To: Panel on Administration of Justice and Legal Services

From:

Ng Shek Wai,

Date: 8/10/2009

Order 5, Rule 6(3) of Rules of the High Court

Feedback to the Response from the Judicial Administration on September 2009

Dear Members of Panel,

1. I found the reason given by the Administration cannot stand on itself or in Lord Woolf's words: "*The rationale of the limitations on company representation is unclear*". The fact is that our court's mentality goes in the opposite way of the current practice in England, UK. Therefore, I shall urge the Panel to make recommendation to the Rule Committee of the High Court that the captioned rule should be amended to the same as that in England.
2. In the mean time, before the rules can be amended, the court may issue new practice direction to change the default of NO to YES. The task of the duty master is narrowed down to verifying the "good reason" given has factual support. Then it is left to the judge who hears the case to decide, along with the merit of the case, whether extra conditions

should be attached to the leave or whether the leave should be revoked. Reasons for my suggestions are listed in the following.

3. I shall start by comparing the corresponding rule and practice directions in England with ours. The corresponding English rule is part 39.6 and the associated practice direction is 5.3. The current version of the rule and practice direction is:

> Civil Procedure Rules - Part 39 - MISCELLANEOUS PROVISIONS RELATING TO HEARINGS
>
> 39.6 Representation at trial of companies or other corporations -
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> A company or other corporation may be represented at trial by an employee if –
>
> (a) the employee has been authorised by the company or corporation to appear at trial on its behalf; and
>
> (b) the court gives permission.
>
> PRACTICE DIRECTION - REPRESENTATION AT HEARINGS
>
> 5.1 At any hearing, a written statement containing the following information should be provided for the court: …
>
> 5.2 Where a party is a company or other corporation and is to be represented at a hearing by an employee the written statement should contain the following additional information …
>
> 5.3 Rule 39.6 is intended to enable a company or other corporation to represent itself as a litigant in person. Permission under rule 39.6(b) should therefore be given by the court unless there is some particular and sufficient reason why it should be withheld. In considering whether to grant permission the matters to be taken into account include the complexity of the issues and the experience and position in the company or corporation of the proposed representative.
>
> 5.4 Permission under rule 39.6(b) should be obtained in advance of the hearing

from, preferably, the judge who is to hear the case, but may, if it is for any reason impracticable or inconvenient to do so, be obtained from any judge by whom the case could be heard.

5.5 The permission may be obtained informally and without notice to the other parties. The judge who gives the permission should record in writing that he has done so and supply a copy to the company or corporation in question and to any other party who asks for one.

5.6 Permission should not normally be granted under Rule 39.6:

(a) in jury trials;

(b) in contempt proceedings.

4. The following is the history of the rule and practice in England.

a Rule 39.6 is the same since 1st version.

b Initially, only practice direction 5.1 is given for the rule 39.6.

c The practice direction 5.2-5.5 was added on May 1999.

d On November 1999, the sentence "*In considering whether to grant permission the matters to be taken into account include the complexity of the issues and the experience and position in the company or corporation of the proposed representative*" is added to practice direction 5.3. The practice direction 5.6 was added at the same time as well.

5. In Hong Kong here, the initial version of Order 5, Rule 6(3) allowed "lack of resources" as a good reason but this was removed in the June 2002 version. The difference between the English rule and ours are:

a In England, the permission is given by the judge who hears the case. In here, the application is heard by a practice master who does not have the jurisdiction to examine the merit of the case.

b In England, the applicant can appeal against a refusal like other orders by a judge. In Hong Kong, an appeal is not allowed.

c The default in England is YES. The court has to give reason when a NO is given. The default in Hong Kong is NO. The applicant has to give "good reasons". The court became even more conservative on this since 2002.

