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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 27 April 2009**

Pilot Scheme for Building Management Cases in the Lands Tribunal

Purpose

This paper gives a brief account of the past discussions of the Panel on Administration of Justice and Legal Services (the Panel) on the Pilot Scheme for Building Management Cases (the Pilot Scheme) in the Lands Tribunal (LT).

Background

Underlying objectives of the Pilot Scheme

2. To improve the efficiency and cost-effectiveness of the procedures in LT, the Judiciary completed a review of the handling of building management cases in early 2006. The review findings identified that (a) inactivity of parties, (b) numerous interlocutory applications and (c) overrunning of trials were the major reasons for delay in some building management cases.

3. Against this background, the Judiciary launched the Pilot Scheme on 1 January 2008 with a view to facilitating the more efficient, expeditious and fair disposal of building management cases in LT. Unnecessary hearings will be cut down and in circumstances where directions can fairly be given on paper without any oral hearing, the Tribunal will do so. Unnecessary interlocutory applications will be discouraged and in appropriate cases, costs sanctions will be imposed. Members may wish to note that against the planned waiting time of 100 days for building management cases in LT from setting down of a case to hearing, the actual waiting time in 2008 was 60 days less than the target.

Main features of the Pilot Scheme

4. The Pilot Scheme seeks to achieve the underlying objectives by (a) introducing automatic directions and checklists; and (b) encouraging alternative dispute resolution (“ADR”). The main features of the Scheme as set out in the Direction issued by the President of LT are given in **Appendix I**.

Automatic directions and checklists

5. The initial phase (1 January to 31 December 2008) of the Pilot Scheme applies primarily to cases with legal representation on both sides. Cases covered by the Scheme are listed on the "Pilot Scheme List" and have to follow the automatic directions as set out in the President's Direction (paragraph 14 of **Appendix I** refers) in relation to the filing and serving of (a) evidence, (b) statement of mediation, and (c) checklists. If a party fails to comply with any of the automatic directions, the Tribunal may give further directions on paper for proper preparation of the case.

ADR and mediation

6. Parties to building management cases are encouraged to attempt to resolve their differences by an ADR mechanism, such as mediation, before or after they issue proceedings in LT. Stay of proceedings for a short duration will be arranged to enable parties to mediate. In cases where parties unreasonably refuse or fail to attempt mediation, adverse costs order may be made against such parties.

7. In support of mediation under the Pilot Scheme, the Judiciary has set up a Building Management Mediation Co-ordinator's Office in LT. The Office conducts information sessions for parties who are willing to attempt voluntary mediation. It also maintains a list of accredited mediators who are willing to participate in the Pilot Scheme and liaise with mediators on mediation outcome.

Discussions of the Panel

8. The Panel was briefed on the main features of the Pilot Scheme at its meeting on 13 December 2007. The major issues raised by members are summarized in the ensuing paragraphs.

9. Some members were concerned about the qualification and experience of, and fees charged by, the accredited mediators under the Pilot Scheme. In this regard, members were advised that some 120 accredited mediators had expressed interest in participating in the Pilot Scheme. Their years of experience in mediation ranged from one year to over 10 years. The charges of these mediators ranged from a hundred dollars to several thousand dollars per hour, while more than 100 accredited mediators had indicated that they would participate in the Pilot Scheme on a pro bono basis.

10. On a member's suggestion of expanding the scope of the Pilot Scheme to cover cases without legal representation on both sides, the Judiciary Administration (JA) advised that as a first step, the Pilot Scheme would apply to cases with legal representation. However, LT, as appropriate, might apply some features of the Scheme to cases with unrepresented litigants with modifications by specific directions. Subject to the response received on the Pilot Scheme, the Judiciary would consider expanding its scope.

11. On the question of whether the lawyers concerned would be involved in the mediation process in a building management case which was legally represented, the Chairman of the Hong Kong Bar Association advised the Panel that as the training for lawyers undertaking litigation and mediation was different, depending on the complexity of cases, mediators would generally prefer not having lawyers involved in the mediation process. In England and some countries in Europe, lawyers were not involved at the initial stage of the mediation. However, when a dispute could be resolved by mediation, lawyers would be brought in to ensure that an appropriate settlement was signed between the two parties.

