

**For discussion
on 28 November 2011**

**Legislative Council Panel on
Administration of Justice and Legal Services**

**Supplementary Provision to Head 92 - Department of Justice
Subhead 234 - Court costs**

PURPOSE

This paper invites Members' views on the proposal to seek Finance Committee's approval for a supplementary provision of \$86.610 million to Head 92 - Department of Justice Subhead 234 - Court costs for meeting the expected higher-than-normal payment in court costs in 2011-12.

JUSTIFICATION

Payment of Court Costs

2. Court costs are sums payable for legal services. The general principle applied is that the costs follow the event. Court costs therefore arise in both prosecution and litigation cases. In the context of prosecution, the general rule is that an acquitted defendant is entitled to be compensated by the prosecution of his / her costs, and in case of an appeal, also the costs of the appeal. On the other hand, in case of conviction or dismissal of the defendant's appeal, save in exceptional circumstances (e.g. the defendant intentionally delaying the case or insisting on the prosecution to prove unimportant or undeniable facts), it is not the practice of the prosecution to seek costs from the defendant. This is because in a criminal case the defendant enjoys the constitutional right of presumption of innocence and the prosecution bears the burden of proving the offence. The prosecution policy, which has been consistently applied, is that a prosecution is only to be brought if there is a reasonable prospect of conviction. Whilst the majority of prosecutions

have resulted in convictions¹, there still remain a number of less successful prosecutions where the Government has to bear the costs of the defendants.

3. As for civil cases, the Government could either be the plaintiff or the defendant. The Secretary for Justice (SJ) usually acts on behalf of the government bureaux and/or departments in the commencement of proceedings. Likewise, when the bureaux and/or departments are sued in legal proceedings, SJ usually provides legal representation to defend their position. The general rule on costs is that the successful party is entitled to recover its costs from the unsuccessful party. However, in certain circumstances, the Court may depart from the general rule and in its discretion order each party to bear its own costs or that the successful party is entitled to recover only part of its costs from the unsuccessful party. In cases when the pursuit of a litigation (in particular in judicial review applications) is not for private gain but for clarification of the law and that the litigation is in furtherance of the interest of public as a whole, the court may not order the unsuccessful applicants to compensate the legal costs of Government. Further, Government may not be awarded costs on the disposal of judicial review applications at the leave stage even if leave is not granted. In respect of out-of-court settlements, the question of costs is a matter of negotiation between the parties.

4. In the context of both prosecution and litigation cases, the actual amount of costs payable is subject to negotiation between the parties, and only failing that would the bill be assessed (i.e. “taxed”) by the court. Any party to the taxation proceedings who is dissatisfied with the taxed amount may apply to the taxing master to review his decision. On review, the taxing master may vary the determination by increasing, decreasing or confirming the taxed amount. In civil cases, any party who is dissatisfied with the decision of the taxing master on review may further apply to a judge for an order to review the decision of the taxing master, and the review decision of the judge may be subject to further appeal. Hence, the time lag between a case going to court and the actual settlement process aside, the actual payment of court costs would be

¹ In 2010, there were 454, 1 421 and 12 594 persons prosecuted in the Court of First Instance, District Court and Magistrates’ Courts respectively. The conviction rates (including guilty plea) were 93.8%, 93.7% and 73.8% respectively, which were comparable to the rates in the previous two years. The conviction rates (including guilty plea) were 94.8%, 92.6% and 73.2% in 2008 and 91.7%, 92.3% and 74.7% in 2009.

contingent upon the progress of the relevant negotiation / assessment process mentioned above.

5. Subhead 234 Court Costs is for the payment of such court costs against the Government. A table showing the amount of court costs paid for the past five financial years² is at **Enclosure 1**. In cases where costs are awarded in favour of the Government, the costs concerned are paid to the General Revenue Account.

Court Costs Requirement for 2011-12

6. The expenditure for court costs awarded against the Government is contingent upon a number of factors, for example the outcome of the trials and appeals, merits of the case, the orders made by the courts, the progress and result of the relevant cost negotiations, etc. The level of payment therefore varies from year to year.

7. Draft annual estimates for court costs are worked out on the basis of the prevailing and available knowledge of the progress of the cases at the time of preparing the estimates. The historical spending pattern also provides a reference. However, due to the variables mentioned in paragraph 6 above, there may be considerable deviation between the draft estimates and actual expenditure in particular years.

