

**Note for the Bills Committee on
District Court (Amendment) Bill 1999**

Interim Assessment and Payment of Costs

Purpose

The purpose of this note is to respond further to Members' views on the proposed introduction of interim assessments and payment of costs into the District Court.

Background

2. In considering the Administration's responses vide LC Paper No. CB(2) 1214/99-00(02) at the Bills Committee meeting on 6 March, Members raised the following questions/remarks:

- (a) Whether the proposed procedure could achieve its intended result, i.e. to discourage frivolous or vexatious interlocutory applications without acting as a deterrent to a less resourceful party; and
- (b) In considering introducing such procedure to the Rules of High Court (RHC):
 - (i) whether the same arrangement is adopted in other jurisdictions; and
 - (ii) whether consideration has been given to limiting the application of such procedure to certain types of cases or parties.

3. Members also requested the Administration to provide them with the latest draft amendment to the RHC on this subject.

Objective of the Proposal and its Application

4. There are three aspects to the existing proposal:-

- (a) Ordering costs to be paid forthwith in interlocutory proceedings;
- (b) Immediate payment of costs would be ordered without taxation; and

(c) Payment is interim, and is on account of the costs forthwith without taxation and the receiving party has to give credit for the sum so paid upon taxation.

(a) *Costs to be Paid Forthwith*

5. There are well-established principles and court practices of ordering costs to be paid forthwith in interlocutory proceedings.

6. In general¹, costs are in the discretion of the court, which has full power to determine by whom and to what extent they are to be paid. And the court has an absolute and unfettered discretion to award or not to award costs. This discretion must be exercised judicially; it must not be exercised arbitrarily but according to principles of the law²; merits of the case³; reason and justice⁴.

7. In considering how to exercise the discretion, the court will have regard to all the circumstances of each particular case⁵, including the conduct of the parties⁶.

8. When on an interlocutory application, the court intends that one party is to have the costs of that application irrespective of the outcome of the substantive action, the usual form of order is ‘costs in any event’, in which case taxation is deferred until the conclusion of the substantive action⁷.

9. It is not unusual for the successful party to ask to have its costs immediately⁸. The court will only order costs to be paid forthwith in exceptional circumstances⁹, e.g., where the application is frivolous or vexatious; where the application is improperly brought in order to create delay; or where the application is wholly without merit¹⁰. Proper administration of justice requires the court to deter such frivolous interlocutory applications by imposing immediate costs

¹ See generally Halsbury's Laws of England, Vol.37, para. 714 at pp.549-540.

² Leckhampton Quarries Co. Ltd. v. Ballinger & Cheltenham RDC (1905) 93 LT 93, CA.

³ Mullen v. LCC (1906) 51 Sol Jo 82.

⁴ Donald Campbell & Co. Ltd. v. Pollak [1927] AC 732, at p. 811, HL.

⁵ The Friedeberg (1885) 10 PD 112, CA.

⁶ Metropolitan Asylum District v. Hill (1880) 5 App Cas 582, HL.

⁷ Allied Collection Agencies Ltd. v. Wood and another [1981] 3 All ER 176 at p. 181; followed in Aktieselskabet Dansk Skibsfinansiering v. Wheelock Marden & Co. Ltd. & others [1994] 1 HKC 607.

⁸ Per Barnett J. in Aktieselskabet Dansk Skibsfinansiering v. Wheelock Marden & Co. Ltd. & others, supra, at p.611.

⁹ Allied Collection Agencies Ltd. v. Wood and another [1981] 3 All ER 176 at p.181.

¹⁰ Frogmore Estates plc v. Berger & others (1980) NLJ 1560 at p.1561.

orders.¹¹

10. Under the existing RHC as applicable to the District Court, both the High Court and District Court may order costs to be paid forthwith notwithstanding that the proceedings have not been concluded. [RHC Order 62 rule 4(1)].

11. The exercise of such discretion will not act as a deterrent to the less resourceful party. On the contrary, it may protect a less resourceful party. Under a scenario where the more resourceful party chooses to abuse and delay the process by lodging frivolous or vexatious interlocutory applications, the less resourceful party faced with such applications will be able to immediately recover at least part of his/her costs incurred for those applications and will be protected from the “wearing down” abuse. Under another scenario where a less resourceful party chooses to abuse the process by lodging frivolous and vexatious application, he/she should be subject to the same sanction if he/she behaves irresponsibly. It must be accepted that litigants, irrespective of their financial position, should behave responsibly and should not abuse the judicial process.

