ("the Rule"), Rules of the District Court ("RDC"). This paper sets out the outcome of the review and the proposed way forward.

**Background**

2. Prior to 2000, counsel's fees would not be allowed on taxation unless the judge has certified the matter to be fit for counsel. This was the position under the District Court Civil Procedure (Costs) Rules, which were repealed in 2000.

3. It may be useful to recapitulate the rationale for such a requirement. The cardinal principle in taxation (on party and party basis) is "necessary or proper". According to the Code of Practice for barristers, counsel only act on instruction of solicitors. Accordingly, where counsel is instructed, there would be more than one fee earner for each hearing attended by counsel; and thus, more costs may be incurred if a counsel is instructed. Since both solicitors and barristers have the same right of audience in the District Court, it is not fair for the paying party (usually the losing party) to pay counsel's fees, unless it is proper or necessary to instruct counsel for the matter. And the trial judge who heard the case/application would be in the best position to make the determination.

4. It should however be noted that to instruct both solicitor and counsel may not necessarily work out to be more expensive. This is because :

(a) junior counsel may charge less than a senior solicitor; and

(b) there is no guarantee that the same solicitor within a firm will handle the matter throughout including the hearing.

5. The requirement of counsel's certificate was considered in the Kempster Report completed in mid 1990s. The Kempster Report

recommended that the civil jurisdiction of the District Court be increased to reflect the rate of inflation and the requirement for counsel's certificate should be retained when the amount recovered is less than \$150,000, having regard to the fact that the District Court, even after the increase in its civil jurisdictional limit, would still be dealing with certain smaller claims at less expense.

6. In 2000, the Administration proposed and the Legislative Council approved the increase of the civil jurisdictional limit of the District Court to \$600,000, having regard to the recommendation of the Kempster Report and developments taken place since its publication. In that exercise, the Judiciary had considered whether the threshold for counsel's certificate at \$150,000 recommended by the Kempster Report should be revised, but came to the view that no revision should be made at that time. Accordingly, the Rule was proposed to implement that recommendation. The main reason was that the recovered amount of \$150,000 or above was considered an amount substantial enough to justify the dispensation of the certificate requirement, despite the civil jurisdictional increase to \$600,000.

7. When the Rule was scrutinised in June 2000 by the Legislative Council Subcommittee on the Rules of the District Court and District Court Civil Procedure (Fees) (Amendment) Rules 2000, members agreed to support the proposal subject to a review in due course. The Rule was accordingly made with the \$150,000 threshold. The Judiciary agreed that the Rule should be reviewed in the context of the review of the jurisdictional limit of the District Court to be conducted in two years' time.

### **Present Position**

8. In March 2003, the Judiciary completed the review on the civil jurisdictional limit of the District Court, and proposed that the financial limit of the civil jurisdiction of the District Court should be further increased to \$1 million, subject to the approval of the Legislative Council. The proposal was considered by the AJLS Panel at the meetings on 31 March 2003 and 26 May 2003. The Panel agreed with the proposal and that the Administration could implement the proposal.

9. At the Panel meeting on 31 March, Members were informed that the Judiciary was in the course of reviewing the requirement of counsel's certificate and the Judiciary was consulting the Bar Association and the Law Society on this subject. The Judiciary would revert to the Panel with its recommendations after receiving comments from these bodies.

10. Comments from the Law Society of Hong Kong and the Hong Kong Bar Association were received in April and June respectively. The relevant issues for consideration, and the responses received are set out below.

## **The Rule**

### **(A) Relevant Statutory Provisions**

11. Under section 53 of the District Court Ordinance (DCO):

*“The costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, are in the discretion of the Court, and the Court has full power to determine by whom and to what extent the costs are to be paid.”*

12. Order 62, rule 32 of the RDC provides as follows:

*“(1) Subject to the foregoing rules and the following provisions of this rule, the scale of costs contained in Schedule 1 to this Order, together with the notes and general provisions contained in that Schedule, shall apply to the taxation of all costs incurred in relation to contentious business done after the commencement of these Rules.” (emphasis added)*

13. In Schedule 1, the Rule provides as follows:

*“2. Fees to counsel*

*... ..*

*(3) No costs shall be allowed in respect of counsel appearing before the Court unless –*

- (a) the Court has certified the attendance as being proper in the circumstances of the case; or*
- (b) the amount recovered exceeds \$150,000.”*

### **(B) How the Rule Works**

14. In practice, the Rule works as follows:

- (1) Where the amount recovered is less than \$150,000 a counsel’s certificate must be obtained. Otherwise no costs shall be allowed in respect of counsel’s fees.

