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**Paper for the House Committee meeting on 3 October 2003**

**Report of the Subcommittee on  
Rules of the High Court (Amendment) Rules 2003**

**Purpose**

This paper reports on the deliberations of the Subcommittee on Rules of the High Court (Amendment) Rules 2003 (the Amendment Rules).

**The Amendment Rules**

2. The main purpose of the Amendment Rules is to add a new rule 11B to Order 24 of the Rules of the High Court (RHC) (Cap. 4 sub. leg. A) to deal with the discovery of a record or transcript of proceedings prepared for a party's use at his own expense.

**The Subcommittee**

3. At the House Committee on 27 June 2003, members agreed to form a subcommittee to study the Amendment Rules. The membership list of the Subcommittee is in **Appendix**.

4. Under the chairmanship of Hon Margaret NG, the Subcommittee held one meeting with the Judiciary Administration on 23 July 2003. The deliberations of the Subcommittee are summarized below.

**Deliberations of the Subcommittee**

Effective date of the Amendment Rules

5. The Subcommittee has noted that the Amendment Rules have come into effect on the day on which they were published in the Gazette, that is, 20 June 2003. The deadline for making amendments to the Amendment Rules is the second meeting of the Legislative Council (LegCo) in the next session, unless extended by resolution.

6. The Judiciary Administration has advised the Subcommittee that the Judiciary agrees in principle that subsidiary legislation subject to the negative vetting procedure of LegCo should come into effect on an appointed day after expiry of the negative vetting period. However, due to an administrative oversight, the Amendment Rules have already come into effect on the day on which they were published in the Gazette, i.e. 20 June 2003. The Judiciary will take steps to ensure non-recurrence of such

incident.

### Records or transcripts of court proceedings

7. The Judiciary Administration has advised the Subcommittee that there are the following two types of records or transcripts of court proceedings -

- (a) records or transcripts produced by the Digital Audio Recording and Transcript Production Services (DARTS); and
- (b) records or transcripts commissioned by the parties at their own expense.

### *Records or transcripts produced by DARTS*

8. All court proceedings are recorded in digital form in the DARTS system by the Judiciary. Audiotapes or transcripts of such records of proceedings are made available to requesting parties on payment of a fee. The time required for the production of the transcripts depends on the length of proceedings concerned. At present, the DARTS system does not provide simultaneous transcripts. The Amendment Rules are not concerned with transcripts produced by the DARTS system.

### *Records or transcripts commissioned by the parties at their own expense*

9. Parties to proceedings may also make their own arrangements, usually by engaging commercial firms to produce records or transcripts of those proceedings (whether by shorthand, mechanical, electronic or other means) for their own use at their own expense. The provision of simultaneous records or transcripts has often in the past been commissioned in complex cases where the parties could afford the cost. The proceedings as they carry on are instantly displayed on computer terminals made available by the provider to the parties and the court. Hard copies are then usually supplied before close of business of the day or on the following day. As for the cost of such a service, in the past, the parties have usually agreed to share equally. According to the Judiciary Administration, the provision of such simultaneous transcripts has proved to be invaluable to the efficient running and management of cases by the courts and makes speedier the resolution of cases.

### The need for the Amendment Rules

#### *Discovery of documents*

10. Discovery of documents is governed by Order 24 of RHC. In brief, discovery is the mutual disclosure and exchange between the parties to the litigation, of all documents relating to matters in question in the action. It is automatic in a wide variety of proceedings upon close of pleadings. A party may, however, apply for further or specific discovery. Upon such an application, the court will have to take into account the following factors -

- (a) whether the document sought to be discovered is relevant to the issues in the action and the disputes between the parties;
- (b) whether discovery is necessary for disposing fairly of the action; and
- (c) whether discovery is necessary for saving costs.

11. If the above considerations are met, the court may make an order requiring the party in possession of the document to produce the same to the other party who will have to pay the reasonable costs for the copy of the document.

