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By Fax (2501 5779) and By Post

17 July 2007

Dear Mr Yau,

Civil Justice (Miscellaneous Amendments) Bill 2007

Since the Administration has clarified the position that the Director of Administration is the sponsor of the Bill, it is perhaps more appropriate for me to correspond with you directly with regard to the legal and technical aspects of the Bill.

I enclose herewith some questions on Part 6 of the Bill and would be grateful if you could let me have your reply in bilingual form at your earliest convenience.

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

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Enclosure

Civil Justice (Miscellaneous Amendments) Bill 2007

Part 6 Discovery

A. The existing law – some observations

1. Section 41 of Cap. 4 provides that CFI may, on the application of a person who appears to the court to be likely to be a party to subsequent proceedings in which a claim in respect of personal injuries or a person's death ("PI claim(s)") is likely to be made, order a person who appears to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that to disclose and/or produce such documents ("pre-action discovery" of relevant documents). The court also has similar power to order pre-action discovery against non-parties to proceedings.

2. Section 42 of Cap. 4 gives similar power to CFI to order pre-action discovery against non-parties to the proceedings.

(a) Purpose of sections 41 and 42 of Cap. 4

3. The existing sections 41 and 42 of Cap. 4 are modelled on sections 31 and 32 of the Administration of Justice Act 1970 of the UK ("the 1970 UK Act").

4. The main purpose of the 1970 UK Act is to enable an applicant, who is the prospective plaintiff, to find out, before he commits himself to the expense of commencing proceedings, whether or not he has a reasonable cause of action (ref: *Charlesworth & Percy on Negligence*, 8th edition, 1990, at p. 374).

5. This purpose of the 1970 UK Act was affirmed in *Dunning v Board of Governors of the United Liverpool Hospitals* [1973] 2 All ER 454, the first case came before the English Court of Appeal where a patient applied for an order under section 31 of the 1970 UK Act for pre-action disclosure by the hospital board of the medical reports and case notes concerning her treatment in a potential medical negligence claim. In this case, the court expressly acknowledged that the likelihood of a claim depended on the outcome of the discovery. Pre-action discovery was upheld because, amongst other things, the family had no reasonable cause for bringing an action for negligence unless they could get medical testimony in support of the case and no medical testimony was available to them so long as the hospital kept their medical records and case notes secret and would not disclose them (at p. 457-8).

(b) The scope of pre-action discovery in PI claims

6. The general rule under the sections 41 and 42 of Cap. 4 regarding which documents are subject to pre-action discovery is that they are ***relevant*** to an issue

arising or likely to arise out of that claim.

7. The word "relevant", in the context of evidence law, to all intents and purposes, is synonymous with the phrase "of probative value" (ref: *Words and Phrases Legally Defined* (3rd ed.), at p. 44-45, copy enclosed).

8. In the House of Lords decision *McIvor v. Southern Health* [1978] 2 All ER 625, which was a case of pre-action discovery against a non-party in the proceedings, Lord Diplock pointed out that pre-action discovery of documents relevant to an issue arising out of the claim in an action "is confined to those documents of which production could ultimately be obtained at the trial on subpoena *duces tecum* (requiring him to produce particular documents that are required as evidence)" (at p. 628).

9. In *Chan Tam-sze & Ors v Hip Hing Construction Co Ltd & Ors* [1990] 1 HKLR 473, Bokhary J (as he then was) held that the scope of pre-action discovery of documents under Order 24 rule 1 of Cap. 4A (mutual discovery of documents relating to matters in question in the action) was equally applicable to pre-action discovery of documents under section 42(1) of Cap. 4. The classic statement of Brett LJ in *The Peruvian Guano case* (1882) 11 QBD 55 that the documents subject to discovery include a document which may fairly lead to "a train of enquiry" was referred to in the judgment and acknowledged (at p. 475-6).

B. The Bill

(a) Objects of Part 6

10. Part 6 of the Bill seeks to implement recommendations 75 and 77 of the Working Party. The Working Party holds the view that –

(i) the court's jurisdiction to order pre-action disclosure before commencement of proceedings should be widened to apply in all cases where it is shown that disclosure before the proceedings have been started is necessary to dispose fairly of the anticipated proceedings or to save cost; and

(ii) discovery should *not* extend to "background" documents or possible "train of inquiry" documents (para. 486, at p. 251-2 of the Final Report).

(b) The scope of pre-action discovery in Part 6

11. Part 6 of the Bill seeks to provide that any order for pre-action discovery will be confined to documents which are "***directly relevant***" to an issue arising or likely to arise out of that claim ("directly relevant" documents). It is proposed that

for the purposes of pre-action discovery provisions, a document is only to be regarded as directly relevant to an issue arising or likely to arise out of a claim in the anticipated proceedings if –

(i) the document would be likely to be relied on in evidence by any party in the proceedings; or

(ii) the document supports or adversely affects any party's case (clauses 14 and 15).

C. Questions

12. Please clarify --

(i) What is the difference between –

(a) "directly relevant" documents in clauses 14 and 15 of the Bill, which will apply to all types of cases including PI claims; and

(b) "relevant" documents under the existing sections 41 and 42 of Cap. 4 in PI claims?

