

CJRS 17/2008

**Subcommittee on Draft Subsidiary Legislation
Relating to the Civil Justice Reform**

Order 62 – Costs

Purpose

On behalf of the Judiciary, the Judiciary Administration presents this paper, which introduces the proposed amendments to Order 62 – Costs in the latest draft Rules of the High Court (Amendment) Rules 2008 (“Draft RHC”), in relation to –

- (a) entitlement to costs;
- (b) counsel’s fees;
- (c) procedure and documents for taxation;
- (d) provisional taxation;
- (e) costs of taxation;
- (f) measures to facilitate settlement and reduce delays in taxation proceedings; and
- (g) bases and scales of taxation.

2. It must be emphasised that where views on the law are expressed herein, such views are not to be taken as statements of law by the courts. Judicial determinations or statements of law may only be made in actual cases that come before the courts after hearing argument.

Entitlement to Costs

3. Currently, under O.62, r.3(2), when making a costs order in any proceedings, the court shall normally order the costs to follow the event.

4. Amendments are proposed to O.62, r.3(2) to exclude interlocutory proceedings from the above general rule. The new O.62, r.3(2A) provides that, for interlocutory proceedings, the court “*may, subject to this Order, order the costs to follow the event or make such other order as it sees fit*”. The proposed amendments seek to implement

Recommendation 122¹, so that (i) the principle of “costs to follow the event” is no longer the prescribed usual order for interlocutory proceedings, but just an option (other options would include, for example, summary assessment of costs as set out in **CJRS 15/2008**). Amendments are also proposed to O.62, r.5 to provide that the Court shall take into account the underlying objectives in O.1A, r.1 in exercising its discretion to award costs – O.62, rr.5(1)(aa) & 7(2)(aa).

Counsel’s Fees

5. At present, counsel’s fees are allowed in full on taxation, unless the taxing master is satisfied that the amount is excessive and unreasonable. Amendments are proposed to implement Recommendation 131² to provide that counsel’s fees are in the discretion of the taxing master – O.62, paragraph 2(5) of Part II of the First Schedule.

Procedure and Documents for Taxation

Present Procedure

6. The present procedure for commencing proceedings for taxation and the relevant documents required are set out in O.62, r.21 and Practice Direction 14.3. Pursuant to O.62, r.21, a party entitled to require any costs to be taxed (i.e. the receiving party) shall file in the court his bill of costs and shall obtain from the taxing master an appointment to tax. The appointment to tax and the bill of costs shall be served to every person entitled to be heard on taxation (including of course, the paying party). The party must also, when he files the bill of costs, deposit with the court an amount equivalent to the taxing fee which would be payable if the bill were to be allowed in full. If only a part of the amount of the bill is allowed on taxation, after deducting the appropriate taxing fee the

¹ The principle that the costs should normally “follow the event” should continue to apply to the costs of the action as a whole. However, in relation to interlocutory applications, that principle should be an option (which would often in practice be adopted) but should not be the prescribed “usual order”. Costs orders aimed at deterring unreasonable interlocutory conduct after commencement of the proceedings should be given at least equal prominence in practice, with the court being directed to have regard to the underlying objectives mentioned in relation to Proposal 1. These powers should not apply to pre-action conduct.

² Proposal 57 (for the abolition of a special rule governing taxation of counsel’s fees) should be adopted.

balance of the deposit will be repaid to the party. If the bill is withdrawn less than 7 days before the appointment for taxation, a fee (a proportion of the deposit) shall be payable.

7. Under Practice Direction 14.3, there will first be a call-over hearing scheduled for the taxation of a bill. Not less than 3 clear days before the call-over hearing, the paying party shall file and serve a list of objections to the receiving party's bill. Parties are expected to discuss and negotiate the bill and reduce the items in dispute as far as possible. With the assistance of parties as to the estimated time required for hearing the taxation, at the call-over hearing a date will be fixed for the substantive taxation hearing. If no settlement is reached between parties, the taxation will be conducted on that day.

Revised Procedure

8. To implement Recommendation 135³, a new O.62, r.13A is added to empower a taxing master to give directions as to, among other things, the form of a bill, the filing of papers and vouchers (i.e. the taxation bundle), the manner in which any objections to the bill may be raised, the steps to be taken at any stage of the taxation proceedings, for the purpose of (i) the just and expeditious disposal of the taxation and (ii) saving the costs of taxation.

9. The existing O.62, r.21 is repealed and replaced by a new rule 21, which provides that a receiving party may commence proceedings for taxation by filing in the court (i) a notice of commencement of taxation ("NOCT") and (ii) his bill of costs - O.62, r.21(1). Within 7 days after filing of these documents, the receiving party shall serve a copy of those on every person entitled to be heard on taxation (including of course, the paying party) - O.62, r.21(2). The receiving party shall, when he files the NOCT, pay to the court the prescribed taxing fee - O.62, r.21 (5). The party is not entitled to any refund of such fee except (i) if the bill is withdrawn within 7 days after application to set down under r.21A(1), or (ii) where the court otherwise directs - O.62, r.21D(3).

10. The new O.62, r.21A provides that, upon compliance with the directions given by the taxing master under O.62, r.13A, the receiving party may apply for setting down the taxation, and shall serve a copy of

³ Rules or practice directions, backed by flexible costs sanctions, should be introduced requiring the parties to a taxation to file documents in prescribed form, with bills of costs supported by and cross-referenced to taxation bundles and objections to items in such bills taken on clearly stated grounds.

the application on every person entitled to be heard on taxation within 7 days after such application. The taxing master may refuse to proceed if he is of the opinion that any of the directions has not been complied with.

