

ITEM FOR FINANCE COMMITTEE

WRITE-OFF OF AN IRRECOVERABLE JUDGMENT DEBT

Members are invited to approve the write-off of an irrecoverable judgment debt of \$663,532.91, inclusive of interest, owed to the Government by a former legally aided person.

PROBLEM

Having exhausted all possible means of recovery, we need to write off an irrecoverable judgment debt of \$663,532.91, inclusive of interest, owed to the Government by a former legally aided person (AP).

PROPOSAL

2. The Director of Legal Aid (DLA), with the support of the Secretary for Home Affairs, proposes to write off the irrecoverable loss of \$663,532.91 under the Public Finance Ordinance (Cap. 2).

JUSTIFICATION

The Case

3. An AP was granted legal aid by the Legal Aid Department (LAD) in August 1995 to claim employees' compensation (EC) and common law (CL) damages for injuries sustained by him during an accident at work. The AP's EC case was dismissed by the District Court in July 1996 and the legal cost paid out by the legal aid fund was \$502,726.02. In September 1998, the AP's claim for CL damages was settled in the sum of \$1,250,000 and the legal cost was \$45,671.67. Pursuant to section 18A of the Legal Aid Ordinance (LAO) (Cap. 91), DLA is empowered to recover DLA's First Charge that covered the legal costs for both EC and CL cases (i.e. \$548,397.69) from the damages recovered by the AP in the CL claim.

4. When releasing a total sum of \$1,120,000 to the AP between November 1998 and January 1999, the case officer in LAD overlooked the need to retain sufficient funds to cover the total legal costs of both the EC case and CL case. Only \$130,000 (i.e. \$1,250,000 minus \$1,120,000) was retained for settling the legal costs¹. Since the total legal costs amounted to \$548,397.69, the Government instituted action to recover the shortfall of \$418,397.69 (i.e. \$548,397.69 minus \$130,000) from the AP.

Actions Taken

5. Upon discovery of the overpayment, LAD immediately referred the case to the Department of Justice (DoJ) on 28 January 1999 for recovery action. Despite repeated requests and demands, the AP did not repay the sum to LAD. On 23 February 1999, a Writ of Summons was issued against the AP. On 7 May 1999, DoJ obtained a judgment against the AP in the sum of \$418,397.69 with interest thereon at a rate of 12.86% per annum from 23 February 1999 to 7 May 1999 and thereafter at judgment rate² until payment. In September 1999, DoJ obtained a garnishee order³ with costs against the AP. However, only \$4,914.53 was recovered from the AP's bank account.

6. Since then, repeated attempts were made by DoJ to locate the AP but in vain. In view of the inability to bring the statutory demand (SD) on the AP in person⁴ as he was outside Hong Kong at all material times, i.e. the time within

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¹ According to established practice, when making the interim payment to an AP upon receipt of party and party costs, LAD will withhold the estimated common fund costs and a buffer for the purpose of potential taxation if the amount of common fund costs cannot be agreed. In this case, the estimated common fund costs and buffer were \$50,000 and \$80,000 respectively, and therefore LAD withheld the amount of \$130,000.

² According to section 49(1) of the High Court Ordinance (Cap. 4), judgment debts carry simple interest from the date of judgment until satisfaction (a) at such rate as the Court may order; or (b) in the absence of such order, at such rate as may be determined from time to time by the Chief Justice by order. The rate of interest on judgment debts fixed by the Chief Justice is the judgment rate. Please see Footnote 7 for the detailed calculation of the judgment rate for this case.

³ A garnishee order is a court order by which a third party (the garnishee, such as a bank) who holds money for a judgment debtor is directed to attach whole or part of the judgment debt to the judgment creditor, and the garnishee is ordered to pay the judgment creditor the amount of any debt due or accruing due to the judgment creditor.

⁴ This is a statutory requirement under the Bankruptcy Ordinance (Cap. 6). Before a bankruptcy petition can be presented to the Court, the debtor has to be personally served with the SD. Hence, attempts have been made to effect personal service of the SD on the AP.

which bankruptcy petition might be presented to the Court (from 7 May 1999 to 6 May 2011)⁵, DoJ advised that no bankruptcy petition could be presented against the AP in Hong Kong. According to the land search conducted by DoJ, the AP did not own any property in Hong Kong between January 1999 and December 2011.

Internal Investigation

7. LAD agreed that the overpayment involved negligence on the part of the case officer. However, no disciplinary or surcharge action had been taken against him before he retired from the service in December 2004. At the material time, LAD considered that at law, the debt being the amount to be recovered from AP remained recoverable prior to the expiry of the limitation period in May 2011. As the recovery action was still on-going then, the amount of loss had yet to be ascertained. As such, a conclusive view on the gravity of the incident and hence the appropriate type of administrative and/or disciplinary action to be taken against the case officer could not be formed.

