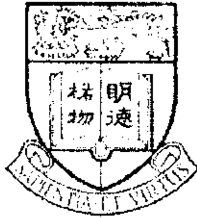
LC Paper No. CB(2)1411/07-08(01)



The University of Hong Kong

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19 March 2008

Mrs Percy MA
Clerk, Subcommittee on Draft Subsidiary Legislation
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Mrs MA

Re: Civil Justice Reform ("CJR")

Thank you for your letter of 7 March 2008. I am delighted to be able to assist the Subcommittee in its work.

My views on the three issues raised in your letter are as follows (I adopt your paragraph style) –

(a) I am afraid that it is difficult to offer a definitive view of the impact of any pre-action protocol on unrepresented litigants without having had sight of the proposed draft of the same. I am, however, generally in favour of pre-action protocols given my experience, both in practice and in legal education, in England. They encourage the early resolution of disputes and, where there is no early settlement, support their subsequent management by the parties and court. This, in turn, saves time and expense for litigants. The use of a clearly worded pre-action protocol in Hong Kong would assist unrepresented litigants by guiding them through the steps leading up to the commencement of court proceedings. To this end, such a pre-action protocol should be accompanied by a "user's guide" - in plain language - for unrepresented litigants and members of the general public. The Subcommittee may be interested to learn that the Civil Justice Council ("CJC") in England is carrying out a consultation exercise on a general pre-action protocol, which is due to conclude in May. The CJC's consultation paper can be found at http://www.civiljusticecouncil.gov.uk/index.htm

I do not propose to comment on the proposed legislative amendments relating to judicial review.

My views on the amendments relating to case management are at (b) below.

(b) I noted in my submission of 3 March 2008 that the aim of the proposed RHC Order 1A rule 1(d) is "to promote greater equality between the parties". My understanding of the CJR process leads me to conclude that this is an equivalent of CPR Part 1.1 (2)(a) by which the 'overriding objective' of the CPR entails "ensuring that the parties are on an equal footing". This provision was introduced into the CPR to reflect the need for the courts to remedy a perceived "lack of equality" between powerful, wealthy litigants and those who – at the extreme – could not afford to obtain adequate legal representation.

Any set of procedures, including their sanctions, can be a trap for those who are not conversant with their intricacies. Attempts to redraft such procedures often fail to achieve the desired outcomes. In my view, the judiciary will, instead, need to use Order 1A rule 1(d), much as the English courts have used CPR 1.1(2)(a), to protect unrepresented litigants from the injustice that would otherwise result from a strict application of a particular provision such as Order 2 rule 5. I have already referred the Subcommittee to *Maltez v Lewis* (1999) The Times, 4 May 1999 in this respect (albeit see (c) below).

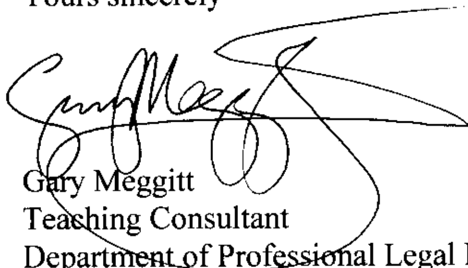
(c) Clearly, it would be more "meaningful" for the Hong Kong courts to make reference to English case law on civil procedure if the proposed RHC was a "local version" of the CPR. It was decided, however, to "cherry pick" only certain items from the CPR rather than conduct a wholesale reform of the RHC. This was, in my opinion, the wrong decision. It may be still helpful for the Hong Kong courts to look to English case law for guidance subject to the following "health warning" - any procedural rulings will be of limited help given that they are based on the "fundamental purpose" of the CPR. This fundamental purpose is the "overriding objective" of CPR 1 (see the notes to CPR 1 in *The White Book Service* published annually by Sweet & Maxwell). The reality is that the Hong Kong courts may, firstly, have repeat the English courts' work of resolving procedural difficulties within the "new" rules and, secondly, reconcile the "new" and "old" rules. This problem was predicted at paragraph 699.1 of the CJR Interim Report and Consultation Paper thus –

> "In this context, one concern needs to be addressed if Hong Kong retains the HCR but incorporates reforms by amendment. This approach is likely to raise issues about the boundaries between the retained rules and the amendments... This kind of debate could generate the unwelcome and costly satellite litigation and could arise with some frequency, particularly in the early years."

Such satellite litigation will be of little practical benefit to litigants.

I hope that the Subcommittee finds the above comments helpful. They are, of course, brief and do not represent a comprehensive or final view on the issues raised.

Yours sincerely



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