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MESSAGE

Dear Margaret

Comments on Schedule 1, Part II, para. 2(3) of
Order 62 District Court Rules

I enclose comments on the above proposal which reflect views after a limited consultation with members of the Bar. In the limited time available, it is has not been possible to consult more widely on the proposal. I hope this is helpful.

Yours sincerely,

Gladys Li, S.C.

c.c. The Chairman of the HK Bar Association

Comment on Schedule 1, Part II, para. 2(3)
of Order 62 District Court Rules

1. Both the proposal and the existing equivalent rule (Rule 8(1) of the District Court Civil Procedure (Costs) Rules) are based on certain assumptions which do not reflect the reality of how litigation is conducted in practice. The result is that the succesful party (the lay client) may be unsuccessful in recovering part of his costs, even if the costs which he has incurred are entirely reasonable. Both the current and proposed rule is discriminatory.

2. What is the supposed rationale of requiring a certificate that the case is fit for Counsel (existing rule) or that the attendance of Counsel is proper in the circumstances of the case (limb (a) of proposed rule)? Cases in the District Court which do not fall within the jurisdiction of the Small Claims Tribunal are presumably considered cases where legal representation is warranted. If that is so, it is unclear why the rules should be biassed in favour of representation by solicitor (where no certificate is required) and against representation by counsel (where a certificate is required). As stated above, this unfairly discriminates against the lay client.

3. There is a common misconception that to instruct solicitor and counsel works out more expensive for the client. This is not necessarily so. The rates of many junior members of the Bar are substantially cheaper than the solicitor of equivalent seniority. Thus, by imposing this rule, the costs may even be higher than they would

otherwise need to be. There is no rule which guarantees that the same solicitor within a firm will handle the matter throughout including at the hearing. In fact, the likelihood is that in many firms, this will just not be possible say if the handling solicitor is engaged on another matter. If the solicitor then has to hand the matter over to someone else, he may hand over to someone who would be more expensive than counsel. The handling solicitor may himself charge more than a junior counsel would. Moreover, the ability for a solicitor to instruct counsel leaves maximum flexibiltiy for small and medium size firms of solicitors and maximizes consumer choice. Otherwise, work will be monopolized by a few large firms. The client could be represented by solicitor only, solicitor and counsel or counsel only should the Bar relax rules against direct access in the future. Thus, the maximum flexibility is provided. The current rule and the proposal militates against that flexibility and choice. It is based on a number of inherently false assumptions as to the process of litigation as it works in practice.

4. It is therefore suggested that the proposed rule 2(3) be deleted. However, if this proposal is to be adopted, limb (b) of the rule should be reworded since the word "recovered" is ambiguous and could be interpreted to mean recovered on enforcement as opposed to the amount in respect of which judgment is given (whether or not ultimately recovered on execution). It is also suggested that this limb should be re-worded to read " the amount claimed exceeds $150,000 ". Otherwise, a successful defendant who is facing a claim which amounts to $150,000 or more does not get the benefit of the

rule whilst a successful plaintiff does. This is unfair. If a claim of this amount is considered to warrant counsel, why should only the successful plaintiff benefit from such a rule?

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