

LEGISLATIVE COUNCIL BRIEF

High Court Ordinance (Chapter 4)

RULES OF THE HIGH COURT (AMENDMENT) RULES 2003 (REPEAL) RULES

INTRODUCTION

On 28 July 2003, the High Court Rules Committee (“HCRC”) made the Rules of the High Court (Amendment) Rules 2003 (Repeal) Rules (“the Repeal Rules”) at **Annex A** under section 54 of the High Court Ordinance to repeal the Rules of the High Court (Amendment) Rules 2003 (L.N. 157 of 2003) (“the Amendment Rules”).

BACKGROUND AND ARGUMENT

2. The Amendment Rules were gazetted and came into operation on 20 June 2003, subject to negative vetting by the Legislative Council (“LegCo”). The Amendment Rules add a new rule 11B to Order 24 of the Rules of the High Court (Cap. 4 sub. leg. A).

3. The LegCo Subcommittee on Rules of the High Court (Amendment) Rules 2003 (“the LegCo Subcommittee”) has been set up to examine the Amendment Rules. The paper submitted to the LegCo Subcommittee, setting out the background to, the reasons for and the effects of the Amendment Rules, is at **Annex B**.

4. The LegCo Subcommittee held its first meeting on 23 July 2003, and raised a number of concerns about the Amendment Rules. These are set out in the Clerk to the Subcommittee’s letter of the dated 24 July 2003 (at **Annex C**).

5. Having regard to the LegCo Subcommittee’s concerns, the HCRC decided to repeal the Amendment Rules in the meantime, and the Repeal Rules were made to this effect on 28 July 2003. The HCRC has

also decided to re-consider the matter in due course, and in doing so, will take into account the LegCo Subcommittee's concerns.

THE REPEAL RULES

6. The Repeal Rules repeal the Rules of the High Court (Amendment) Rules 2003 (L.N. 157 of 2003).

LEGISLATIVE TIMETABLE

7. The Repeal Rules will be gazetted on 1 August 2003 and will come into effect on the same day.

PUBLIC CONSULTATION

8. The LegCo Subcommittee has been informed of the HCRC's decision to repeal the Amendment Rules.

PUBLICITY

9. As the Repeal Rules are mainly concerned about the procedural matters of the court, no publicity will be made. However, the two legal professional bodies will be informed of the Repeal Rules on 1 August 2003.

ENQUIRIES

10. Any enquiries on this brief can be addressed to Miss Vega Wong, Assistant Judiciary Administrator (Development) (tel. no. 2825 4244).

RULES OF THE HIGH COURT (AMENDMENT) RULES 2003 (REPEAL) RULES

(Made by the Rules Committee of the High Court under section
54 of the High Court Ordinance (Cap. 4))

1. Repeal

The Rules of the High Court (Amendment) Rules 2003 (L.N. 157 of 2003)
are hereby repealed.

Made this 28th day of July 2003.

Andrew LI
The Hon. Chief Justice

The Hon. Mr. Justice MA
Chief Judge of the High Court

The Hon. Mr. Justice
ROGERS, V.P.

Mr. MOK Yeuk Chi

Mr. Godfrey LAM

Mr. Nicholas HUNSWORTH

Mr. Jeremy S.C. POON
Secretary

Explanatory Note

The purpose of these Rules is to repeal the Rules of the High Court (Amendment) Rules 2003 (L.N. 157 of 2003).

Rules of the High Court (Amendment) Rules 2003

Purpose

The Rules of the High Court (Amendment) Rules 2003 (“the Amendment Rules”) add a new rule 11B to Order 24 of the Rules of the High Court (“RHC”) (Cap. 4 sub. Leg. A) dealing with the question of discovery of a record or transcript of proceedings prepared for a party’s use at his own expense. For easy reference, a copy of the Amendment Rules is annexed at **Annex 1**. This paper describes the background leading to the Amendment Rules, sets out the reasons for the amendment and explains their effect.

