

Pre-Emptive Costs Order Application

This is a situation where a party in a civil proceedings may obtain an order in advance of the trial that his costs shall be paid out of a fund irrespective of the outcome of the trial.

Discretion as to costs

In general, the Court has very wide jurisdiction to make a costs order of all types, including a pre-emptive costs order. *Section 52A(1) of the High Court Ordinance, Cap.4* provides that :-

"Subject to the provisions of rules of court, the costs of and incidental to all proceedings in the Court of Appeal in its civil jurisdiction and in the Court of First Instance, including the administration of estates and trust, shall in the discretion of the Court and the Court shall have full power to determine by who and to what extent the costs are to be paid."

Discretion to be exercised judicially

Judicial discretion must, however, be exercised on fixed principles. That is according to rules of reason and justice, not according to private opinion.¹

Entitlement to costs

As between litigants, the general principle is costs follow the event. That is the loser will be ordered to pay the winner's costs and he will be left to bear his own costs.

This general principle is contained in *Order 62 Rule 3(2) of the Rules of High Court*, which provides that :-

"If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this order, order the costs to follow the event, except when it appears to the Court

¹ Hong Kong Civil Procedure 2009, vol 1, Note 62/6/6.

that in circumstances of the case some other order should be made as to the whole or part of the costs."

This is the general rule governing that a successful party will be awarded his costs unless there is evidence that he has conducted the litigation unreasonably. This basic rule is found on the result of the litigation which poses a major obstacle to an application for pre-emptive costs order, as it would not be easy for a Court to properly exercise its discretion on costs well in advance of the substantive decision.

Exceptions to the general rule

There are however circumstance where litigants, such as trustees, beneficiaries, personal representatives and mortgagees act in the capacity as such, are entitled to have their costs be paid out of a fund.

In *McDonald v Horn [1995] 1 All ER961*, the Court of Appeal confirmed the exceptions to the general rule. The fact of that case was that the plaintiffs were members of an occupational pension scheme who brought an action against their employers, the pension fund trustees and others, for breach of trust and abuse of fiduciary powers. The Court of Appeal held that the action was analogous to a derivative action by a minority shareholder on behalf of a company where the minority shareholder would be entitled to a pre-emptive costs order indemnifying him out of the assets. The Court of Appeal indicated that it had jurisdiction to make the pre-emptive costs order and the employees' residuary interest in the fund did not preclude the judge from making the order in the exercise of his discretion.²

Lord Justice Holemann in *McDonald v Horn* identified 4 types of exceptions :-

(1) *Costs of trustees and other fiduciaries*³

This is a well-established exception to the general rule. A trustee is entitled to his costs out of the fund on an indemnity basis, provided he has acted reasonably or for the interest of the fund.

² See Hoffmann LJ at 971f-972a in *McDonald v Horn* (1995) 1ALLER961.

³ See Order 62, r6(2) of the RHC.

This procedure was sanctioned by the Court of Appeal in ***Re Beddoe, Downes v Cottam [1893] 1 Ch 547***, where the trustee was required to make full disclosure of the strengths and weaknesses of his case.

(2) *Extension of special principle to beneficiaries*

The Court of Appeal in *McDonald v Horn* adopted the decision in ***Re Buckton, Buckton v Buckton [1907] 2 Ch 406*** where Kekewick J described that trust litigation could be divided into 3 categories :-

- (i) Proceedings brought by trustees to have the guidance of the Court as to the construction of the trust instrument or some question arising in the course of administration. In such cases, the costs of all parties are usually to be paid out of the fund.
- (ii) The application is made by someone other than the trustees, but raises the same kind of point as in the first category and would have justified an application by the trustees. The Courts have been willing in some circumstances to extend to beneficiaries performing the function as the trustees or are assisting them to do so.
- (iii) A beneficiary is making a hostile claim against the trustees or another beneficiary.⁴

The Court have been willing in the above circumstances extend the entitlement to costs in any event to other parties in trust litigation. However, before granting a pre-emptive application, the judge must be satisfied that the discretion of the trial judge on the costs issue should not be fettered.

