

**Panel on Administration of Justice and Legal Services
Meeting on 28 January 2008**

Enforcement of Judgment in Civil Cases

Introduction

At its meeting held on 23 October 2006, Members of the Panel on Administration of Justice and Legal Services (AJLS) discussed the issue of enforcement of judgment in civil cases, particularly in matrimonial and labour cases. Subsequent to the meeting, the AJLS Panel invited views from the two legal professional bodies. The Law Society of Hong Kong (the Law Society) and a solicitors' firm have since provided written submissions. This paper sets out the responses of the Administration and the Judiciary Administration to the main points raised by Members and in the written submissions.

Matrimonial Cases

Interest and Surcharge on Arrears of Maintenance

2. The Home Affairs Bureau (HAB) notes the concern of the Law Society on the effect of the interest and surcharge arrangements. In fact, the Interest and Surcharge on Arrears of Maintenance Ordinance was brought into operation in May 2005 with the objective of compensating the maintenance payee for monetary loss due to default by the maintenance payer, and to deterring repeated default. The current interest is, similar to other judgment debt cases, set at a rate ordered by the Court or, in the absence of an order, at the rate the Chief Justice determines by order. A defaulter is also liable to a surcharge of up to 100% of the total arrears of maintenance. The level should not be considered low.

3. The number of applications on interest and/or surcharge applied through judgment summons hearing was 37 in the second half of 2005 (about 6 applications per month), and increased to 173 in 2006 (about 14 applications a month). As the Ordinance has only been brought into operation for two years, we will closely monitor developments. There are readily available publicity materials on maintenance-related matters compiled by various Government Bureaux and Departments.

Separately, HAB has also sponsored non-governmental organizations to carry out projects/activities to enhance public awareness of the rights of maintenance payees and services available to them.

Obtaining the address of the defaulting maintenance payers

4. The Law Society expressed concern that legal practitioners have difficulties in obtaining the addresses of maintenance payers from the Immigration Department, Transport Department, Inland Revenue Department and the Police.

5. At present, the Immigration Department, Transport Department and Housing Department provide the maintenance payer's addresses (if available) to the maintenance payee (or legal representative) at the latter's request through a standard letter, if the maintenance payer's address is required for instituting legal proceedings against him for failing to pay maintenance. The Departments have confirmed that the arrangement is still in force. If the Law Society encountered difficulties in any specific case, we are ready to look into the case with the relevant departments.

6. As for the Inland Revenue Department, the "official secrecy" provision in the Inland Revenue Ordinance (Cap.112) precludes it from providing information such as defaulting maintenance payers' address.

7. The Hong Kong Police Force is fully cognizant of its duties in investigating cases involving a maintenance payer who fails to notify a maintenance payee of his/her change of address. The Police will consider release of a defaulting maintenance payer's address on a case by case basis.

8. HAB will continue to improve, in consultation with the relevant departments and organisations, the measures (including publicity and education measures) affecting the maintenance payees.

Labour Tribunal Awards

9. Concerns have been expressed about the failure of some employees in obtaining the judgment sum awarded by the Labour Tribunal (LT). As in the case of all civil actions, the parties involved in the claim bear the responsibility of enforcing the judgment if it is not complied with.

10. Notwithstanding the above, the Labour Department (LD) has taken a number of measures to assist employees with defaulted LT awards. Details are set out in the reply by the Secretary for Labour and Welfare to a question raised in the Legislative Council meeting on 9 January 2008 (copy at the Annex). On top of the existing measures, LD is looking into the feasibility of further measures to better assist employees to have the LT awards enforced. LD's preliminary observation is that an effective measure would likely be one which would need to entice the employers-at-fault to pay up. The subject is a complex one which straddles the purview of different Bureaux and Departments as well as the Judiciary. LD will work closely with concerned parties with a view to exploring feasible improvement measures to safeguard the statutory rights of employees and will be consulting the Labour Advisory Board and the Panel on Manpower.¹

Companies Insolvent Trading and Discharge of Judgment Debtors

11. In its submission, the Law Society expressed concern that legislative provisions providing for sanctions against directors of a company who have allowed the company to trade while it is insolvent have yet to be enacted. Separately, the solicitors' firm which provided a written submission stated that the present system on 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". The Financial Services and the Treasury Bureau (FSTB) has considered these views.