Annex 1

Background

2. Generally speaking, there are two types of records or transcripts of court proceedings:

(a) Records or Transcripts prepared by the Judiciary

These are records or transcripts produced by the Digital Audio Recording and Transcript Production Services (“DARTS”) of the Judiciary. All court proceedings are recorded in digital form in the DARTS system. 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.

(b) Records or Transcripts commissioned by the parties at their own expense

Parties to proceedings may also make their own arrangements, usually by engaging commercial firms that specialise in such services, 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. Simultaneous transcripts are extremely useful in such complex cases. As for the cost of such a service, in the past, the parties have usually agreed to share equally. 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.

3. When Order 24 of the RHC first came into being, the provision of simultaneous transcripts set out at paragraph 2(b) was not envisaged. The Amendment Rules deal with the discovery of records or transcripts commissioned and paid for by the parties (see paragraph 2(b)). As stated above, they do not concern those prepared by the DARTS system (see paragraph 2(a)).

Discovery of Documents

4. It is useful to first briefly set out the principles governing discovery of documents. For present purposes, it is sufficient to state the following.

5. Discovery of documents is governed by Order 24, RHC. A copy of the entire Order 24 can be found at **Annex 2**. In brief, discovery is the mutual disclosure and exchange between the parties to the litigation, of all documents relevant to the disputes between them (or, in the words found in Order 24, “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.

6. 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.

7. 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 its 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 7th 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 (i) \$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 (ii) \$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).

The Need for the Amendments

8. This 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.

9. The following considerations are relevant:
- (a) The Amendment Rules are necessary and desirable. As stated above, the effect of the *Ho Lai Chuen, Cadia* decision has been to discourage quite dramatically the use of the simultaneous transcript service referred to earlier. This has deprived the parties and the courts of a very useful tool. The Amendment Rules will address such adverse effect.
 - (b) No injustice is caused by the Amendment Rules. While it has to be accepted that discovery of documents relevant to the disputes between parties in an action is necessary, a transcript of proceedings relates not so much to the disputes in a case but rather represents merely a record of the proceedings in which all parties take part and are able themselves to record. 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.
 - (c) Having regard to the matters above, 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.
 - (d) However, 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.
 - (e) 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. This is in accordance with the general principle that

whenever a party provides material to the court, he must provide it to the other party, unless that other party consents not to have it provided. Here, reasonable charges should include the costs of procuring or commissioning the production of such record or transcript or a fair and reasonable proportion of such costs. In short, 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).

The Amendment Rules

10. Having regard to the considerations referred to in paragraph 9 above, the Amendment Rules are made, adding a new rule 11B to Order 24 of the RHC.

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

12. The effect of these amendments is that the above 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.

Advice Sought

13. Members are invited to note the contents of this paper.

RULES OF THE HIGH COURT (AMENDMENT) RULES 2003

(Made by the Rules Committee of the High Court under section
54 of the High Court Ordinance (Cap. 4))

1. Discovery by parties without order

Order 24, rule 2(1) of the Rules of the High Court (Cap. 4 sub. leg. A) is amended by repealing "of rule 4" and substituting "of rules 4 and 11B".

2. Order for discovery

Order 24, rule 3(1) is amended by repealing "and 8" and substituting ", 8 and 11B".

3. Order for discovery of particular documents

Order 24, rule 7(1) is amended by repealing "rule 8" and substituting "rules 8 and 11B".

4. Rule added

Order 24 is amended by adding -

**"11B. Disclosure of records of proceedings or
their transcripts (O. 24, r. 11B)**

(1) Where a party to any proceedings has a record of those proceedings or a transcript of such a record prepared (whether by shorthand, mechanical, electronic or any other means) for that party's use, that party shall not be required, whether by a court order or otherwise, to make discovery of or to produce that record or transcript, or a copy of that record or transcript, to any other party for the purpose of those proceedings.

(2) A record, transcript or copy referred to in paragraph (1) may be produced to and for the use of the Court, but only if all the parties to the proceedings consent to such production.