8. In preparing the draft estimates for 2011-12, we allocated an amount of \$89.449 million for court costs payment under Subhead 234. However, as a result of the unanticipated court costs requirements for some mega cases which were not known at the time of preparing the draft estimates and the deferment of some payments from 2010-11 to 2011-12 as a result of protracted negotiation process, by 30 September 2011, the expenditure on court costs accrued already amounted to \$82.912 million (or 93% of the total allocation for court costs for 2011-12)

9. It is currently estimated that the total expenditure on court costs for 2011-12 will amount to \$186.059 million. As the remaining sum under Subhead 234 is clearly not sufficient to meet the likely court costs payment required for the remainder of 2011-12, and the Government is under legal obligation to make timely payment for court costs, supplementary provision needs to be sought.

² Including payments arising from court cases and arbitration cases.

10. Details of the major cases contributing to the actual expenditure up to 31 October 2011 and anticipated expenditure in the remainder of 2011-12 are set out in **Enclosure 2**.³

FINANCIAL IMPLICATIONS

11. The latest estimates of Subhead 234 (up to 31 October 2011) are as follows –

	\$ million
Approved provision	89.449
Viaient from Subhead 000 ⁴	10.000
<i>less</i>	
Actual expenditure up to 31 October 2011	(89.997)
Estimated expenditure up to 31 March 2012	(96.062)
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Estimated shortfall (i.e. supplementary provision requested)	(86.610)

ADVICE SOUGHT

12. Members are invited to comment on the proposal. Subject to Members' support, we will seek the approval of the Finance Committee at its meeting on 16 December 2011 of our proposal to provide a supplementary provision of \$86.610 million to meet the estimated shortfall for court costs set out above, and the revised provision of \$186.059 million will be reflected in the 2011-12 revised estimates.

Department of Justice
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³ The actual amount of court costs is subject to negotiation between the parties and disclosure is inappropriate. Hence, we can only provide the aggregate amount for the court costs paid and court costs claimed / estimated to be claimed in respect of the cases concerned.

⁴ To cope with the unanticipated hike in court costs requirements, the Department arranged a supplementary provision of \$10 million to Subhead 234 Court Costs by offsetting an equivalent amount from Subhead 000 Operating Expenses under delegated authority.

Enclosure 1

Subhead 234 Court costs
Amount of Court Costs Paid for 2006-07 to 2011-12
(up to 31.10.2011)

Financial year	Number of cases	Amount paid (\$'000)
2006-07		
Civil cases	130	31,865
Criminal cases	228	34,152
Total for 2006-07	358	66,017
2007-08		
Civil cases	139	51,704
Criminal cases	257	29,867
Total for 2007-08	396	81,571
2008-09		
Civil cases	125	43,722
Criminal cases	406	54,160
Total for 2008-09	531	97,882
2009-10		
Civil cases	119	56,751
Criminal cases	402	49,610
Total for 2009-10	521	106,361
2010-11		
Civil cases	120	25,089
Criminal cases	388	64,250
Total for 2010-11	508	89,339
2011-12 (up to 31.10.2011)		
Civil cases	87	22,116
Criminal cases	201	67,881
Total for 2011-12 (up to 31.10.2011)	288	89,997

Details of Expenditure in respect of Major Cases in 2011-12

I. Actual Expenditure from 1.4.2011 to 31.10.2011

<u>Brief description of cases</u>	<u>Amount</u> <u>(\$'000)</u>
Civil	
<p>(1) FACV 8/2009 (on appeal from CACV 176 and 177/2007) Penny's Bay Investment Company Limited v Director of Lands</p> <p>This case involves an application by Penny's Bay to the Lands Tribunal for determination of compensation under the Foreshore and Seabed (Reclamations) Ordinance (Cap.127). The Lands Tribunal ruled in Government's favour at the preliminary hearing. Penny's Bay then appealed to the Court of Appeal (CA) which allowed its appeal. The Government subsequently appealed to the Court of Final Appeal (CFA). The CFA allowed the Government's appeal and ordered that the case be remitted to the Lands Tribunal for determination of compensation payable to the Penny's Bay, while the costs in the CFA and below would be dealt with by written submissions to be filed by the parties. On the basis of submissions filed by the parties, the CFA ordered that the Government should pay Penny Bay's costs of the appeals before the CFA and the CA.</p>	13,754 (total amount paid for items (1) to (4))
<p># (2) HCAL 82/2009 Fortune Key Limited v Appeal Tribunal (Buildings) & Building Authority (Interested Party)</p> <p>This involves a Judicial Review against the decision of Appeal Tribunal (Buildings) (the Tribunal) in dismissing a building appeal against the Building Authority's earlier decision in rejecting a set of General Building Plans. The Court of First Instance allowed the judicial review with costs to be borne by the Interested Party, and remitted the plans to the Tribunal for reconsideration.</p>	
<p># denotes case where payment was deferred from 2010-11 to 2011-12</p> <p>* denotes unexpected court costs when the 2011-12 Draft Estimates were prepared</p>	

