

立法會
Legislative Council

LC Paper No. LS113/06-07

**Paper for the Bills Committee on Attachment of Income Order
(Application to Government and Miscellaneous Amendments) Bill 2007**

Introduction

At the Bills Committee's meeting on 23 July 2007, members requested the Legal Adviser to the Bills Committee to give his views on the Administration's response to the following question : whether the Bill should seek to validate all attachment of income orders (AIOs) already made against wages or salary payable to a maintenance payer by the Government. The Administration issued a paper on 6 September 2007 vide LC Paper No. CB(2)2674/06-07(01) (the paper). Paragraphs 6-12 of the paper are relevant to this issue.

The clauses of the Bill at issue

2. Clause 3(6) of the Bill amends section 20 the Guardianship of Minors Ordinance (Cap. 13), clause 5(6) of the Bill amends section 9A of the Separation and Maintenance Orders Ordinance (Cap. 16) and clause 7(6) of the Bill amends section 28 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) (collectively called the AIO legislation). Each of the clauses adds a provision in the respective ordinance to validate any AIO made in respect of wages or salary payable by the Government before the commencement of the Attachment of Income Order (Application to Government and Miscellaneous Amendments) Ordinance 2007 (if the Bill is passed) (the Amendment Ordinance). These clauses are collectively called the validation provisions below.

Background to introduction of the validation provisions

3. According to paragraphs 4 and 5 of the LegCo Brief on the Bill, in the absence of an express provision in the AIO legislation to apply the AIO to the Government and to override paragraph (a) of the proviso to section 23(1) of the Crown Proceedings Ordinance (Cap. 300) (CPO) (which prohibits attachment of wages or salary payable by the Government), judges in the Family Court had different interpretation as to whether wages or salary payable by the Government were/was subject to AIO until the Court of Appeal's decision in *L v L* [2007] 1 HKLRD 236.

4. *L v L* was concerned with an appeal by the husband, a civil servant, in ancillary relief proceedings under the Matrimonial Proceedings and Property Ordinance. The court held that no attachment order could be made in respect of wages or salary paid by the Government in view of paragraph (a) of the proviso to section 23(1) of the CPO¹.

5. As a result of the decision in *L v L*, the Bill amends the existing AIO legislation to make it apply to the Government as an income source by explicitly stipulating that an AIO can be made against the wages or salary payable to a maintenance payer by the Government notwithstanding paragraph (a) of the proviso to section 23(1) of the CPO.

6. In spite of the decision in *L v L*, according to paragraph 5 of the LegCo Brief on the Bill, the Government has complied with AIOs issued by the court against it as an income source. According further to paragraph 5 of the LegCo Brief, as at 31 May 2007, the Director of Accounting Services was handling 64 AIOs against the wages of Government employees. In order to ensure that the past payments to maintenance payees by the Government would be free from any possible legal challenge, the validation provisions provide that any AIO made by the court before the commencement of the Amendment Ordinance in respect of the wages or salary payable to a maintenance payer by the Government is deemed to be valid as if the Amendment Ordinance had commenced before the order was made unless the court, before or after the commencement of the Amendment Ordinance, discharges the AIO or declares it to be invalid.

Considerations from the legal perspective

Principle against retrospective operation

7. Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation². Retrospectivity is artificial, deeming a thing to be what it was not³. In the present context, the legal effect of AIOs made by the court before the commencement of the Amendment Ordinance in respect of the wages or salary payable to a maintenance payer by the Government would be deemed

¹ Section 23 of the Crown Proceedings Ordinance (Cap. 300) reads :

"(1) Where any money is payable by the Crown to some person who, under any order of any court, is liable to pay any money to any other person, and that other person would, if the money so payable by the Crown were money payable by a subject, be entitled under rules of court to obtain an order for the attachment thereof as a debt due or accruing due, or an order for the appointment of a sequestrator or receiver to receive the money on his behalf, the Supreme Court may, subject to the provisions of this Ordinance and in accordance with rules of court, make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that other person, or to the sequestrator or receiver :

Provided that no such order shall be made in respect of—

(a) any wages or salary payable to any officer of the Crown as such;

... "

² Francis Bennion, *Statutory Interpretation* (4th edition, 2002) Butterworths, p265

³ Francis Bennion, *Statutory Interpretation*, *ibid*, p266

to be valid as if the Amendment Ordinance had commenced before the order was made. However, the general presumption against retrospective operation as a principle of statutory interpretation would not apply if contrary intention appears very clearly, for example in the terms of the statute⁴. The wording of the validation provisions is very clear to validate any AIO made in respect of the wages or salary payable by the Government before the commencement of the Amendment Ordinance. There appears to be no room for the presumption against retrospective operation to apply. This would be so even the retrospective enactment inflicts a detriment on a person⁵.

