LC Paper No. CB(2)1214/99-00(02)

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 to Members' views on the proposed introduction of interim assessment and payment of costs into the District Court.

Background

2. Members noted vide LC Paper No. CB930/99-00(02) entitled "New Procedural Framework for the District Court" that under the new District Court Rules, it has been proposed that the court will have the power to order interim payment of costs forthwith without taxation. Members sought the views of the Bar Association and the Law Society on the proposal, and considered the Administration's responses vide LC Paper No. (2) 1003/99-00(01). At the Bills Committee meeting on 1 February 2000, Members asked the Administration to consider introducing such proposal into the District Court after the introduction of the relevant rules into the High Court.

Existing Arrangements

3. Under the existing Rules of the High Court ("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 [Order 62 rule 4(1)]. The Court may also direct that, instead of taxed costs, the receiving party shall be entitled to a gross sum so specified in lieu of taxation [Order 62 rule 9(4)(b)].

4. The main purpose of the existing provisions is to discourage frivolous interlocutory applications and to reduce the associated problems, e.g. undue costs and delay. This is because under a normal situation where payment of costs is ordered at the end of the proceeding, one party could be disadvantaged by having to pay

his/her own solicitor heavy fees caused by unmeritorious interlocutory applications brought by the other party (though he/she could recover the costs at the end of the proceeding). By making the said powers available to the Court, the judge or master could order costs incurred/to be incurred by one party to be paid forthwith by the other party whose application is considered frivolous and unmeritorious.

5. However, in practice, the power under Order 62 rule 9(4)(b) is rarely invoked. There are good reasons for this. The main disadvantage of using the power under Order 62 rule 9(4)(b) is that a judge or master seeking to make a gross sum order, which is regarded as the final costs, is in the position of having to carry out a mini-taxation at the time. A party intending to apply for an order would have to be prepared with a draft bill which would have to be served on the paying party so that he is in a position to challenge it, or part of it. The procedure may become cumbersome and potentially may increase costs. The Court occasionally exercises its power under Order 62 rule 4(1) by seeking to make a "costs to be taxed and paid forthwith" order. But separate taxation in the interim has been said to be a waste of judicial time and resources. Sometimes, the amount of costs involved may be too small to justify the process of a normal taxation.

The Proposal

6. To address the concerns at para 5 above and enhance the effectiveness of the existing procedure, it has been proposed that the court should have the power to order interim assessment and payment of costs forthwith without taxation. The interim payment is on account of the costs pending taxation and the receiving party has to give credit for the sum so paid upon that taxation. The proposal is designed to achieve the intended benefits of discouraging frivolous interlocutory applications without the risk of conducting a mini-taxation and the associated problems, as a party intending to apply for such order should supply a short skeleton bill only. At the same time, the arrangement whereby the receiving party has to give credit for the sum so paid up on final taxation would ensure that the receiving party would receive no more and no less than the taxed costs in any event. It is also intended that the court will order to make such interim payment orders in appropriate cases, for example, where there having been unmeritorious interlocutory applications, or where there is clear evidence of abuse of process.

7. The great benefits of the proposal has been widely recognised. It is considered that immediate assessment and payment of costs will be effective in discouraging frivolous interlocutory applications. In this regard, Mr Ronny Tong, SC, Chairman of the Hong Kong Bar says:[1]

> "One of the things which struck us most when we reviewed the efficiency or otherwise of our legal process is the abundance of unnecessary interlocutory disputes being dragged out at the expense of judicial time and costs. Daily abuses of interlocutory procedure are not uncommon resulting in considerable delays to speedy resolution of disputes. One of the ways to prevent abuse of interlocutory procedure is to strengthen the court's power to sanction those who improperly seek to benefit from such abuses. We suggest that the most effective sanction is to impose orders for immediate payment of costs….[We] think the most pressing argument is that immediate taxation and payment of costs will shape litigants' behaviour in the right direction. It would increase the litigants' awareness to their need to behave responsibly and economically. Properly engineered, a change of the relevant rules and our practice in this regard will in the long run result in shorter proceedings and lower costs."