12. On companies insolvent trading, FSTB points out that legislative proposals on corporate rescue procedures and insolvent trading were introduced in the Legislative Council first in 2000 and subsequently in 2001 again. During the scrutiny of the relevant Bill by the Bills Committee, some Members and stakeholders expressed concern about matters such as the proposed trust account arrangement in respect of employees' entitlements and the possible impact of insolvent trading provisions on the business sector. Notwithstanding the efforts made in

¹ The AJLS Panel and the Panel on Manpower held a number of joint meetings in 2003 and 2004 to discuss matters relating to the operation of the LT. Both Panels agreed in 2005 that issues relating to defaulted LT awards should be followed up by the Panel on Manpower.

conducting further study and consultation, the relevant Bill was not enacted during the last LegCo term. FSTB will review, in the light of the developments in other jurisdictions on corporate rescue and insolvent trading matters, the need for such legislative proposals in Hong Kong and, if so, how best they should be taken forward.

13. On the submission concerning the discharge of judgment debtors in bankruptcy proceedings, FSTB points out that the current regime permitting automatic discharge of bankrupts is contained in the Bankruptcy (Amendment) Ordinance 1996, reflecting the Law Reform Commission's recommendations regarding rehabilitation of bankrupts. Under this regime, a first-time bankrupt can be automatically discharged four years after his bankruptcy order takes effect, unless the bankrupt has failed to cooperate with the trustee or has conducted himself unsatisfactorily, resulting in the court ordering the extension of the bankruptcy period on the application of the trustee or creditor who makes a valid objection. Nevertheless, discharge *per se* does not release a bankrupt from some types of liabilities set out in section 32 of the Bankruptcy Ordinance (Cap. 6), such as any bankruptcy debt which consists in a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty being damages in respect of personal injuries to any person (except to such extent and on such conditions as the court may direct).

Enforcement Mechanisms

14. In its submission, the Law Society suggested that a review of the mechanisms for enforcement be conducted, and made a number of related suggestions, including the modes of service of process, the establishment of a public database on outstanding judgments, reform of the court rules for capturing and making public enforcement results, and measures to facilitate the enforcement of periodical payments, lump sum orders and secured periodical payments.

15. On the service of process, the Judiciary points out that relevant provisions are of general application and contained in existing legislation and judicial decisions. The suggestion regarding electronic service of legal process in connection with judgment enforcement proceedings (including some application of the Immigration Department's system for using smart ID cards) has far-reaching legal and policy implications and would entail legislative amendments. It would require careful and extensive examination.

16. As to the other suggestions in paragraph 14 above, the Judiciary advises that as a matter of principle, in civil cases, the litigants bear the responsibility of enforcing the judgment if it is not complied with. It is not the Judiciary's responsibility to monitor the compliance. If it is considered that the judgment creditors in certain types of cases should be treated differently from other judgment creditors in civil cases, the Judiciary shares the Director of Administration's view that this is a matter of policy for the relevant Bureaux in the Administration.

17. In the event that the judgment debtor does not pay in full or at all, the judgment creditor may consider what action should be taken to enforce the judgment. If the creditor elects to enforce the judgment by way of a writ of *fiери facias* (among other ways), he has to apply to the Bailiff Office and give instructions to the Office (e.g. on the whereabouts of the judgment debtor known to the creditor). Whether sufficient sums could be recovered in enforcement action, such as the amount of valuable belongings that can be found at the location of execution, is due to many factors beyond the control and responsibility of the Bailiff Office. The parties may also consider applying for secured periodical payment. The Court would exercise discretion to make such an order on a case by case basis.

Concluding Remarks

18. The relevant Bureaux are prepared to consider the need to introduce appropriate measures to address the specific problems, taking account of policy and resources considerations, if problems in enforcing judgments in specific policy areas are identified. On the mechanisms generally applicable to all civil actions, the Administration and the Judiciary will consider any further concrete suggestions that may be made.

Administration Wing, Chief Secretary for Administration's Office
Financial Services and the Treasury Bureau
Home Affairs Bureau
Labour and Welfare Bureau

Judiciary Administration

January 2008

LegCo Question No. 3

(Oral Reply)

Asked by : Hon TSANG Yok-sing Date of meeting : 9 January 2008

Replied by : Secretary for Labour
and Welfare

Question :

Will the Government inform this Council whether it knows:

- (a) the number of cases in the past three years in which employees lodged claims at the Labour Tribunal ("LT") to recover outstanding wages; among them, the respective numbers of cases in which the employees' claims were successful and unsuccessful, as well as the average time taken from the date of filing to conclusion in such cases;
- (b) among the successful cases referred to in (a), the average percentage of the amounts of compensation awarded by LT to the employees concerned in the amounts they claimed, and the average percentage of the amounts of money ultimately received by such employees in the amounts awarded; and
- (c) apart from implementing the measures which have been accepted by the Chief Justice of the Court of Final Appeal for solving problems in connection with the enforcement of LT's awards, how the relevant authorities assist the employees who have lodged and succeeded in their claims to recover outstanding wages in recovering the amounts awarded, and whether they have plans to review the relevant policies?

