CJRS 20/2008

Subcommittee on Draft Subsidiary Legislation Relating to the Civil Justice Reform

Response to Remaining 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 the remaining issues raised at previous Subcommittee meetings. 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 4 – Commencement of Proceedings

A. To clarify the form to be used for commencing proceedings under O. 118, r.4(1), as Form No. 11 is expressly stated in O.119, r.4, but not in O.118, r.4(1), both of which are ex parte proceedings.

2. The types of proceedings dealt with under O.118 and O.119 are by nature ex parte. The Steering Committee agrees with the Subcommittee's views that there should be no difference between the wording of the two provisions (i.e. O.118, r.4 and O.119, r.4). The Steering Committee proposes that the two provisions should be amended along the following lines –

> O.118, r.4(1)
> "*An application for a warrant under section 85 shall be made ex parte by originating summons in Form No. 11 in Appendix A supported by affidavit.*"
>
> O.119, r.4
> "*Subject to rule 6, an application to which this Order applies shall be made ~~by~~ ex parte ~~notice of motion in Form 109~~ by originating summons in Form No. 11 in Appendix A and, except for an application made under section 14D of the Ordinance, be supported by affidavit.*"

Part 8 – Sanctioned Offers and Payments

B. To clarify whether a plaintiff can make a sanctioned offer to one or more, but not all defendants where the defendants are sued jointly.

3. The proposed O.22, rr.1(2) and 2(1) provide the basis for a plaintiff to make a sanctioned offer to some, but not all, defendants. Upon acceptance by that defendant, the usual consequences under O.22 will apply. The plaintiff can, in principle, pursue his claim against other defendants on claims with several liability. If the plaintiff discontinues the action against the other defendants, O.21, r.2 or 3 will apply. To cater for the issue of costs (if any) between the defendants, in the event that only one or more, but not all, defendants accepted the plaintiff's sanctioned offer, the Steering Committee proposes to add a provision to require that the notice of acceptance of plaintiff's sanctioned offer should be given to other defendants, who may then apply to the court as regards costs or other directions.

Part 10 – Case Management, Timetabling and Milestones

C. To consider adding a note to the questionnaire on case management to alert the parties that they should, as far as possible, try to agree the directions and timetable for the case without requiring reference to the court.

4. This will be dealt with by the relevant Practice Direction ("PD"). On the questionnaire, parties will be reminded to read the relevant PD.

D. To consider setting out explicitly in O.25, r.1B the threshold for granting applications for variation of milestone dates, as in the case of non-milestone dates.

5. The Steering Committee agrees to the Subcommittee's suggestion, and proposes to amend O.25, r.1B to specify that the Court shall not grant an application for variation of a milestone date unless there are exceptional circumstances.

6. The Steering Committee also proposes to amend O.25, r.1C to clarify that –

(a) If both the plaintiff and counterclaiming defendant have not appeared at the case management conference ("CMC") or pre-trial review ("PTR"), the claim and counterclaim shall be provisionally struck out, subject to a period of 3 months for restoration; and

(b) If the plaintiff has not appeared at the CMC or PTR, but the counterclaiming defendant has, the counterclaim should not be struck out and the defendant may proceed with his counterclaim, notwithstanding the plaintiff's claim is provisionally struck out.

Part 11 – Vexatious Litigants

E. To clarify the mode for commencing proceedings for applications for vexatious litigant orders under the existing and proposed procedures; and consider whether a fast-track procedure should be provided for applications involving little or no factual disputes.

7. Currently, the mode of commencing proceedings for applications for vexatious litigant orders under s.27 of the High Court Ordinance ("HCO") (Cap. 4) is by originating summons ("OS"). Under the proposed O.32A, r.1, proceedings under the new s.27 of the HCO will be the same as at present, i.e. by OS.

8. For an application under s.27, the Judiciary does not see the need to provide an urgent procedure to curb vexatious litigation. A s.27 order involves the deprivation of a person's right to institute / continue with legal proceedings (unless leave of the Court is obtained). The person against whom the order is sought should at least be given a chance to properly respond.

