

立法會
Legislative Council

LC Paper No. CB(2)2540/99-00
(These minutes have been seen
by the Administration and
cleared with the Chairman)

Ref : CB2/BC/2/99

Legislative Council
Bills Committee on District Court (Amendment) Bill 1999

Minutes of 7th meeting
held on Monday, 6 March 2000 at 2:30 pm
in Conference Room B of the Legislative Council Building

Members Present : Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Hon Ronald ARCULLI, JP
Hon Jasper TSANG Yok-sing, JP
Hon Mrs Miriam LAU Kin-ye, JP

Members Absent : Hon Ambrose LAU Hon-chuen, JP

Public Officers Attending : Ms Emma LAU
Deputy Judiciary Administrator

Ms Miranda CHIU
Deputy Director of Administration

Mr David LEUNG
Assistant Judiciary Administrator

Ms Rosanna LAW
Assistant Director of Administration

Mr J D SCOTT
Senior Assistant Law Draftsman

Ms Carmen CHU
Senior Government Counsel

Mr Ryan CHIU
Assistant Secretary (Administration)

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Mrs Eleanor CHOW
Senior Assistant Secretary (2)7

Action
Column

I. Confirmation of minutes of meeting on 21 December 1999
(LC Paper No. CB(2)1169/99-00 issued vide LC Paper No. CB(2)1170/99-00)

The minutes of the meeting held on 21 December 1999 were confirmed.

II. Matters arising

2. Referring to the six papers which the Administration had briefly explained at the last meeting, the Chairman asked whether members had any questions to raise.

New civil procedure on "standard discovery"
(LC Paper No. CB(2) 1214/99-00(01))

3. Members did not raise any queries on the paper.

Interim assessment and payment of costs
(LC Paper No. CB(2) 1214/99-00(02))

4. In response to Mr Albert HO, Deputy Judiciary Administrator (DJA) explained that under the existing rules of the High Court (HC) as applicable to the District court (DC), both the HC and the DC might order costs to be paid forthwith notwithstanding that the proceedings had not been concluded (Order 62 rule 4(1)). The court might also direct that, instead of taxed costs, the receiving party should be entitled to a gross sum so specified in lieu of taxation (Order 62 rule 9(4)(b)). However, in practice, the power under Order 62 rule 9(4)(b) was rarely invoked. The reason was that the procedure might become cumbersome and potentially might increase costs. As regards Order 62 rule 4(1), the court occasionally exercised the power to make a "costs to be taxed and paid forthwith" order. But separate taxation in the interim had been said to be a waste of judicial time and resources. In addition, the amount of costs involved might be so small to justify the process of a normal taxation. To address the concerns about the existing procedure, it was proposed that the court should have the power to order interim assessment and payment of costs forthwith without taxation. The proposal was also intended to be used to deter unmeritorious interlocutory applications.

5. Mr Albert HO expressed concern that the proposal could be a deterrent to the less resourceful party. He said that he would discuss the matter with members of the Democratic Party and reserve his position for the time being.

6. DJA said that as explained in paragraph 14 of the paper, the proposal would not act as a deterrent to the less resourceful party. On the contrary, it protected a less resourceful party. The less resourceful party faced with unwarranted interlocutory applications would be able to immediately recover at least part of his costs incurred for those applications. In addition, the court retained discretion as to not to order immediate assessment and payment of costs.

7. Mr Ronald ARCULLI sought clarification as to whether interim payment of costs would only apply to the applicant (Party A) but not the respondent (Party B), i.e., no question of interim payment of costs would arise if Party A won the application, but it could be ordered to pay interim of costs if its application was rejected. Mrs Miriam LAU and the Chairman held the view that Party A could ask for interim payment of costs from Party B, as Party A could allege that he was forced to make an interlocutory application against Party B because of the latter's negligence. The Chairman asked the Administration whether the court could order Party B to pay Party A in the circumstances.