(3) Where a record or transcript, or a copy of a record or transcript, is produced to the Court under paragraph (2), 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.”.

5. Order for production to Court

Order 24, rule 12 is amended -

- (a) by renumbering it as Order 24, rule 12(1);
- (b) by adding -

“(2) This rule does not apply in relation to a document referred to in rule 11B(1).”.

Made this 11th day of June 2003.

Explanatory Note

These Rules add a new rule 11B to Order 24 of the Rules of the High Court (Cap. 4 sub. leg. A).

2. The effect of the new rule 11B is as follows -

- (a) if a party to any proceedings before the Court (Note: The expression "the Court" is defined in Order 1, rule 4(2) of the Rules of the High Court (Cap. 4 sub. leg. A)) has a record of the proceedings or a transcript of that record prepared for his own use, the party shall not be required to make 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;
- (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.

3. In view of the making of the new rule 11B, some other provisions of Order 24 also need to be amended. Rule 2(1) (which requires the parties to an action to make, within 14 days after the pleadings in the action

are deemed to be closed, discovery of documents and lists of such documents relating to a matter in question in the action which are or have been in the possession, custody or power of the parties), rule 3(1) (which enables the Court to, amongst other things, order the making of a list of the documents relating to a cause or matter, which are or have been in the possession, custody or power of a party to the proceedings), rule 7(1) (which empowers the Court to order the making of an affidavit stating whether any document or class of document specified or described in the application is, or has at any time been, in the possession, custody or power of a party to the proceedings) and rule 12 (which enables the Court to order the production of any document relating to a cause or matter in the possession, custody or power of a party to the proceedings) are now amended to the effect that these rules do not apply to a record or transcript, or a copy of the record or transcript, referred to in the new rule 11B.

The Rules of the High Court (Cap. 4 sub. leg. A)

Order 24

Discovery and Inspection of Documents

1. Mutual discovery of documents (O. 24, r. 1)

(1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action.

(2) Nothing in this Order shall be taken as preventing the parties to an action agreeing to dispense with or limit the discovery of documents which they would otherwise be required to make to each other.

2. Discovery by parties without order (O. 24, r. 2)

(1) Subject to the provisions of this rule and ~~of rule 4 of rules 4 and 11B~~, the parties to an action between whom pleadings are closed must make discovery by exchanging lists of documents and, accordingly, each party must, within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action.

Without prejudice to any directions given by the Court under Order 16, rule 4, this paragraph shall not apply in third party proceedings, including proceedings under that Order involving fourth or subsequent parties.

(2) Unless the Court otherwise orders, a defendant to an action arising out of an accident on land due to a collision or apprehended collision involving a vehicle shall not make discovery of any documents to the plaintiff under paragraph (1).

(3) Paragraph (1) shall not be taken as requiring a defendant to an action for the recovery of any penalty recoverable by virtue of any written law to make discovery of any documents.

(4) Paragraphs (2) and (3) shall apply in relation to a counterclaim as they apply in relation to an action but with the substitution, for the reference in paragraph (2) to the plaintiff, of a reference to the party making the counterclaim.

(5) On the application of any party required by this rule to make discovery of documents, the Court may-

(a) order that the parties to the action or any of them shall make discovery under paragraph (1) of such documents or classes of documents only, or as to such only of the matters in question, as may be specified in the order, or

(b) if satisfied that discovery by all or any of the parties is not necessary, or not necessary at that stage of the action, order that

there shall be no discovery of documents by any or all of the parties either at all or at that stage;

and the Court shall make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the action or for saving costs.

(6) An application for an order under paragraph (5) must be by summons, and the summons must be taken out before the expiration of the period within which by virtue of this rule discovery of documents in the action is required to be made.

