



Enforcement of Court Judgments in Civil Cases

The Law Society's Civil Litigation and Family Law Committees have reviewed the letters from the Panel on Administration of Justice and Legal Services dated 13 and 28 November 2006 on "Enforcement of court judgments in civil proceedings" and have the following observations:

1. Civil Litigation Committee

(a) Comprehensive Review

There should be a comprehensive review of the existing mechanism of enforcement of court judgments in civil cases as this matter was not considered by the Judiciary in its report on Civil Justice Reform ("CJR"). It is clear the existing mechanisms should be reformed as some are clearly outdated and fail to meet the needs of our society. We suggest the Administration conduct research on enforcement methods in other jurisdictions, and as with the CJR exercise, cherry pick those which are cost-effective and efficient.

(b) Attachment of Income

There is no general legislation permitting attachment of earnings in Hong Kong, apart from the Attachment of Incomes Ordinance for matrimonial cases. The Administration should consider introducing such legislation.

(c) Information on Judgment Debtors

Enforcement of court orders from a judgment creditor's viewpoint is often not only a frustrating process but also expensive and time-consuming. The existing procedures fail to provide an efficient process to enable a judgment creditor to obtain such further additional orders as may be necessary or expedient to enforce a judgment.

An example of this is the court's lack of jurisdiction to order a judgment debtor to file an affidavit of means *after pronouncement* of judgments. It is noted the Administration proposes to introduce a new Order 13A: "*Admissions in Claims for Payment of Money*" which will require a defendant to complete Statutory Form No. 16 and provide information on his financial means, including details of employment, savings and residency, etc.

A judgment creditor has no right to seek this information after obtaining judgment; he can only obtain this information through a separate application under Order 48 of the High Court Rules known as "Examination of a Judgment Debtor etc"; the procedure is costly and requires personal service of the application on the judgment debtor, who has to attend before the court for an "oral examination as to assets and means". It is therefore recommended to extend the jurisdiction of the court to enable it to order a judgment debtor to file an affidavit of means upon pronouncement of judgment. If this new

procedure is introduced it will emphasise to judgment debtors and their legal advisers the court is also concerned with enforcement and that its orders will not be flouted. If the new Order 13A requires information on payment of judgment orders on admissions then a judgment creditor should be entitled to receive this information generally at the end of an expensive trial.

(d) Bailiff Service and Deposits

(i) Bailiff Service

There is widespread dissatisfaction with the effectiveness of the bailiff recovery system. It is felt the entire system is in need of review and radical change. Many practitioners report a low return of successful recoveries. Those who have worked personally with bailiffs found them unmotivated and ineffectual. Practitioners report they avoid issuing Writs of *Fifa* if there is any chance of success by using any other method of enforcement. It was also reported the procedure is very slow. The review should study the current English system and adopt its improvements.

(ii) Bailiff Deposits

The Committee did not consider the fees for the bailiff deter judgment creditors from enforcing judgments and did not recommend the abolition of such fees.

(e) Company Insolvent Trading

In 1996, the Law Reform Commission recommended, in its Report "*Corporate Rescue and Insolvent Trading*", the introduction of a new concept of insolvent trading:

"The liquidator could take proceedings against those directors of the company who have allowed a company to trade while it was insolvent. Directors found to have failed in their duty to prevent a company trading while insolvent could be personally liable to pay compensation to the company".

Unfortunately, the Companies (Amendment) Bill, proposing such reforms failed to pass but the problem remains as so many companies in Hong Kong are private ones. It was also noted the need for provisional supervision has re-appeared and so the problem of companies trading while insolvent remains a significant problem.

(f) Database on Outstanding Judgments

As court judgments are regarded as private documents there is no public database of these orders. This is an omission which should be addressed. Practitioners can instruct private companies to conduct searches which is an additional expense and such search results are not necessarily comprehensive.

(g) Reform of the Rules

The Committee noted the Judiciary could not be expected to have information on the results of applications for Writs of *Fifa* or for the bailiff service generally as there is no procedure in place to retain such information as there is no database.

(h) Service of Process

Service of process is a common problem which judgment creditors encounter in enforcement proceedings. The existing mode of personal service and substituted service should be reviewed as the current methods are not only ineffectual but are also expensive and time-consuming. (This complaint is echoed in paragraph 2(e) below).

We support a full review of enforcement procedures and in this regard suggest service of legal process could be done electronically as all Hong Kong citizens have smart ID cards (the replacement exercise will be completed well before any legislative changes can be introduced). A programme could be introduced whereby on passing through immigration, the system should be able to inform targeted individuals that there is a legal document which awaits collection, for example, from the High Court Registry. This would be a more efficient method of substituted service, than the existing one which requires placing an advertisement in a newspaper which is (a) expensive and (b) ineffective as a mode of bringing the individual's attention to legal process. As many Hong Kong people travel regularly, this would be a more efficient means of bringing to their attention the existence of legal process.

(i) Substituted service – service by advertisement

When a judgment debtor avoids service of documents or cannot be located a judgment creditor will make an application for substituted service under in order to publicise the orders often by an advertisement in English and/or Chinese in the local press. We suggest discussion take place on the feasibility of posting such notices by electronic means as an alternative method of service.

