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Report of the Subcommittee on Rules of the High Court (Amendment) Rules 2017

Purpose

This paper reports on the deliberations of the Subcommittee on Rules of the High Court (Amendment) Rules 2017 ("the Subcommittee").

Background

2. According to the Legislative Council ("LegCo") Brief (Ref.: SC 19/1/23) dated 14 June 2017 issued by the Judiciary Administration ("JA"), after reviews, the Judiciary has put forward various amendments to the Rules of the High Court (Cap. 4A) ("RHC") to improve the court procedures at the Court of Appeal ("CA") and introduce some other minor changes generally to the RHC.

3. On 2 June 2017, the Rules Committee of the High Court¹ made the Rules of the High Court (Amendment) Rules 2017 ("the Amendment Rules") under section 54 of the High Court Ordinance (Cap. 4) to introduce various amendments primarily to improve the court procedures. The proposed amendments are subject to negative vetting by LegCo. The main provisions of the Amendment Rules are set out as follows –

¹ The Rules Committee of the High Court is constituted under section 55 of the High Court Ordinance which may make rules of court regulating and prescribing the procedure and the practice to be followed in the High Court (see also section 54(1) of the High Court Ordinance). The Committee is chaired by the Chief Judge and comprises, among others, barristers nominated by the Hong Kong Bar Association and solicitors nominated by the Law Society of Hong Kong.

Appeals relating to Disciplinary Proceedings of Solicitors

- (a) Rule 10 repeals the existing Order 106, rule 12(1) to remove the automatic anonymity regarding the title of the notice of originating motion by which an appeal is brought against an order that the Solicitors Disciplinary Tribunal (“SDT”) makes after inquiring into and investigating the conduct of a solicitor or a solicitor’s clerk;

Civil Appeals to the Court of Appeal (“CA”)

- (b) Rules 3 and 7 amend Order 59, rules 2B and 15 to empower also the Court of First Instance (“CFI”) to extend the time limit for applying for leave to appeal to the CA, even though the time limit for the related appeals/applications may have expired;
- (c) Rules 4 and 5 amend Order 59, rule 5 and add a new rule 6A to Order 59 to provide for a clearer framework for fixing the date for hearing an appeal after the appeal has been set down;
- (d) Rule 6 amends Order 59, rule 7 to enhance the court's case management powers over the parties' amendments to notices of appeal and respondent's notices;

The expression “(HK)” in the RHC

- (e) Rule 13 repeals all the expression “(HK)” in various provisions of the RHC; and

Others

- (f) Rules 8, 9, 11 and 12 introduce some minor textual amendments to the RHC.

The Amendment Rules

4. The Amendment Rules were published in the Gazette on 16 June 2017 and tabled before LegCo at its meeting on 21 June 2017. The Amendment Rules will come into operation on 1 December 2017.

The Subcommittee

5. At the House Committee meeting held on 23 June 2017, Members agreed that a subcommittee should be formed to study the Amendment Rules. The membership list of the Subcommittee is in the **Appendix**.

6. Under the chairmanship of Hon James TO Kun-sun, the Subcommittee has held a meeting with the Administration and the JA to discuss the Amendment Rules.

Deliberations of the Subcommittee

7. The Subcommittee in general supports the proposed amendments to the RHC. In examining the Amendment Rules, the Subcommittee has focused its discussion on several areas which are summarized in the following paragraphs.

Rule 10 of the Amendment Rules

Appeals relating to Disciplinary Proceedings of Solicitors

8. The Subcommittee enquires the reasons for the proposed amendment to remove the present automatic anonymity requirements for appeals to the CA relating to disciplinary proceedings of solicitors.

9. The JA explains that currently according to section 13(1) of the Legal Practitioners Ordinance (Cap. 159), an appeal against any order made by the SDT shall lie to the CA and the provisions of Order 59 of the RHC shall generally apply to every such appeal. Section 13(4) of Cap. 159 specifically states that the hearing of every appeal against SDT decision shall be in open court unless the CA may otherwise direct. However, according to Order 106, rule 12(1) of the RHC, for an appeal against the decision of the SDT to the High Court, the solicitor or the solicitor's clerk concerned is not to be named in the title of the notice of the originating motion by which the appeal is brought.

10. After reviewing the existing arrangements in respect of the disciplinary proceedings of solicitors, the Judiciary notes that the non-disclosure arrangement under Order 106, rule 12(1) is not consistent with the early and final stages of the disciplinary proceedings handled by the SDT.

11. The JA advises that in short, neither Cap. 159 nor the Solicitors Disciplinary Tribunal Proceedings Rules (Cap. 159C) contain any provision that expressly requires non-disclosure of a solicitor's name in disciplinary proceedings. Order 106, rule 12(1) of the RHC is the only express provision that

stipulates the solicitor is not to be named in the notice of the originating motion for appeal against an order made by the SDT.