(7) Any party to whom discovery of documents is required to be made under this rule may, at any time before the summons for directions in the action is taken out, serve on the party required to make such discovery a notice requiring him to make an affidavit verifying the list he is required to make under paragraph (1), and the party on whom such a notice is served must, within 14 days after service of the notice, make and file an affidavit in compliance with the notice and serve a copy of the affidavit on the party by whom the notice was served.

3. Order for discovery (O. 24, r. 3)

(1) Subject to the provisions of this rule and of rules ~~4 and 8~~, **8 and 11B**, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) Where a party who is required by rule 2 to make discovery of documents fails to comply with any provision of that rule, the Court, on the application of any party to whom the discovery was required to be made, may make an order against the first-mentioned party under paragraph (1) of this rule or, as the case may be, may order him to make and file an affidavit verifying the list of documents he is required to make under rule 2 and to serve a copy thereof on the applicant.

(3) An order under this rule may be limited to such documents or classes of document only, or to such only of the matters in question in the cause or matter, as may be specified in the order.

4. Order for determination of issue, etc., before discovery (O. 24, r. 4)

(1) Where on an application for an order under rule 2 or 3 it appears to the Court that any issue or question in the cause or matter should be determined before any discovery of documents is made by the parties, the Court may order that that issue or question be determined first.

(2) Where in an action begun by writ an order is made under this rule for the determination of an issue or question, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires parties to serve a notice specifying the orders and directions which they desire and with any other necessary modifications, apply as if the application on which the order was made were a summons for directions.

5. Form of list and affidavit (O. 24, r. 5)

(1) A list of documents made in compliance with rule 2 or with an order under rule 3

must be in Form No. 26 in Appendix A, and must enumerate the documents in a convenient order and as shortly as possible but describing each of them or, in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it to be identified.

(2) If it is desired to claim that any documents are privileged from production, the claim must be made in the list of documents with a sufficient statement of the grounds of the privilege.

(3) An affidavit made as aforesaid verifying a list of documents must be in Form No. 27 in Appendix A.

6. Defendant entitled to copy of co-defendant's list (O. 24, r. 6)

(1) A defendant who has pleaded in an action shall be entitled to have a copy of any list of documents served under any of the foregoing rules of this Order on the plaintiff by any other defendant to the action; and a plaintiff against whom a counterclaim is made in an action begun by writ shall be entitled to have a copy of any list of documents served under any of those rules on the party making the counterclaim by any other defendant to the counterclaim.

(2) A party required by virtue of paragraph (1) to supply a copy of a list of documents must supply it free of charge on a request made by the party entitled to it.

(3) Where in an action begun by originating summons the Court makes an order under rule 3 requiring a defendant to the action to serve a list of documents on the plaintiff, it may also order him to supply any other defendant to the action with a copy of that list.

(4) In this rule "list of documents" (文件清單) includes an affidavit verifying a list of documents.

7. Order for discovery of particular documents (O. 24, r. 7)

(1) Subject to ~~rule 8~~ **rules 8 and 11B**, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.

**7A. Application under section 41 or 42(1)
of the Ordinance (O. 24, r. 7A)**

(1) An application for an order under section 41 of the Ordinance for the disclosure of documents before the commencement of proceedings shall be made by originating summons (in Form No. 10 in Appendix A) and the person against whom the order is sought shall be made defendant to the summons. (L.N. 404 of 1991)

(2) An application after the commencement of proceedings for an order under section 42(1) of the Ordinance for the disclosure of documents by a person who is not a party to the proceedings shall be made by summons, which must be served on that person personally and on every party to the proceedings other than the applicant.

(3) A summons under paragraph (1) or (2) shall be supported by an affidavit which must-

(a) in the case of a summons under paragraph (1), state the grounds on which it is alleged that the applicant and the person against whom the order is sought are likely to be parties to subsequent proceedings in the Court of First Instance in which a claim for personal injuries is likely to be made; (25 of 1998 s. 2)

(b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of a claim for personal injuries made or likely to be made in the proceedings and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

(4) A copy of the supporting affidavit shall be served with the summons on every person on whom the summons is required to be served.

