CJRS 19/2008

Subcommittee on Draft Subsidiary Legislation Relating to the Civil Justice Reform

Response to Issues Raised at Previous Subcommittee Meetings

Purpose

On behalf of the Judiciary, the Judiciary Administration presents this paper, which sets out the Judiciary's response to certain issues raised at the Subcommittee meetings on 8.4.2008, 14.4.2008 and 18.4.2008. 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 1 – Preliminary

A. To provide a response to the Assistant Legal Adviser's letter dated 10.4.2008 regarding draft rule 1 in the Rules of the High Court (Amendment) Rules 2008 ("the Rules"), as to whether -

(i) there will not be a separate commencement notice for the Rules;

(ii) the commencement notice would appear in the Enactment History section of the Loose-leaf Edition; and

(iii) it should be revised to provide for a separate commencement notice for the Rules, which may appoint the same date on which the Civil Justice (Miscellaneous Amendments) Ordinance 2008 ("the Ordinance") comes into operation.

2. There would not be a separate commencement notice to be made under rule 1 of the Rules. In accordance with the existing practice, commencement notices do not appear in the Enactment History of the Loose-leaf Edition. This would be the case even if rule 1 were to provide for a separate commencement notice for the Rules. For ease of reference, the usual practice is to specify the commencement date by

way of a footnote to the relevant section. By way of illustration, upon gazettal of a commencement notice appointing 2.4.2009 as the commencement date for the Ordinance, a footnote would be inserted to proposed O.5, r.7 in the Loose-leaf Edition of the Rules, as follows –

> "**7. Transitional provision relating to rule 17 of Amendment Rules 2008** (O. 5, r. 7)
>
> Any civil proceedings begun by originating motion or petition before the commencement* of the Amendment Rules 2008 and pending immediately before the commencement may be continued and disposed of as if rule 17 of the Amendment Rules 2008 had not been made.
>
> *Commencement date: 2 April 2009"

3. The above transitional provision has taken into account the Subcommittee's comments at the meeting on 8.4.2008. O.8, r.6 and all other relevant transitional provisions will be amended accordingly.

4. Given that the above arrangements would apply whether or not there is a separate commencement notice for the Rules, the Steering Committee considers that there is no need to revise the existing draft rule 1.

Part 4 - Commencement of Proceedings

B. To provide a written response to explain why opportunity was not taken to amend the references to "Crown" in O.77, the timeframe for making such amendments and the interpretation of the word "Crown" before such amendments are made.

5. The word "Crown" in O.77 of the RHC is pending adaptation. Adaptation of law is a matter for the Administration and is outside the purview of the Steering Committee. The Judiciary considers that any amendments for adaptation of the RHC should be pursued by the Administration as a separate exercise. According to the Department of Justice, the meaning of the word "Crown" pending adaptation will have to be construed in accordance with Schedule 8 to the Interpretation and General Clauses Ordinance (Cap. 1).

C. To provide a written response to clarify the impact of the proposed abolition of originating motions ("OM") as a mode of commencement of proceedings.

6. As the Final Report makes clear in making Recommendations 12-14, the object is to simplify the existing modes of commencing proceedings. By prescribing that only writs and originating summonses ("OS") are to be used, this will be achieved. The use of the OS procedure will not result in any less expedition than at present. In fact, the usual procedure at present to deal with issues of pure construction would be by way of OS rather than OM. This will remain. It should be noted that, where an OS is issued to determine a question of law or construction in an uncontroversial factual context, the procedural steps such as pleadings, discovery, witness statements, etc. are avoided as unnecessary (see para. 160 of the Final Report). It should also to be noted that the OM procedure will remain for those types of proceedings where this procedure is expressly required (See Recommendation 14).

Part 6 - Default Judgments and Admissions

D. To consider modifying the proposed procedure for making an admission to a money claim and requesting time to pay into a two-stage process – (i) at the 1st stage, the defendant may admit liability and make a proposal on payment terms (as to time and instalments) without the need to supply information on his means; and (ii) the 2nd stage should only apply if the plaintiff does not accept the defendant's proposal for payment, in which case, the defendant would be required to provide information on his means.

7. Currently, the basic rule is that a plaintiff is entitled to enforce a judgment on a money claim once it is given, and a stay of enforcement is the exception rather than the norm. Where a defendant applies for a stay of execution, he has to furnish sufficient information to assist the plaintiff and the Court to assess his financial means to comply with instalment payments. The types of information required are similar to those required in the relevant admission forms if payment terms are proposed.

8. The new O.13A introduces a new procedure for a defendant in a money claim to make admission and propose payment terms as to time and instalments to satisfy the claim. One of the options to the plaintiff under O.13A is to accept a lesser sum in settlement of his claim (e.g. when the defendant admits part of the claim). The defendant is thus encouraged to be frank with his means to enable the plaintiff to make an informed decision. If an option of getting information on the defendant's means is available, it may be expected that the plaintiff will, in most cases, opt for this in order to make an informed decision. Splitting the procedure into two stages will cause delays to the proceedings.

E. To consider adding a proviso to the Explanatory Notes in Form No. 16 to alert a defendant making an admission and proposals for payment terms that he will not normally be allowed to resile from his admission, if the plaintiff does not accept his proposal.

9. The Steering Committee agrees to the suggestion, and would add such notice to Forms 16 and 16C.

F. To consider making it clear in the new O.13A, r. 10 and the relevant forms that the Court will determine payment terms taking into account the defendant's means.

10. Apart from the means of the defendant, the Court would also take into account other relevant factors, e.g. the number of instalments involved and the plaintiff's objections to the defendant's proposal. In an extreme case where the payment terms are unrealistic and the plaintiff opposes (e.g. on the ground that the defendant might abscond), the Court may exercise its discretion not to order instalment payments.

