Information paper for meeting of
Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2007
on 18 March 2008

Proposed amendments to "wasted costs" provisions of Costs in Criminal Cases Ordinance (Cap. 492)

Administration's response to submission of Hong Kong Bar Association to Bills Committee

Relevant Bills Committee minutes

The minutes (dated 13 December 2007) of the meeting of the Bills Committee on the Statute Law (Miscellaneous Provisions) Bill 2007 held on 29 November 2007 state –

> "9. Members noted that the Administration was still studying the Hong Kong Bar Association's proposals in its submission on the proposed amendments in Part 7 of the Bill relating to the wasted costs in criminal proceedings, and was unable to revert to the Bills Committee at the moment.
>
> 10. The Chairman said that the next meeting would be scheduled after the response from the Administration was received. Members would be notified of the meeting date in due course."

2. The submission from the Bar was sent to the Bills Committee on 20 September 2007 for discussion at the meeting of the Bills Committee held on 24 September 2007. The minutes (dated 16 October 2007) of the 24 September meeting state –

"6. Members noted that the Hong Kong Bar Association (Bar Association) had provided a further submission on Part 7 of the Bill concerning the proposed amendments relating to wasted costs in criminal proceedings. The Administration advised that it would need time to study the proposals put forward by the Bar Association and would provide a written response later. Members agreed that discussion on Part 7 of the Bill would be held in abeyance pending a written response from the Administration. Members also agreed that –

(a) the Clerk should send a copy of The Bar Association's written submission to the Law Society of Hong Kong for reference and views, if any; and

(b) the Administration should seek the views of the Law Society of Hong Kong on The Bar Association's proposals, if necessary, and provide a consolidated response to the issues of concern raised by the two legal professional bodies."

Law Society's response to Bills Committee

3. In a letter dated 10 October 2007, the Law Society advised the Clerk to the Bills Committee –

"We would like to confirm that we are in support of the views of the Bar Association as set out in the submission paper [dated 20 September 2007]."

Bar's submission of 20 September 2007

4. In its submission, the Bar stated a "preferred position" and an

"alternative position". The Administration summarises and comments on the main aspects of the two positions below.

Bar's preferred position

(1) Withdraw Part 7

5. The Bar prefers that the proposed amendments in Part 7 of the Bill not proceed (submission, paras 5 and 6). It considers that equating criminal wasted costs with the regime for civil proceedings, similarly to the UK's Prosecution of Offenders Act 1985 (on which the proposed amendments are modelled), is inapt. It submits that, under the Bar's Code of Conduct [para. 146: "must endeavour to protect his client from being convicted"] "defence counsel has a very limited duty to the court and the public" compared with prosecuting counsel [para. 159: "to lay before the jury fairly and impartially the whole of the facts [of] the case for the prosecution and ... the law applicable to those facts"] and with counsel in civil proceedings [para. 135: "conduct cases in such manner as in his discretion he thinks will be most to the advantage of his client"].

Administration's comments on (1)

6. It appears that the Bar's Code of Conduct does not support a stark distinction between the duties of barristers in civil and criminal proceedings, particularly regarding the submission that "defence counsel has a very limited duty to the court and the public". The Code appears to impose duties that are mainly common to barristers whether acting in civil or criminal proceedings. For example –

> Code, para. 110: "A barrister has a duty to uphold the interests of his client without regard to his own interests or to any consequences to himself or to any other person."
>
> Code, para. 111: "A barrister has the same privilege as his client of

asserting and defending the client's rights by the statement of every fact and the use of every argument that is permitted by the principles and practice of the law."

Code, para 130: "A barrister must not knowingly deceive or mislead the court.";

Code, para. 133: "He must in every case use his best endeavours to avoid unnecessary expense and waste of the Court's time.";

Code, para. 135: "Subject to the provisions of this Code, a barrister should conduct cases in such manner as in his discretion he thinks will be most to the advantage of his client."

Code, para. 136: "In civil and, subject to the provisions of paragraph 154 [which provides: "Defence Counsel is not under any duty to draw matters of fact or law to the attention of the Court at the conclusion of the summing-up, but he may do so if he believes it would be to the advantage of his client."], in criminal cases, a barrister must ensure that the Court is informed of any relevant decision on a point of law or any legislative provision, of which he is aware and which he believes to be immediately in point, whether it be for or against his contention."; and

Code, para. 146: "A barrister [acting as defence counsel] must not provide or devise facts which will assist in advancing his client's case."

7. The duty under Code, para. 133 that a barrister "must in every case use his best endeavours to avoid unnecessary expense and waste of the Court's time" is directly relevant to the object of the proposed "wasted costs" amendments provided in

the Bill and is not qualified in respect of criminal proceedings by the Code.