(5) An order under section 41 or 42(1) for the disclosure of documents may be made conditional on the applicant's giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just, and shall require the person against whom the order is made to make an affidavit stating whether any documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.

(6) No person shall be compelled by virtue of such an order to produce any documents which he could not be compelled to produce-

(a) in the case of a summons under paragraph (1), if the subsequent proceedings had already been begun; or

(b) in the case of a summons under paragraph (2), if he had been served with a writ of subpoena duces tecum to produce the documents at the trial.

(7) In this rule "a claim for personal injuries" (就人身傷害而提出的申索) means a claim in respect of personal injuries to a person or in respect of a person's death.

(8) For the purposes of rules 10 and 11 an application for an order under section 41 or 42(1) shall be treated as a cause or matter between the applicant and the person against whom the order is sought.

8. Discovery to be ordered only if necessary (O. 24, r. 8)

On the hearing of an application for an order under rule 3, 7 or 7A the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

9. Inspection of documents referred to in list (O. 24, r. 9)

A party who has served a list of documents on any other party, whether in compliance with rule 2 or with an order under rule 3, must allow the other party to inspect the documents referred to in the list (other than any which he objects to produce) and to take copies thereof and, accordingly, he must when he serves the list on the other party also serve on him a notice stating a time within 7 days after the service thereof at which the said documents may be inspected at a place specified in the notice.

10. Inspection of documents referred to in pleadings and affidavits (O. 24, r. 10)

(1) Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings, affidavits or witness statements served under Order 38, rule 2A, or experts' reports, reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof. (L.N. 223 of 1995; L.N. 383 of 1996)

(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

11. Order for production for inspection (O. 24, r. 11)

(1) If a party who is required by rule 9 to serve such a notice as is therein mentioned or who is served with a notice under rule 10(1)-

- (a) fails to serve a notice under rule 9 or, as the case may be, rule 10(2), or
- (b) objects to produce any document for inspection, or
- (c) offers inspection at a time or place such that, in the opinion of the Court, it is unreasonable to offer inspection then or, as the case may be, there,

then, subject to rule 13(1), the Court may, on the application of the party entitled to inspection, make an order for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.

(2) Without prejudice to paragraph (1), but subject to rule 13(1), the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.

(3) An application for an order under paragraph (2) must be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the

belief of the deponent that they are in the possession, custody or power of the other party and that they relate to a matter in question in the cause or matter.

11A. Provision of copies of documents (O. 24, r. 11A)

(1) Any party who is entitled to inspect any documents under any provision of this Order or any order made thereunder may at or before the time when inspection takes place serve on the party who is required to produce such documents for inspection a notice (which shall contain an undertaking to pay the reasonable charges) requiring him to supply a true copy of any such document as is capable of being copied by photographic or similar process.

(2) The party on whom such a notice is served must within 7 days after receipt thereof supply the copy requested together with an account of the reasonable charges.

(3) Where a party fails to supply to another party a copy of any document under paragraph (2), the Court may, on the application of either party, make such order as to the supply of that document as it thinks fit.

11B. Disclosure of records of proceedings or their transcripts (O. 24, r. 11B)

(1) Where a party to any proceedings has a record of those proceedings or a transcript of such a record prepared (whether by shorthand, mechanical, electronic or any other means) for that party's use, that party shall not be required, whether by a court order or otherwise, to make discovery of or to produce that record or transcript, or a copy of that record or transcript, to any other party for the purpose of those proceedings.

(2) A record, transcript or copy referred to in paragraph (1) may be produced to and for the use of the Court, but only if all the parties to the proceedings consent to such production.

(3) Where a record or transcript, or a copy of a record or transcript, is produced to the Court under paragraph (2), 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.

12. Order for production to Court (O. 24, r. 12)

(1) At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit.

(2) This rule does not apply in relation to a document referred to in rule 11B(1).

13. Production to be ordered only if necessary, etc. (O. 24, r. 13)

(1) No order for the production of any documents for inspection or to the Court or for the supply of a copy of any document shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of

the cause or matter or for saving costs.

