THE LAW SOCIETY OF HONG KONG 香港律師會

LAW SOCIETY'S COMMENTS

Pilot Scheme for Building Management Cases in the Lands Tribunal

1. **Objectives of the Pilot Scheme (Scheme)**
The Scheme seeks to achieve more efficient, expeditious and fair disposal of building management ("BM") cases by: (a) case management through adoption of automatic directions and checklists; and (b) the use of mediation.
We generally support these objectives.

A. Evaluation Report on Pilot Scheme for Building Management Cases in the Lands Tribunal ("the Report")

2. **Compliance with the Checklist Requirement.**
We note Paragraph 11 of the Report indicates in 2008 there were only two cases where solicitors filed checklists for the Applicants pursuant to the automatic direction to file the same within 14 days of the application to list for hearing. We speculate there maybe two reasons for such low compliance:

(a) Litigants are not fully aware of the "automatic" requirement, i.e. that the checklist should be filed without the need for specific direction; or

(b) Litigants did not follow the automatic directions which require evidence to be filed **at the same time** as the pleadings (i.e. Notice of Application and Notice of Opposition) as they maybe reluctant to provide an explanation for their failure to file such evidence unless the Tribunal specifically directs them to do so.

3. **Mediation**
The use of mediation is still at an embryonic stage hence more vigorous promotion, education and training by all stakeholders is required; more resources should be put into its promotion.

We note the Report is very positive about the Scheme's success, but suggest a deeper analysis of the statistics. The data should be viewed in relation to the Scheme as a whole i.e. the data should be reviewed against the total number of BM cases handled by the Tribunal on average every year:

3.1 From an average of 300 BM cases filed with the Tribunal in a year (see Footnote 1 of the Report), only 95 cases were referred to mediators (**about 32%** [i.e. 95/300]) (see paragraph 12 of the Report).

3.2 Mediation was completed in only 63 cases (**about 21%** [i.e. 63/300]) (see paragraph 13 of the Report).

3.3 After mediation, only 26 cases reached full or partial settlement (**about 9 %** [i.e. 26/300]) (see paragraph 13 of the Report).

3.4 Out of the 63 completed mediated cases, only 73 parties were surveyed (see paragraph 19 of the Report). Assuming one case has two parties (i.e. the Applicant and the Respondent), the representative rate of the surveyed respondents is **about 58%** [i.e. 73/(63x2)].

We therefore query the "high" percentage of satisfaction expressed by those surveyed and that such satisfaction may not in fact be as overwhelming as stated in the Report given the overall statistics indicate about 9% of all cases achieved full or partial settlement.

3.5 We note the significance of paragraph 22 of the Report which mentions 61% of the surveyed respondents were ready to pay a certain amount in fees for mediation (most not exceeding $1,000). However, it should be recognised by the Judiciary that mediation should not be promoted as a "cheap form of justice". All of the 63 completed mediated cases chose pro bono service provided under the Scheme. If parties to disputes expect pro bono mediation such a policy will inevitably cause problems as qualified mediators cannot be expected to continue to provide their services for free or at unrealistic rates.

4. Proposed Way Forward: Applicability to Litigants in person.

The Law Society expressed reservations on the appropriateness of applying the Scheme to litigants in person given the difficulties which they may have in understanding the procedures and thus their ability to comply with the automatic directions, and the filing of the checklist.

We therefore agree with the recommendation in paragraph 26 of the Report that these case management features should only be applicable to cases where all parties are legally represented.

5. Proposed Way Forward: Mediation.

The Law Society agrees that mediation should be explored by the legal representatives (but should not be mandatory). We also agree that where one of the parties applies or if the Lands Tribunal considers it **appropriate**, mediation should also be explored in unrepresented cases as well.

In this connection, we wish to re-iterate our observations that mediation may not be effective in all BM cases, particularly those involving: rights and obligations of owners in common, incorporated owners building manager and management committee under deeds of mutual covenants and/or the Building Management Ordinance, e.g. validity of

a resolution of an owner's meeting, or a meeting of the management committee, validity of appointment of a building manager, duty to repair, duty to contribute to management expenses and/or repair expenses, breach of deed of mutual covenants and negligence of manager etc..