2. Family Law Committee

(a) Interest and Surcharge on Arrears of Maintenance Ordinance

This legislation fails to address the problem of non-payment of maintenance orders by the paying party. For the first 3 quarters of 2006 there were only 144 applications. The interest awarded on arrears is very small and the amount of surcharge imposed does not provide real compensation to the receiving party. It does not act as a deterrent to the paying party.

(b) Enforcement of Periodical Payments and Lump Sum Orders

The Family Law Committee supports the proposal by the Civil Litigation Committee (in paragraph 1(c) above), to permit a judge, at the end of a trial, to issue directions requiring the judgment debtor to provide an affidavit of means in relation to assets and liabilities.

In relation to maintenance orders there is no practice in place which enables the court to monitor compliance with its orders. The current practice ends with the court order for periodical payments and/or a lump sum; this is confirmed by the practice of the Legal Aid Department which requires a fresh application for legal aid to pursue arrears, as the original Legal Aid Certificate for ancillary relief is discharged once the maintenance order has been made.

The Family Law Committee suggests new procedures be introduced whereby the court, upon pronouncement of its orders, would then issue directions requiring the paying party to provide an affidavit on implementation and/or compliance with the court's order.

A call over hearing should be fixed to review implementation within 2 months of the date of the order which will enable the court to monitor compliance within a relatively short period, rather than months or even years when the matter has become "stale". A majority of the paying parties will comply with the court order so the call over can be vacated upon the filing of evidence indicating compliance. This additional procedure will impress upon the paying party the need to make appropriate arrangements to comply, failing which the paying party would have to return to court to explain the lack of action. (Care should be taken to ensure the call over hearing would not be a review such that the paying

party would regard the call over hearing as an opportunity to have a second “bite at the cherry”).

As the call over hearing will be within a relatively short time of the final maintenance order, it should be possible to re-list the hearing before the same judge who made the original order and will thus be familiar with the basis of the order. If the court is dissatisfied with the excuses of the paying party, the judge has a range of remedies to force the paying party to comply, e.g. issue leave for a judgment summons and permit service on the paying party at the hearing.

This proposal would save resources for all concerned as the paying party and legal advisers will be aware of the need to comply with court orders; this proposal can also be applied to lump sum orders.

(c) Secured Periodical Payment

There are few applications for secured periodical payments and the court is reluctant to order the same. When an order is granted it is usually made in relation to respondents who are self employed e.g. a company director, etc.

(d) Creation of a Database

The Family Law Committee endorsed the suggestion of creating a database of court judgments noting (as outlined in 1(f) above) appearance on the database would increase pressure on those paying parties who wish to ensure their names are not placed on a list of defaulting judgment debtors.

(e) Inability to obtain details of the paying party's current address

It was noted Section 28(A) of the MPPO requires the paying party to provide notice of change of address and failure to do so is a criminal offence. Practitioners have difficulty in obtaining the latest whereabouts of defaulting spouses. It is difficult to obtain this information from the Immigration Department, Inland Revenue Department and Transport Department.

When a complaint is made to the police on the disappearance of a non-paying party, the police do conduct an investigation. However, once they have discovered the non-paying party's whereabouts, the police do not have the authority to disclose the current address to the complainant. The ability to locate the non-paying party is important because a judgment summons requires personal service. Section 28(A) should be extended to enable the police to release details of the address and work details of the non-paying party to the complainant and/or the legal advisers and may require amendment to the Personal Data (Privacy) Ordinance to avoid any loopholes in the legislation.

**The Law Society of Hong Kong
9 February 2007**

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4th December 2006

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Director of Practitioners Affairs

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Dear Sirs,

Re: Enforcement of Court Judgment in Civil Cases

I refer to your circular dated 27th November 2006 and I am pleased to note that the Panel on Administration of Justice and Legal Services is conducting a review of the existing mechanism of enforcement of court judgments in civil proceedings. Unfortunately, the provisions relating to enforcement of court judgment in civil cases is in my experience grossly deficient, to the extent that judgment debtors can effectively ignore court orders and avoid settling judgments that they have been ordered to pay. There are a number of aspects why I consider the existing system to be deficient including the following:-

1. The court Bailiff's Office appears to be staffed with dim witted, lazy, inefficient persons who have neither the ability, nor any incentive whatsoever to enforce any court judgment. It is frankly adds insult to injury to a judgment creditor to have to deal with the court bailiff's system. As a first step I would suggest that the entire court bailiff office be fired and new staff recruited and that such bailiffs are incentivised to ensure that judgments are enforced.
2. The present system of bankruptcy appears to offer most judgment debtors an easy way out of settling judgments and judgment debtors appear to rest easy in the knowledge that if they sit matters out for a limited period of time they are then discharged from their bankruptcy and can carry on as before.
3. If a judgment creditor wishes, and is prepared to pay the costs of the same they should have the opportunity to imprison the judgment debtor until the debt is paid or at the very least for a specific period of time.

4. Directors of insolvent companies should be held liable for the debts of their companies, when such are incurred in circumstances where the director is aware that there is a serious risk of the company would be unable to settle its debts yet continues trading.

I would be grateful if you could pass on my views to the relevant panel.

Yours faithfully,