12. Regarding the scope of the review to be conducted on the Pilot Scheme, the Panel was advised that the review report would provide information on the effectiveness of the Pilot Scheme, the caseload, the number of mediators participating in the Scheme, the mediation cost, user feedback, and whether the Scheme should continue. Members noted that it would take three to six months for the Judiciary to evaluate the effectiveness of the Pilot Scheme after it had been launched for 12 months. The Panel agreed to follow up the review in March or April 2009.

Latest development

13. The initial phase of the Pilot Scheme ended on 31 December 2008. JA is scheduled to revert to the Panel on the review at the upcoming meeting on 27 April 2009.

Relevant papers

14. A list of the relevant papers which are available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix II**.

**Direction Issued by the President of the Tribunal
Pursuant to Section 10(5)(a) of the
Lands Tribunal Ordinance (Cap. 17)**

Pilot Scheme for Building Management Cases

Aim of the pilot scheme

1. The Lands Tribunal will introduce a pilot scheme in the Lands Tribunal to streamline the processing of building management cases with effect from 1 January 2008. At the initial phase (from 1 January 2008 to 31 December 2008), the scheme will apply to cases with legal representation on both sides. In appropriate cases, with suitable modifications, the Tribunal may apply some features in the scheme to other cases by specific direction made in the course of proceedings.
2. The aim of the scheme is to facilitate the more efficient, expeditious and fair disposal of building management cases. Unnecessary hearings would be cut down and in circumstances where directions could fairly be given on paper without any oral hearing, the Tribunal will do so. Unnecessary interlocutory applications will be discouraged and in appropriate cases, costs sanctions will be imposed.

The respective roles of the Tribunal and the litigants and their advisers in fair efficient and cost effective disposal of cases

3. It is important for litigants as well as those advising them to appreciate that efficient and cost effective resolution of disputes cannot be achieved without due diligence and co-operation on their part. The Tribunal will be proactive in case managing in accordance with the underlying objectives in paragraph 2.
4. Parties and those advising them should explore settlement or alternative dispute resolution before they decide to litigate.

They should understand that litigation will inevitably involve time, efforts and costs involved and should assess for themselves whether it is proportionate to litigate on a matter. Although the Tribunal will encourage parties to compromise their disputes, its primary function and objective should be the fair and efficient adjudication of cases.

5. Given the nature of most building management cases, there is no reason why preparation for trial could not be made before a first hearing. For instance, the applicant should be able to file some of his evidence (witness statements and documents) even without sight of the Notice of Opposition. Given the time gap between the filing of Notice of Opposition and the first hearing, the applicant should be able to file his evidence in reply in an ordinary building management case. Likewise, the respondent should be able to prepare his evidence at the same time when he prepares his Notice of Opposition.
6. Building management cases in the Tribunal should focus on the relevant issues. Proliferation of efforts on irrelevant factual or legal disputes would be prevented.
7. In other words, with due diligence, the parties should be able to file most of the evidence before the Tribunal considers whether to list a case for hearing. If that were done, the Presiding Officer would be able to assess on the papers,
 - (a) Whether there are any loose ends that require further filing of evidence or documents;
 - (b) Whether the case is in a state of readiness to be set down for trial with an informed estimate about the length of trial;
 - (c) Whether the case can be disposed of summarily on a point of law.

This will save the need for unnecessary hearings in most cases.

8. In a simple building management case, with the use of appropriate checklists filed by parties, the review of the case could be conducted on paper without any oral hearing.

9. Even if there are loose ends, it does not mean trial dates cannot be fixed. If the loose ends could probably be dealt with within a certain time frame, trial dates can still be fixed. Parties could be directed to inform the Tribunal of compliance within a certain date. Late filing will require leave which may not be granted, especially when there is no cogent explanation for the default, if the trial dates could be jeopardized.
10. If the case obviously requires some major overhaul, the Tribunal will not set it down for trial.