8. DJA said that she could not comment on individual cases. She could only say that the court, having considered the application, would make a decision as to

Action
Column

whether or not to order interim payment of costs. She stressed that both the HC and DC already had the power to order interim payment of costs.

9. The Chairman said that she shared the concern of Mr HO. A resourceful party could make a number of interlocutory applications which could well be meritorious, for the purpose of exhausting the resources of a less resourceful party well before the trial. The court had to consider the application on merit and make a fair judgement, irrespective of the financial position of the applicant. While members appreciated that one of the objectives of the proposal was to deter frivolous and unmeritorious interlocutory applications, they had doubts as to whether the proposal could achieve the intended purpose. In fact, it could have the opposite result. Although both the HC and DC had the power to order interim payments of costs now, the proposal sought to simplify the existing procedure to make it easier for a resourceful party to use interlocutory applications to wear down a less resourceful party.

10. Mr Ronald ARCULLI asked whether the proposal, if introduced, would be of universal application irrespective of the parties involved. He expressed concern about the situation where the resources of the two parties could be grossly unbalanced, for instance, in the case of a judicial review where a person litigating against the government, and in matrimonial cases where the financial power of the spouses varied substantially.

Adm 11. DJA confirmed that the proposal would have universal application. On Mr ARCULL's question as to whether consideration had been given to limiting the rule to certain types of cases or parties, she agreed to revert to members. In further response to Mr ARCULLI, DJA said that UK had adopted similar arrangements. Adm She undertook to find out whether the same rule was adopted in other jurisdictions; and if so, how it worked.

Adm 12. Mrs Miriam LAU asked whether the proposed rules of the DC contained specific reference to frivolous and unmeritorious applications. DJA advised that the latest position was that the Civil Court User' Committee (CCUC) supported the proposal and the Administration was now drafting amendments to the rules of the HC to bring into effect the proposal. She undertook to provide members with the draft rules so that members would have a clearer picture of the actual effect of the proposal.

Jurisdiction on probate matters
(LC Paper NO. CB(2) 1214/99-00(03))

Action
Column

13. The Chairman said that the Administration considered that it was pre-mature to consider conferring on the DC the jurisdiction on probate actions at this stage. Having regard to the Bills Committee's concern that too many changes were introduced to the DC, the Chairman said that she was content to leave things as they were for the time being. She invited views from members.

14. Mr Albert HO said that he was not convinced by the reason set out in paragraph 6(a) of the paper. He did not think that probate action were particularly complex such that DC judges were not competent to handle it. However, he accepted the reason given in paragraph 6(b) that there were only a few probate actions each year and DC judges had yet to build up expertise to deal with complex cases. He agreed with the Administration's view that the position should be reviewed in the light of any changing circumstances.

15. The Chairman suggested and members agreed that the matter should be followed up by either the CCUC or the Panel on AJLS after the Amendment Ordinance had been in operation for a couple of years.

Letter from Munro, Claypole & Reeves (MCR)
(LC Paper No. CB(2) 1214/99-00(04))

16. Members did not raise any queries on the paper.

Adm 17. The Chairman requested and Deputy Director of Administration (DD of Adm) undertook to provide a copy of the Administration's reply to MCR to members for reference.

Manpower resources, waiting time and caseload of the HC
(LC Paper No. CB(2) 1214/99-00(05))

18. Members did not raise any queries on the paper.

Transfer of proceedings between courts
(LC Paper No. CB(2) 1242/99-00(03))

19. Members noted that the Administration would introduce CSAs similar to the existing section 38(3)(b) and 38(4) of the DC Ordinance and was re-considering the desirability of proposed section 39.

Action
Column

III. Clause by clause examination of the Bill

(LC Paper Nos. CB(2)420/99-00(02), 672/99-00(03), 1196/99-00 and 1242/99-00(04))

20. The Chairman said that proposed sections 42-44B had not been dealt with at a previous meeting pending the Administration's reply on transfer of proceedings between courts.