(3) *Extension to derivative action*

⁴ This category is usually treated in the same way as ordinary common law litigation and costs usually follow the event.

In *Wallersteiner v Moir (No.2)*, the Court of Appeal held that a minority shareholder bringing a derivative action on behalf of a company could obtain the authority of the Court to sue as if he was a trustee suing on behalf of a fund and his costs position be indemnified out of the assets of the company thus not personally liable for the costs. The indemnity was analogous to the indemnity available to a trustee.

(4) Pension Funds

The principle in *Wallersteiner v Moir (No.2)* has also been extended to situation where an action by a member of a pension fund to compel trustees or others to account to the fund, they could seek their costs from the assets of the fund by taking out a Beddoe application for the sanction of the Court to bring the proceedings.

The relevant legal principles under Order 85

"An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action

Even if a person falling within one of the categories stated in McDonald v Horn, it is important that he comes before the court seeking indemnity must be able to meet the requirements set out in *Order 85 of the Rules of High Court* and to show the following :-

- (1) The full strengths and weakness of his case. If Counsel making the application is also conducting the action which the directions are sought, he can orally give his opinion on the merits. Otherwise, written opinion is preferred.
- (2) The likely order to be made at the end of the trial. It must appear that the judge at the trial could properly exercise his discretion **only** by ordering the applicant's costs be paid out of the trust estate. This imposes a very high threshold.
- (3) The justice of the application.

- (4) Any special circumstances. In *Chessels v British Telecommunications Plc (2002) WTLR 719*, Baddie J was of the view that the size of the fund cannot constitute a special circumstance in the Court's exercise of discretion.

Recent Development - the "Cause of Litigation Principle"

In *Kostic v Chaplin (2008) WTLR655*, the English Court confirmed that the costs of a contentious probate action were within the discretion of the Court. However, there were 2 long-established exceptions⁵ to the general rule that costs should follow the event, namely :-

- (1) that if the testator or the residuary beneficiaries had really been the cause of the litigation, a case was made out for the costs to come out of the estate; and
- (2) that if the circumstances led reasonably to an investigation of the matter, then the costs might be left to be borne by those who had incurred them.

The first exception mentioned above is now commonly known as the "*Cause of Litigation Principle*"⁶. In the highly unusual circumstances of the case, the deceased's strange behaviour and bizarre correspondence could properly be regarded as the primary cause of the issue between the claimant and potential beneficiary.

In *Kostic v Chaplin*, Henderson J found in favour of the Claimant after a trial in a contested probate action that the deceased's purported last 2 Wills should be set aside on the basis that he lacked testamentary capacity. The Claimant sought his costs against the Conservative Party Association ("**CPA**") which would have benefitted under the 2 Wills. CPA sought an order that its costs should be paid out of the estate. Henderson J said that before departing from the general rule that costs should follow the event, "*a positive case has to be made out*" and the 2 excepts are "*neither exhaustive nor rigidly prescriptive*" but are guidelines, not straitjackets and their application will depends on the facts of the particular case.

Henderson J discussed the meaning where one says that the testator has been "*really the cause of the litigation*". His Lordship found this to be a causal test and "*the touchstone*

⁵ Spiers v English [1907] P122.

⁶ Ning Kung v Wang Din Shin (No.2) (2006) 9HKCFAR800 at 808C.

should be whether it was the testator's own conduct which had led to his will being surrounded with confusion or uncertainty in law or fact".

The current trend as emanated from *Kostic v Chaplin* is that the Court has narrowed the circumstances in which "**Cause of litigation principle**" is held to be engaged. The English Court is increasingly alert to the dangers of encouraging litigation and discouraging settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful part.⁷ The Hong Kong Court is most likely to follow this approach.

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⁷ *Kostic v Chaplin* (2008) WTLR655, at paragraph 21.