

WS Clarke

Mrs Percy MA
Clerk to Bills Committee
Legislative Council
Hong Kong

3rd July 2007

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Dear Mrs MA,

Re: Your Ref: CB2/BC/7/06
Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007

Thank you for your letter dated 18 June 2007. Following up on the invitation of Hon Margaret Ng at the Bills Committee meeting on 11 June 2007 you asked for suggestions as to which parts of the draft subsidiary legislation would be appropriate to be examined together with the Bill.

I set out some suggestions below. References are to the draft subsidiary legislation as set out in the consultation paper issued by the Chief Justice's working party which the judiciary administrator said at the meeting on 11 June 2007 is subject to revision.

Draft Orders 1A and 1B

- *Case management powers* - The draft Orders 1A and 1B would enact a new 'underlying objective' of the Rules of the High Court and impose on the court a duty of active management of cases. The powers of management set out in draft Order 1B rule 1 are not necessarily new, but the intention seems to be that the court should take a more pro-active role. For example, Order 1B rule 3(1) would empower the court to give directions of its own motion, without hearing from the parties. These changes, if they are still on the table, would mark a significant shift from the traditional common law system whereby the parties are in control of the progress of cases and the court takes a passive role, largely confined to consideration of the matters brought before it by the parties. Changes along these lines have already been adopted in other common law jurisdictions and are, in my view, worthy of support. However LegCo should be aware that there are likely implications: unless it is thought that the judiciary already has sufficient resources to take up the additional burden, it is probable the legislative council will have to make a choice between (a) spending more money on appointment of additional judicial officers, and (b) allowing cases to be delayed until a judicial officer is available to deal with case management issues.
- *Alternative dispute resolution* – At the meeting on 11 June Mr Norris Yang expressed disappointment that there is nothing in the Bill about mediation as

an alternative to litigation. Hon Margaret Ng replied that there is a need to balance any proposal for mandatory mediation against the right of access to the courts. I do not recall there being any mention of the proposed Order 1A rule 4(2)(e) which includes 'encouraging the parties to use an alternative dispute resolution procedure . . .' as part of the court's duty of active case management. If that proposal is still on the table, it should be the focus of any discussion on this topic.

Draft Order 35 rule 3A

This draft rule, if it is still on the table, would expressly empower the court to curtail the time allowed for examining and cross-examining witnesses, for making oral submissions and so on. This is another fundamental change. Although I support it, I think LegCo should be aware that it is part of the 'package'.

Draft Order 62 rules 8 – 8D

These draft rules, if they are still on the table, might, to some extent, alleviate the concern expressed at the meeting on 11 June 2007 about the proposed power to make wasted costs orders against barristers (section 18 of the Bill). The overall thrust of the draft rules, as I read them, is that the power would only be exercised in exceptional circumstances and after a full right to be heard, similar to what already exists in relation to solicitors (see *Ma So So Josephine* [2004] 3 HKLRD 294 (CFA)).

Conclusion

The draft Bill and proposed subsidiary legislation are, in my view, worthy of support. The extent to which will change (in my view, improve) the existing system of civil procedure can best be seen by referring to the draft subsidiary legislation together with the Bill. I hope they will both be given effect as soon as possible.

Yours sincerely,

WS Clarke