(2) But where the amount recovered is more than \$150,000:

- (i) Counsel's certificate may still be applied for from the judge. Where the judge grants counsel's certificate, the taxing master will assess counsel's fees accordingly.
- (ii) Where the certificate is not applied for from the judge, then the taxing master will decide whether to allow counsel's fees.

15. The following points should be made. First, it should be stressed that under s.53 DCO, the Court has full discretion whether to award counsel's certificate. Even where the amount recovered exceeds \$150,000, there is no entitlement to counsel's certificate if applied for. The Court has discretion whether to grant it. The primary consideration of the court remains whether the attendance of the counsel is proper or necessary in the circumstances of the case.

16. Secondly, a defendant (usually where successful) **must** obtain counsel's certificate from the trial judge/master to recover the counsel's fees from the paying party (usually the losing party), irrespective of the sum defended against. This is because under the existing Rule, the threshold is expressed in terms of "amount recovered", instead of "amount defended against".

17. Thirdly, it should be noted that the \$150,000 threshold has no relevance to counter-claims or third party proceedings. It has no relevance to non-monetary claims. For these instances, both the plaintiff and defendant **must** obtain counsel's certificate from the trial judge/master to recover the counsel's fees from the paying party (usually the losing party).

(C) Review of the Rule

18. It is considered that the following questions are relevant in the review of the Rule:

- (a) Should the requirement of counsel's certificate be retained or repealed?
- (b) If the requirement is to be retained, should the existing Rule be revised or refined?

*(a) Retention or Repeal of the Requirement*

19. The Judiciary has no objection in principle to either retention or repeal of the Rule. This is because the Court always has the discretion on costs (see s.53 of the DCO). With or without the Rule, the Court exercises such discretion on costs.

20. The Judiciary, however, notes that the requirement for counsel's certificate has been in existence in Hong Kong for a long time and is also prevalent in the rules in some other overseas common law jurisdictions. It also notes that members of the legal profession may consider that setting out such requirement in the rules may assist the court, the profession and the litigants in dealing with the matter of costs.

*(b) Refinement and Revision of the Rule*

21. The Judiciary is of the view that if the Rule is to be retained, consideration should be given to whether refinements and revisions to the existing Rule should be made.

22. The Judiciary has considered whether the present threshold at \$150,000 should be reviewed, in particular in the context of the proposed further increase in the civil jurisdictional limit to \$1 million. It is noted that the threshold was devised to deal with certain smaller claims at less expense (see paragraph 5). So far, from the Court's experience, the Judiciary sees no compelling reasons to revise the present threshold.

23. The Judiciary is however of the view that there is a need to clarify the position of a defendant who has successfully defended a monetary claim (see paragraph 16). The Judiciary also considers it desirable to set out how third party proceedings and counterclaims should be dealt with (see paragraph 17). In this regard, it is proposed that in setting out the Rule, the following different situations covering different parties obtaining the costs order should be considered and dealt with accordingly.

- (a) As regards the plaintiff, by the amount recovered by the plaintiff;
- (b) As regards the defendant, by the amount claimed against the defendant;
- (c) As regards third party proceedings, as per (a) and (b) as if the defendant were the plaintiff and the third party were the defendant; and

- (d) As regards a counterclaim, as per (a) and (b), mutatis mutandi.

### **Consultation with the Two Legal Professional Bodies**

24. The Law Society supports the retention of the Rule. The Bar Association's view is that there is no compelling reasons to revise the present threshold of HK\$150,000. Both the Law Society and the Bar Association agree with the proposals to clarify the Rule as set out at paragraph 23 above.

### **Recommendations**

25. It is recommended that -
- (a) The existing requirement of counsel's certificate in the District Court be retained; and
  - (b) The existing Rule be revised to clarify how the threshold of HK\$150,000 for a counsel's certificate should apply to the different situations covering different parties obtaining the costs order as set out at paragraph 23 above.

### **Proposed Way Forward**

26. Subject to Members' views on the recommendations in paragraph 25 above, the District Court Rules Committee will, pursuant to section 72 of the DCO, proceed to make the necessary amendments to the RDC. The amendments to the RDC will be submitted to the Legislative Council for negative vetting in due course.