These are matters which are usually not capable of being settled through mediation (e.g. the validity of the appointment of a management committee member or manager affects not only the interests of the parties in the litigation but all other owners of the estate, and depending on the facts of the individual dispute may not be one that can be resolved through mediation).

B. *Direction Issued by the President of the Lands Tribunal Pursuant to Section 10(5)(a) of the Lands Tribunal Ordinance (Cap. 17) – Pilot Scheme for Building Management Cases ("the Practice Direction")*

We have technical comments on the Practice Direction as follows:

6. Standard of Discovery of Documents.

The primary obligation (unless otherwise ordered) of the parties in High Court or District Court proceedings is to make discovery of "**relevant documents**". Section 10(1) of the amended Lands Tribunal Ordinance stipulates that the Tribunal may follow the practice and procedure of the Court of First Instance. However, for BM cases in the Lands Tribunal, the Practice Direction does not refer to the standard discovery of documents but all the proscribed Checklists (namely, A4, B4, A6, B6) refer to the filing and serving of "**supporting documents**" only.

It is unclear whether the intention is to change the standard of the first-stage of discovery from "*relevancy*" to "*only documents in support of the parties' own case*". If the latter is intended then a party will have to apply for specific discovery of documents which are relevant but not supportive of the other party's case (and hence do not require disclosure in the first place).

This direction should be clarified.

7. Expert Evidence.

The automatic directions set out in paragraph 14 of the Practice Direction requires parties to file "*evidence*" at the same time as the pleadings. "*Evidence*" is referred to as "*witness statements and documents*" in paragraph 5.

We query whether this includes "*expert's report(s)*"? C1 of the Checklist asks a party who intends to adduce expert evidence to explain why an expert's report has not been disclosed to the other side and when will it be ready for disclosure.

This direction should be clarified.

8. Protection of Privilege

We note the Judiciary's draft Practice Direction on ADR circulated in July 2008 was to

a large extent based on the directions issued by the President of the Lands Tribunal for the Pilot Scheme. However, that draft has been discarded and replaced by the new *Practice Direction 31 on Mediation.*

Paragraph 11 of the Practice Direction indicates that when deciding costs the Tribunal "*shall take into account all relevant circumstances, but not what happened during the actual process of the mediation or other alternative dispute resolution mechanism*"; it fails to make any reference on the protection of privilege. We therefore recommend the President's Direction address this issue by adapting the relevant provisions in the recently promulgated *Practice Direction 31* as follows:

"Parties to building management disputes are encouraged to make attempts to resolve their differences by an alternative dispute resolution mechanism, such as mediation, before or after they issue proceedings in the Tribunal. If there are means to resolve a dispute which could be less costly, more efficient and effective than by way of litigation, unreasonable failure to make a bona fide attempt in that regard on the part of either party ***(where this can be established by admissible evidence)*** *will be relevant conduct to be taken into account by the Tribunal in any decision on costs (see Wealthy Plus Ltd v Lai Man Ho [2001] 4 HKC 691 at p.710 F to I). ... ...*

In determining whether a party has acted unreasonably in refusing to proceed with mediation or other alternative dispute resolution mechanism, the Tribunal shall take into account all relevant circumstances, but not what happened during the actual process of the mediation or other alternative dispute mechanism ***and other materials which are protected by privilege in accordance with legal principles, including legal professional privilege and the privilege protecting without prejudice communications.***" (proposed amendments highlighted in bold)

9. Reference to Alternative Dispute Mechanism.

In order to avoid confusion, and in line with *Practice Direction 31*, we recommend the heading of paragraph 11 "*Alternative dispute resolution and mediation*" be amended to "*Mediation*".

10. Application for Stay for Mediation Purpose.

The Practice Direction makes no reference to this mechanism and so paragraphs 16 and 17 of *Practice Direction 31* should be included as appropriate.

The Law Society of Hong Kong
Civil Litigation Committee
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