12. The JA further explained that such a non-disclosure arrangement under Order 106, rule 12(1) is not in line with that for similar court proceedings for barristers either. While most of the provisions relating to the Barristers Disciplinary Tribunal ("BDT") are similar to those governing the SDT, Order 106 of the RHC is not applicable to appeals against BDT's decisions. There is no anonymity of barristers in the titles of proceedings of appeals against BDT's decisions.

13. In response to the Chairman's enquiry, the JA confirmed that there is no similar anonymity restriction in respect of appeals from disciplinary tribunals of other professions such as public accountants and medical practitioners.

14. The Subcommittee notes that the Judiciary suggests repealing Order 106, rule 12(1) of the RHC so as to remove the automatic anonymity requirement in appeals against decisions of the SDT to the CA. The court's present discretion to order anonymity in individual cases as the circumstances may require remains unaffected. The Subcommittee has no objection to amending Order 106, rule 12 as proposed.

Rule 6 of the Amendment Rules

Civil Appeals to the CA

15. The Subcommittee notes that Order 59, rule 7 of the RHC governs the amendments of the notice of appeal and the respondent's notice. A party may amend the notice of appeal or respondent's notice with leave of the CA at any time according to rule 7(1)(a); or without such leave, by serving a supplementary notice on all the parties concerned not less than 3 weeks before the hearing date of the appeal according to rule 7(1)(b). In other words, even a wholesale amendment of the original notice of appeal can be made without any control by the court if it is made earlier than 3 weeks before the hearing of the appeal. The same is true for amending a respondent's notice. The Judiciary considers that this is unsatisfactory and could result in abuses.

16. The JA explains that to strike a better balance between the need for flexibility and proper case management, the Judiciary proposes to tighten up rule 7(1)(b) by advancing the cut-off date of serving a supplementary notice to amend a notice of appeal or respondent's notice without the leave of the CA to the date when a hearing date of the appeal is fixed. Any subsequent amendments to the notice of appeal/respondent's notice will be subject to the approval of the CA because such amendments may affect, among others, the

length of the appeal hearing and the preparations needed for the hearing before the CA.

17. In order to ascertain the efficacy of the proposed amendment, the Subcommittee requests the JA to provide information on the background/justifications and policy intent for setting the cut-off date of serving a supplementary notice to amend a notice of appeal or respondent's notice without the leave of the Court of Appeal as "not less than three weeks before the date fixed for the hearing of the appeal" under the existing rule 7(1)(b); and the average time duration between the date when a hearing date of an appeal is fixed and the actual hearing date of the appeal.

18. The JA explains in writing that Order 1A of the RHC sets out clearly the objectives of the court procedures in the RHC and the role of the court in handling court cases. Stress is put on the court's case management powers. Among other things, Order 1A, rule 4 of the RHC provides for the court's duty to manage cases, and specifies that active case management includes identifying the issues at an early stage; fixing timetables or otherwise controlling the progress of the case; and giving directions to ensure that the trial of a case proceeds quickly and efficiently.

19. The Subcommittee notes that in the light of these policy objectives, the Judiciary has recently reviewed the court procedures and practices for civil appeals to the CA. In March 2017, the Judiciary substantially revised and implemented a Practice Direction ("PD") governing civil appeals (namely PD 4.1) to strengthen the court's case management powers for such appeals. In particular, the hearing date of an appeal will not be fixed until all essential documents relating to an appeal are ready. Such include the notice of appeal, any respondent's notice and the index of the appeal bundles. Moreover, both parties have to jointly submit a checklist confirming, among others, that there is no outstanding interlocutory application and the estimated time needed for the hearing.

20. The JA further explains that if either party indicates an intention to amend the notice of appeal or the respondent's notice, the hearing date will not be fixed and the case will be referred to the Registrar of Civil Appeals for further direction. The fixing of a hearing date signifies the parties' readiness for hearing of the appeal.

21. The Subcommittee notes that the time between an application to fix a hearing and the first available hearing date offered by the court is now normally under 3 months (averaging at about 86 days in 2016).

22. The JA explains that the existing Order 59, rule 7(1)(b) which allows a party to amend the notice of appeal or respondent's notice which serves to set

out the grounds of appeal or grounds of opposition to the appeal so close to the hearing date without any control of the court is a relic of the past. It was enacted a long time ago when litigation was allowed to be conducted in a more relaxed pace with the court adopting essentially a passive role. Viewed in the light of the underlying objectives as set out in Order 1A, rule 4 of the RHC, the JA considers that the provision is plainly an oddity which is prone to give rise to unacceptable delays, wasting of costs and efforts, and even abuses.

23. The JA further explains that under the revised PD 4.1, by the time when it is up to 3 weeks before the hearing, both parties will have long submitted all their related documents to the CA and confirmed that there is no more outstanding interlocutory application. The skeleton arguments and lists of authorities will have already been submitted to the court as well. If any party has any substantive last-minute changes to the grounds of appeal or grounds of opposition to the appeal at this late stage, it will very likely lead to wasted costs and efforts of the other party. The other party may also need to incur additional costs to prepare fresh/refined counter-arguments. Besides, last-minute substantive changes without controls may also lead to disruption or wastage of preparatory efforts of the court. Such last-minute changes may also cause unfairness to the other party, adversely affecting the administration of justice.

