CJRS 2/2008

Subcommittee on Draft Subsidiary Legislation Relating to the Civil Justice Reform

Policy Aspects of the Proposed Amendments to the Rules of the High Court (Cap. 4A)

INTRODUCTION

On behalf of the Judiciary, the Judiciary Administration presents this paper which sets out the Judiciary's position on the policy aspects of the proposed amendments to the Rules of the High Court for the implementation of the recommendations in the Final Report of the Civil Justice Reform ("CJR") and other related recommendations by the Steering Committee on CJR ("the Steering Committee").

BACKGROUND

Problems in the Present Civil Justice System

2. As in many common law jurisdictions, our present civil justice system has to keep abreast with the needs and developments of modern times. With Hong Kong's economic development and social and technological advances, there has been over the years a sharp increase in the number and complexity of transactions, in particular commercial ones. The increase in the scope and complexity of legislation reflects this. All this has put pressure on our civil justice system, generating large numbers of disputes and consequent civil proceedings. The increase in and volume of litigation over the past 20 years is a clear indication of this. Our civil justice system, largely unchanged for several decades, has been criticised for not having kept up with the times.

3. The procedural system of justice in Hong Kong is adversarial based, meaning that the courts will leave it to the parties themselves to bring cases to court and on the whole let them define the nature and extent of their dispute. However, this has led to the pace and timetabling of litigation often to be in the hands of the parties rather than the court. This in turn has resulted in excessive costs, delay and complexity, which have been criticised as being the common faults of the present system.

Thus, important features in the system have been misused. For instance, (i) pleadings, which should focus the issues between the parties, are at times unclear and obscure rather than clarify; (ii) discovery, which should be a candid disclosure of documents to promote a fair resolution of the dispute, are taken to excessive lengths resulting in severe delays and therefore inflating the costs of action; (iii) numerous interlocutory applications to court are often made which serve little useful purpose but which increase the costs of an action and cause significant delays. Because the present system is largely party driven rather than being court driven, these excesses are permitted to exist. In addition, the failure to identify the real issues in a case at an early stage or the fact that parties are able to reveal the true strengths or weaknesses of their cases only at a relatively late stage of the proceedings, result in cases not being settled before significant costs are incurred and delays having already occurred.

Need for Reform

4. In February 2000, the Chief Justice appointed the Working Party on CJR ("the Working Party") to review the rules and procedure of the High Court ("HC") in civil proceedings and to recommend changes thereto, with a view to ensuring and improving access to justice at reasonable cost and speed. The Working Party submitted its recommendations to the Chief Justice in its Final Report in March 2004, making a total of 150 recommendations.

Steering Committee on CJR

5. In March 2004, the Chief Justice accepted the Working Party's Final Report and set up the Steering Committee to oversee the implementation of the recommendations therein relating to the Judiciary. The Chief Justice subsequently decided that the proposed changes should be implemented not just in the HC, but also in the District Court ("DC") and the Lands Tribunal ("LT") where such changes are appropriate. Accordingly, the terms of reference of the Steering Committee were expanded in September 2006 to oversee the application of the recommendations in the Final Report to the DC and LT.

6. The work of the Steering Committee has so far focused mainly on the legislative amendments for the implementation of the recommendations in the Final Report. The work on legislative amendments to primary legislation is completed with the enactment of the Civil Justice (Miscellaneous Amendments) Ordinance 2008 (hereafter referred to as "CJO") in January 2008. The work on legislative

amendments to subsidiary legislation is at an advanced stage. Whilst the proposed amendments to subsidiary legislation relate primarily to the recommendations in the Final Report, they have also taken into account developments and various other matters deliberated on by the Steering Committee since the publication of the Final Report, and having regard to the comments received in the two rounds of consultation conducted by the Steering Committee in April 2006 and October 2007. The latest draft of the Rules of the High Court (Amendment) Rules 2008 ("Draft RHC") was presented to the LegCo Subcommittee vide paper **CJRS 1/2008**.

OBJECTIVES OF THE PROPOSED AMENDMENTS

7. Most of the proposed amendments to the RHC seek to implement the recommendations in the Final Report. Some are to implement the recommendations of the Steering Committee, having regard to related developments in the course of the Steering Committee's deliberations. These are mainly logical extensions in line with the objectives of recommendations the Final Report. Others are minor amendments to tidy up the existing rules. The major amendments in the Draft RHC and the policy objectives they seek to achieve are highlighted below.

8. In order to deal with the problems of the present system highlighted above, the proposed amendments to the RHC will bring into focus the need of the courts to have regard to the following underlying objectives, namely -

(a) increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
(b) ensure that a case is dealt with as expeditiously as is reasonably practicable;
(c) promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
(d) promote greater equality between the parties;
(e) facilitate settlement of disputes; and
(f) ensure that the resources of the Court are distributed fairly,

whilst always recognizing that the primary aim of case management is to secure the just resolution of the parties' dispute in accordance with their substantive rights.