21. DJA said that if CSAs were to be proposed to facilitate the whole action to remain in the DC notwithstanding that the counterclaim exceeded the DC jurisdiction, the relevant sections in clause 22 would have to be suitably amended.

Clause 22 (section 44) – Transfer to the Court from the Court of First Instance of proceedings within the jurisdiction of the Court

22. Referring to proposed section 44(1) which stated that the Court of First Instance (CFI) might order the transfer of an action which "appears to the CFI likely to be within the jurisdiction of the DC", Mr Albert HO asked why the drafting was so tentative. He pointed out that problems might arise in the case where a litigant was claiming unliquidated damages and the court held a view different from the litigant as to the amount to be recovered in the action. Mrs Miriam LAU echoed the view and gave an example of how section 44(1) could cause problems in personal injuries cases.

Adm 23. The Chairman said that the DC was a court of limited jurisdiction. The CFI could not order the transfer of cases if the action was only "likely to be" within the jurisdiction of the DC. The Chairman requested and the Administration undertook to consider whether the word "likely" should be removed from proposed section 44(1).

Clause 23 (section 48) – General ancillary jurisdiction

24. The Chairman indicated that the Assistant Legal Adviser (ALA) should relate to member his observation on the provisions. ALA said that proposed section 48(3)-(5) was new. On proposed section 48(3), he alerted members that the meaning "as in the past" was not entirely clear. The Chairman said that "as in the past" could give rise to different interpretations. She asked the Administration to elucidate on the drafting intention.

25. Noting that the wording used in the Kempster Bill was "hitherto", Senior Assistant Law Draftsman (SALD) said that the law draftsman who drafted the Bill

Action
Column

must have considered the word outdated and therefore replaced it with “as in the past”. Members did not find the reply satisfactory.

26. Mr Albert HO asked the Administration why proposed section 48(2) only made reference to the rules of equity and the rules of the common law and disregarded the others such as customary law and statute. He said that the drafting of the existing section 48 was better and simpler and should be able to cover all the situations and powers that the DC was expected to enjoy.

27. The Chairman said that while the Kempster Bill provided the basis for this Bill, its drafting was never meant to be the final draft. Even if it did, it was drafted some years ago. She expected that the Administration in accepting the draft must have independently considered its content. The Chairman suggested and the Administration undertook to reconsider the need for proposed section 48(3)-(5).

Clause 23 (section 48B) - Contempt of Court

28. The Chairman advised that contempt of court was also dealt with in section 22 which covered committal for contempt. She asked for the purpose of the new section. DJA replied that the intention of the section was to set out more explicitly the power of the judge of the DC in this regard.

29. Referring to proposed section 48B(c) which set out that a judge of the DC had the power of a judge of the CFI to discipline or punish for breach of a duty imposed upon a solicitor by rules of court, members remarked that the judge appeared to have taken over the function of the Law Society of Hong Kong. The Chairman said that the drafting appeared to be in order given that proposed section 70 provided that a solicitor admitted to practise in the HC was an officer of the court.

Clause 23 (section 49) - Interest on claims for debt and damages

30. Referring to "the Court cannot award interest" in proposed section 49(5) and "the Court cannot take account of any interest" in proposed section 49(7), the Chairman pointed out that it was a very informal way to use the word "cannot" in the context of the two provisions. Members considered that "shall not" was the more appropriate term. The Administration undertook to consider members' suggestion.

31. On proposed section 49(5), Mr Albert HO queried what the provision intended to cover. Proposed section 49(5) stated that "The Court cannot award interest on a debt under this section for a period under which, for whatever reason, interest on the debt already runs".

Action
Column

32. The Chairman said that on the face of it, the proposed section meant that the court could not award interest on top of interest. Mr Albert HO asked that in the event that a person was indebted to a bank for a loan under a contractual rate of interest and the loan had later become a judgement debt, whether the rate of interest ordered by the court would prevail over the contractual rate of interest.