8. We also believe that by avoiding the need for a separate taxation in the interim, the proposed new power could be used effectively by the court to redress the balance between parties where one party might be disadvantaged by having to pay his own lawyer heavy fees caused by unnecessary interlocutory applications brought by the other. Interlocutory applications have been used or abused to 'wear down' an opponent: a party may have to spend substantial costs purely on procedural matters and as a result, his resources may be exhausted well before any determination of the merits. An interim cost order in lieu of taxation will be of particular benefit to a litigant who is less resourceful. He/she will be able to immediately recover at least part of his/her costs incurred for the application brought by the other party.

[1] Reform of the Civil Process in Hong Kong, Butterworths, at pp. 190 & 191.

9. Moreover, this proposal could help bring home to the parties the reality of the level of costs incurred. This would usually be ordered at a time when it would not be too late for parties to settle rather than run up large legal costs. This would certainly shape litigants' behaviour in the right direction.

10. The proposal and its benefits have been thoroughly considered and debated in the Civil Court Users' Committee since April 1998. Both the Bar Association and the Law Society supported the proposals with strong reasons. The High Court civil judges also warmly welcomed it. The Civil Court Users' Committee unanimously recommended in early 1999 that the RHC should be amended to give effect to the proposal.

Proposed Introduction to the High Court

11. Having considered the views of the Civil Court Users' Committee, the High Court Rules Committee, chaired by the Chief Justice, decided to amend the RHC to give effect to the proposal. Instruction has already been given to the Law Draftsman who has prepared a draft. The Civil Court Users' Committee continued to support the proposal and expressed general agreement with the draft at its meeting on 26.2.2000. Our plan is to submit the revised RHC to the Legislative Council for negative vetting by April 2000.

Proposed Introduction into the District Court

12. In order to achieve consistency and the same benefits as described above, it is proposed that similar provisions for immediate assessment and payment of costs should be introduced into the new District Court Rules.

13. In the context of examining the District Court (Amendment) Bills, some concerns have been expressed on the implementation of this proposal. These concerns could be summarized as follows:-

(a) Whether the proposal could be a deterrent to the less resourceful party, or whether the proposal could put unnecessary pressure on the parties and cause severe hardship, particularly to those without legal aid or financial resources, even before they reach trial;
(b) Whether the proposal would lead to problems particularly if a

non-legally aided plaintiff has to pay any difference back after a taxation; and

(c) Whether there is any need for the introduction of this proposal into the District Court as it is unlikely that many applications will be made to that court.

14. Our responses to these concerns are set out as follows:-

(a) As mentioned above, the proposal is intended to be used to deter unmeritorious interlocutory applications. The proposal would not act as a deterrent to the less resourceful party. On the contrary, it protects a less resourceful party. A less resourceful party faced with unwarranted interlocutory applications will be able to immediately recover at least part of his costs incurred for those applications. He/she will be protected from the 'wearing down' abuse. Further, it must be accepted that litigants, irrespective of their financial position, should behave 'responsibly and economically'. They should be subject to the same sanction if they behave irresponsibly. It follows that if a party, though less resourceful, chooses to so behave, he should be visited with an order of immediate assessment and payment of costs. It will obviously help to shape his litigation behaviour. However, if the applications are warranted, the court still retains discretion as to not to order immediate assessment and payment of costs;

(b) Having heard the interlocutory application itself, the court is in the best position to assess what is the proper amount of costs for that particular application. But before making an assessment, it will have to consider the skeleton bill, counsel's brief if applicable and parties submissions. The court will then make a careful assessment. The chance of over-assessing the costs should not be great. If, however, it does occur, it can be dealt with, say, by way of an appropriate order of setting-off against other costs or sums due to that party; and

(c) One of the main reasons for increasing the civil jurisdiction of the District Court must be to enable a greater number of litigants to benefit from the reduced costs incurred in that jurisdiction. Collateral to that will be a more expeditious processing of such disputes. Interlocutory applications should, therefore, be confined to those which are really necessary. Immediate assessment and payment of costs will help to eliminate

unwarranted interlocutory applications, reduce unnecessary costs and expedite the litigation process. It is thus entirely consistent with the spirit of the District Court being a ‘procedurally simpler forum for resolution of disputes’, and is necessary for the District Court as well as the High Court.

Way Forward

15. In the light of the above, the Administration is of the view that the introduction of immediate assessment and payment of costs will bring about great benefits to litigants in civil proceedings. The Administration intends to introduce the same arrangements to both the High Court and the District Court by mid-2000.