Alternative dispute resolution and mediation

11. Parties to building management disputes are encouraged to make attempts to resolve their differences by an alternative dispute resolution mechanism, such as mediation, before or after they issue proceedings in the Tribunal. If there are means to resolve a dispute which could be less costly, more efficient and effective than by way of litigation, unreasonable failure to make a *bona fide* attempt in that regard on the part of either party will be relevant conduct to be taken into account by the Tribunal in deciding on costs (see *Wealthy Plus Ltd v Lai Man Ho* [2001] 4 HKC 691 at p.710 F to I). Nevertheless, where a party has engaged in mediation or other alternative dispute resolution mechanism up to the minimum level of expected participation agreed by the parties beforehand or as determined by the Tribunal, or has a reasonable explanation for non-participation, he shall not suffer any adverse costs order. In determining whether a party has acted unreasonably in refusing to proceed with mediation or other alternative dispute resolution mechanism, the Tribunal shall take into account all relevant circumstances, but not what happened during the actual process of the mediation or other alternative dispute resolution mechanism.

Special List for building management cases under the pilot scheme: automatic directions and checklists

12. With effect from 1 January 2008, building management cases where both parties are legally represented, or where the Presiding Officer considers appropriate, will be listed before a

designated Presiding Officer of the Tribunal, and the list of such cases shall be referred to as “**the Pilot Scheme List**”. Applications to list such cases for hearing will be dealt with in accordance with the procedures set out below. The procedures will not be applicable to cases for which application to list for hearing has been made prior to the effective date.

13. Unless the Tribunal directs otherwise specifically, a case will not be placed in the Pilot Scheme List or will be taken out from the same if either one or both parties are not legally represented. The same applies to cases where a party ceases to be legally represented in the course of proceedings. Call-over hearings will be listed for cases involving litigants acting in person as in the past. The Tribunal will apply the underlying objectives and principles in paragraphs 2 to 4, 6, 9 to 11 above and paragraphs 17 and 18 below to deal with such cases and the checklists could be used for conducting call-over hearings. The Tribunal may also give directions on the papers in dealing with litigants in person if it is satisfied that a fair opportunity has been given to such litigants to make submissions on the proposed directions.
14. The following procedure will automatically be applied to cases coming within the Pilot Scheme List with (a) to (e) to be treated as automatic directions given by the Tribunal,
 - (a) An applicant shall file and serve the first batch of his evidence at the same time as when he files and serves his Notice of Application;
 - (b) An applicant shall file and serve at the same time as his Notice of Application a statement setting out (i) whether he has attempted to resolve the dispute by mediation; (ii) whether he is willing to attempt mediation; and (iii) if he considers the case unsuitable for mediation, brief reasons for that conclusion;
 - (c) A respondent shall file and serve his evidence by the time he files his Notice of Opposition;
 - (d) A respondent shall file and serve at the same time as his Notice of Opposition a statement setting out (i) whether he is willing to attempt mediation; and (ii) if he considers

the case unsuitable for mediation, brief reasons for that conclusion;

- (e) Both the applicant and the respondent shall file evidence in reply to the evidence of the opposite side and a checklist as per **Annex** within 14 days of the application to list for hearing;
- (f) If a party fails to comply with (a), (b), (c), (d) or (e), the Tribunal shall give further directions on paper for proper preparation of the case;
- (g) Unless there is a specific direction by the Tribunal to the contrary, a case falling within the Pilot Scheme List will only be listed for hearing when these directions are complied with;
- (h) Repeated defaults on the part of a litigant may be sanctioned by unless orders or orders barring him from adducing evidence at the trial without leave;
- (i) Upon review on paper,
 - i. If the Tribunal is of the view that the case is ready for trial, it may list the case for trial without any call-over hearing;
 - ii. If the Tribunal is of the view that there are still some outstanding matters which may need to be argued, it may list the case for a call-over hearing at which directions may be given, including a direction for setting down the case for trial;
 - iii. If the Tribunal is of the view that there are still significant outstanding matters to be attended to or a checklist is incomplete, it may give written directions on papers and defer the listing of a case for hearing until the preparation by the parties reaches a reasonably satisfactory stage.