9. In any event, a s.27 order is usually a last resort, and one would have thought that (i) a restricted application order or (ii) a restricted proceedings order would have been in place or applied for by way of summons, which would be a quicker way, before the case has developed to such a stage that a s.27 is warranted. If any case were made out for an expedited or even an urgent hearing, the Court would of course accommodate this as in any other case. Apart from the ROA and

RPO procedures, the Court will also in appropriate cases grant interim injunctive relief.

Part 14 – Interlocutory Assessment of Costs of Interlocutory Applications

F. To clarify whether "*the Court*" in O.62, r.9A(4) and (5) refers to the taxing master; and if so, whether the words "*the Court*" should be replaced by "*taxing master*" for the sake of clarity.

10. The reference to "*the Court*" in O.62, r.9A(4) and (5) refers to the taxing master. The Steering Committee agrees to the Subcommittee's suggestion, and would propose amendments to replace references to "*the Court*" in O.62, r.9A(4) and (5) by "*taxing master*".

G. To clarify whether the phrase "*aggrieved by the order*" in O.62, r.9A(2) introduces an additional condition for seeking a taxation of costs and review the need for the phrase.

11. The phrase "*aggrieved by the order*" in O.62, r.9A(2) is not intended to introduce an additional condition for seeking a taxation of costs. For clarity, the Steering Committee proposes to delete this phrase from O.62, r.9A(2).

Part 15 - Wasted Costs

H. To clarify the scope of "legal representative" as defined in O.62, r.1(1), in particular whether it covers ex-legal representatives where a litigant has changed legal representatives in the course of the litigation.

12. The term "legal representative" as defined in O.62, r.1(1) covers the legal representative(s) conducting the litigation at the relevant time, including ex-legal representatives where a litigant has changes legal representatives in the course of the litigation.

I. To clarify whether there are any sanctions under the rules for breach of O.62, r.8C and how to address the practical difficulties in monitoring compliance with the rule.

13. A party in breach of O.62, r.8C (e.g. indicating an application for a wasted costs order without giving particulars) may face an adverse costs order (or even a wasted costs order) against him (or the legal representative). This sanction may be suitably provided under a PD. See paragraphs 567-568 of the Final Report.

Part 16 – Witness Statements and Evidence

J. To confirm whether the intention of O.38, r.2A(7)(b) is to allow a witness to amplify his witness statement (r.2A(7)(b)(i)), or to supplement it with evidence in relation to matters which have arisen since serving the witness statement (r.2A(7)(b)(ii)); and if so, whether consideration would be given to replacing the word "and" with the disjunctive "or".

14. The intention of O.38, r.2A(7)(b) is to allow a witness to (i) amplify his witness statement, or (ii) supplement it with evidence in relation to matters which have arisen since serving the witness statement, or (iii) to do both. The word "*and*" in the present draft is appropriate.

Part 17 – Expert Evidence

K. To clarify the circumstances under which the court may make an order for appointment of a single joint expert ("SJE") under O.38, r.4A(1), in particular whether such an order can be made if none or only one of the parties intends to appoint an expert witness.

15. O.38, r.4A(1) is not intended to apply where no party considers it appropriate to appoint an expert. If the parties want to adduce expert evidence, the Court may make an order on its own motion under O.38, r.4A(1) after taking into account the factors in O.38, r.4A(5). This provision for the Court to make a SJE order on its own motion is added taking into account the Law Society's submissions in July 2006, which make reference to the relevant provisions in the Civil Procedure Rules.

16. The Steering Committee proposes to amend O.38, r.4A to make it clear that –

(a) before the Court considers appointing an SJE on its own motion, it should hear the parties first; and

(b) the Court will only appoint an SJE where the circumstances allow this (see O.38 r.4A(5)), but where one party objects, or both or all parties object, the Court may nevertheless appoint an SJE in the interests of justice.

L. To explain the operation of O.38, r.4A(6) (which empowers the court to set aside an order on the appointment of an SJE) and consider setting out clearly in the rule the procedures involved.

17. An application for setting aside an order for the appointment of an SJE under r.4A(6), like any other interlocutory applications, can be made by summons. The Court may on its own motion or upon a party's application set aside the order under r.4A(6). O.1B, r.2(1) already provides that the Court may exercise its powers on an application or of its own motion.

Part 19 – Leave to Appeal

M. To convey to the Judiciary the Subcommittee's reservation about the proposed O.59, r.2A(8), and to provide statistics on applications to the Court of Appeal ("CA") and renewal leave applications.

