CJRB 10/2007

Bills Committee on Civil Justice (Miscellaneous Amendments) Bill 2007

Response to Issues Raised at the Bills Committee Meetings on 12 and 30 October 2007

Purpose

This paper sets out the response from the Administration/Judiciary Administration to the issues raised at the Bills Committee meetings on 12.10.2007 and 30.10.2007. It must be emphasised that where views on the law are expressed herein, such views are not to be taken as statements of law by the courts. Judicial determinations or statements of law may only be made in actual cases that come before the courts after hearing argument.

Part 5 – Vexatious Litigants

A. To provide a response to Assistant Legal Adviser ("ALA")'s letter dated 11.10.2007, as to -

(i) the definition of "vexatious litigants" and legal representation;

(ii) whether there is a need to provide for variation /rescission/revocation of a vexatious litigant order; and

(iii) the role of Secretary for Justice in respect of applications by affected persons under the proposed section 27.

2. As the Bills Committee had deliberated and accepted the proposed amendments in Part 5 at its meeting on 12.10.2007, the Administration will not proceed with the suggestions in ALA's letter of 11.10.2007.

Part 6 – Discovery

B. To consult the two legal professional bodies on the proposed application of "direct relevance" test to pre-action discovery of personal injuries ("PI") cases.

3. The two legal professional bodies have been consulted on the proposed application of the "direct relevance" test to pre-action discovery in PI cases. Both the Bar Association (**Annex A**) and the Law Society (**Annex B**) have confirmed their support for the proposed amendments in Part 6 of the Bill.

Annex A
Annex B

Part 7 – Wasted costs

C. To advise whether the Bar Association's suggestion regarding the provision of public funds to meet a legal representative's costs in successfully defending a court-initiated wasted cost order could be dealt with by amendments to subsidiary legislation.

4. As the Bar Association's suggestion involves the use of public funds, it cannot be effected by amendments to subsidiary legislation only.

Part 8 – Leave to Appeal

D. To consider deleting the word "*compelling*" from section 14AA(4)(b) of the High Court Ordinance ("HCO") and the proposed section 63A(2)(b) of the District Court Ordinance ("DCO") such that the phrase would read "*some other reason why the appeal should be heard*".

5. The phrase "*some other reason why the appeal should be heard*" would be too broad. Subject to Members' views, the Administration would propose Committee Stage Amendments ("CSAs") to amend the phrase to read, "*some other reason in the interests of justice why the appeal should be heard*".

E. To advise whether the proposed section 14AB of the HCO will contravene the Basic Law which stipulates that the power of final adjudication is vested in the Court of Final Appeal ("CFA").

6. The proposed section 14AB of HCO seeks to implement Recommendation 113 of the Report of the Working Party on CJR, to provide that a refusal of leave to appeal by the Court of Appeal in relation to interlocutory questions should be final. In coming to this recommendation, the Working Party had taken account of the decision of the CFA in *A Solicitor v The Law Society of Hong Kong [2004] 1 HKLRD 214,* laying down the approach to determining the validity of statutory provisions which seek to accord finality to decisions of courts other than the CFA. It was there held that a legislative provision seeking to limit the CFA's power of final adjudication is reviewable for consistency with Article 82 of the Basic Law. The limiting provision cannot be imposed arbitrarily, but will be upheld if it pursues a legitimate purpose and if a reasonable proportionality exists between the limitation and the purpose sought to be achieved.

7. Recommendation 113 relates to interlocutory questions, which have already been considered by a master and a judge at first instance, and which are considered by at least two Justices of Appeal to lack any reasonable prospect of success on appeal. The Working Party considered that making a refusal of leave to appeal final in such circumstances would be valid. The decision sought to be appealed does not involve substantive rights and the objective of the limitation is the legitimate and proportional promotion of cost-effective and speedy dispute resolution. (See paragraphs 648 – 650 of the Final Report).

Part 12 – Lands Tribunal

F. To submit a paper on the proposal to introduce CSAs for leave requirement for appeals from the Lands Tribunal to the Court of Appeal.