24. Taken the above together, the Judiciary takes a strong view that the current arrangement in Order 59, rule 7(1)(b) of allowing parties to freely make changes to the notice of appeal or respondent's notice so close to the actual hearing is not acceptable and is not in line with the policy objectives of Order 1A of the RHC.

25. According to the JA, the proposed amendments have been agreed by the legal professional bodies, including the Law Society and the Hong Kong Bar Association.

26. Some members of the Subcommittee are concerned with the legal costs that may be incurred if leave is required for amendments after the hearing date is fixed as the period requiring such leave will in most cases be longer than the current period of three weeks.

27. The JA explains that as required in the revised PD 4.1, the key issues for determination in the appeal, as defined by the grounds of appeal in the notice of appeal and grounds of opposition in the respondent's notice, have to be crystallized before the fixing of the hearing date. The parties are specifically required to confirm in writing that there is no outstanding interlocutory application before the hearing date is fixed. Furthermore, if either party indicates an intention to amend the notice of appeal or respondent's notice, no hearing date will be fixed until the matter is sorted out. Therefore, the chance for the parties to subsequently introduce any substantial changes to the notice of

appeal/the respondent's notice is small. Moreover, an unopposed application for leave to make a late amendment may be disposed of by consent between the parties (followed by a court order). The court may also deal with an opposed application for leave to amend on paper without an oral hearing.

28. The JA considered that the overall advantages to be gained by the proposed amendments to the rule, including the saving of legal costs that may otherwise be wasted, far outweigh the additional costs that may be involved in the proposed leave requirement in individual cases.

Rule 13 of the Amendment Rules

The expression "(HK)" in the RHC

29. The Subcommittee notes that the RHC, which were largely modeled on the Rules of the Supreme Court ("RSC") in England and Wales, were enacted in 1988. For ease of reference, the English numbering system as it existed at that time was followed in the RHC. For those rules or orders that were unique to Hong Kong, they were indicated with the expression "(HK)" in the RHC.

30. In 1999, the RSC were largely replaced by the Civil Procedure Rules ("CPR"), which are considered to be an entirely new code of civil procedure. Although the substantial amendments to the RHC in 2009 relating to the Civil Justice Reform were heavily influenced by the English CPR, only selected aspects of the CPR have been adopted, and in some cases in modified format. It is also noted that in recent years, there has not been a consistent practice of adding the expression "(HK)" to the RHC. Moreover, the expression has not been included in any amendments to the RHC since 1997.

31. The Judiciary therefore considers that the existing arrangement may not be the most satisfactory for statute readers or users. For provisions without the expression "(HK)", they were either adapted from the RSC or subsequently added to the RHC. In the former case, if the English counterparts have been repealed by the CPR in 1999, although the HK provisions originated from the RSC, arguably they have now become "HK-specific" provisions. In the latter case, it is unclear to statute users whether the provisions are "HK-specific" or not as no "(HK)" can be found.

32. The Subcommittee notes that according to section 18 of the Interpretation and General Clauses Ordinance (Cap. 1), these expressions have no legal effect for interpretation of the law. The Subcommittee does not object to the Judiciary's proposal to remove all of the expression "(HK)" in the RHC.

Rules 8, 9, 11 and 12 of the Amendment Rules

Minor textual amendments

33. The Subcommittee notes that Rules 8, 9, 11 and 12 of the Amendment Rules introduce some minor textual amendments to the RHC. On the discrepancy between the Chinese rendition of "settle" in section 227 of the Companies Ordinance (Cap. 622) (i.e. 擬備) and that in Order 102, rule 14 of the RHC (i.e. 議定), the JA advises that the Judiciary has consulted the Financial Services and the Treasury Bureau and the Department of Justice. They have advised that the Chinese equivalent of "議定" in Order 102, rule 14 of the RHC is appropriate considering the context of section 227 of Cap. 622. As such, for alignment, the Government will amend the Chinese equivalent of "settle" in the relevant provisions of Cap. 622, including section 227, when they next amend Cap. 622.

34. The Subcommittee raises no objection to the Amendment Rules. Both the Subcommittee and the Administration will not move any amendment to the Amendment Rules

Advice sought

35. Members are invited to note the deliberations of the Subcommittee.

Subcommittee on Rules of the High Court (Amendment) Rules 2017

Membership list

Chairman Hon James TO Kun-sun

Members Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
 Hon Paul TSE Wai-chun, JP
 Hon Alvin YEUNG
 Dr Hon Junius HO Kwan-yiu, JP
 Hon Holden CHOW Ho-ding
 Hon CHEUNG Kwok-kwan, JP

(Total : 7 Members)

Clerk Ms Sophie LAU

Legal adviser Miss Rachel DAI