Preventive and Improvement Measures Taken

8. To prevent the recurrence of similar incidents in future, LAD has taken the following preventive and improvement measures –

- (a) staff have been reminded of the appropriate work procedures through various channels –
 - (i) a Departmental Circular was issued to all professional officers in the Application and Processing Division (Headquarters) (A&PD) drawing their attention to DLA's First Charge provision (i.e. section 18A of the LAO). The circular is uploaded onto the departmental intranet for staff's reference and is re-circulated regularly;

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⁵ In accordance with section 4(4) of the Limitation Ordinance (Cap. 347), the limitation period for institution of a bankruptcy proceeding to enforce a judgment shall expire at the end of 12 years from the date of a judgement, i.e. from 7 May 1999 in this case.

- (ii) the Office Support Unit in A&PD, which has taken up the responsibility of finalisation of accounts of all cases handled at the Headquarters office including all EC and connected CL claims since June 2011, has been tasked to ensure that all final payments to APs following finalisation of accounts will take into account outstanding costs in connected EC claims⁶;
 - (iii) in-house talks on related subject matters such as DLA's First Charge and EC claims have been arranged since 2004 and staff have been reminded of the need to retain sufficient money from damages recovered in CL claims by APs to pay for costs incurred and not recovered from the opposite parties in related EC claims; and
 - (iv) check-lists of dos and don'ts have been produced and uploaded onto the departmental intranet for staff's reference. The check-lists are regularly updated to remind staff to take into account any costs outstanding in the connected EC file when calculating the amount of CL damages payable to APs. All staff (especially newcomers) are reminded frequently at internal meetings of the need to familiarise themselves with contents of the check-lists which are also re-circulated regularly;
- (b) a computerised Case Management and Case Accounting System (CMCAS) was implemented in late 2002 and further enhanced in August 2012 with the following safeguards against over-payments –
- (i) CMCAS can automatically prevent the case officer from releasing interim or final payments in excess of the amount of the DLA's First Charge computed in accordance with the provisions set out in the LAO and its subsidiary legislation;
 - (ii) in special cases where any payment which may result in inadequate balance to cover the DLA's First Charge is proposed to be made, it can only be done through an electronic submission made by the case handling officer who should normally be a Legal Aid Counsel or Senior Legal Aid Counsel which has secured approval by the division/section head at directorate level; and

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⁶ Under the relevant provisions of the Employees' Compensation Ordinance (Cap. 282) and the LAO, no deduction can be made from the EC except for the costs incurred in the EC claim itself. Hence, when finalising accounts and making payments to an aided person in the EC claim, it is not necessary to take into account the outstanding costs and disbursements incurred in the connected CL claim.

- (iii) when payments are made to APs out of damages recovered in cases where there are connected EC and CL claims, the system would automatically check if there are any outstanding costs and disbursements in the connected EC file that need to be taken into account in calculating the amount payable to APs and if so, will generate a prompting message to the case officer to prevent overpayment.

Write-off Proposal

9. Upon expiry of the time limitation for all enforcement actions including bankruptcy proceedings against the AP on 6 May 2011, there was nothing further the Government could do to recover the debt. The Government has exhausted all possible legal means to recover the debt but to no avail. The debt owed by the AP is irrecoverable and there is no other alternative but to write off the debt and interest of \$663,532.91.

10. For cases of write-off of losses of public moneys, stores, etc. involving fraud or negligence, the current limit of delegated authority specified by the Finance Committee (FC) of the Legislative Council (LegCo) is \$500,000 in each case, or in respect of any one cause. Since the current case involves negligence of an ex-LAD staff and the amount exceeds the above financial limit, the approval of the FC is required for the write-off.

FINANCIAL IMPLICATIONS

11. The total amount proposed to be written off is \$663,532.91, with breakdown as follows –

(a)	Judgment debt	\$413,483.16
(b)	Interest ⁷	\$250,049.75
	(from 23 February 1999 to 6 May 2005)	
Total:		<u>\$663,532.91</u>

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⁷ Interest rate from 23 February 1999 to 7 May 1999 was fixed by the Court in the Judgment dated 7 May 1999. From 8 May 1999 to 6 May 2005, judgment rates were adopted in the calculation of interest on the judgment debt. The interest is counted up to 6 May 2005 because according to section 4(4) of the Limitation Ordinance, no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

PUBLIC CONSULTATION

12. We consulted the LegCo Panel on Administration of Justice and Legal Services on the write-off proposal on 26 June 2017 and Members supported the submission of this proposal to the FC.

Home Affairs Bureau
Legal Aid Department
July 2017