8. The proposal is set out in **CJRB Paper No. 11/2007**.

Administration Wing
Chief Secretary for Administration's Office

Judiciary Administration

November 2007

Annex A

HONG KONG BAR ASSOCIATION

Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
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Telephone: 2869 0210 Fax: 2869 0189

Your Ref: SC/CR 15/1/62 Pt.5

14 November 2007

Miss Vega Wong
Judiciary Administration
Judiciary
38 Queensway
Hong Kong.

Dear Vega,

Re: Civil Justice (Miscellaneous Amendments) Bill
Part 6 - Discovery

I refer to your letter dated 26 October 2007 regarding the captioned matter.

Enclosed herewith is the letter from the Chairman of our Special Committee on Personal Injuries, which sets out the position of the Bar on this matter.

Best Regards,

Yours sincerely,

Rimsky Yuen SC
Chairman

Encl.

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13 November 2007

Mr. Rimsky Yuen S.C.,
Chairman,
Hong Kong Bar Association,
LG2 Floor, High Court,
38 Queensway,
Hong Kong.

Dear Rimsky,

Re: Civil Justice (Miscellaneous Amendments) Bill 2007
Part 6 – Discovery

I refer to your letter dated 29 October 2007 seeking the views of the Special Committee on Personal Injuries on the proposed amendments in Part 6 of the Civil Justice (Miscellaneous Amendments) Bill 2007 relating to the "direct relevance" test for pre-action disclosure in personal injuries cases. The Special Committee has deliberated on the subject and responds as follows.

There has been widespread acceptance of the extension of the power to order pre-action discovery to all proceedings and not only to proceedings for personal injuries and fatal accident claims. The Bar, however, expressed its concerns that if the power to order pre-action discovery was couched in too wide terms, there was a risk that litigants could utilise this as a tool to embark on oppressive or fishing applications (see para.63 of the Bar's Response dated 1 March 2002 and para.99 of the Bar's Submission dated 19 July 2006). The Bar's concerns have been met by the introduction of the "direct relevance" test to pre-action disclosure. As defined in section 14 of the Bill, 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 (a) the document would be likely to be relied on in evidence by any party in the proceedings; or (b) the document supports or adversely affects any party's case. This new test would restrict the right of an applicant to obtain discovery of "train of enquiry" documents.

The question raised at the Legislative Council Bills Committee Meeting on 12 November 2007 is whether the restriction to be imposed by the new "direct relevance" test would impact on the rights currently enjoyed by personal injury claimants to obtain pre-action discovery. The short answer to that question is yes, because

.... cont'd

potential personal injury claimants would no longer be able to obtain discovery of "train of enquiry" documents under the proposed new test for pre-action disclosure. In practical terms, however, the actual impact would be nil or negligible because "train of enquiry" documents are rarely, if ever, ordered to be disclosed to potential personal injury claimants under the current law and practice.

There is no good reason why personal injury claimants should enjoy greater rights of discovery than other claimants. The Special Committee supports the amendment because it ensures that a uniform test would be applied to all claimants seeking pre-action disclosure. On the other hand, all claimants continue to enjoy the right to apply for discovery of "train of enquiry" documents after proceedings have been commenced.

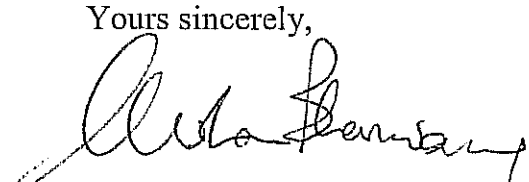
The loss of the right of a personal injury claimant to discover a "train of enquiry" document, on an application for pre-action disclosure, is not considered to be significant.

The reality is that it is extremely difficult, even under the present law and practice, to obtain discovery of such documents, whether the application for the same is made by a personal injury claimant before or after the commencement of proceedings (see the restricted approach as expounded in O.C. v M. Co. [1996] 2 Lloyd's Rep 347 and the discussion in Hong Kong Civil Procedure 2007 at marginal note 24/2/10 on p.436).