12. There may be concerns that the less resourceful party, particularly those litigants in person, may be disadvantaged by such procedure in case he/she fails in an interlocutory proceeding because of insufficient knowledge of law or procedures. This will not happen as the court will only exercise its discretion judicially and fairly, having regard to all circumstances of each particular case. Moreover, it should be pointed out that the order of immediate payment of costs by the court is appealable.

(b) Payment of costs without taxation

13. As explained under paras 3-5 of our previous note ref. LC(Paper) CB(2) 1214/99-00 (02), a judge or master seeking to make a gross sum order under Order 62 rule 9(4)(b) is in the position of having to carry out a mini-taxation at the time. The court, in exercising its power under Order 62 rule 4(1) by seeking to make a “costs to be taxed and paid forthwith” order, requires separate taxation in the interim. The result of the existing procedure could be further expense and delay.

¹¹ Ibid.

14. Under the proposed procedure, the party seeking the payment would be required to provide a skeleton bill only, but since the payment would be on an interim basis, it should be unnecessary to require the services of a law costs draftsman, and would hence avoid delays and reduce litigants costs.

15. In the case where a less resourceful party is seeking to recover part of his/her own costs if faced with frivolous or vexatious interlocutory applications, he/she would benefit more under the proposed procedure since he/she would not need to incur initially the costs of the law costs draftsman, which can come to a significant portion of the costs involved in the litigation, in taxation.

(c) Interim nature of payment

16. The interim nature of the arrangement whereby the receiving party has to give credits for the sum so paid up on final taxation should be regarded as an improvement over the existing procedure under Order 62 rule 9(4)(b). The proposed procedure would ensure that the receiving party would receive no more and no less than the taxed costs, in any event. This is fair to both parties, irrespective of their financial position.

17. In the light of paras 5 to 16, the Administration would like to reiterate the view that the proposed procedure will achieve its intended result without acting as a deterrent to a less resourceful party. Rather, it serves to better protect the less resourceful party if he/she is faced with frivolous or vexatious interlocutory applications.

Reference to Overseas Experience

18. When the proposal was deliberated by the Civil Court Users' Committee, useful references had been made to the UK experience. Reference had been made to the power to make an immediate assessment of costs in the UK as governed by the former RSC O.62 R7(4)¹², i.e. in awarding costs to any person, the court may

¹² Rules of Supreme Court were replaced by the Civil Procedure Rules in late 1999. See Rule 44.3 of the Civil Procedure Rules.

order that, instead of his taxed costs, that person shall be entitled to a proportion of those costs (not taxed cost) from or up to a stage of the proceedings so specified or to a gross sum so specified in lieu of those costs. The Civil Court Users' Committee also noted that the relevant commentary extracted from the Supreme Court Practice 1999 as follows:

“In appropriate cases the Patents Court will adopt a more vigorous approach to costs. In particular, it will be willing to consider application for immediate assessment by the judge who has just tried the case rather than remit the matter for taxation. Such an assessment may be done on the basis of the actual detail bills sent to clients. Without in any way limiting the court's discretion as to when it will exercise this power, it may in particular be exercised in a case where the delays caused by a taxation of costs may themselves give rise to injustice.”¹³

19. Having consulted judges and masters of the High Court, the Bar Association and the Law Society, the Civil Court Users' Committee recommended the current proposal to the High Court Rules Committee. While it is noted that the existing proposal is slightly different from the relevant UK rule in the sense that it allows the receiving party to give credit for the sum so paid up on final taxation, this minor difference should be regarded as an improvement over the relevant UK rule.

General vs Limited Application of the Procedure

20. In considering the proposal, the Civil Court Users' Committee took the view that this procedure should be intended for general application.

Draft Amendment to RHC

21. A copy of the latest draft amendment to RHC on “Interim Payment of Cost” is attached at the Annex for Members' information. The Civil Court Users' Committee expressed general agreement with this draft at its meeting on 26.2.2000.

¹³ See 104/030 commentary & 2B-158 commentary, The Supreme Court Practice 1999.

22. The draft amendment will be considered by the High Court Rules Committee shortly and will be introduced in LegCo for negative vetting in early April.