Annex

15. Parties may also apply with supporting reasons to take the case out of the Pilot Scheme List. The Tribunal will consider the application and decide whether to accede to the request. If the

Tribunal decides to take the case out of the Pilot Scheme List, consequential directions will be given at the same time.

16. If the circumstances warrant, the Tribunal may direct further call-over hearings. Such further call-over hearings would however be exceptional.
17. Unnecessary and disproportionate interlocutory applications should not be made and would not be entertained. Insofar as possible, litigants should also deal with interlocutory matters by consent summons. Unnecessary or unreasonable interlocutory applications will normally be met with adverse costs consequences including gross sum assessments and orders for immediate payment of costs.
18. Once fixed, trial dates should not be vacated without good and cogent reasons. Late filing of evidence or late amendments that could result in adjournment of trial will not be allowed lightly.
19. Lawyers advising parties in building management cases should advise their clients of the costs implications of litigation and the Tribunal's attitude on costs, in particular the consideration in paragraph 11, when they prepare the statements under paragraph 14(b) and (d) (see *Halsey v Milton Keynes NHS Trust* [2004] 1 WLR 3002).
20. There shall be a review of the Pilot Scheme after one year.

Dated this 7th day of September 2007.

Johnson Lam
President, Lands Tribunal

CHECKLIST / 核對清單

This checklist is filed by the solicitors for the _____ *Applicant/Respondent.

此核對清單由第 _____ *申請人/答辯人的律師存檔。

- Notice / 注意:**
- (1) Applicant must complete Parts A and C / 申請人須填寫甲及丙部
 - (2) Respondent must complete Parts B and C / 答辯人須填寫乙及丙部
 - (3) * Please delete the inappropriate / 請將不適用者刪除
 - (4) Please tick the appropriate box. / 在適用的方格內加上“✓”號

| Part A: To be completed by Applicant 甲部: 由申請人填寫 | | Part B: To be completed by Respondent 乙部: 由答辯人填寫 | |
|--|---|--|---|
| A1. Has Notice of Application been served? 申請通知書是否已送達? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> | B1. Has Notice of Opposition been filed and served? 反對通知書是否已存檔及送達? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| Date of service: 送達日期: | | If not, why and when it would be filed and served? 若否, 說明原因及何時會存檔及送達? | |
| Method of service: 送達方式: | | | |
| A2. Any amendment required for the Notice of Application? 申請通知書是否需要修訂? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> | B2. Any amendment required for the Notice of Opposition? 反對通知書是否需要修訂? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| If yes, are the amendments ready? 若要, 修訂內容是否已擬備? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> | If yes, are the amendments ready? 若要, 修訂內容是否已擬備? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| Will the amendments be opposed by the Respondent? 答辯人是否反對修訂? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> | Will the amendments be opposed by the Applicant? 申請人是否反對修訂? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| A3. Have you filed and served witness statement(s) before the case is listed for hearing? 案件排期聆訊前, 證人陳述書是否已存檔及送達? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> | B3. Have you filed and served witness statement(s) before the case is listed for hearing? 案件排期聆訊前, 證人陳述書是否已存檔及送達? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| If not, why and when would it be filed and served? 若否, 說明原因及何時會存檔及送達? | | If not, why and when would it be filed and served? 若否, 說明原因及何時會存檔及送達? | |