(ii) Please provide some specific examples of the type of documents, in a PI claim, which are "relevant" documents but not "directly relevant" documents.

(iii) Will potential claimants in PI claims have to meet a new test with respect to the relevance of the documents being sought before they may be granted an order of pre-action discovery? If this is the case, please let the Bills Committee have the reasons for such change.

13. By virtue of section 41(b) and section 42(1)(b) of Cap. 4, the court may, in appropriate cases, order the relevant documents to be disclosed to the applicant's medical, legal or professional adviser instead of to the applicant himself. As you may be aware, section 41(b) and section 42(1)(b) are modelled on section 33 of the Supreme Court Act 1981 of the UK. They were specifically enacted in 1987 for the special needs of PI claims as a result of the recommendations of a sub-committee of the Supreme Court Rules Committee chaired by Kempster J.

14. In light of the background of sections 41(b) and 42(1)(b) of Cap. 4 and the interpretation queries raised by Hon Li Kwok-ying at the Bills Committee meeting on 6 July 2007, I wonder if the Administration would review the drafting of Part 6 of the Bill to see if it is more appropriate to make separate and general provisions relating to pre-action discovery in cases other than PI claims.

class take as joint tenants. That being so, and some having died without severing, the survivors will take the whole.' *Eagles v Le Breton* (1873) 42 LJ Ch 362 at 362, 363, per Lord Romilly MR

'The gift is to "the nearest relatives". Whose nearest relatives are meant? As the testator has not made any reference to those of anyone else, I suppose he must mean his own. Then follow the words "then living", which clearly mean living at the death of the widow, the tenant for life. Then we have "to be hereafter named in a codicil"; but the testator has left no codicil, so we cannot give effect to that phrase. What then is the law applicable in this state of circumstances? In the case of *Bullock v Downes* [(1860) 9 HL Cas 1], it was held that, under a gift, after a life interest, to such next of kin by blood of the testator as would under the Statutes of Distribution "have become and been then entitled thereto in case" the testator "had died intestate", the persons entitled were to be ascertained at the death of the testator. We must give some effect to the words in the will "then living", which, as I have said, in my opinion mean living at the death of the testator's widow. As regards the words "nearest relatives", they mean something different from those who would be entitled under the Statutes of Distribution; they must mean relatives by blood.' *Re Nash, Prall v Bevan* (1894) 71 LT 5 at 6, CA, per Lindley LJ

Australia [A testatrix referred, in her will to her 'relatives'.] 'The word "relatives" means here what it naturally and primarily means: those related by blood to the testatrix.' *Re Griffiths, Griffiths v Griffiths* [1926] VLR 212 at 217, per Mann J

RELEASE *See* RECEIPT

RELEVANT

'When I say "relevant" I mean this, so nearly touching the matter in issue as to be such that a judicial mind ought to regard it as a proper thing to be taken into consideration.' *Tomkins v Tomkins* [1948] P 170 at 175, CA, per Lord Greene MR

'The main general rule governing the entire subject [of admissibility of evidence] is that evidence which is sufficiently relevant to an issue before the court is admissible and all that is irrelevant or insufficiently relevant should be excluded. The word "relevant" is used in the sense in which it is defined in art 1 of Stephen's Digest of the Law of Evidence (12th edn). It is there stated that the word "means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connexion with other facts proves or renders probable the past . . . existence . . . of the other." Thus the word "relevant" is to all intents and purposes synonymous with the phrase "of probative value". It must be noted that this basic rule has to be applied to differing circumstances. The words "sufficiently", "insufficiently", "common course of events" and "probable" have to be used, and these are matters of degree and opinion.' *R v Harz, R v Power* [1966] 3 All ER 433 at 449, CCA, per Thesiger J

RELIEF

'The words "relief" and "relieve" are the appropriate terms to describe the remedial action of the Court of Equity in cases where a penalty or forfeiture has been incurred, which the court thinks it equitable that the plaintiff should not lie under or suffer.' *Nind v Nineteenth Century Building Society* [1894] 2 QB 226 at 233, CA, per Davey LJ

'There may be a good charity for the relief of persons who are not in grinding need or utter destitution . . . [but] relief connotes need of some sort, either need for a home, or for the means to provide for some necessity or quasi-necessity, and not merely an amusement, however healthy.' *Inland Revenue Comrs v Baddeley* [1955] 1 All ER 525 at 529, HL, per Lord Simonds; also reported [1955] AC 572 at 585

RELIGION

'What is "religion"? Is it not what a man honestly believes in and approves of and thinks it his duty to inculcate on others, whether with regard to this world or the next? A belief in any system of retribution by an overruling power? It must, I think, include the principle of gratitude to an active power who can confer blessings.' *Baxter v Langley* (1868) 38 LJMC 1 arg. at 5, per Willes J

'It seems to me that "religion" and "faith" are interchangeable words.' *Re Tarnpolsk, Barclays Bank Ltd v Hyer* [1958] 3 All ER 479 at 481, per Danckwerts J