6. Next, I shall look at the reason given by the Administration in paragraph 6. The root case of his reason is the Radford v. Freeway Classics Ltd [1994] 1 BCLC 445 at 448. The paragraph which is much quoted is:

"A limited company, by virtue of the limitation of liabilities of those who own it, is in a very privileged position because those who are owed money by it, or obtain orders against it, must go empty away if the corporate cupboard is bare. The assets of the directors and shareholders are not at risk. That is an enormous benefit to a limited company but it is a benefit bought at a price. Part of the price is that in certain circumstances security for costs can be obtained against a limited company in cases where it could not be obtained against an individual, and another part of the price is the rule ... that a corporation cannot act without legal advisors. The sense of these rules plainly is that limited companies, which may not be able to compensate parties who litigate with them, should be subject to certain constraints in the interests of their potential creditors".

7. I have reservation on this argument. If the sparse resource of a limited company is spend on hiring a solicitor on a hopeless case, it would only work against the wish of its creditor or the interest of the opposition party. If a company screws up a hopeful case because a solicitor is not hired, the opposition party would be happy to see this happen. However, the opposition does have a good reason to make objection. The good reason is that the opposition can stop his unjust act be exposed in the court.

8. After all, the Radford case is vitiated by Lord Woolf's report:"Access to Justice" and the subsequent change to the English rules listed above. The Lord Woolf's report should be read as an overriding authority on the Radford case. Thus our court and the Administration are obviously wrong in citing the vitiated Radford case again. For yours convenience, Lord Woolf's report:"Access to Justice" (1996) Chapter 12, paragraph 61-72 is enclosed as Appendix A. Lord Woolf's report has all the pros and cons well discussed. I would like to further elaborate on the arguments in Lord Woolf's report in the followings:

   a The argument of the Administrator: "*To permit a limited company to pursue proceedings without legal representation, at no financial risk …recover costs against a company that cannot afford legal representation*" is against the concept of limited company. If this argument has footing, no person should conduct business with limited liability. The whole concept of limited company is to be thrown away. This is the thought behind Lord Wolf's answer in paragraph 64.

   b When a party is engaged in business with a limited company, he should be prepared to accept the implication of limited liability. This includes the consequence when there is a lawsuit between parties. When a party chooses not to hire a solicitor, there is no prejudice to the opposition party.

   c As it is argued above, to make a company spend its sparse resource on the legal cost cannot protect the financial interest of its creditor or the opposition party. If a creditor has concern on this, a creditor may take his own action. There is no reason for the court to act on behalf of a creditor who chooses to remain silent or even give his consent to the case.

   d Given that the application for leave to be represented by a director is an ex parte application, the concern on the interest of the opposition should not be a consideration of the court. Otherwise, representation from the opposition should be

invited. Therefore, the court should not act on behalf of the opposition without looking into the merit of the case. In particular, a practice master, who has no jurisdiction to look into the merit of the case, should not interfere.

e If the purpose of insisting a company to hire a solicitor is to put a financial burden on the company, this argument goes against the objective of our advocate system. A solicitor is meant to help the litigant. It is not meant to be deterrence to those who can't afford a solicitor. Or put it the other way, does it mean a company which cannot afford a solicitor has no legal right to seek court action against injustice?

f After all, fairness and justice comes first. This is the bottom line of the court. If the litigant is the victim of unfair or unjust acts, it should not be barred from seeking justice form the court simply because it is unable to afford the legal cost.

9. Furthermore, I would like to draw the attention of the panel to the Scottish case HM Secretary of State for Business Enterprise & Regulatory Reform, Re Order to Wind Up UK Bankruptcy Ltd [2009] ScotCS CSOH_50. The full opinion can be found at http://www.scotcourts.gov.uk/ opinions/opinions/2009csoh50.html

10. In this Scottish case, even the Scottish Court takes a positive view that a limited company should be allowed to be represented by its director. The only condition is that there is strict case management. This is all possible when the English rules are adopted. The judge who hears the case may decide and impose necessary conditions, e.g. a security, arguments relevant to issue. In cases where a leave is required, e.g. a judicial review application, the condition will inherently be met because cases with no merit will be strike out.