11. The Steering Committee proposes setting out in O.13A, r.10 and the Explanatory Notes in the Forms 16 and 16C that, if the plaintiff does not accept the defendant's proposal for payment, the Court will decide how the payment should be made, taking into account (i) the information set out by the defendant in the admission form, (ii) the plaintiff's objections set out in the request for judgment, and (iii) any other relevant factors.

G. To consider whether the word "denial" in O.18, r.13(5) should be replaced by the word "non-admission".

12. There is no need to replace the word "denial" in O.18, r.13(5) by "non-admission", as the sub-rule relates to a "denial" rather than a "non-admission".

Part 7 - Pleadings

H. To confirm whether, for the purpose of O.41A, pleadings include statements of claim.

13. For the purpose of O.41A, pleadings include statements of claim.

I. To consider setting out in the relevant forms for issuing a writ or an originating summons the requirement that the pleading should be verified by a statement of truth.

14. The Steering Committee agrees to the suggestion and will introduce amendments to the relevant forms accordingly.

J. To provide a written response on the possible consequences for a legal representative if he has failed to fulfill the requirements specified in O.41A, r.4(3)(a)-(c).

15. The possible consequences include, (i) the relevant pleading may be struck out under O.41A, r.6; (ii) costs consequences for the legal representative's client: (iii) the legal representative may face claims from his client if his client suffers any loss as a result; and (iv) disciplinary action against the legal representative if his client makes a complaint to the relevant legal professional body. Another possible consequence is that proceedings for contempt of court may be brought against the legal representative if he puts forward a false statement of truth without his client's authority (O.41A, r.9).

K. To clarify whether a statement of truth could be filed separately from the pleading that it verified, and if so, whether any special procedure is required.

16. There is no provision in the present draft Rules that a statement of truth cannot be filed separately. No special procedure is required. If the filing of the separate document is pursuant to an order of the Court, it may be that the document should recite the court order: O.41A, r.8.

Part 8 – Sanctioned Offers and Payments

L. To explain whether, and if so what, penalty would be imposed against a party who has disclosed a sanctioned offer or payment to the trial judge in breach of O.22, r.21(2).

17. Similar to the present position for payment into Court, where a party has made such disclosure to the trial judge, the other party to the proceedings may apply for the trial judge to recuse himself, and the party who has made the disclosure may be liable to bear the costs thrown away. In practice, however, parties on many occasions do invite the judge to disregard such disclosure and continue with the trial.

M. To advise how partial settlement would operate, e.g. whether the pleadings have to be amended by deleting the items settled, and whether that would disclose the fact that there has been a sanctioned offer/payment to the trial judge.

18. The part of the claim that is settled will be stayed under the new O.22, r.18(3). The plaintiff would just have to inform the Court that the part of the claim is not to be pursued. There is no need to amend the pleading or to disclose the fact that there has been a sanctioned offer or sanctioned payment.

N. To explain, with relevant case law, the criteria for the Court's determination as to whether a judgment is "better" / "more advantageous" than the sanctioned offer or payment.

19. The criteria and/or principles for these phrases will be developed by case law. Paragraph 27 in *Factortame v Secretary of State* [2002] 1 WLR 2438 (a case involving a Part 36 offer in the UK) will provide some assistance –

> "Each case will turn on its own circumstances. It seems to me that so far as possible the judge should be trying to assess who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been. It is plainly right that a full-scale trial examining privileged material, and listening to ex post facto justification should be avoided. It furthermore does not seem to me to be right to seek to lay down rules as to where the onus will lie where a defendant is allowed to amend his case. As I have already said straightjackets in this area should be avoided. The starting point is that a claimant who fails to beat [an offer] will prima facie be liable for the cost. An amendment may be of such a character that a judge will feel that the onus should be firmly placed on the defendant to persuade him that the prima facie rule should continue to apply; on the other hand the judge may be quite clear by reference to his feel of the case that the amendment is being used as an excuse [to accept an offer] that should have been accepted when originally made. Some cases will lie between the two extremes, and the judge will have to adjust his assessment to give effect to possibilities which it would be inappropriate to try out and thus by reference to his overall view of the case."

O. To consider informing unrepresented litigants that if they have made an offer to settle which does not fall under the new regime of O.22, they may draw such offer to the court's attention during its determination on costs under O.62, r.5.

20. The Judiciary will consider including such information in updating the relevant information pamphlet for unrepresented litigants.

P. To consider (i) replacing the word "appropriate" in O.22, r.23(2) which may give the impression that a defendant is actually paying money into court, and (ii) specifying when the money appropriated in accordance with r.23(2) would deem to be a sanctioned payment.

21. The word "appropriate" has been in use in the existing O.22, r.8. Experience shows that it does not give any such mistaken impression that a defendant has to actually pay money into court. As regards, O.22, r.23(2), the Steering Committee will propose amendments to clarify that the money is deemed to be a sanctioned payment on the date the sanctioned payment notice is served on the offeree, and the notice in r.23(2)(a) is deemed to be sanctioned payment notice; and in the case of pleading a plea of tender, the date the plea is served: see r.9(2).

Q. To consider the need for prescribing a standard form for giving notice under O.22, r.23(2)(a).

22. With the proposed clarification in para. 21 above, the Steering Committee considers that it is not necessary to specify a prescribed form for the situation under O.22, r.23(2)(a). It is covered by r.7(2)(f). The statutory form for sanctioned payment notice can be adapted accordingly to give that notice.

Judiciary Administration
May 2008