

LS/B/15/06-07

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Miss Emma Lau
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Judiciary
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Hong Kong

By Fax (2530 2648) and By Post

21 May 2007

Dear Miss Lau,

Civil Justice (Miscellaneous Amendments) Bill 2007

I enclose herewith some questions on the long title, Parts 2 and Part 4 of the Bill and would be grateful if you could let me have your reply in bilingual form at your earliest convenience.

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

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cc. LA
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Civil Justice (Miscellaneous Amendments) Bill 2007

Abbreviations

Cap. 4	High Court Ordinance (Cap. 4)
DCO	District Court Ordinance (Cap. 336)
RHC	Rules of the High Court (Cap. 4A)
CPR	Civil Procedure Rules (England and Wales)
CFI	Court of First Instance
White Book	<i>Hong Kong Civil Procedure 2007</i> , Sweet & Maxwell
Consultation Paper	Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform
Final Report	Final Report of the Chief Justice's Working Party on Civil Justice Reform
Draft Bill / Draft Rules	Draft Bill and Draft Rules as annexed to the Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reform
Steering Committee	Steering Committee on Civil Justice Reform

A. *Long title of the Bill*

1. The long title of the Bill reads as follows –

“A bill to amend the High Court Ordinance, District Court Ordinance, Lands Tribunal Ordinance, Small Claims Tribunal Ordinance, Law Amendment and Reform (Consolidation) Ordinance and Arbitration Ordinance as proposed by the Steering Committee on Civil Justice Reform, to implement some of the recommendations made in the Final Report of the Chief Justice's Working Party on Civil Justice Reform and to implement several recommendations proposed by the Steering Committee.”.

2. As you may be aware, the long title of a bill usually sets out in general terms the purposes of the bill and should cover everything in the bill. Although being of a procedural nature, the long title is nevertheless regarded by the courts as a guide to legislative intention (ref: Francis Bennion, *Statutory Interpretation*, 4th ed., pp. 620-623).

3. Parts 10, 11 and 12 of the Bill seem not to form part of the Final Report. Please provide more information about the terms of reference of the Steering Committee and its proposals in relation to the different Parts, particularly Parts 10, 11 and 12 of the Bill.

4. The proposed subsections 52B(3)(b) and (c) of Cap. 4 (clause 3 of the Bill) seem to give powers additional to the proposed section 52B(3) of the Draft Bill (as discussed in para. 7 below). The effect of clause 3 of the Bill appears to be a departure from Recommendation 9 of the Final Report, hence falls outside the scope of the long title of the Bill. Please let the Bills Committee have your views.

B. Costs-only proceedings

5. The proposed subsections 52B(1) and 52B(2) of Cap. 4 are broadly in line with the legislative proposals in the Final Report (at pp. 70-74) and the draft Bill (p. A1- A2). The draft Bill (section 52B(3)), which provides that the court may “make an order for the costs of and incidental to the dispute”, is largely similar to CPR 44.12A.

6. It seems that the essence of CPR 44.12A is agreement of the parties. CPR 44.12A gives a limited power to the English court in that it may make an order for costs, or must dismiss the claim for costs if the costs-only proceedings is opposed, thus leading to a swift and possibly economical resolution of dispute.

7. The proposed subsections 52B(3)(b) and (c) of Cap. 4, however, seem to give powers additional to the proposed section 52B(3) of the Draft Bill (and CPR 44.12A as well) in that the court may –

- (a) make an order for the costs of and incidental to the dispute to be taxed or assessed;
- (b) make an order awarding costs to or against any party to the proceedings; and
- (c) make an order awarding costs against a person who is not a party to the proceedings, if it is satisfied that it is in the interests of justice to do so.

8. Please explain why a much wider discretionary power is provided to the court under the proposed section 52B(3). In particular, if the parties to the dispute have already reached an agreement as to the liability of costs and the only remaining question is the amount of costs, please explain why additional powers are sought to be given to the court to re-open the question of who (including a non-party) should pay the costs of the dispute and whether such provisions have been included in the consultation exercise.

9. Under the proposed section 52B, can the parties to the dispute agree that a non-party to the dispute/agreement is to bear the costs of the dispute and commence costs-only proceedings?

10. Under section 52A of Cap. 4, the court has full power to determine by whom and to what extent the costs are to be paid. This is a wide discretionary power which must be exercised on fixed principles (para. 62/2/6 of the White Book). Do these principles as set out in the White Book and the relevant case law apply to the proposed section 52B(3) of Cap. 4?

11. In order to enable the court to exercise the discretion to determine the question of who should pay the costs of the dispute, will the parties (including whoever the non-party is) be required to produce evidence to show, for example, the conduct the parties throughout the dispute, their respective merits and the negotiation process leading to the agreement?