The other reality is that the documentary evidence relevant to personal injury claims usually takes the form of accident and other related reports. These would be discoverable under the "direct relevance" test. In fact, it is difficult to conceive of a class of document relating to a personal injury claim that would only qualify as a "train of enquiry" document but not as a "directly relevant" document.

In Hong Kong, applications for pre-action discovery are usually made in medical negligence cases, or other cases where the identity of a potential defendant is not known, and can only be ascertained from a hospital medical report, or a statement made to insurers or investigation authorities. In medical negligence cases, the climate has changed and hospitals normally disclose relevant documents without formal application being made.

Yours sincerely,



Mohan Bharwaney
Chairman
Special Committee on Personal Injuries

THE
LAW SOCIETY OF HONG KONG
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Practitioners Affairs

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Annex B

Our Ref : PA0005/07/110788
Your Ref : SC/CR 15/1/62 Pt.5
Direct Line :

12 November 2007

BY HAND

Miss Vega Wong
for Judiciary Administrator
Judiciary Administration
Judiciary, 38 Queensway, Hong Kong

Dear Miss Wong,

Re: Civil Justice (Miscellaneous Amendments) Bill 2007 (the Bill) Part 6 - Discovery

I refer to your letter dated 26 October 2007 addressed to the President and I have been asked to send a reply on his behalf.

We understand the Bills Committee is seeking confirmation of support for the proposed amendments to section 41 of the High Court Ordinance (HCO) and 47A of the District Court Ordinance (DCO) in the Bill.

In the Law Society's Report on Civil Justice Reform dated April 2002 the topic of "Pre-Action and Non-party Discovery" was discussed in Chapter 4 "Disclosure of Documents and Documentary Evidence" when Recommendation 28 was supported. I attach a copy of Chapter 4 for reference.

We do not consider the "direct relevance" test for pre-action disclosure, although slightly stricter than the previous "relevance test" will restrict potential PI claimants' rights of access to "train of enquiry documents". We agree with the observations in your letter that paragraph 7 of Practice Direction 18.1 already imposes this test for P I cases:

"....In considering whether to make any order for specific discovery or disclosure, the court will have regard to.....whether the documents and matters sought to be discovered or disclosed are strictly and directly relevant to the issues between the parties."

The Law Society's specialist Committees have reviewed and confirms its support for the proposed amendments to the HCO and DCO.

Yours sincerely,

Joyce Wong

Joyce Wong
Director of Practitioners Affairs
e-mail: dpa@hklawsoc.org.hk

Chapter 4 DISCLOSURE OF DOCUMENTS AND DOCUMENTARY EVIDENCE

Introduction

1.1 The object of this Chapter is to consider ways to simplil~ and streamline the process of disclosure of documents and of other documentary evidence, in line with the overall objectives of cost saving and proportionality. This has to be balanced against the overall interests of justice. This Chapter also covers procedures for obtaining disclosure of documents pre-action or from non-parties.

2. Reform

2.1 Reform of the rules relating to discovery of documents in civil litigation has been a key subject of debate in many jurisdictions. In England, Lord Woolf referred frequently to the excesses of discovery, and one of the primary aims of his new rules of civil procedure was to reduce the scope, and therefore the cost, of discovery.

2.2 Hong Kong now remains one of the few jurisdictions which retain the very wide rule of discovery emanating from the 19th century case *of Peruvian Guano.* This provides an extensive obligation on parties to litigation to disclose documents directly or indirectly relevant, and documents which may only lead to a train of enquiry to relevant documents. Many believe that this obligation of discovery is excessive and results in significant costs being expended in the litigation process, for little or no benefit. Whether, and if so in what way, the scope of discovery should be narrowed has been the key issue of the Law Society's consideration in relation to discovery.

3. Possible Improvement Measures

3.1 After considerable debate, the Law Society has concluded that the existing *Peruvian Guano* test for discovery of documents should be retained. The principal reasons are as follows:

- There was wide acknowledgement of the excesses of discovery which can arise, particularly in large commercial cases, but it was found that the current test of discovery often did not produce excesses in small or medium cases.