*Ruling of the Court of First Instance and its implications*

12. In *Ho Lai Chuen, Cadia trading as Resolution Software Consultants v Xerox (Hong Kong) Limited* (HCA6454/1997) before the Court of First Instance, the defendant commissioned and paid for a commercial transcript provider to prepare simultaneous transcripts of the proceedings at his own expense, the plaintiff having refused to bear the cost involved. By consent of the parties, the transcripts were made available to the court for its use. However, on the seventh day of trial, the plaintiff applied for discovery of the transcripts under Order 24, RHC. In making the order for discovery sought by the plaintiff, the court held that both the hard and soft copies of the simultaneous transcripts were discoverable documents. The court also ruled that the reasonable charge payable by the plaintiff to the defendant for production of copies was -

- (a) \$7,000 per day for a soft copy of the simultaneous transcripts i.e. instantaneous live display of the transcript in computers in court (which was half of the amount charged by the provider to the defendant); and
- (b) \$500 for a hard copy of the transcripts of a day's proceedings.

The result of the decision was that whilst the defendant had to pay at least \$14,000 per day for the service provided by the provider (being the cost of the simultaneous soft copy), the plaintiff was entitled to obtain a hard copy of the transcripts at merely \$500 per day. (The plaintiff did not have to obtain a soft copy at the higher cost of \$7,000 per day).

13. The Judiciary Administration has explained that the decision has had a dramatic but adverse effect on the willingness of parties to engage the services of professional simultaneous transcript providers. Given that its effect is to enable one party to demand and obtain a copy of the transcript for a mere fraction of the cost, litigants who otherwise would have been willing to engage such service providers, have become very reluctant to do so. As a result, the parties and the courts have been deprived of a useful tool in complex cases where previously such a transcript would have been commissioned by the parties.

*The Amendment Rules*

14. In order to address the adverse effect of the *Ho Lai Chuen, Cadia* decision, the Rules Committee of the High Court has decided to amend Order 24 of RHC by adding rule 11B which has the following effect -

- (a) if a party to any proceedings before the court has a record of the proceedings or a transcript of that record prepared for his own use, the party shall not be required to take discovery of or to produce that record or transcript (or a copy of that record or transcript) to the other parties to the proceedings;
- (b) the record or transcript, or a copy of the record or transcript, may be produced to and for the use of the court if all the parties to the proceedings agree; and
- (c) if the record or transcript, or a copy of the record or transcript, is produced to the court, the court shall order such record or transcript, or a copy of such record or transcript, to be also supplied to all the other parties to the proceedings subject to the payment of reasonable charges which include the costs of procuring or commissioning the production of such record or transcript or a fair and reasonable proportion of such costs.

15. Consequential amendments are also made to other relevant rules in Order 24 so that they will become consistent with the new rule 11B. These rules are -

- (a) rule 2(1) on discovery by parties without order;
- (b) rule 3(1) on order for discovery;
- (c) rule 7(1) on order for discovery of particular documents; and
- (d) rule 12 on order for production of documents to the court.

The effect of these amendments is that these rules concerning discovery and production of documents do not apply to a record or transcript, or a copy of the record or transcript, referred to in the new rule 11B.

16. According to the Judiciary Administration, the following considerations are relevant to the Amendment Rules -

- (a) there is no injustice in a party being denied unrestricted access to the other party's record of the proceedings. On the contrary, there may be unfairness in a non-paying party being able to obtain at a cut price a service that the other party has paid for at great expense;

- (b) simultaneous transcripts commissioned and paid for by one party are basically that party's own notes of the proceedings and should not be discoverable as they do not directly relate to the disputes between the parties. This does not, however, affect the principle that transcripts prepared by a party in any earlier set of proceedings are discoverable in a later set of proceedings provided that they are relevant to the issues in the relevant (i.e. the later) proceedings;
- (c) with the consent of all parties to the proceedings, a record or a transcript of proceedings prepared for a party's use should be made available for the court. Consent of all parties is required because the transcripts are the notes of one of the parties. They cannot be produced to the court without the consent of the other party to the proceedings; and
- (d) where a record or transcript prepared for a party's use is by consent produced to the court, the court should direct that such record or transcript be also supplied to the other party to the proceeding, subject to the payment of reasonable charges. The reasonable charges will cover a fair portion of the costs paid to the transcript provider for the service rendered (and not merely a fraction of such costs).