(2) Rely on Bar's self-regulatory processes

8. The Bar notes that conduct which might attract sanction under the proposed amendments should be serious misconduct and almost inevitably would be a disciplinary offence. It submits that –

> Disciplinary action under the Bar's self-regulatory processes, inclusive of the power to order compensation, would be a more appropriate means of dealing with misconduct (submission, para. 7).
>
> The proposed amendments will create more problems than they will solve. For example, the barrister's right to be heard may conflict with the client's right to legal professional privilege. A convicted defendant is less likely to waive privilege if he can see an opportunity for appeal, placing counsel in a difficult ethical position where the concerns of the court may easily be answered by an exposition of instructions (submission, para. 8).
>
> There is a risk that the new power will become a disguised fine for disagreeable conduct (submission, para. 9).
>
> The "fearless advocacy" provision in the proposed new section 18(3) of the Costs in Criminal Cases Ordinance (Cap. 492) (clause 22 of the Bill) provides no real protection. A formal complaint to the Bar after the proceedings, inclusive of an indication by the court where the opposing party has been prejudiced as to costs, would enable the practitioner to answer for himself before his peers (submission, para. 10).

The present Ordinance already provides for cases of conduct which the Privy Council indicated in *Harley v McDonald* [2002] 2 AC 678 are apt for summary disposal by the court (submission, paras 11 and 12).

Administration's comments on (2)

9. The right of the court to protect itself, the parties and the public interest in the administration of justice from inappropriate conduct by barristers (or any other person) exists in parallel with the disciplinary processes of the Bar. In *Ridehalgh v Horsefield* [1994] Ch 205, at p.227, the Court of Appeal noted that the court's jurisdiction in wasted costs is founded on breach by practitioners, as officers of the court, of the duty to promote within their own sphere the cause of justice. *Ridehalgh v Horsefield*, at p.237, also acknowledged the risk that a client might not waive privilege and said that, "Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story."

10. Unfair or arbitrary decisions are a possibility regardless of the forum and may be subject to appeal whether they occur in a court or elsewhere. Cases such as *Harley v McDonald* and *Ridehalgh v Horsefield* specify constraints on judges in the exercise of the "wasted costs" jurisdiction. *Harley v McDonald* does not purport to be exhaustive of the cases of misconduct that are appropriate for summary disposal (it specifies, as examples, failures to appear, conduct leading to an otherwise avoidable procedural step, and prolongation of proceedings by repetition or extreme slowness in presentation) whereas the present Cap. 492 unsatisfactorily limits "wasted costs" to costs incurred only as a result of failure to appear or lateness. For comments relevant to the "fearless advocacy" provision, see paragraphs 15 and 17 below.

Bar's alternative position

11. The Bar considers that the amendments should be more limited than

those proposed by the Administration (submission, para. 13). The benchmark for assessing any practitioner should be serious failure to comply with the Bar's Code of Conduct or the Hong Kong Solicitor's Guide to Professional Conduct. This would be consistent with the breaches of duty apt for summary disposal by the court, referred to in *Harley v McDonald*, and the Administration's aim to deter extremely deficient work. It would also be consistent with the Bar's concern for standardisation (submission, para. 14).

12. The Bar suggests the following alternative wording –

> " "wasted costs" means any costs incurred by a party to the proceedings –
>
> (a) as a result of –
>
> (i) any serious[ly?] improper ~~or unreasonable~~ act or omission; or
>
> (ii) any undue delay or any other misconduct ~~or default~~ on the part of any representative or any employee of a representative; or
>
> (b) which, in the light of any such act or omission, delay, or misconduct ~~or default~~ occurring after they were incurred, the court considers it is unreasonable to expect that party to the proceedings to pay."

Administration's comments on alternative wording

13. It appears that the Bar's alternative wording should refer to "any seriously improper act or omission" with "seriously" qualifying "improper"; rather

than "any serious improper act or omission" where "serious" and "improper" both appear to qualify "act or omission".

14. The Administration considers that the suggested change of wording is unnecessary having regard to cases such as *Harley v McDonald* and *Ridehalgh v Horsefield* (references at paragraphs 8 and 9 above respectively). For example, *Ridehalgh v Horsefield*, at p.227, states that, "Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct the making of a wasted costs order does not."; and "While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross." *Ridehalgh*, at p. 236, also held that, "It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him."

15. That the substandard conduct must be plainly unjustifiable is implicitly emphasised by the express requirement in the proposed new section 18(3) of Cap. 492 for the court "to take into account the interest that there be fearless advocacy under the adversarial system of justice". In *Ridehalgh v Horsefield*, at p.233, the court considered that "improper, unreasonable and negligent" ("default" and "negligent" are similar in meaning) could not usefully be given self-contained meanings, since "[c]onduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable."

