

**Bills Committee on
the Public Health and Municipal Services (Amendment) Bill 2008**

Appeal and Compensation Mechanism

Purpose

At the Bills Committee meeting on 12 March 2009, Members raised concern on whether the interface between the appeal and compensation mechanism under the Public Health and Municipal Services (Amendment) Bill 2008 would cause the legal problem of *estoppel* and *res judicata*. This paper sets out the Administration's response.

Appeal and Compensation Mechanism

2. Section 78G of the Amendment Bill provides that a person bound by a section 78B order may, within 28 days from becoming bound by it, appeal to the Municipal Services Appeals Board (MSAB). Section 7(1)(b) of the MSAB Ordinance (Cap 220) provides that in determining an appeal against an administrative decision, the MSAB shall affirm, vary or set aside the administrative decision. The MSAB is not empowered to grant compensation.

3. Section 78H of the Amendment Bill provides for a compensation mechanism. There is no need for a person bound by a section 78B order to first seek a decision from the MSAB. He may apply to the court (i.e. the District Court or Small Claims Tribunal, as the case may be) for compensation direct under section 78H.

4. It follows that there are three possibilities –

(a) An aggrieved person may choose to disregard the MSAB appeal channel under section 78G and seek compensation from the court direct under section 78H.

(b) An aggrieved person may choose to seek a ruling from MSAB first under section 78G before deciding whether to make a claim to the court under section 78H.

- (c) An aggrieved person may also choose to go to MSAB to seek a ruling under section 78G and go to court to seek compensation under section 78H concurrently.

That said, it should be noted that since different time limits apply, it is not unreasonable to expect that in practice, an aggrieved person may not wish to lodge a claim for compensation first because practically viewed, he may wish to lodge an appeal with the MSAB first in consideration of the costs implications of the court proceedings and the speedy mechanism provided in the MSAB Ordinance for the resolution of the appeal. The chance for compensation for the aggrieved person may, generally speaking (although not absolutely), be higher if the MSAB has varied or set aside the section 78B order. These are the practical considerations an aggrieved person would take into account in deciding his way forward.

Estoppel and Res Judicata

5. Members raised concern on whether the situation in paragraph 4(c) above, the legal problem of *estoppel* and *res judicata* may arise if during the court hearing, the MSAB decision is still pending.

6. Order 35 rule 3 of the Rules of the District Court (Cap 336H) provides that the judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit. Section 26 of the Small Claims Tribunal Ordinance (Cap 338) also provides that the tribunal may at any time, either of its own motion or on the application of any party, adjourn the hearing of proceedings on a claim on such terms as it thinks fit. Such power of stay of court/tribunal proceedings has to be exercised judiciously on good grounds.

7. On the doctrines of *estoppel* and *res judicata*, the Administration is advised that they are common law principles which aim essentially at achieving finality in litigation. They work to prevent issues finally decided on the merits between two parties by a court/tribunal of competent jurisdiction from being re-litigated between the same parties again; the decided issues in the first litigation are treated as conclusive between the same parties on the same issues for the purpose of any later litigation. The application of the said common law doctrines to litigation may be displaced by statute either expressly or by

implication as a matter of construction of the relevant statutory provisions.

8. Members may like to note the followings under our Amendment Bill and the MSAB Ordinance –

- (a) Section 78G and section 78H of the Amendment Bill operate independently. A finding by the MSAB as to whether the Authority had reasonable grounds to make a section 78B order should not determine the issue of liability for compensation before the court.
- (b) Section 15(4) of the MSAB Ordinance provides that a decision or order of the MSAB is admissible in any proceedings as *evidence* of the decision or order. The statutory effect given to the MSAB’s decision does not go so far to make the MSAB decision on any issue conclusive as between the same parties in later litigation on the same issue.
- (c) Section 78H provides a statutory basis for claiming compensation before the court which is separate from the appeal to the MSAB under section 78G. While the issue of whether the Authority had reasonable grounds to make a section 78B order could be an issue common to the appeal under section 78G and the compensation proceedings under section 78H, there are no provisions under the Amendment Bill (or the MSAB Ordinance) to render the MSAB’s decision conclusive on the said issue in the compensation proceedings. Neither are there provisions to restrict the evidence that the court may receive from the parties before it, which may include “fresh” evidence over and above the evidence adduced before the MSAB such that the court may, on such evidence before it, justifiably come to a decision different from that of the MSAB. The MSAB’s decision should, therefore, not be treated as being conclusive on the issue for the purposes of the compensation proceedings.

Recommendation

9. We recommend to retain the MSAB mechanism in the Amendment Bill to provide an alternative channel of appeal for food traders. As the MSAB appeal mechanism is simpler, faster, and less costly than the court, we consider that some food traders may choose to seek a ruling from the MSAB first and

will decide whether to make a claim for compensation after the MSAB ruling is available.

10. We do not consider that an express provision should be included in section 78H of the Amendment Bill that the court should disregard the decision of the MSAB when considering a claim under section 78H. Firstly, there is no need for such a provision as the court is not legally bound by the decision of the MSAB under section 78H. Secondly, as explained above, some traders may choose to seek a ruling from MSAB first. Section 15(1) of the MSAB Ordinance (Cap 220) provides that the MSAB shall give reasons in writing for its decisions, and those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based. Section 15(4) of the MSAB Ordinance further provides that a decision or order of the MSAB and to be certified by the secretary of the MSAB to be a true copy of the decision or order is admissible in any proceedings as evidence of the decision or order. It would certainly facilitate the court proceedings if the MSAB decisions could be admitted as evidence in the court.

Advice Sought

11. Members are invited to comment on the above.

Food and Health Bureau
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