<u>Brief description of cases</u>	<u>Amount</u> (\$'000)
<p>* (3) HCAL 2/2007, CACV 299/2007, FAMV 78/2008 & FACV 2/2009 China Field Ltd. v Appeal Tribunal (Buildings) & Building Authority (Interested Party) This is a judicial review case brought about by China Field Limited against an adverse ruling of the Appeal Tribunal (Buildings) in relation to a proposed redevelopment in Wang Fung Terrace. The Building Authority was the Interested Party to the proceedings. The Court of Final Appeal ruled in favour of China Field Limited with costs to be borne by the Interested Party.</p>	
<p>(4) 1 arbitration case with payment at / above \$1 million (As Government is bound by the conditions of contract and the arbitration rules to keep the information relating to arbitration confidential, the information relating to the arbitration case has not been set out.)</p>	
<p>(5) 83 cases with payment under \$1 million each</p>	
<p>Sub-total for civil cases : 87 cases</p>	<p>22,116</p>
<p>Criminal</p>	
<p>(6) FACC 5/2009 (on appeal from CACC 248/2006) HKSAR v Lam Ping Cheung (also known as Andrew Lam) The defendant, a practising solicitor, was charged jointly with others for conspiracy to pervert the course of public justice and conspiracy to disclose information about the identity of a participant in the witness protection programme. He was convicted of the first charge after trial. The conviction was upheld by the Court of Appeal. His appeal was allowed by the Court of Final Appeal with costs awarded.</p>	<p>46,746 (total amount paid for items (6) to (17))</p>

Brief description of cases

Amount
(**\$'000**)

- * (7) **FACC 6-8, 10-12/2010 & CACC 302/2008 (on appeal from DCCC 980/2006)**
HKSAR v Habiullah Abdul Rahman (D2), Ng See Wai, Rowena (D3), Lam Chi Chu, Fiona (D4), Fan Cho Man (D5), Lai Sau Cheong, Simon (D6), Koo Hoi Yan, Donald (D7)
This case relates to the land and bank loan transactions involving the then publicly listed company “Shanghai Land Holdings Limited”. The defendants were variously charged with conspiracy to defraud and false statement by company directors. On appeal to the Court of Appeal and then to the Court of Final Appeal, all of their convictions were quashed with costs of trial and/or all or part of costs of appeal awarded. [only partial settlement reached]
- # (8) **FACC 2/2009 (on appeal from CACC 414/2005)**
HKSAR v Nancy Ann Kissel
The defendant was charged with and convicted of murdering her husband after trial. Her appeal against conviction was dismissed by Court of Appeal but was allowed by the Court of Final Appeal and a retrial was ordered. The Court of Final Appeal also awarded half of the defence costs in the trial, one third of costs in the Court of Appeal and all costs in the Court of Final Appeal to the defendant in respect of the original trial. [payment in 2011-12 was the remaining costs]
- * (9) **HCMA 449/2008, FAMC 38/2010 and FACC 4/2010 (on appeal from FLCC 886 of 2007)**
HKSAR v Chan Wai-yip and 16 others
The defendants were alleged to have entered into an agreement not to compete at the auction of cooked food stalls at Tai Po Hui Market. They were charged with and were convicted of one count of “conspiracy to defraud”. The Appeal was allowed at the Court of Appeal. Prosecution took the matter further to the Court of Final Appeal which dismissed the appeal of the Prosecution and awarded costs to the defendants.
- * (10) **DCCC 526/2010**
HKSAR v Cheung Kwai Kwai
This is a case involving the sale of Lehman Brothers investment funds. The defendant was charged with nine offences of fraudulently or recklessly inducing others to invest money. She was acquitted after trial with costs awarded.

Brief description of cases

Amount
(\$'000)

- * (11) **DCCC 687/2004**
HKSAR v Yu Chi-wai (D3), Ho Shek-on, Simon (D4), Yan Kin-ming (D5) and Wong Tin-sum (D6)
The case involved corrupt dealings between a public servant in the Housing Department and the directors/proprietors of a number of companies who were approved suppliers to sub-contractor for the projects of the Housing Authority. The defendants were charged with two counts of conspiracy to falsify account.

D3 was convicted and he appealed to the Court of Appeal. His appeal was allowed and conviction was quashed. After considering the case, prosecution subsequently offered no evidence on all charges against the other defendants. The Court ordered the hearing on costs be adjourned indefinitely but the parties could always apply to restore the hearing on costs.