16. The addition of "serious[ly]" or the deletion of "unreasonable" and "default" would render the statute law Bill inconsistent with the Civil Justice (Miscellaneous Amendments) Bill 2007. Clauses 18 (High Court Ordinance) and 19 (District Court Ordinance) of the civil justice Bill respectively define "wasted costs" as –

"any costs incurred by a party as a result of –

(a) an improper or unreasonable act or omission; or

(b) any undue delay or other misconduct or default,

on the part of any legal representative, whether personally or through an employee or agent of the legal representative."

17. In LC Paper No. CB(2)27/07-08(06) (Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007: Response to Submissions to Bills Committee, September 2007), the Administration stated as follows (with emphasis in the original) –

"A useful body of case law exists that will assist the courts in dealing with wasted costs orders. As stated in the Final Report of the CJR, the cases have stressed that the wasted costs jurisdiction should only be invoked and orders made in *clear cases* (cf. paras. 560 and 561).

Further, in line with the amendments to the Costs in Criminal Cases Ordinance ("CCCO") (Cap. 492) in the Administration's Statute Law (Miscellaneous Provisions) Bill 2007, the proposed wasted costs provisions in the Bill have specifically provided that, "*the interest that there be fearless advocacy under the adversarial system of justice*" should be one of the circumstances which the court should consider when it determines whether or not to make a wasted costs order."

Private practitioners and public officers

18. Regarding the proposed new section 18(6) (presently part of section 18(3)) of Cap. 492 (submission, para. 16), the Bar considers that private practitioners should not be placed at personal risk of financial loss while the interests of Government practitioners who are equally culpable are safeguarded. The Bar suggests that section 18(6) should be deleted or should provide for wasted costs ordered against all counsel appearing on behalf of the Government or the legal aid fund to be borne by the general revenue.

Administration's comments on section 18(6)

19. In addressing a similar suggestion by the Bar in submissions on the civil justice reform Bill, the Administration responded to the Bills Committee (in the paper cited at paragraph 17 above) that it, "does not find it justified making available public funds to meet the costs of a legal representative who has successfully shown cause in defending a wasted costs order made on the court's own motion."

20. The subject matter of section 18(6) is separate from the scope of the definition of "wasted costs" in section 2 of Cap. 492. The purpose of the subsection is to provide a fund out of which the costs of the other party shall be paid. It is an avoidance of doubt provision, ensuring that the costs must be met from the general revenue. But that would be without prejudice to any steps that the Government takes to recover the sum involved.

Article on wasted costs jurisdiction

21. The Bar requested the Bills Committee to consider an article by Hugh Evans entitled "The Wasted Costs Jurisdiction" (2001) 64 MLR 51when deliberating on the proposed amendments (submission, para. 17). The article argues (headnote, at p. 51) that the wasted costs jurisdiction, despite the guidance laid down in *Ridehalgh v Horsefield,* is very costly proportionate to the amount recovered; judges can initiate a

wasted costs enquiry, which is unfair and even more disproportionately costly; is procedurally complex; is unpredictable regarding waiver of privilege; does not enable practitioners to make contribution claims against each other; and is mostly used against lawyers representing legally aided litigants from whom costs cannot be recovered.

Administration's comments on article

22. The Evans article considers the overall wasted costs jurisdiction as it has operated in the United Kingdom, whereas the scope of the Bill is mainly confined to extending the unduly limited definition of "wasted costs" under Cap. 492. The article is not evidence that similar problems have arisen – or could not be addressed by the courts were they to arise – in Hong Kong. Evans notes, at p. 52, that the courts are aware of the competing principles, as shown by the following quote from *Ridehalgh v Horsefield* , at p. 226 –

> "The argument we have heard discloses a tension between two important public interests. One is that lawyers should not be deterred from pursuing their clients' interests by fear of incurring a personal liability to their client's opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against a legally-aided or impoverished litigant; and that the remedy should not grow unchecked to become more damaging than the disease. The other public interest, recently and clearly affirmed by Act of Parliament, is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their opponents' lawyers."

Consultation of Judiciary Administrator

23. The Judiciary Administrator was requested to comment on the Bar's submissions regarding the proposed amendments to "wasted costs" under Cap. 492 and responded (19 December 2007) as follows –

> "The Judiciary has indicated its support to the proposed definition of "wasted costs" in the Bill. There is no change to this position. The other matters in the Bar's submission are matters for the Administration to consider. The Judiciary has no comment on them."

Legal Policy Division
Department of Justice
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