9. Bearing in mind these objectives should result in having in place in every case effective procedures ensuring that (i) there are no unnecessary steps taken or applications made and (ii) parties are provided at an earlier (rather than a later) stage with a good idea as to the true nature and strength of their respective cases. Effective procedures will result in unnecessary delays in litigation being avoided, parties not having to incur unnecessary expense and in the more efficient resolution of disputes, whether at trial or, as important, at an earlier stage with a settlement. The elimination of unnecessary (and therefore costly) steps will also promote greater equality between parties (for example, by eliminating the use delaying tactics) and enable the courts to utilise their resources efficiently and properly (in dealing with cases and applications that merit attention).

10. Integral to the implementation of the reforms is the need for greater case management by the courts on proceedings before them. It is proposed that the case management powers of the court be enhanced and put on a statutory footing. Such case management include the following facets -

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;

(b) identifying the issues at an early stage;

(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

(d) deciding the order in which the issues are to be resolved;

(e) encouraging the parties to use an alternative dispute resolution procedure if the Court considers that appropriate, and facilitating the use of such a procedure;

(f) helping the parties to settle the whole or part of the case;

(g) fixing timetables or otherwise controlling the progress of the case;

(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(i) dealing with as many aspects of the case as practicable on the same occasion;

(j) dealing with the case without the parties needing to attend at court;

(k) making use of technology; and

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

11. The proposed amendments to the RHC seek to give effect to the above underlying objectives and case-management powers. These changes are intended to foster a new culture for the conduct of cases, so that at an earlier stage than it is at present, parties will have to be better prepared and be in a better position to know the other side's case. Case management can be applied to restrain excessive discovery, deter undue prolixity of witness statements and evidence, cut down the number of unmeritorious and unnecessary interlocutory applications, which are some of the major causes of costs and delays in the present system. Under the new system, there should be no scope for tactical games (which are often designed to cause delay or increase costs) by any party. Every step permitted by the court will go towards the just and efficient resolution of the dispute before the court bearing in mind the said objectives.

12. Some examples can now be given of how the underlying objectives are achieved by the proposed amendments to the RHC, although some of the examples will overlap between the various objectives. The examples given are of course not exhaustive.

Improving Cost-effectiveness, ensuring cases are dealt with expeditiously, promoting a sense of reasonable proportion, procedural economy and promoting greater equality between the parties

13. As stated above, active case management is integral to achieving these stated objectives. What constitutes active case management (see paragraph 10 above) are expressly set out in the proposed amendments to the RHC (see the proposals contained in Part 2). The court will at a relatively early stage of proceedings adopt a "hands on" approach to ensure that proceedings are court controlled rather than

party driven. In this way, the court can ensure that proceedings will proceed with expedition, that costly and unnecessary steps (that at present can lead to expense and delay out of all proportion to the amount at stake in the proceedings) are avoided and that parties are put on an equal footing (for example, the party with the greater resources is not able to prejudice the other side by tactics). Apart from the proposals in Parts 2 and 10 setting out (i) the underlying objectives and the court's case management functions, and (ii) court-determined timetables, as well as Part 18 confirming the Court's powers of case management in trials, a number of other proposals in the Draft RHC are intended to achieve these objectives. These and some examples are briefly explained and set out as follows.

Court-determined Timetables

14. Instead of leaving the progress of actions in the hands of the parties as at present, the Court will assume much greater control over the progress of actions by setting a firm timetable for each case at an early stage of proceedings. A court-determined timetable takes into account the needs of the particular case and the reasonable requests of the parties. The time-table sets out milestone dates for the major steps in any proceedings, such as the dates for trial and other important hearings. Only in the most exceptional circumstances will a milestone date be changed. This arrangement also helps reduce delays. Part 10 of the draft RHC seeks to give effect to this proposal.

Expert Evidence

15. In order to counter the possible lack of impartiality or independence of expert witnesses, it is proposed that an expert witness be required to (i) declare that he owes a duty to the court which overrides any obligation to those instructing or paying him; (ii) acknowledge that overriding duty in his report; and (iii) declare his agreement to be bound by an approved code of conduct for experts. Part 17 of the draft RHC give effect to this.

Pleadings to be Verified by Statements of Truth

16. Pleadings, which should contain a concise and clear statement of the true nature of the case and the facts relied on, are at present often obscure, thereby hiding the true nature and strength of a party's case. For example, a defence pleading contain merely bare denials or non-admissions or even drafted in an over-elaborate way. Extravagant claims

or defences may be made (for tactical reasons) which are later shown to be unsustainable or which are abandoned. To confirm the proper function of pleadings, it is proposed that pleadings should be verified by a "statement of truth". Substantive defences must be revealed. These changes will enable each party's case to be defined with sufficient precision and accuracy at an early stage. In this way, early settlements should be achieved or if not, this will enable the parties to be better prepared and focused for trial. Part 7 of the Draft RHC seek to give effect to this proposal.