| Part A: To be completed by Applicant 甲部: 由申請人填寫 | | Part B: To be completed by Respondent 乙部: 由答辯人填寫 | |
|---|---|---|---|
| A4. Have you filed and served supporting documents <u>before</u> the case is listed for hearing? 案件排期聆訊前, 文件證據是否已存檔及送達? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> | B4. Have you filed and served supporting documents <u>before</u> the case is listed for hearing? 案件排期聆訊前, 文件證據是否已存檔及送達? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| If not, why and when would it be filed and served? 若否, 說明原因及何時會存檔及送達? | | If not, why and when would it be filed and served? 若否, 說明原因及何時會存檔及送達? | |
| A5. Have you filed and served all witness statement(s) in reply <u>after</u> the case is listed for hearing? 案件排期聆訊後, 所有證人陳述書是否已存檔及送達以作回應? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> | B5. Have you filed and served all witness statement(s) in reply <u>after</u> the case is listed for hearing? 案件排期聆訊後, 所有證人陳述書是否已存檔及送達以作回應? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| If not, why and when would it be filed and served? 若否, 說明原因及何時會存檔及送達? | | If not, why and when would it be filed and served? 若否, 說明原因及何時會存檔及送達? | |
| A6. Have you filed and served all supporting documents in reply <u>after</u> the case is listed for hearing? 案件排期聆訊後, 所有文件證據是否已存檔及送達以作回應? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> | B6. Have you filed and served all supporting documents in reply <u>after</u> the case is listed for hearing? 案件排期聆訊後, 所有文件證據是否已存檔及送達以作回應? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| If not, why and when would it be filed and served? 若否, 說明原因及何時會存檔及送達? | | If not, why and when would it be filed and served? 若否, 說明原因及何時會存檔及送達? | |
| A7. Have you attempted to resolve the dispute by mediation? 曾否嘗試以調解方式解決本案之爭議? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> | B7. Have you attempted to resolve the dispute by mediation? 曾否嘗試以調解方式解決本案之爭議? | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| If not, why and whether you are willing to try mediation? 若否, 說明原因及是否願意嘗試調解? | | If not, why and whether you are willing to try mediation? 若否, 說明原因及是否願意嘗試調解? | |

| Part C: To be completed by all parties 丙部：訴訟各方均須填寫 | |
|---|---|
| C1. Do you intend to adduce evidence from expert witnesses? 是否打算提出專家證據？ | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| If yes, what is the field in which expert witness is required? 若是，須要哪方面的專家作證？ | |
| Have expert reports been disclosed to the other side? 專家報告是否已向對方披露？ | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| If not, why and when would reports be ready for disclosure? 若否，說明原因及何時可向對方披露？ | |
| C2. Will there be any further interlocutory applications before the case is ready for trial? 審前準備期間，是否會再提出其他非正審申請？ | Yes/有 <input type="checkbox"/> No/沒有 <input type="checkbox"/> |
| If yes, what are the intended interlocutory applications? 若會，打算提出甚麼非正審申請？ | |
| C3. If the case is ready for trial, what is the estimated length of trial? 如案件已準備就緒可排期審訊，預計審訊需時多久？ | Day(s)/天 |
| C4. Do you intend to be represented by counsel/solicitor at trial? 審訊時是否打算由大律師/律師代表出庭？ | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| C5. If yes, has advice been obtained from solicitors or counsel as regards the above steps and have solicitors or counsel confirmed that the case is ready for trial? 若是，是否已就上述步驟取得大律師/律師的意見？大律師/律師又是否已確定案件已準備就緒可排期審訊？ | Yes/是 <input type="checkbox"/> No/否 <input type="checkbox"/> |
| If advice or confirmation has not been obtained, why and when would such advice and confirmation be obtained? 若否，說明原因及何時可取得大律師/律師的法律意見及確定？ | |

Signed/簽署： _____ Date/日期： _____

Name of solicitors' firm/律師事務所名稱： _____

Solicitors for the _____ *Applicant/Respondent / 代表第 _____ *申請人/答辯人

Pilot Scheme for Building Management Cases in the Lands Tribunal

Relevant documents

| <u>Meeting</u> | <u>Meeting Date</u> | <u>Paper</u> |
|---|---------------------|--|
| Panel on Administration of Justice and Legal Services | 13 December 2007 | Judiciary Administration's paper on "Pilot Scheme for Building Management Cases in the Lands Tribunal" [LC Paper No. CB(2)401/07-08(01)] Minutes of meeting [LC Paper No. CB(2)927/07-08] |

Council Business Division 2
Legislative Council Secretariat
21 April 2009