

For discussion
on 28 November 2005

LegCo Panel on Administration of Justice and Legal Services

Recovery Agents

Background

The Administration is aware that a number of organizations have advertised services under a “no win, no charge” basis. They provide services to help clients handle their claims for accident compensation. According to the advertisement, the company’s business is to recover damages, usually arising from personal injuries cases, for a fee chargeable only when the company is successful in recovering damages.

2. The Law Society issued a circular in August 2000 requesting its members to report such incidents to the Law Society if they were aware of them.

3. A question was raised in the Legislative Council by the Hon Ms Margaret Ng on 12 June 2002 concerning this subject. The Administration replied that it was aware of the kind of services in question and that the Department of Justice would liaise with the Bar Association and the Law Society on the way forward. The Department of Justice has then requested the Bar Association, the Law Society and the Consumer Council to advise the Department of any further information on this subject which came to their attention. The Department has also advised them that if evidence of any criminal conduct was uncovered, it could be referred to the police.

4. Since then the Law Society has reported to the Department of Justice about a company which advertised the provision of accident compensation assistance. The matter was taken up by the Department of Justice and was referred to the police for investigation but subsequently no one was prosecuted.

5. In respect of some advertised services, action was taken by the Bar Association, the Law Society, the Consumer Council and the Department of Justice to find out how they operate.

6. The Administration is aware that the Law Society established a working party in July 2002 to investigate the activities of unqualified persons. This included what was then a relatively unknown category of recovery agents involved particularly in the field of personal injuries. A circular was issued to members of the Law Society advising them of the reservations held by the Law Society if solicitors were to accept instructions from recovery agents. These included the impairment of the solicitor's independence and the client's freedom of choice of solicitor under such arrangements as were believed to be made by recovery agents, and concern that victims of accidents were not receiving the full level of compensation because of the contractual obligation to pay over a percentage frequently as high as 25% to the recovery agents.

7. In November 2004, the Law Society established a second working party specifically to look at the activities of recovery agents in relation to personal injury claims. This was done because of an awareness of growth in the activities of recovery agents in personal injury claims and concerns at the social implications arising. Advice was obtained from leading counsel on the legality of a number of recovery agents' contracts with accident victims. The Law Society issued a further circular to its members dated 17 May 2005, advising them that the practice of recovery agents is a criminal offence in Hong Kong and lawyers risked committing professional misconduct if they worked on cases financed by recovery agents.

8. The Bar Association issued a report on recovery agents in May 2005. The report covers 3 main topics – (i) What are claims recovery agents? (ii) The legality of the operation of recovery agents and (iii) the legality and professional ethics issues of lawyers working with recovery agents.

Assessment by the Consumer Council

9. The Consumer Council published an article on accident compensation assistance in the November 2002 edition of "Choice"

magazine. It made some useful points for consumers to consider before using the services offered.

10. The Consumer Council commented that if this kind of service was widely accepted by the public, this might signify that the existing legal services market cannot meet the needs of the general public. It was noted that the major clientele of these agents are those neither eligible to apply for legal aid nor able to afford the high legal cost.

11. The Consumer Council considered that the Legal Aid Department should promote the Supplementary Legal Aid Scheme to the public as an alternative legal service for eligible applicants. The Consumer Council also considered that the needs of consumers for legal services should not be discouraged.

12. In June 2005, the Consumer Council advised the Department of Justice that it had received one complaint regarding this type of business and the matter was subsequently referred to the police for investigation. Apart from that complaint, the Consumer Council has not received any complaints from consumers to date. It will continue to keep an eye on developments. If it received any information about the subject, it will notify the Department of Justice, the police and the consumer public.

The Legal Position

13. A number of laws and rules of professional conduct are relevant to the legality of recovery agents.

- (1) Under the Legal Practitioners Ordinance (Cap 159), it is an offence for a person to practise as a barrister or notary public, or to act as a solicitor, if he or she is not qualified to do so. There are also offences in respect of unqualified persons who prepare certain documents relating to the commencement and conduct of proceedings, conveyancing and the administration of a deceased person's property.
- (2) At common law, it is both a civil wrong and a criminal offence to assist or encourage a party to litigation in circumstances that amount to "maintenance" or "champerty".

Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action. The maximum penalty for an indictable offence under section 101I of the Criminal Procedure Ordinance, (Chapter 221) is imprisonment for seven years and a fine.

- (3) Under the Legal Practitioners Ordinance and the Law Society's Guide to Professional Conduct, a solicitor may not act in contentious proceedings on the basis of a contingency fee arrangement i.e. on the basis that the solicitor will only receive payment if the case is successful. The Bar's Code of Conduct prohibits barristers from accepting any brief or instructions on a contingency fee basis.

14. In the U.K., the common law offences and torts of maintenance and champerty were abolished by section 13 of the Criminal Law Act 1967. According to section 14(2) of the Criminal Law Act 1967, the abolition of these forms of liability does not affect any rule of law as to cases in which a contract involving maintenance or champerty is to be treated as contrary to public policy or otherwise illegal.

15. Since no provision equivalent to section 13 of the Criminal Law Act 1967 has been enacted in Hong Kong, champerty and maintenance remain as common law offences in Hong Kong.

The Administration's Approach

16. The Department of Justice has studied the activities of recovery agents. It has also received information on them from the Law Society, Bar Association and the Consumer Council.