The Government's obligation to deduct the maintenance payer's salary for the benefit of the maintenance payee in light of *L v L*

8. In paragraph 6 of the paper, the Administration is of the view that there is legal basis for the continued compliance with the AIOs already issued to the Government. The Administration's view is based on the common law principle that any order of the court should be obeyed unless and until it is stayed or set aside. In support of the view, the Administration in paragraph 6 of the paper also cites relevant judicial precedents. In this respect, we agree to the legal analysis in paragraph 6 of the paper. However, we wish to point out that although the Administration appears to be bound by the existing AIOs, there would not have been the need for introducing the validation provision, had the Administration sought a direction from the court as to whether or not the Government should continue to deduct its employee's salary for the benefit of the maintenance payee in light of the decision in *L v L*⁶.

Precedents on validation provisions in local legislation

9. In paragraph 12 of the paper, the Administration gives one example of validation provision. In fact, other similar examples may also be cited⁷. However, policy justifications for enacting a validation provision vary from case to case. These examples should not be regarded as providing justification per se for the validation provisions proposed in the Bill. What they serve to illustrate is that it is within the legislative competence of LegCo to enact a validation provision where it considers appropriate.

⁴ Ibid, p266

⁵ Ibid, p267. It may be argued that the income of a maintenance payer who is a civil servant should not have been subject to an AIO. Therefore, the maintenance payer whose salary is deducted for payment of the outstanding maintenance has been suffering a detriment.

⁶ Arguably, the Administration has the locus standi to apply for a court's direction to clarify its obligation to deduct its employee's (the maintenance payee's) salary.

⁷ (a) section 55 of the Building Ordinance (Cap. 123) – validation of act or thing done by the Building Authority;
(b) section 57C of the Companies Ordinance (Cap. 32) – empowers the court to make orders validating any issue or allotment of shares which is invalid by reason of the Companies Ordinance or the memorandum or articles of the company;
(c) section 29 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) – validation of certain void or voidable decrees of divorce, nullity of marriage or judicial separation

Consideration from a policy point of view

10. In our view, the key policy issue for members' consideration is that, whether this is an exceptional case which warrants validation provisions to validate all AIOs already made against wages or salary payable to a maintenance payer by the Government having regard to the interests of the maintenance payer and maintenance payee. Some of the policy factors are listed below for members' consideration.

The effect of not validating all AIOs already made against wages or salary payable to a maintenance payer by the Government on the maintenance payee

11. Without validating the AIOs already made against wages or salary payable to a maintenance payer by the Government, there is a possibility for the maintenance payer to challenge the validity of the maintenance order in question. Upon a successful challenge of the validity of the AIOs in question, the maintenance payee may have to get an order for the payment of money which has to be enforced by way of judgment summons⁸. In addition, the maintenance payee may have to apply for interest on arrears of maintenance under section 28AA of the Matrimonial Proceedings and Property Ordinance or surcharge on arrears of maintenance under section 28AB of the Matrimonial Proceedings and Property Ordinance.

Does the validation provision add additional legal burden on the maintenance payer?

12. It may be argued from a policy point of view for not introducing validation provisions in the Bill that the income of a maintenance payer who is a civil servant should not have been subject to an AIO in light of the decision in *L v L*. The validation provisions may inflict detriment on the maintenance payer. The counter argument, according to paragraph 11 of the paper, is that the validation provision does not add legal burden to maintenance payers. Paragraph 11 of the paper further says that provisions validating the existing AIOs only make it clear that civil servants are treated in the same way as other people in Hong Kong as far as the enforcement of a maintenance order is concerned.

Prepared by

Legal Service Division
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⁸ Halsbury's Laws of Hong Kong, Volume 12(2) (2006 Reissue) Lexis Nexis, 180.562