33. ALA responded that the proposed section was copied from section 48(4) of the HC Ordinance. He advised that proposed section 49 only dealt with interest on claims, while interest on judgements was covered in section 50. Mrs Miriam LAU was of the view that if a particular claim already carried a contractual interest, then by virtue of proposed section 49(5) the court should not levy another interest on claims.

34. Mr Albert HO sought clarification as to whether section 49 applied to the situation before a judgement was made. ALA said that the situation was not so straight forward because under proposed section 50(1)(b), if the court did order a specific rate of interest for the judgement debt, the interest might be applicable to the period both before and after the judgement, depending on the judgement order. However, the principle of proposed section 49(5) was clear in that the court should not award interest over interest. In further response to Mr HO, ALA said that proposed section 50(1) provided that the rate of interest might be ordered by the court or determined by the Chief Justice.

Adm 35. The Chairman requested the Administration to explain the operation of proposed section 49(5) by way of an example. DJA undertook to respond in writing.

Clause 24 (section 52) - Extension of jurisdiction to grant injunctions and to make declaration

36. ALA said that jurisdiction of the DC under proposed section 52(1)(c) was calculated with reference to both rateable value and annual value of the immovable property, which was different from proposed sections 35, 36 and 37(4). Members noted that the Administration had yet to explain why the jurisdictional limit in sections 35, 36 and 37(4) was proposed to be calculated with reference to rateable value only.

Clause 25 (section 52A) - Power of Court to impose charging order

37. Mrs Miriam LAU expressed concern on the operation of proposed section 52A (2) which stated that the court in deciding whether to make a charging order had

Action
Column

to consider, inter alia, "the personal circumstances of the debtor". She noted that the practice was copied from section 20(3) of the HC Ordinance. However, she was not aware of cases whereby the court specifically looked at the personal circumstances of a debtor in deciding whether or not to impose a charging order.

38. The Chairman said that judging from the wordings used in proposed section 52A(1) that "the Court *may* by order impose a charge for securing the payment" and proposed section 52A(2) that "*in deciding* whether to make a charging order", she would presume that the court had discretionary power to impose a charging order, and when it did, it had to take into account proposed section 52A(2)(a) and (b).

Adm 39. Mrs Miriam LAU said that since section 52A(2)(a) and (b) was new, she would like to know how it would affect applications for charging order in the DC. The Chairman said that given that the procedure was in practice in the HC for some time, the Administration should be able to explain the operation of proposed section 52A by way of an example.

Clause 25 (section 52B) - Injunction and receivers

40. Noting that the DC did not have jurisdiction over the winding up of companies, Mr Albert HO asked whether it had the power to appoint a receiver to take charge of a company under proposed section 52B.

41. The Chairman believed that the section was about a different kind of receivers, given that the DC did not have jurisdiction over winding up of companies. She said that ordering injunctions and appointing receivers were ancillary powers of a judge. Section 51 of the DC Ordinance which set out the ancillary powers of a judge was proposed to be repealed.

42. DJA said that section 51 of the DC Ordinance set out in general terms the ancillary powers of the DC judge. The Kempster Working Party had recommended that the power should be set out more explicitly. Proposed section 52B sought to achieve that effect and was modelled along section 21L of the HC Ordinance with appropriate adaptation.

43. Comparing the provisions in the Bill and the HC Ordinance, the Chairman said that the jurisdiction of the HC was wider than the DC in respect of granting injunctions and appointing receivers. The CFI may grant an injunction or appoint a receiver in all cases in which it considered just or convenient to do so. However, the same power of the DC was limited to any action or proceedings within the jurisdiction of the DC.

44. Members then discussed whether the power of the DC under proposed section 52B(1) was restricted by proposed section 52B(5). They were of the view that under section 52B(1), the DC was empowered to grant an injunction or appoint a receiver in any action that was within its jurisdiction. This section was not restricted by subsection (5) which merely referred to the court's power to appoint a receiver by way of equitable execution in relation to all legal estates and interest in land.