17. So far as publicity methods of recovery agents are concerned, we understand that they canvass for business at various places to which accident victims go to seek assistance. They also distribute leaflets and

advertise through the internet, newspapers and television. Recovery agents may also employ “claims consultants” to canvass for business. With regard to the fees payable to recovery agents if the claim is successful, we understand that these generally range from 20% to 25% of the compensation recovered.

18. The Administration’s approach to these activities falls into three categories.

(i) Public education

The first is public education of the possible risks involved in using the services of recovery agents, and of the availability of legal aid.

As part of its annual program of activities, the Legal Aid Department through its professional staff has been paying regular visits, and delivering talks, to NGOs promoting the availability of legal aid. It has also published an article in the LAD News, the target readers of which are the general public, explaining the advantages of undertaking litigation with the assistance of legal aid while drawing the public’s attention to the possible pitfalls of seeking help from recovering agents to pursue a claim in court.

The Social Welfare Department continues to advise all applicants for Traffic Accident Victims Assistance of their right to claim compensation against any party at fault, through a solicitor or the Legal Aid Department.

(ii) Prosecution

The Department of Justice will consider bringing a prosecution against a recovery agent if there is sufficient evidence that it has committed any offence. However, the Department of Justice does not investigate possible offences and only considers bringing a prosecution if evidence is referred to it by law enforcement agencies or others. The Department of Justice has advised the Law Society, Bar Association and Consumer Council that, if they discover any evidence of criminal conduct by recovery agents, this can be referred to the police. So far, there has been no case in which sufficient evidence of an offence by a recovery agent has been produced to the Department of Justice to warrant a

prosecution. The Administration is aware that the Consumer Council has received one such complaint in June 2005 and this case has been referred to the Police for investigation. It remains to be seen whether there is sufficient evidence to bring a prosecution in that case.

(iii) Possible legislation

The Department of Justice will also keep under consideration whether legislation should be introduced to regulate recovery agents.

So far, there is no evidence to show that recovery agents are causing a real problem in Hong Kong and so it is considered that there is insufficient justification for legislating on the subject. However the Administration will continue to monitor the situation. The Department of Justice has again requested the Consumer Council to keep the matter in view and to inform it of any new information about the subject.

Developments in the U.K.

19. Unlike the situation in Hong Kong where consumer complaints against recovery agents are scarce, claims management companies in the U.K. have giving rise to considerable concerns from both consumers and solicitors. Large scale recovery agents (also known as claims management companies or “claim farmers”) have emerged in the U.K. in recent years. In 2003 and 2004, a number of claims management companies collapsed.

20. At present, claims management companies in the U.K. may join the Claims Standards Council (previously known as the Claims Standards Federation) on a voluntary basis. However, only a small proportion of claims management companies have joined the Claims Standards Council.

21. In June 2004, a report was released by the Better Regulation Task Force on the compensation system in the U.K. and recommendations were made on a number of issues, including claims management companies.

22. In November 2004, in its response to that report, the U.K. Department for Constitutional Affairs proposed that the Claims Standards Council should work vigorously towards approval of its code of practice by the Office of Fair Trading (“OFT”). It was hoped that the code would raise the standards of claims management. The Law Society of England and Wales has also indicated that, if the OFT approves the code of practice, it would consider requiring solicitors to deal only with intermediaries who operate by that code.

23. In December 2004, the Final Report by Sir David Clementi on the Review of the Regulatory Framework for Legal Services in England and Wales was published and claims assessment and management were identified as one of the regulatory gaps. According to the Final Report, the advantages and disadvantages have to be weighed in deciding whether a certain service should be regulated. Any changes to the regulatory net to deal with such matters should be subject to careful cost-benefit analysis.

24. Following the publication of the Final Report by Sir David Clementi, the U.K. Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer announced on 21 March 2005 that a White Paper would be released later this year, followed by legislation to reform the market for legal services. The White Paper, known as “The Future of Legal Services - Putting Consumers First” was published on 17 October 2005. On 2 November 2005, the Compensation Bill (“the Bill”) was introduced in the UK House of Lords. The Bill provides a statutory framework for the regulation of claims management companies.

25. The Bill provides for the Secretary of State to designate a regulator who will be responsible for ensuring that claims management companies abide by clear rules and a code of practice. The regulatory responsibility will only be given to a body that is competent, has appropriate governance and other management arrangements in place and will provide benefits to consumers. If no suitable body can be appointed or established, the Secretary of State will regulate directly.

26. It is provided in the Bill that a person providing claims management services without the requisite authorisation by the regulator will be committing an offence and liable to a maximum of up to 2 years’ imprisonment. Those providing claims management services will be

required to give consumers clear advice about the validity of their claim, options for funding the costs and provide a complaint mechanism if things go wrong.

27. Details of the regulatory regime, such as the designation of the regulator by the Secretary of State and the functions of the regulator, will need to be set out in regulations to be made under the new legislation.

Conditional fees

28. The Law Reform Commission released its Consultation Paper on conditional fees in September 2005 and is now at the public consultation stage. The Administration considers that the outcome of the consultation on conditional fees may have a bearing on the policy regarding recovery agents.

Our Proposal

29. In view of the current developments in the U.K. and the on-going consultation regarding conditional fees, we propose to continue to monitor the situation in Hong Kong and in the U.K. before deciding the way forward.

Department of Justice
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