(2) Where on an application under this Order for production of any document for inspection or to the Court or for the supply of a copy of any document privilege from such production or supply is claimed or objection is made to such production or supply on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

14. Production of business books (O. 24, r. 14)

(1) Where production of any business books for inspection is applied for under any of the foregoing rules, the Court may, instead of ordering production of the original books for inspection, order a copy or any entries therein to be supplied and verified by an affidavit of some person who has examined the copy with the original books.

(2) Any such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations.

(3) Notwithstanding that a copy of any entries in any book has been supplied under this rule, the Court may order production of the book from which the copy was made.

14A. Use of documents (O. 24, r. 14A)

Any undertaking, whether express or implied, not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the Court, or referred to, in open court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs.

15. Document disclosure of which would be injurious to public interest: saving (O. 24, r. 15)

The foregoing provisions of this Order shall be without prejudice to any rule of law which authorizes or requires the withholding of any document on the ground that the disclosure of it would be injurious to the public interest.

16. Failure to comply with requirement for discovery, etc. (O. 24, r. 16)

(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose or to supply copies thereof fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

(2) If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.

(3) Service on a party's solicitor of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but the party may show in answer to the

application that he had no notice or knowledge of the order.

(4) A solicitor on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal.

17. Revocation and variation of orders (O. 24, r. 17)

Any order made under this Order (including an order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the Court made or given at or before the trial of the cause or matter in connection with which the original order was made.

(Enacted 1988)

(By fax and by post)
Total : 2 pages

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24 July 2003

Judiciary Administrator
(Attn : Ms Emma LAU)
38 Queensway
Hong Kong

Dear Ms LAU,

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

At the meeting of the Subcommittee held on 23 July 2003, members expressed the following concerns on the new rule 11B to Order 24 of the Rules of the High Court -

- (a) rule 11B fails to achieve its intended purpose because records or transcripts of proceedings prepared for a party's use could only be produced for the use of the court and the other parties subject to two conditions, i.e. consent of all the parties and payment of reasonable charges. Some members have pointed out that a party may refuse to give consent to the production of such documents to the court, or, even if consent is given, refuse to pay for the charges for the documents. In addition, a party who is willing to give consent may not afford to pay the charges. In such cases, the court and the parties to the proceedings will not have the benefit of access to the documents. The requirement of consent in rule 11B(2) limits the use of the rule;
- (b) the notes of proceedings taken by a party on its own should be treated on different footing from records or transcripts produced by professional transcript providers. Rule 11B(2) should not apply to the latter type of documents;
- (c) charges for the records or transcripts under rule 11B should be treated as part of the litigation costs and dealt with at the taxation stage of the trial; and
- (d) rule 11B(1), in its present formulation, should cover hardcopies of transcripts produced by the Judiciary's Digital Audio Recording and

Transcript Production Services (DARTS) which are made available to a requesting party, since those documents are transcripts of proceedings "prepared for the party's use". Hence, if it is the Judiciary's intention that rule 11B should not concern transcripts produced by DARTS, rule 11B should be suitably revised.

As the Amendment Rules have already come into effect on the day on which they were published in the Gazette, i.e. 20 June 2003, before LegCo has the chance to scrutinize them, and in view of members' concerns expressed, the Judiciary is requested to consider the best way to deal with the situation (including the possibility of repealing the Rules), and revert to the Subcommittee at the next meeting.

I should be grateful if you could provide a bilingual written response (with soft copies via e-mail to (ftsang@legco.gov.hk)) **by 28 July 2003**.

The next meeting of the Subcommittee will be held on **30 July 2003 at 10:45 am in Conference Room A of the Legislative Council Building**. I shall let you have the agenda for the meeting shortly. Please let me have the attendance list for the meeting by **28 July 2003**.

With best regards,

Yours sincerely,

(Mrs Percy MA)
Clerk to Subcommittee