

Hong Kong Law Costs Draftsmen Association

香港訟費員協會

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Our Ref : CJB(BC)/070705

Date : 5th July 2007

Your Ref. : CB2/BC/7/06

Mrs. Percy Ma
Bills Committee
Legislative Council
Legislative Council Building
8 Jackson Road, Central
Hong Kong

By Fax (No.2509-9055) & Post

Dear Mrs. Ma,

Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007

Thank you for your letter of 18 June 2007.

The Costs Draftsmen are given to understand that the Rules of the High Court (Amendment) Rules 2007 – Consultation Draft, and its District Court equivalent, are indeed regarded as the relevant draft subsidiary legislation, so far as the Civil Justice (Miscellaneous Amendments) Bill 2007 is concerned.

In this regard we have already submitted our views, dated 6 June 2007, on what are the proposed amendments to Orders 62 and the new Order 62A of the Rules of Court. Should you require our elaboration on any of those points raised, please let us know and we would endeavor to do so.

We venture to add however that we agree with the Bar Association's view that the Bill should be examined together with, as well, all the relevant non-legislative documentation, which the Bar Association has identified at paragraph 7 of its Submissions of 19 July 2006, to include practice directions, pre-action protocols and other codes of practice, guidelines, or prescribed information or instructions that are expected to accompany the primary legislation and rules of court. Without these, it would not be possible to properly evaluate the impact and workability of the proposed amendments.

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The Bar Association went on to state its reasons as per paragraphs 8 to 12 of those Submissions, which we agree with and would gratefully accept as conforming with our own position.

The Costs Draftsmen's prime concern is as stated in paragraphs 6 to 9 of their own Submissions of 6 June 2007, regarding the proposers' manifested intention to make, presumably, wide and intensive use of the new provisions and additional powers once they become enacted. As a general observation, we fear that the now proposed summary costs assessments, and provisional taxations on paper without a hearing, whether by taxing masters or judicial clerks, may indeed operate adversely and oppressively, to discourage even warranted applications, ensue extra time and costs of the parties and the Court, and ultimately defeat their supposed purposes manifested to do good on the contrary.

In paragraphs 10 to 50 of our Submissions, we have identified specifically the proposed new or amended rules that we find problematic, and stated our respective reasons for our objections. In particular, we remain most skeptical as to the effectiveness and propriety of the proposals to:

1. remove the existing rule 8 in its entirety and replace it with the new rr.8 and 8A to 8D which seek to vest in the Court an even wider power and discretion in making a wasted costs order against a legal representative;
2. subject all costs of interlocutory proceedings to summary assessments in lieu of taxed costs (rr. 9(4)(b), 9(5), 9A, 9B, 9C and 9D), which may be unjust and inept and has indeed proved to be unpopular and counter-productive according to the recent English experience;
3. subject costs of more cases to provisional taxations by judicial clerks without contested taxation hearings (r.13(1A)) and to further empower the already powerful taxing masters to give virtually whatever directions as they "may" (r.13A), so much so that the results might become Draconian if the discretions were not exercised judicially, consistently or universally;
4. overhaul completely the present taxation process without due regard to its existing virtues (rr.21(1), (2) and (4), 21D, 22(1) to (3), 22(5), 23, 24(1A), 32A, 32B), subjecting it to the unknown and unproven directions (rr.21A, 26(2)), introducing nouveau costs penalties for failures to "materially exceed" provisionally assessed amounts (r.21B), generally rendering a party's

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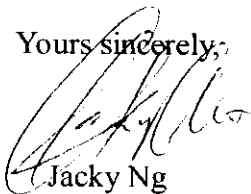
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current right to a taxation discretionary by nature (r.21C), and making the incidence of taxation costs result-based in a monetary sense as the court may so order (rr.32A and C);

5. impose a much harsher indemnity costs penalty against a party for failing to beat the other side's sanctioned costs offer in a taxation (O.62A) than on the ordinary party-and-party basis that would have applied as under the O.22 provisions.

Whilst obviously these proposals seek to vest further and wider discretionary powers in the Court and the taxing masters, we cannot agree more with your learned Legal Adviser's view that such power, if so vested, must be exercised on fixed principles (para.62/2/6 of the White Book).¹ It is our view that to deliberate the merits of any such fixed principles, the relevant non-legislative documentation, practice directions, guidelines etc. referred to above, are indeed indispensable and must also be scrutinized by the Legislature.

Yours sincerely,



Jacky Ng
Vice-Chairman

¹ LC Paper No.CB(2)1995/06-07(05), Enclosure, para.10