Clause 25 (section 52C) – Attachment of debts

45. ALA advised that the word “bank” in the existing section was replaced by “authorized institution” in proposed section 52C(1). The proposed section was similar to the provisions in section 21 of the HC Ordinance, although the term used was “authorized financial institution” which was defined to mean an authorized institution within the meaning of section 2 of the Banking Ordinance (Cap. 155).

46. In response to Mrs Miriam LAU, DJA said that “authorized institution” was also defined in the same way under clause 3 (section 2).

Clause 27 (section 53) – Review of orders made in the absence of parties

Adm 47. DJA said that section 53 was not in the Kempster Bill nor was it included in the HC Ordinance. The section was added to the Bill in the 1996 legislative exercise. The Administration intended to propose a CSA to repeal the new section. However, similar provisions on review of orders would be included in the new rules of the DC which were modelled on the existing rules of the HC.

Clause 27 (section 53A) – Costs

48. ALA said that the section was new. The DC had discretion to order costs but not against a person who was not a party to the relevant proceedings in the absence of express statutory provisions. In response to Mr Albert HO, ALA said that he was not aware of any other general provisions on costs in the Bill except proposed section 44B which, however, was related to costs in transferred cases, etc.

49. As to whether the existing rules of the HC on costs would be applicable to the DC, Assistant Judiciary Administrator (AJA) replied in the negative. He explained that the DC had its own rules on costs. These rules would be incorporated in the new set of DC rules being drafted.

Clause 30 (section 59A) – Production of documents to other courts, etc.

50. DJA explained that section 54 of the HC Ordinance was a general provision on rules of the HC. Section 54(2)(k) of the HC Ordinance specifically dealt with the provision of documents by the Registry to other courts or tribunals. New section 59A of the Bill followed the provisions in the Kempster Bill which was modelled on section 54(2)(k) of the HC Ordinance.

51. The Chairman said that while section 54 of the HC Ordinance provided a whole set of rules for the HC, new section 59A in the Bill was free standing. New section 59A(1) set out that “The Registry of the Court may produce a document filed with it, or in its custody to any court or tribunal (including an umpire or arbitrator) sitting elsewhere than at the Court”. It would mean that the Registry of the DC could provide documents even to an overseas jurisdiction, with or without the consent of anybody, provided the document was filed with the DC.

52. The Chairman further said that new section 59A of the Bill was distinctly different from section 54 of the HC Ordinance. The latter expressly provided that certain persons might make rules of court regulating and prescribing certain things. She asked the Administration to explain the purpose and ambit of new section 59A.

53. SALD said that the original intention of proposed section 59A was to cover all the courts and tribunals in Hong Kong. DJA responded that the law draftsman who drafted the Bill had apparently taken out several provisions from section 54 of the HC Ordinance and adapted it to the Bill as a standalone section. She undertook to look into the matter and see whether the drafting had reflected the original intention.

Clause 32 (section 63) – Appeal to Court of Appeal

54. DJA suggested and members agreed that proposed section 63 should be dealt with at a later stage, pending the Administration’s paper on appeal mechanism.

Others

55. Given that the Bill proposed substantial amendments to the DC Ordinance, Mr Albert HO expressed concern that some of the existing powers of the DC might be curtailed inadvertently. He asked whether all the powers of the court were exhaustively set out in the Bill.

56. The Chairman said that the table prepared by ALA (LC Paper No. CB(2)

Action
Column

672/99-00(03)) on new provisions added, provisions repealed with or without substitution and provisions amended, sought to highlight the effect of the proposed amendments in the Bill. In the course of examination of the Bill, ALA would supplement anything that was omitted from the table and the Administration would also be invited to make comments on the table. The Chairman added that the general ancillary jurisdiction of the DC was provided in proposed section 48 of the Bill.

IV. Date of next meeting

57. The next meeting would be held on 13 March 2000 at 10:45 am.

58. The meeting ended at 4:28 pm.

Legislative Council Secretariat
17 April 2000