- There was considerable reticence, in the interests ofjustice, to any narrowing of the scope of discovery: that was thought to provide too much latitude to the unscrupulous to hide relevant documents. There are many examples where only the broad test of discovery had allowed key documents to be unearthed, and examples where narrower tests had allowed parties to hide key documents, which had only come to light by accident (this applied particularly in arbitration proceedings). Whilst it was acknowledged that the unscrupulous will always make efforts to hide relevant documents, it was felt that a narrower test of discovery would unnecessarily facilitate this.

- Evidence from England was that, under the narrower discovery test, costs savings had been much less than anticipated. This was largely because more senior lawyers needed to spend more time assessing documents against the more complicated test of relevance.

- Many of the excesses of discovery would be effectively mitigated by the remaining reforms suggested by the Law Society (as explained below).

- There are problems with all other discovery tests, particularly the test under Woolf in England, used in arbitrations and under many continental European rules.

3.2 It was generally agreed that the process of listing and/or bundling of documents was over-complicated. It was found that in many cases it was the listing process itself which ran up significant unnecessary costs. Measures should be introduced into the rules to enhance the scope of listing by paginated bundles or other convenient order, the key requirement being that the opposing party could have a general idea of the nature and volume of the documents, and later be able to identify them (for example by their by pagination). It was not normally necessary to list documents individually.

3.3 There is an obligation on the parties to give discovery within 14 days after close of pleadings under HCR Order 24(2). It is therefore incumbent on the parties to consider the nature and scope of discovery to be given, whether and how it could be limited, and the method of giving discovery. Whilst scope for limiting and agreeing discovery already exists, for example, in HCR Order 24 rules 1(2), 3(3) and 8, these are little used in practice, and have not found favour with the courts. They need to be enhanced and used.

3.4 Similarly, measures to narrow the issues in dispute, together with enhancements of pleadings (particularly removal of bare denials) would assist in limiting and defining the issues, and hence limiting the scope of discovery which needed to be given.

3.5 The current rules allowing a party to object to giving discovery on the basis that it is oppressive should, in particular, be enhanced with some concept of reasonableness and proportionality. Whilst the underlying *Peruvian Guano* test of relevance would be maintained, it should be easier to refuse to give discovery of very large volumes of documents of only very marginal relevance.

3.6 It should no longer be possible for parties to disclose an unsorted warehouse full of documents in large cases, leaving the opposing party to plough through this in the hope of finding of what was relevant at very considerable cost. Excessive disclosure of irrelevant or unordered material could also be objected to.

3.7 The Law Society considered that a concept of *"asker pays"* might usefully be introduced. If one party considered that documents held by the opponent may contain something of marginal relevance, but the court would ordinarily refuse discovery as being unnecessary, then the requesting party could be given discovery of those documents on the basis that it was to bear the costs of that additional discovery exercise. A variant on this theme which could be used in marginal cases would be that the costs

of giving additional discovery might be made conditional on the outcome of that discovery exercise: if it yielded significant documents, then the giver should pay. If it did not, the requester should pay.

3.8 It was considered that no real change was necessary to the current rules and procedures on seeking additional discovery, or having discovery verified by affidavit. These rules were well attuned to the *Peruvian Guano* test. Whilst there was some feeling that there were still fishing expeditions for discovery, in the hope of turning up something relevant, it was believed that other reforms set out above (particularly on proportionality/reasonableness) would assist in weeding out such excessive discovery requests. Experience under Woolf was that the narrower test of discovery had not in fact led to fewer fishing expeditions or requests for discovery. There was apparently an actual reduction in the number of discovery applications made to the court, but this was found to reflect an artificial limit of one discovery application per party per case being imposed by the court under case management.

4. Pre-action and Non-party Discovery

4.1 The current rules on pre-action discovery or discovery against a non-party are disparate and confusing. HCR Order 24 rule 7(A), bringing into effect Sections 41 and 42 of the High Court Ordinance, allows for such discovery only in personal injury actions. Stringent criteria are set out for justifying such discovery.

