THE LAW SOCIETY OF HONG KONG 香港律師會

Response of the Law Society on the queries raised by the Subcommittee on 7 March 2008

The Law Society has been invited by the Subcommittee on Draft Subsidiary Legislation Relating to the Civil Justice Reform to consider the impact and possible consequences CJR will have on, inter alia, unrepresented litigants appearing before the Courts; the impact of the proposed rules in terms of justice between represented and unrepresented litigants; and whether it would be meaningful for Hong Kong courts to make reference to relevant case law in UK if only certain provisions of the Civil Procedure Rules were adopted in Hong Kong.

1. General Observations

The Law Society acknowledges some unrepresented litigants face problems when they conduct civil litigation before the High Court or District Court.

- In practice, such people can only negotiate the system with help and indulgence from the Bench and (usually) assistance from practitioners who are acting against them.
- Certain proposed changes in the rules (examples below) will in theory make the procedure somewhat more difficult, but in reality it is already so difficult that the changes will make no difference. We expect the system to continue to work as it currently does.
- The changes necessary to amend the higher court procedures to accommodate untrained lay litigants representing themselves would be so extensive that they would not be compatible with the other aims of the current reforms, such as efficiency and cost-saving.
- Any major simplification of the rules will be at the expense of fairness, efficiency, disproportionate costs, and completeness.
- A represented party facing an unrepresented litigant, more often than not, faces higher fees as hearings and trials last longer.
- Sanctions are rarely imposed on unrepresented litigants.
- Issues relating to unrepresented litigants were embraced in the CJR which aims to reduce delays and minimise costs. The Judiciary also put into place its Resource Centre for Unrepresented Litigants which provides assistance on procedural matters.

2. Proposed changes to the Subsidiary Legislation

The following questions have been raised by the Subcommittee:

A. "*Impact of the proposed legislative amendments, in particular those relating to pre-action protocols, judicial review and case management powers of the court, on unrepresented litigants*"

(a) Case management Order 1A Objectives

Order 1A r.4

The Court is charged with implementing the underlying objectives outlined in O1A r.1 by "actively managing cases". The Law Society expects the Judiciary to provide assistance to unrepresented litigants as a result of their case management powers.

(b) Practice Directions and Pre-Action Protocols ("PAPs")

The following definitions have been added to Order 1:

Practice Direction means:

"(a) a direction issued by the Chief Justice as to the practice and procedure of the court; or

(b) a direction issued by a specialist judge for his specialist list;"

Pre-action protocol means:

"*any code of practice designated as such and approved by a practice direction*".

Practice Directions issued by the Chief Justice have been posted in bilingual format on the Judiciary's website and currently, there are 3 Practice Directions for the following specialist lists: Commercial, (SL1), Construction and Arbitration List (SL2), and Administrative Law (SL3). Practice Directions and PAPs will be used by the Judiciary to implement the underlying objectives as stated in the new Order 1A.

The Law Society does not consider the introduction of PAPs will have any prejudicial affect on unrepresented litigants. The Subcommittee's attention is drawn to **Order 2, r.5 (1) (g)** which provides relief from sanctions for non-compliance with Order 2 rr.3 and 4:

> *" On application for relief from any sanction imposed for failure to comply with any rule, court order, practice direction or pre-action protocol, the Court shall consider all the circumstances including-*
>
> ……
>
> ……
>
> *(g) in the case where the party in default is not legally represented, whether he was unaware of the rule, court order, practice direction or pre-action protocol, or if he was aware of it, whether he was able to comply with it without legal assistance."*

We consider the proposed amendments to the subsidiary legislation provide adequate protection to unrepresented litigants as the Court has a positive duty to consider the status of the parties when considering any application for relief from sanctions. This

duty is now clearly spelt out in the rules. The impact of case management powers on unrepresented litigants should therefore be positive.

(c) Judicial Review

The following extract is from the Law Society's Submissions on Order 53 dated July 2006:

> ***"1. Introduction***
>
> *On comparing Recommendations 144-49 with the Steering Committee's proposed amendments to Order 53, it is considered the proposed changes do implement the Recommendations.*
>
> *However, we make the following suggestions or observations:*
>
> ***2. Current Practice***
>
> *The existing procedure for applications for leave to seek judicial review of a decision do not require service of the proceedings on the putative respondent, or notice to any person or body which may be 'interested' in the proceedings. In practice, it is not uncommon for the decision-maker to be represented at an early stage, even prior to the issuance of proceedings. Often a request will be made for a copy of the proceedings to be served on the putative respondent or the Department of Justice will readily accept service.*
>
> *This service is ex-Rules and has no basis or requirement. Up until the filing of a Notice of Motion under the existing rule 5, the proceedings are ex parte. In some cases the court will invite the attendance of the intended respondent at an oral application, or communicate to the putative respondent in writing. The application for leave becomes ex parte on notice.*
>
> ***3. Order 53 r. 2A and 2D***
>
> *The proposed new rules 2A to 2D represent a shift from that present position and essentially require the application for leave to be ex parte on notice not only to the intended respondent but to all persons or bodies whom the applicant considers have a legitimate interest in the matter. How this will work in practice is unclear.*
>
> *While the putative respondent is now required to be notified and served with the application for leave, giving them better notice of proceedings against them, the trade off should not be that the respondent cannot apply to set aside ex-parte leave once granted. Whilst in many cases the respondent(s) will be ready to oppose leave, and will choose to do so, in many other cases the respondent will not be ready, and cannot fully participate. It should be clear that service on such respondents or interested parties does not* ***oblige*** *them to attend and oppose leave, nor do they lose their right to challenge leave that is given merely by having been served. If they wish to participate they should file an acknowledgement, as prescribed by the new draft rules, but they may choose not to, either because they cannot get ready, cannot afford to, or wish to see first if leave is granted before incurring costs. Failure to acknowledge should not be counted against them in the full proceedings, if leave is granted.*

The fact that notice must now be given means that many respondents will incur legal costs, and if leave is refused will seek to recover those costs from the applicant. Admittedly, at present, there is always the risk that an application for leave may involve the respondent if the court chooses to provide the respondent with such opportunity.

Although is it not compulsory that the respondent will be involved at the leave stage, we think that it is likely the respondent will want to be involved in most cases.

If the respondent chooses to contest the application for leave, and leave is granted, it is submitted the court should normally award the costs of the leave hearing to the applicant, irrespective of the outcome of the substantive hearing, and there should be a specific provision in Order 53 or Order 62 for this."

The Law Society queried the new procedure requiring an applicant to serve the notice of application not only on the intended respondent but also on "*any person the applicant considers to be an interested party***" (New rule Order 53 r.2B (b)). This proposal could result in unnecessary costs being incurred not only by the applicant but also by some of the respondents served under this new rule. On balance we do not think this new rule will provide any significant improvement to the existing procedures for the parties, represented or unrepresented.**

Practice Direction SL3 will have to be updated but as this is currently in bilingual format we do not consider unrepresented litigants will be adversely affected by the changes.

B. "*The impact of the proposed rules in terms of justice between represented litigants and unrepresented litigants, e.g. in the case of application for relief from sanctions for non-compliance of pre-action protocols (order 2, rule 5), whether the former (who are expected to be capable of full compliance) would be put in an advantageous position vis a vis the latter (who are expected to be not familiar with the law and court procedures)*."

The Law Society repeats its general observations above. Represented parties will continue to face the same problems when dealing with unrepresented litigants who are ignorant of the existing rules. Solicitors and barristers will have to adapt to the new practices and procedures. This is not something which is new to them as the Judiciary has introduced new practices and procedures through Pilot Schemes for many years. We do not expect unrepresented litigant to be disadvantaged under the proposed changes to the subsidiary legislation as these changes concern procedure and practice. Unrepresented litigants will continue to receive assistance from the Judiciary and the Judiciary's Resource Centre for Unrepresented Litigants. We do not believe there will be any impact in terms of "justice" between represented and unrepresented litigants.

C. "*Whether it would be meaningful for Hong Kong courts to make reference to the relevant case law in UK if only certain provisions of the Civil Procedure Rules were adopted in Hong Kong"*

The Chief Justice's Steering Committee on Civil Justice Reform decided to "cherry pick" the Civil Procedure Rules which have been successful such as:

- case management
- early disposal mechanisms

- Admissions in claims for payment of money (New Order 13A)
- Offers to settle and payments into court (New Order 22)
- Miscellaneous Provisions about payments into court (New Order 22A)

- Appeals (Order 59)

As many of the proposed amendments adopt the wording of the Civil Procedure Rules we see no difficulties if the Judiciary refers to English case law where the context permits. After all, this is a question of weight to be decided by Hong Kong courts: i.e. if the case law in England is relevant to the interpretation of a particular provision adopted in the Hong Kong rules, Hong Kong courts obviously should make reference to it. On the other hand, if in the context of that particular provision, it is desirable for Hong Kong courts to distinguish the English case law on the (albeit rather general) basis that not all provisions of the Civil Procedure Rules were adopted in Hong Kong, our courts may accordingly attach less or little weight to the corresponding English case law.

The Law Society of Hong Kong

18 March 2008

113721v2