18. The Judiciary's response is set out in paper **CJRS 21/2008**.

N. To clarify whether the proposed amendments on the calculation of time for making an application for leave to appeal or appeal, i.e. from the date of an order (instead of the date of the perfection of an order as at present), would affect the operation of the proposed O.59, r.5(1)(a), which requires the appellant to lodge with the Registrar a copy of the sealed judgment or order within 7 days after the service of the notice of appeal.

19. In the majority of cases, the absence of a perfected order will not hold up the appeal process, since the losing party will have obtained the result and the reasons for it (obviously if the reasons are unavailable, this will often be a good reason for an extension of time to appeal to be given). O.59, r.5(1)(a) requires the appealing party to lodge with the Registrar a sealed judgment within 7 days after the date of service of the notice of appeal. A notice of appeal is filed either 28 days from date of judgment if no leave to appeal is required, or if leave to appeal is required, 7 days from the grant of leave. There will be ample time in between to seal the order if a party acts promptly.

O. To consider drawing up a performance pledge on the time on the timeframe for the perfection of an order.

20. The Judiciary will try its best to ensure that draft orders of the Court of First Instance ("CFI") will normally be approved within 7 working days after receipt of the draft from the party concerned.

Part 22 – Taxing the Other Side's Costs

P. To provide explanations for the proposed revisions to scale costs and fixed costs in the Schedules of Order 62.

21. The revisions to the scale costs and fixed costs are proposed taking into account the Law Society's proposal, the experience of taxing Masters, and the use of gross sum assessment of costs to better reflect the solicitors' work involved. For example -

(a) the Law Society has proposed a fixed sum of $10,000 (i.e. 1% of the financial limit of $1 million above which cases have to be dealt with at the CFI) for profit costs in cases where default judgments (O.13 & 19) are entered. Having

considered the work usually involved in obtaining a default judgment (including the preparation of a demand letter, drafting of the writ and statement of claim, conferencing with client, correspondence, requisition from the Court and drafting of the order), and on the assumption of an hourly rate of $4,000 for a solicitor's work, the proposed $10,000 is 2.5 hours' work. The Steering Committee considers the Law Society's proposal reasonable, and considers the same should apply to O.13A judgments on admission;

(b) the item on mechanical preparation of documents is deleted, as it is obsolete. Solicitors and their staff now use personal computers and hourly rate is charged for preparation of a document; and

(c) the item of making additional copies of documents is reduced from $3 per page to $1 per page, taking into account the reduction in photocopying costs.

Revised Part 23 – Judicial Review

Q. To explain the consequences if an applicant fails to identify all the interested parties in an application for leave for judicial review ("JR").

22. In principle, an applicant in JR has a duty to inform/ serve party (other than the respondent) whom he believes will be directly affected by his application. However, in practice, applicants do not do so in many cases. Sometimes, the interested party will apply for permission to take part in the proceedings. In some cases, the Court will give the necessary directions on filing of evidence and the like. In other cases, it may be at a late stage (e.g. at the substantive hearing) that it comes to the Court's attention that there is an interested party who should be served. The hearing may have to be adjourned and costs will have to be paid to the respondent.

23. The proposed O.53, r.3(2)(a) requires the applicant for leave for JR to file a new Form 85B, with particulars as to the respondent(s) and /or interested party(ies), if any. The proposed requirement does not add to the obligations of an applicant. It merely brings forward the time when he has to decide who to be named as the respondent and who may be an interested party, so as to enable the Court to give directions timely

and avoid unnecessary costs and delays. Litigants in person will be informed of the statutory definition of "interested party", and in any event, they are likely to be accorded some leeway by the Court in case of genuine difficulty.

R. To clarify the costs consequences, if any, on the applicant if an interested party named in the application form turns out to be not truly an "interested party".

24. If parties are named who are not considered to be true "interested parties", the Court will, at the leave stage, give suitable directions regarding service on the interested parties, and where the applicant has cast the net too widely, the Court can sift out those persons who need not be served or need not participate in the proceedings. At the leave stage, there is no question of costs consequences as it is essentially ex parte, and all respondents and interested parties at this stage are "putative" only.

Judiciary Administration
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