11. I would also like to draw the panel's attention to the case Harley v. McDonald (New Zealand) [2001] UKPC 18 as well. In paragraph 67, Lord Hope said:

As a general rule litigants have a right to have their case presented to the court and to

instruct legal practitioners to present them on their behalf. Although exceptional steps may have to be taken to deal with vexatious litigants, the public interest requires that the doors of the court remain open. And on the whole it is in the public interest that litigants who insist on bringing their cases to court should be represented by legal practitioners, however hopeless their cases may appear.

12. If even a hopeless case should be allowed to be heard in front of the court, why a company should be barred from presenting a may be hopeful case by its director? As it is discussed in paragraph 20 in the Scottish case, for the shake of fairness, it should be allowed.

13. Lastly, the Administration's arguments in paragraph 7 have no standing. First of all, if there is a delay, it is because the court refuses a leave and the delay caused is the matter of the company, not the court's concern. Secondly, the court's jurisdiction to revoke a leave has nothing to do with the right of the company to appeal against the refusal for a leave.

14. In conclusion, when the others have changed their position on this issue or is prepared to change, why our court should hold on a practice which is desert by the others? In particular, I do not understand why this part of the Lord Woolf's report was not incorporated into our last civil justice reform. Whatsoever the reason is, I make my petition to the panel to support the change now.

Yours sincerely,

S.W. Ng

Appendix A

Lord Wolf's Report: Access to Justice 1996

Chapter 12 Practice and Procedure

Representation of companies

61. At present a company has no right to represent itself in proceedings in the High Court or in the county courts. It may do so only at the court's discretion. County courts commonly, though not invariably, exercise the discretion in favour of companies; the High Court will almost never do so. I make recommendations below to extend a company's ability to represent itself.

62. I have received numerous representations about the inconvenience and additional expense which the present restrictions impose. They are particularly irksome in relation to routine procedural steps, such as an application to register a county court judgment for enforcement in the High Court. Steps such as these require no special skills. This has not gone without comment by the courts. The Court of Appeal, in Jonathan Alexander Ltd v Proctor, [1996] 2 All ER 334, held that a company representing itself should be entitled to the same costs as a litigant in person.

63. The rationale of the limitations on company representation is unclear. It is true that a company, being a legal and not a physical entity, cannot physically 'appear' in court. It follows, as the Court of Appeal confirmed in Alexander v Proctor, that a company cannot be a litigant in person. On the other hand, an officer or employee of a company, not being the litigant in

person either, is prevented (except at the discretion of the court) from acting as a representative because he does not qualify under Part II of the Courts and Legal Services Act 1990.

64. A justification which is put forward for the present restriction is that it is simply the consequence of a company's limited liability. Directors cannot have it both ways by saying that the company has a separate legal personality but that they can act for it in person. To my mind that is not a sufficient answer. Incorporation is intended to provide public as well as private benefits. If it contains features which are burdensome to companies but which are not obviously justifiable in the public interest, then those features should be re-examined.

65. What are the arguments against allowing companies to represent themselves? First, it would mean in effect that the courts would have to deal with more litigants in person. However, unlike the position in some continental countries, it has never been the policy here to oblige litigants to employ professional lawyers to represent them in the courts. I cannot, therefore, see a basis in principle for distinguishing the treatment of companies in this respect. Despite the undoubted difficulties which the policy of openness can create for the courts, I believe that it is desirable to maintain this tradition. In the interim report, I made recommendations for improved advice facilities for litigants in person, and these would also help the courts. Small companies may also need assistance, though not exactly the same kind as individuals. If companies are to have a wider facility to represent themselves, bodies representing their interests may wish to consider how guidance and advice might be provided. In line with my general approach, any such guidance should include guidance on the availability of ADR.

66. A second objection is that company employees are not subject to the same duty to the court or to the same professional discipline as solicitors. But they are in no different position from litigants in person. Under my proposals, the court will certainly have sanctions (if it does not already have them) to prevent abuse and maintain case progress. In addition, I see no difficulty in a company being held liable for the defaults of its duly authorised representative. There has been a suggestion that, in certain circumstances, the representative as well as the company could be joined as a party in order to make him more directly amenable to sanctions. I believe that such a step would normally not be necessary.