Provisional Taxation

11. Amendments are proposed to empower Masters to do provisional taxation on paper without a hearing (Recommendation 134⁴).

12. At present, if the amount of the bill of costs does not exceed HK\$100,000, the taxing master may conduct a provisional taxation without a hearing and inform parties the amount provisionally taxed by notice – O.62, r.21(4). This is usually performed by a Chief Judicial Clerk by virtue of O.62, r.13. Any party who disagrees to that amount may apply for an appointment to tax the bill.

13. Amendments are proposed to empower a Chief Judicial Clerk to conduct a provisional taxation if the amount of the bill of costs does not exceed HK\$200,000 – O.62, r.13(1A).

14. The new O.62, r.21B introduces a new procedure to enable a taxing master to (i) conduct a provisional taxation without a hearing and (ii) make an order nisi as to the amount and costs he allows - O.62, r. 21B(1). The party who has applied for setting down shall serve a copy of the order nisi to other party or parties – O.62, r.21B(2). The order nisi becomes absolute 14 days after it is made unless a party applies within the 14-day period for a hearing - O.62, r.21B(3). Upon taxation, if the amount allowed does not materially exceed the amount allowed under the order nisi, the taxing master may order the party who applied for the hearing to pay the costs of the hearing - O.62, r.21B(5). The relevant considerations include (i) the amount by which the costs taxed at the hearing exceed the amount allowed in provisional taxation, and (ii) whether the exceeded amount is proportionate to the costs of the hearing - O.62, r.21B(6).

15. Where the taxing master is satisfied that there is good reason to do so, he may, either of his own volition or on application by a party, set down for hearing the taxation of the whole or part of the bill of costs - O.62, r.21C(1).

⁴ The court should have a general discretion to conduct provisional taxations on the papers, with any party dissatisfied with the award being entitled to require an oral taxation hearing, but subject to possible costs sanctions if he fails to do materially better at the hearing.

Costs of Taxation

16. The new O.62, rr.32A and 32C seek to implement Recommendation 136⁵. O.62, r.32A is modelled on rule 47.18 of the Civil Procedure Rules (“CPR”) in England and Wales. It provides that a party entitled to payment of any costs to be taxed is also entitled to his costs of the taxation, except where any ordinance, rules or practice direction provides otherwise or the Court orders otherwise. Whether or not the Court should make some other order is guided under O.62, r.32A(2).

17. O.62, r.32C is modelled on Part 44.14 of the CPR. It empowers the Court to disallow all or part of the costs being summarily assessed or taxed; or order the party at fault or his legal representative to pay costs that he has caused any other party to incur, if the party or his legal representative fails to comply with a rule, practice direction or an order of the court; or it appears to the court that the conduct of a party or his legal representative was unreasonable or improper.

Facilitating Settlement and Reducing Delays

Present Procedure

18. Under the existing O.62, r.22, if, within one month after an order of the court requiring the payment of any costs to be taxed (generally referred to as “the costs order”), the receiving party has not commenced the taxation proceedings and the amount of costs has not been agreed, upon application by the paying party the court may order the receiving party to commence the taxation proceedings within a specified period. If the receiving party still does not commence the taxation proceedings within the specified period and there is still no agreement, the costs order shall thereupon be wholly discharged. If the taxing master is satisfied that there has been undue delay in filing of the bill of costs or in the service of the notice of appointment to tax, he may make appropriate order as to the costs of taxation against the delaying party and may even disallow any item contained in the bill.

⁵ Rules conferring a broad discretion on the court in respect of the costs of a taxation and giving guidance as to the exercise of such discretion should be introduced along the lines of CPR 44.14 and CPR 47.18, suitably modified to fit local circumstances.

Revised Procedure

19. Under the new O.62, r.22(1)-(3), if, within 3 months after the costs order the receiving party has not served the NOCT and the amount of costs has not been agreed; or if he has not proceeded with the taxation after commencing it, the taxing master may (i) order him to commence taxation proceedings or proceed with the taxation within a specified period; and (ii) further order that he shall not be entitled to commence those taxation proceedings or proceed with the taxation unless he does so within the specified period. The extension of the period to commence taxation proceedings from 1 month to 3 months after the costs order would allow more time for the parties to negotiate for settlement.

20. Whether or not the taxing master has made an order as mentioned above, in case of undue delay in commencing or proceeding with the taxation, he may (i) order the delaying party to pay costs of the taxation, (ii) disallow any part of the costs to be taxed, and/or disallow interest or reduce the rate or period of which in relation to the taxed costs - O.62, r.22(5).

21. The new O.62, r.22(7) provides that a party is not entitled to commence taxation proceedings after the expiry of 2 years from the “completion date”, defined under O.62, r.22(9) to mean usually the date of the costs order. Currently, there is no limitation period for the taxation of civil bills (compare this to taxation of criminal bills, which is subject to a limitation period of 3 months from the date of the costs order, unless extended by the taxing authority: rules 6 and 9 of the Costs in Criminal Cases Rules, Cap. 492A). Whilst accepting that bills of costs in civil cases may be more complex, there is no justification for leaving taxation of a costs order outstanding indefinitely. The proposed limitation period of 2 years seeks to reduce delays in commencing taxation proceedings.

Bases and Scales for Taxation

22. The scales of costs for taxation are contained in the First and Second Schedules of O.62. Some rates (e.g. mechanical preparation of documents) are outdated and certain fixed costs are obsolete. Revisions are proposed to update these rates and fixed costs.