Reply :

Madam President,

- (a) According to the information provided by the Labour Tribunal, the number of cases handled, the number of awards made (where sums were awarded) and the average time taken from filing of claim to conclusion over the past 3 years are set out below -

<u>Year</u>	<u>2005</u>	<u>2006</u>	<u>2007</u> <u>(Jan to Nov)</u>
(a) Number of cases handled by the Labour Tribunal	6570	6543	5649
(b) Number of cases where monetary awards were made (including arrears of wages, wages in lieu of notice, severance payment, etc.)	5349	5383	4393
(c) Average length of period from the date of filing to conclusion	41 days	47 days	55 days

As claims generally have multiple items and in some cases there are more than one claimants, it is difficult to differentiate the cases that are successful or unsuccessful. For instance, a claimant may succeed in one or two items of a claim but fail in the others. In the above table, row (b) only shows the number of awards for general reference. Besides, some claimants may withdraw their claims after they have settled directly with the defendants subsequent to filing.

- (b) As regards the percentage of the amounts of compensation awarded by the court as against the amounts claimed by the claimants under the items where awards were made, the figures for the past 3 years are set out below (the figures do not differentiate between the claims lodged by the employers and those lodged by the employees) -

<u>Year</u>	<u>2005</u>	<u>2006</u>	<u>2007</u> <u>(Jan to Nov)</u>
Amounts awarded	\$325m	\$333m	\$235m
Amounts claimed	\$481m	\$518m	\$401m
Percentage of amounts awarded as against the amounts claimed	68%	64%	59%

Furthermore, as some employees and employers settle the judgment sum on their own, the Labour Tribunal has no available information on the percentage of the amounts of money ultimately received by the employees as against the amounts awarded by the court.

- (c) The Administration is concerned about the failure of some employees in obtaining the judgment sum awarded by the Labour Tribunal (LT). In essence, the issue relates to the enforcement of awards made by the Judiciary. As in the case of all civil actions, the parties involved in the claim bear the responsibility of enforcing the judgment if it is not complied with.

The experience of Labour Department (LD) reveals that there are broadly two scenarios where the employees could not recover their wages in arrears despite having an LT award in their favour: (1) the employer has become insolvent; and (2) the employer is solvent and still in operation.

In the first scenario where the employer has ceased business or become insolvent, LD will assist the affected employees to apply for ex gratia payment of wages in arrears and other termination payment from the Protection of Wages on Insolvency Fund. LD will also refer such employees to the Legal Aid Department for assistance in instituting winding-up or bankruptcy proceedings against the insolvent employer.

In the second scenario where the employer is solvent and still in operation, LD will initiate vigorous enforcement action against the employer. Upon receipt of complaints by employees on defaulted payment of LT awards, labour inspectors of the LD will conduct follow-up investigation on these cases. If there is sufficient evidence, we will prosecute employers who have violated the Employment Ordinance.

In 2007, LD secured 171 convicted summonses in respect of cases of defaulted payment of LT awards, up 10.3% from 155 in 2006. Among these cases, one convicted employer was fined \$70,000 while another was sentenced to immediate imprisonment for two weeks. These heavy sentences have sent a strong message to employers that breaches of the Employment Ordinance are serious offences.

Whilst LD's enforcement action against wage default is confined to criminal prosecution and the employees concerned could not benefit from the criminal sanction imposed on the offenders, we believe that our stringent enforcement effort has served to strengthen the deterrent effect against wage defaults. To further enhance the deterrent effect, the maximum penalty for wage offences in the Employment Ordinance has, with effect from 30 March 2006, been substantially increased from a fine of \$200,000 and imprisonment for one year to a fine of \$350,000 and imprisonment for three years.

The Administration is aware of the problems faced by some employees in recovering the sum awarded by LT in their favour. We will continue to work closely with the Judiciary to explore feasible improvement measures to safeguard the statutory rights of employees.