4.2 The issue is largely one of balance between allowing a potential plaintiff access to the documents which are key to putting together his case, but happen to be in the hands of opponents or unrelated parties, and on the other hand, oppression against potential defendants by plaintiffs with spurious claims, hoping to be able to put together a claim by access to the potential defendants' documents.

4.3 Liquidators have wide powers to obtain documents, which do in reality lead to litigation. Similarly, discovery actions can be commenced on the *Norwich Pharmacal* principles. In appropriate cases, documents can be obtained by subpoenas, or under an *Anton Piller* injunction. The criteria in each instance are different, and no one procedure covers all types of case.

4.4 The Law Society recommended the introduction of a comprehensive code for pre-action and non-party discovery. The hurdle which a plaintiff, or asking party, must overcome will remain high, akin to the test presently applicable to personal injury actions. The rules will, however, allow such discovery requests in all cases. The *Anton Piller* injunction should however remain as the appropriate way to seize and preserve evidence otherwise at risk of destruction.

4.5 It would usually be a requirement of discovery against a non-party that the asking party should bear the costs of the non-party giving the discovery, backed up by security for costs and/or undertakings in damages in appropriate cases.

4.6 Changes to the terminology of discovery which have been introduced in the Woolf reforms are unnecessary. A wholesale re-write of the rules relating to discovery is also unnecessary.

5. Summary of Recommendations

5.1 Retain the *Peruvian Guano* test for disclosure of documents.

5.2 Introduce measures to streamline the process of listing, bundling and discovery of documents.

5.3 Impose a positive obligation to consider the nature, scope and extent of discovery to be given, by enhancing the present rules.

5.4 Introduce positive obligations of proportionality to curb excessive or unnecessary discovery.

5.5 Introduce the concept of *"asker pays"*, such that a party asking for significant documents of marginal relevance from an opponent, may have to do so at their own cost.

5.6 Streamline and simplify the varied rules on pre-action and non-party disclosure to make this generally available, but with strong safeguards.

6. Response to the CJR

6.1 Proposals 25: Automatic discovery should be retained, but the *Peruvian Guano* test of relevance should no longer be the primary measure of parties' discovery obligations. The primary test should be restricted to directly relevant documents.

These relate to the process and extent of disclosure of documents. This is an area of key difference between the Law Society and the CJR, with the CJR adopting a test for discovery of documents similar to that in the Woolf reforms. As set out in section 3 above, for the reasons given there, the Law Society strongly recommends the retention of the existing Peruvian Guano test for discovery. Accordingly, Proposal 25 is not supported.

6.2 Proposal 26: The parties should be free to reach agreement as to the scope and manner of making discovery. When no agreement is reached, they should be obliged to disclose only those documents required under the primary test, ascertainable after a reasonable search.

This supports the parties being free to reach agreement on the scope and manner of discovery, and that reasonableness in the searches for relevant documents should be taken into account. To an extent, this Proposal is supported, and the Law Society certainly agrees parties should be free to reach agreement, and an element of proportionality should be introduced into the discovery process, as explained above. Nevertheless, to the extent that this Proposal is based on the Woolf test for disclosure, it is not supported.

6.3 Proposal 27: In the alternative to Proposals 25 and 26, discovery should not be

automatic, but should be subject to an inter-partes request.

This is largely consequential on the adoption of the Woolf test, and is therefore not supported.

6.4 Proposal 28: Parties should be empowered to seek discovery before commencing proceedings and from non-parties along the lines of the CPR.

This concerns pre-action and non-party discovery and is supported.

6.5 Proposal 29: The Court should be expected to exercise its case management powers with the view to tailoring an appropriate discovery regime for the case at hand. It should have a residual discretion both to direct what discovery is required, including full *Peruvian Guano* style discovery if necessary, and in what way discovery is to be given.

This is supported to the extent that it refers to the court exercising case management powers to tailor appropriate discovery for the case in hand. The Proposal is supported in giving the court a residuary discretion as to the nature of discovery, but is not supported where it suggests that Peruvian Guano discovery should be the exception rather than the norm.