The amount paid is the amount agreed by the parties.
- (12) **FACC 3/2009 (on appeal from CACC 248/2006)**
HKSAR v Kevin Barry Egan
The defendant, a practising barrister, was charged with conspiracy to pervert the course of public justice and conspiracy (and alternatively, attempting) to disclose information about the identity of a participant in the witness protection programme. He was convicted of the alternative charges after trial. His appeal was subsequently allowed by the Court of Appeal. Prosecution appealed to the Court of Final Appeal but the appeal was unsuccessful with costs awarded to the defendant.
- * (13) **HCCC 120 / 2010**
HKSAR v Yeung Man-ting
The defendant was jointly charged with murder with others. Others were also charged with conspiracy to wound and assisting the offender. The defendant was acquitted after trial with costs awarded to him.

<u>Brief description of cases</u>	<u>Amount</u> (\$'000)
<p>* (14) CACC 236/2009 and CAAR 8/2009 (on appeal from DCCC 1159/2008) HKSAR v Chan Kong-on (A1), Yung Yat-hin (A2) and Lau Man-kin (A3) The three defendants were convicted after trial of the offence of conspiracy to defraud. The Prosecution's case was that they had dishonestly and falsely represented to the victim to invest in a high yield investment scheme in the amount of US\$500,000. The appeal by the three defendants was allowed and convictions were quashed. Costs of the appeal and trial were awarded.</p>	
<p>(15) FAMC 43/2010 (on application for leave to appeal from CACC 424/2008) HKSAR v Wong Hung Ki (R1) and Yu Chi-wai (R2) The defendants R1 and R2 were charged with and convicted of two counts of "conspiracy to offer an advantage to public servants" and two counts of "conspiracy to falsify accounts". The Court of Appeal allowed the appeal and ordered a permanent stay of the proceedings. Prosecution applied to the Appeal Committee of the Court of Final Appeal for leave to appeal. The application for leave was refused and the Appeal Committee awarded costs to the defendants.</p>	
<p>(16) HCCC 155/2009 HKSAR v Murase Tsukasa The defendant was charged with one count of rape. The defendant was acquitted after trial with costs awarded.</p>	
<p>(17) HCCC 217/2009 HKSAR v Mok Ka Leong Mok was charged with one count of indecent assault and one count of attempted rape. He was found not guilty on both charges with costs awarded.</p>	
<p>(18) 189 cases with payment under \$1 million each</p>	
<p>Sub-total for criminal cases: 201 cases</p>	
<p>Total for civil and criminal cases: 288 cases</p>	

21,135

67,881

89,997

**II. Estimated Expenditure for the remaining part of 2011-12
(from 1.11.2011 to 31.3.2012)**

<u>Brief description of cases</u>	<u>Amount (\$'000)</u>
Civil	
<p>(19) CACV 32/1999 To Kan Chi, To Fuk Tim & To Kam Chau as Managers of the To Ka Yi Tso & Others v SJ & Others This involves an appeal by the Secretary for Justice to the Court of Appeal against the Court of First Instance's decision on the non-charitable status of the "Tsing Wan Kun" temple. Appeal was dismissed with costs.</p>	113,532 (total amount claimed / estimated to be claimed for items (19) to (24))
<p>* (20) CACV 50/2010 Dr Tan Ronald Francis v The Medical Council This is an appeal against Medical Council's decision in finding the Appellant guilty of professional misconduct. The appeal was allowed by the Court of Appeal with costs to the Appellant.</p>	
<p>* (21) FACV 12/2010, CACV 27/2010, CACV 27/2010 (AFA), LDRA 358/2004, 464/2005, 46/2006 & 99/2007, LDGA 224/2004, 166/2005, 179/2006 & 106/2007 The Hong Kong Electric Co Ltd (HEC) v Commissioner of Rating and Valuation (CRV) This concerns an appeal by HEC to the Court of Final Appeal (CFA) against the Court of Appeal (CA)'s judgment. The CFA allowed HEC's appeal with costs, set aside the CA's judgment, and restored the Lands Tribunal's judgment in favour of the rating and Government rent appeals by HEC against CRV's assessments for rates and Government rent for "HEC's Electricity Generation, Transmission and Distribution System/Tenement" for the test year of assessment of 2004-05.</p>	
<p>* (22) MIS 728/2007 (HCIA 8/2007) Nice Cheer Investment Ltd v Commissioner of Inland Revenue This is a tax appeal lodged by Nice Cheer Investment Ltd (Taxpayer) who challenged the Commissioner of Inland Revenue's tax assessment in which unrealised gains arising from revaluation of unsold listed securities held at year end and charged to the Taxpayer's profits and loss accounts were treated as taxable. The Court of First Instance allowed the appeal with costs to the Taxpayer.</p>	

