CJRS 5/2008

Subcommittee on Draft Subsidiary Legislation Relating to the Civil Justice Reform

Response to Issues Raised at the Subcommittee Meeting on 21 February 2008

Purpose

On behalf of the Judiciary, the Judiciary Administration presents this paper, which sets out the Judiciary's response to the issues raised at the Subcommittee meeting on 21.2.2008. It must be emphasised that where views on the law are expressed herein, such views are not to be taken as statements of law by the courts. Judicial determinations or statements of law may only be made in actual cases that come before the courts after hearing argument.

Part 2 - Objectives and case management powers

A. To review the wording of O. 1A, r. 1(d), i.e. "*to promote greater equality between the parties*" in the light of members' views.

2. In light of the various views that have been expressed by both members of the Subcommittee and deputations, the Steering Committee has reviewed the wording of O.1A, r.1(d). The view is maintained that some form of wording is necessary so as to allow the Court to ensure that there is, for example, a level playing field between parties. The use of the word "equality" obviously causes difficulty. One alternative that was suggested was to use the following wording: "*to promote as much as is reasonably practicable equality of arms between the parties*". It is considered that this formulation may cause similar difficulty.

3. Subject to any comments the Subcommittee may have, the Steering Committee proposes that O.1A, r.1(d) be revised to read, "*to ensure fairness between the parties*". Whilst the term "*fairness*" is a broad term, it is considered that the concept of fairness is better understood in terms of civil procedure.

B. To explain how O. 1B, r. 1(2)(g) (i.e. the court's power to try two or more claims on the same occasion) worked and whether it was a new power granted to the court.

4. The power under O.1B, r. 1(2)(g) would be no different from that under the existing O.4, r.9. As mentioned at the meeting on 21.2.2008, many of the powers set out in O.1B, r.1(2) can be found within the existing procedural mechanism. Nevertheless, it would be more convenient and clearer if they were enumerated in the new O.1B.

C. To provide the following information concerning O.1B, r. 2(2) (which provided that where the Court proposed to make an order of its own motion, it might give any person likely to be affected by the order an opportunity to make representations) –

(a) whether it was a new power to be conferred on the court;
(b) examples to illustrate the scope of "any person likely to be affected"; and
(c) who would bear the costs of the hearings.

5. O.1B, r.2(2) provides for wider powers to be given to the court to complement its case management powers under the CJR. Under the existing Rules, the Court can make orders on its own motion (e.g. O.42, r.5B(6)) but these are limited. An example of a "*person who may be affected*" (other than of course the parties to an action who would usually be affected parties) would be third parties affected by a Mareva injunction or a person affected by an order for pre-trial discovery. To facilitate the consideration of the matter, the Court may, on its own motion, order the person(s) to join as a party, and in making such an order, may give that person an opportunity to make representations. This is a term that permits the court the flexibility to make the right order. The question as to who would bear the costs of the hearings is a matter of the court's discretion having regard to all the relevant circumstances of the case concerned.

Part 3 – Pre-action protocols

D. To address members' concerns about -

(a) the proposed sanction of payment into court under O.2, r. 3(2)&(4) and to provide information on how it would work;
(b) the lack of interest sanction as provided in the Civil Procedure Rules ("CPR");
(c) the difficulties which might be posed to unrepresented litigants; and
(d) the impact of the proposed O.2, r.5(1)(g) on the represented party.

6. In the light of observations of the Subcommittee and also taking into account the views expressed through deputations at the meeting on 29.2.2008, the Steering Committee considers that it may be better to leave out references to "*pre-action protocol*" and "*practice direction*" in O.2, rr.3-5 for the time being. If the automatic sanction provisions regarding pre-action protocols and practice directions are considered to be necessary in due course, this can be revisited at the appropriate time after due consultation with all relevant parties, including the two legal professional bodies. Subject to the Subcommittee's views, the Steering Committee would revise its proposed amendments to O.2 to confine the proposed sanctions to non-compliance with a rule or a court order. The proposed sanctions would complement the case management powers of the court under the revised rules.

7. Under the above revised proposal, the response to the questions raised by the Subcommittee is as follows –

(a) Payment into court

The court should be given the power to order payment in by parties for non-compliance with a rule or court order, whether by a plaintiff or a defendant. At present, the court has power to order payment in under limited situations (e.g. security for costs, giving conditional leave to defend, setting aside default judgment on condition). Non-compliance with rules and court orders in the course of proceedings can only

be penalized by costs sanctions at the conclusion of the proceedings. This may not have sufficient impact on, for example, a delaying party or some other party who has seriously committed a breach. Giving the court a general power to order payment in at any stage of the proceedings as an appropriate sanction is a necessary measure to ensure that its orders are adhered to. The amount to be paid in may vary according to the circumstances and would conceivably include the payment in of an amount to reflect costs or in some cases, even the amount of the claim.

(b) Interest sanctions

Taking into account the consultation response to the Interim Report and the experience in England and Wales, the Working Party on CJR did not recommend a wholesale adoption of the approach under CPR for pre-action protocol. Nevertheless, the existing section 48 of the High Court Ordinance ("HCO") (Cap. 4) should be wide enough to empower the court to impose interest sanctions. At present, when making an order for payment into court, the Court already has power to order the payment be made to an interest bearing account.

(c)&(d) Impact on unrepresented litigants and represented parties

It is inevitable that at times unrepresented litigants may be given more leeway than represented litigants. It will continue to be the case that lawyers will (and can be expected to) know about the applicable procedures more than litigants in person. In any given case, it will be up to the judge to case-manage so as to ensure fairness to the parties. Details on the assistance available to unrepresented litigants are provided in paper **CJRS 7/2008**.

Judiciary Administration
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