67. Thirdly, it is argued that a representative may not be genuinely representing the interests of the company but may be exploiting it. As a general rule, I would require a representative to show due authorisation to act from the company. I recognise that this does not deal with the situation where the representative effectively controls the company and is acting contrary to its interests. If that fact became apparent, then I believe that the court would have power under its inherent jurisdiction to refuse to allow the misbehaving representative to continue in that capacity. The company would then either have to obtain professional representation or discontinue the proceedings.

68. Finally, it may be argued that allowing company employees rights to litigate and to act as advocates cuts across the regime for approving litigators and advocates established under the Courts and Legal Services Act 1990. Such a change would either enable in-house lawyers to do what they are not at present able to do under that regime or make them worse off than their non-lawyer colleagues. My answer in principle would be that, if it is right that companies should be allowed to represent themselves, then the identity of the representative is immaterial, subject to the conditions which I have already indicated. So long as the position

of in-house lawyers remains as it is under the 1990 Act, those representing companies would be treated as lay representatives; they would not have the status of lawyers though, as I have explained, their acts would bind the company; they would be subject where appropriate to the court's sanctions and the company itself would be liable to be penalised for their misbehaviour.

69. It is not the case that all companies are uniformly better able to afford representation than individual litigants. We have a huge number of very small companies in this country, for whom the potential costs of litigation (especially under the present arrangements) are daunting and burdensome. It is for this reason that those representing the interests of small businesses in particular have welcomed my proposals for the fast track. Legal aid is generally not available to companies. Under the existing legislation, they are unlikely to be able to take advantage of conditional fee arrangements unless they are insolvent. By no means all steps in proceedings require professional legal skills. In certain areas of work, such as debt recovery and small claims, company employees regularly involved may become as competent as any solicitor. Furthermore, a company is more likely than an individual to be capable of judging when professional help is needed, assuming it is affordable.

70. Companies are at present frequently represented by their employees in county court proceedings, subject to the court's discretion. It has not been suggested that this has harmed the administration of justice. The objections to a right of self-representation need to be weighed against that fact. This would not be a leap in the dark. At the same time, I recognise that it would be desirable on the whole not to move too far away from the regime established under Part II of the Courts and Legal Services Act for extending rights of advocacy and representation.

71. I therefore recommend that rules of court should no longer require a company to act by a solicitor and that, subject to the court's discretion, a duly authorised employee of a company should normally be permitted to take any steps on behalf of the company which a litigant in person could take on his own behalf in High Court and county court proceedings. Exercise of the facility would be subject to the court being satisfied that the representative was duly authorised to act and to the right of the court to stop any advocate who misbehaves from addressing it. In effect I am recommending that the discretion to allow companies to represent themselves should be exercised on county court lines as opposed to High Court lines. To ensure that the discretion is exercised in a consistent and reasonable way, I also recommend that the Head of Civil Justice should set out in a practice direction the considerations which would be relevant to the court's decision. It should normally be possible for a company which is acting reasonably to be confident in advance that it will be able to act on its own behalf.

72. The question was raised in Alexander v Proctor whether companies should be entitled to the same costs as litigants in person. My recommendation about this is a provisional one, since I believe that the matter needs further consideration. A company has potentially more scope for incurring time-based costs on a scale which most individual litigants would be unlikely to approach. The fact that unreasonable costs could be reduced on taxation is not a complete answer. It would not be desirable to encourage companies to set up informal litigation operations in larger cases where they would be better advised to seek professional help. However, on the fast track, I am recommending that the costs recoverable by litigants in person, like those of solicitors, should be capped (see chapter 4). In cases on the multi-track, I am recommending (chapter 7, paragraphs 35-37) that the courts should develop an approach

to limiting costs, at least in the more standard cases. These limitations would also apply to a company representing itself. I therefore consider that it is reasonable in principle to allow companies the same costs in those cases as litigants in person. This will be subject to the general review of litigant in person costs which I am recommending.