<u>Brief description of cases</u>	<u>Amount</u> <u>(\$'000)</u>
<p>* (23) HCIA 3/2010 & HCMP 541/2011 Li & Fung (Trading) Limited v Commissioner of Inland Revenue By HCIA 3/2010, the Commissioner appealed to the Court of First Instance by way of case stated against the decision of the Board of Review (Inland Revenue Ordinance) which ruled against the Commissioner on the issue of source of profit. Before the appeal hearing, the Commissioner applied to amend the case stated and the application was refused by the hearing judge. By HCMP 541/2011, the Commissioner appealed to the Court of Appeal against the hearing judge's decision but the appeal was dismissed. The Commissioner's appeal in HCIA 3/2010 was also dismissed after hearing. The Commissioner was ordered to pay costs both in HCIA 3/2010 and HCMP 541/2011.</p>	
<p>(24) 2 arbitration cases with payment at / above \$1 million (As Government is bound by the conditions of contract and the arbitration rules to keep the information relating to arbitration confidential, the information relating to the arbitration cases has not been set out.)</p>	
<p>(25) 42 cases with amount claimed / estimated to be claimed under \$1 million each</p>	
<p>Sub-total for civil cases : 49 cases</p>	13,456 (claimed / estimated to be claimed)
<p>Amount claimed / estimated to be claimed⁵</p>	126,988
<p>Expected expenditure in 2011-12</p>	51,062

⁵ The actual amount to be paid and the timing of payment will be subject to the progress and the result of the relevant cost negotiations. It is estimated that part of the payment will be made in 2012-13.

Brief description of cases

Amount
(\$'000)

Criminal

- *(26) FACC 6-8, 10-12/2010 & CACC 302/2008 (on appeal from DCCC 980/2006)**

HKSAR v Habiullah Abdul Rahman (D2), Ng See Wai, Rowena (D3), Lam Chi Chu, Fiona (D4), Fan Cho Man (D5), Lai Sau Cheong, Simon (D6), Koo Hoi Yan, Donald (D7)

This involves the remaining claims for item (7) above which have yet been settled.

- #(27) HCCC 67/2008 and HCCC 188/2008**

HKSAR v Yip Kim-po

The defendant was charged with one count of “obtaining a pecuniary advantage by deception”, four counts of “false statement by a company director” and two counts of “fraud”. He was acquitted of all the charges with costs awarded.

- *(28) DCCC 1035/2010**

HKSAR v Garth Patrick Hochong

The defendant was charged with the offence of conspiracy to deal with property known or believed to represent the proceeds of an indictable offence. The amount involved was about \$14 million. He was acquitted after trial with costs awarded to him.

- *(29) ESS 21671-6/2009**

HKSAR v The Pressure Piling Co. (HK) Ltd. (D1), Tsang Kwok Chiu (D2), Kwan Wah On (D3), Cheung Lam (D4), Wong Yui Chung (D5)

Defendant D1 was charged with the offence of deviating from approved plans while the five defendants D1 to D5 were jointly charged with the offence of carrying out works in manner likely to cause a risk of injury/damage. They were all acquitted after trial with costs awarded to them.

- *(30) DCCC 527 & 1272 / 2010**

HKSAR v Tai Ching

This is a case involving the sale of Lehman Brothers investment funds. The defendant was charged with three offences of fraudulently or recklessly inducing others to invest money. Prosecution offered no evidence on one of the charges, leaving two. The defendant was acquitted of the remaining two charges after trial with costs awarded.

108,967
(total amount
claimed /
estimated to be
claimed for
items (26)
to (30))

	<u>Brief description of cases</u>	<u>Amount</u> <u>(\$'000)</u>
(31)	133 cases with amount claimed / estimated to be claimed under \$1 million each	21,269 (claimed / estimated to be claimed)
		<hr/>
	Subtotal for criminal cases : 138 cases	130,236
	Amount claimed / estimated to be claimed ⁶	
	Expected expenditure in 2011-12	45,000
	Total expected expenditure for civil and criminal cases for the remaining part of 2011-12 : 187 cases (\$51,062,000 + \$45,000,000)	96,062
		<hr/>
	Total expected court costs payment for 2011-12 (\$89,997,000 + \$96,062,000)	186,059

⁶ The actual amount to be paid and the timing of payment will be subject to the progress and the result of the relevant cost negotiations. It is estimated that part of the payment will be made in 2012-13.