#### Concerns of the Subcommittee

17. Members of the Subcommittee have expressed a number of concerns about the new Order 24, rule 11B of RHC.

18. Members are of the view that the new rule 11B fails to encourage the use of the services of professional simultaneous transcript providers. They point out that a record or transcript of the proceedings prepared for a party's use could only be made available to the court subject to two conditions, i.e. consent of all parties to the proceedings (rule 11B(2)), and payment of reasonable charges (rule 11B(3)). A party may refuse to give consent to the production of such record or transcript to the court, or, even if consent is given, refuse to pay for the charges. In addition, a party who is willing to give consent may not afford the costs. In such cases, the court and the parties to the proceedings will be denied the benefit of access to such record or transcript.

19. Hon Audrey EU has requested the Judiciary Administration to clarify the application of rule 11B(2) to notes prepared by parties on their own vis-a-vis records or transcripts of proceedings produced by professional simultaneous transcript providers. Ms EU has pointed out that under the existing practice, notes taken by any parties to the proceedings on their own could not be made available to the courts save in certain exceptional situations. However, Ms EU is of the view that records or transcripts of proceedings produced by professional simultaneous transcript providers, which are of high professional standard and very useful in complex cases, should be treated differently. Hon Albert HO considers that the requirement of "consent of all parties to the proceedings" in rule 11B(2) would restrict the use of the rule and should be relaxed.

20. As regards rule 11B(3), some members have expressed concern that the affordability of a party to share the costs of production of records or transcripts commissioned by another party to the proceedings would affect the access of the court to such records or transcripts. Hon Audrey EU has suggested that that the charges for the records or transcripts under rule 11B could be treated as part of the litigation costs and dealt with at the taxation stage after the trial.

21. The Judiciary Administration has advised that the Amendment Rules do not apply to transcripts produced by the DARTS system. Members are of the view that rule 11B(1), in its present formulation, covers transcripts produced by the DARTS system which are made available to a requesting party on payment of a fee. The Subcommittee has requested the Judiciary Administration to consider revising rule 11B, so as to make it clear that the rule does not apply to transcripts produced by the DARTS system.

22. The Subcommittee considers that there are problems with the Amendment Rules which need to be addressed. As the Amendment Rules have come into effect on 20 June 2003 and the earliest opportunity for the Amendment Rules to be amended would be at the second meeting of LegCo in the next session due to the summer recess, the Subcommittee finds the situation undesirable and has requested the Judiciary Administration to consider the best approach to deal with the Amendment Rules during the interim, including the possibility of repealing the Amendment Rules.

### **Latest development**

23. The Judiciary Administration has subsequently advised the Subcommittee that having regard to the concerns of members, the High Court Rules Committee has decided to repeal the Amendment Rules in the meantime, and to reconsider the matter in due course.

24. The High Court (Amendment) Rules 2003 (Repeal) Rules were gazetted on 1 August 2003 and came into effect on the same day.

### **Advice sought**

25. Members are invited to note this report.

**Subcommittee on  
Rules of the High Court (Amendment) Rules 2003**

**Membership list**

**Chairman** Hon Margaret NG

**Members** Hon Albert HO Chun-yan  
Hon Jasper TSANG Yok-sing, GBS, JP  
Hon Audrey EU Yuet-mee, SC, JP

(Total : 4 Members)

**Clerk** Mrs Percy MA

**Legal Adviser** Miss Kitty CHENG

**Date** 23 July 2003