12. Under Order 42 rule 5A of RHC, where all the parties to a cause or matter are agreed upon the terms in which a judgment should be given, a judgment in such terms may be given effect as a judgment of CFI in accordance with the procedure set out in Order 42 rule 5. A consent order is generally considered to be contractual in nature and will only be set aside in exceptional circumstances (para. 42/5A/4 of the White Book). Please advise whether there is any difference in the court's treatment of -

- (i) an agreement reached by the parties before the commencement of court proceedings governed by the proposed Part 2 of Bill; and
- (ii) an agreement of the parties as contained in a consent order under Order 42 rule 5A.

13. Are subsections (3)(a), (b) and (c) of the proposed section 52B(3) conjunctive or disjunctive?

14. Under the proposed section 52C of Cap. 4, CFI may order the transfer of costs-only proceedings commenced in CFI to the District Court at any stage of the proceedings. Please advise whether CFI has power to make such order on terms.

15. Clause 4 of the Bill seeks to repeal section 44A(6) of DCO. Section 44A(6) of DCO provides that where proceedings in which the District Court has jurisdiction (not exceeding \$1,000,000 in contract, quasi-contract and tort cases) are brought in CFI, the District Court *shall order* costs on the scale and in the amount as if the proceedings had been brought in the District Court, unless the proceedings were brought by the leave of CFI or unless CFI otherwise orders. The relevant subsection was not sought to be repealed in the Draft Bill. Please explain the background of clause 4 of the Bill.

16. If, for example, a plaintiff brings an action against a defendant for a contractual claim involving complex legal issues for \$250,000 and chooses to issue proceedings in CFI, he eventually succeeds in his claim but has incurred costs of \$1,200,000. Please explain whether there is any difference in the outcome with respect to costs under the existing section 44A(6) of DCO and the Bill.

C. *Interim remedies and Mareva injunctions in aid of proceedings outside Hong Kong*

17. The object of clauses 9 and 10 of the Bill is to enable CFI to appoint a receiver or grant other interlocutory relief in aid of proceedings outside Hong Kong which are capable of giving rise to a judgment which may be enforced in Hong Kong.

18. Under the existing section 21L(1) of Cap. 4, CFI may grant an injunction or appoint a receiver in all cases commenced in Hong Kong. The proposed section 21M, however, empowers CFI to appoint a receiver or grant “other interim relief”. Under the proposed section 21M(7), “interim relief” includes an interlocutory injunction referred to in section 21L(3). Please advise what kinds of interim relief other than interlocutory injunction may be granted by CFI under the proposed section 21M.

19. Please also explain why different powers are given to CFI with respect to the following situations –

- (i) in substantive Hong Kong proceedings, only receivership or interlocutory injunction is available under section 21L of Cap. 4; and
- (ii) in the absence of substantive proceedings in Hong Kong, receivership, interlocutory injunction or other interim relief is available.

20. The essential principles concerning the grant of interlocutory injunction in cases of substantive local proceedings have been set out in the leading English House of Lords authority of *American Cyanamid Co. v. Ethicon* [1975] AC 396 and the White Book contains a detailed discussion about these principles (para. 29/1/1 to 29/1/79).

21. It seems that “a serious question to be tried” and “a real prospect of success” are amongst the most important questions for the court to consider in the exercise of its discretion whether to grant an interlocutory injunction. Since the proceedings or intended proceedings under the proposed section 21M are issued or to be issued in a place outside Hong Kong, please advise –

- (i) whether principles governing the grant of interlocutory injunction in *American Cyanamid* will apply to the applications under this provision; and
- (ii) if so, in what way will the court in Hong Kong apply the *American Cyanamid* tests of “a serious question to be tried” and “a real prospect of success” where the applicable law in those cases will be foreign law.

22. One of the most important requirements laid down in *American Cyanamid* is that the plaintiff must comply with a strict duty of full and frank disclosure (para. 29/1/56 of the White Book). Since the Hong Kong court has no jurisdiction in relation to the subject matter of the foreign proceedings, please explain the way in which the Hong Kong court can ensure the plaintiff’s compliance with the duty of full and frank disclosure.

23. Under the existing law, “worldwide” Mareva injunction may be granted in Hong Kong proceedings where the assets which are to be frozen are wholly or partly located abroad. The White Book refers to the English law in this respect and states that the plaintiff in an application for “worldwide” Mareva injunction must satisfy the court that, amongst other things, there are no assets or insufficient assets within (the English) jurisdiction to satisfy the plaintiff’s claim (para. 29/1/76 of the White Book). Will the applicant under the proposed sections 21L(3) and 21M of Cap. 4 be required to show before the Hong Kong court that there are no or insufficient assets within the jurisdiction where the proceedings are or to be commenced to satisfy his claim?

24. Please advise whether there is any reciprocal arrangement made between Hong Kong and other country(ies)/place(s) by which a party may apply for an interlocutory injunction in that country/place in relation to proceedings commenced or about to be commenced in Hong Kong and where the court in that country/place does not have jurisdiction over the subject matter of those proceedings.

25. Please provide the Bills Committee with more information (with copy of the relevant legislation) about the experience of other jurisdictions where similar forms of interlocutory relief in aid of foreign proceedings are available.