17. The proposals in Part 16 will provide the Court with greater flexibility in dealing with witness statements and evidence. Part 23 on judicial review seeks to provide greater clarity and involve interested parties at an earlier stage.

18. A number of proposals are intended to reduce complexity and streamline procedures.

Commencement of Proceedings

19. The present system, with four different modes of commencement of proceedings - writs, originating summonses, originating motions and petitions – is often criticised for being too technical and cumbersome. It is proposed to simplify this, so that, save for certain exceptions, the modes of commencement will be confined to (i) writs where substantial factual disputes are likely to arise, and (ii) originating summonses where questions of law involving no or little factual investigation are to be placed before the court. Part 4 of the Draft RHC seeks to give effect to this proposal.

Leave to appeal to the Court of Appeal

20. At present, the procedure with regard to applications for leave to appeal to the Court of Appeal are cumbersome and inconsistent. It is proposed that all applications for leave to appeal be dealt with in the same way. It is also proposed that applications for leave to appeal should involve all parties (inter partes) and not just the party applying for leave (ex parte) save in exceptional cases. At present, the party applying for leave makes the application and this is dealt with by the court in the absence of the other party. If leave is granted, the other party may then apply to court to set aside the initial order. This is unnecessarily cumbersome and costly. Part 19 of the draft RHC seeks to give effect to the above proposals.

Facilitating Settlement

21. Experience has shown that a high percentage of cases settle just before or after the start of the trial. It is in the public interest that if settlements can be reached at a much earlier stage, significant costs, efforts and time can be saved. Various proposals in the Draft RHC are intended to facilitate settlement.

Costs-only Proceedings

22. To facilitate settlement, the CJO introduces amendments to the High Court Ordinance ("HCO") (Cap. 4) to provide for a new cause of action called "costs-only proceedings". This will enable parties who have reached settlement on a substantive dispute and have also agreed on who should on principle pay the costs, but cannot agree on the amount of such costs, to apply for their costs to be taxed by the Court of First Instance ("CFI") or the Court of Appeal. Following these changes in HCO, Part 3 of the Draft RHC sets out the proposed procedures for costs-only proceedings.

Admissions and Default Judgments

23. It is proposed that a new procedure for making admissions to money claims be introduced to facilitate settlement. At present, the default judgment process (which requires no court appearance) is limited, applying only where the defendant unconditionally surrenders to the claim. Accordingly, in many money claims, e.g. debt-collection claims, although the defendant has no defence (and accepts this), he may make desperate attempts to stave off default judgment being made against him just to avoid an immediate liability to pay. The plaintiff may then have to apply to the court for summary judgment or even take the matter to trial, incurring much expense and suffering delay. The defendant may also incur expense in trying to avoid an immediate liability to pay. Thus, to facilitate settlement in money claims, it is proposed that a defendant may, in admitting a claim, also make proposals regarding payment terms (whether as to the time to pay or as to instalment payments) in the discharge of the liability on the claim. This would facilitate the settlement of claims in many cases. Part 6 of the Draft RHC seeks to give effect to this proposal.

Sanctioned Offers and Payments

24. It is proposed that a system of "sanctioned offers and payments" be introduced so that, effectively, offers to settle any type of dispute (not just money ones) may be made, thereby bringing the whole action or a part of it, to an end. The proposals substantially alter the existing system of payments into court and would considerably widen the ambit of offers to settle cases. For example, under the existing rules, only a defendant may offer to settle claims by payments into court, thereby putting a plaintiff at risk as to costs. Under the proposed system, a plaintiff, by making an offer to the defendant, can put the defendant at such risk. This proposal is modelled on the system of "Part 36 offers and payments" of the Civil Procedure Rules which has achieved great success in England and Wales. This will act as a significant incentive for parties to settle disputes at an earlier stage than at present. This is regarded as an extremely important measure in the just and expeditious resolution of disputes. Part 8 of the Draft RHC seeks to give effect to this proposal.

Discovery

25. To facilitate settlement, the CJO amends the HCO to extend pre-action discovery to all civil claims, instead of death and personal injuries claims as at present. The proposed amendments in Part 12 of the Draft RHC are mainly intended to set out the detailed procedures to be adopted following the amendments in the CJO.

Fair Distribution and Better Deployment of Court Resources

26. A number of proposed amendments are intended to further the objective of reducing delays, thereby enabling better deployment of the Court's resources.

System of Interlocutory Applications

27. The proliferation of interlocutory applications has been regarded as one of the most serious causes of additional expense and delay in the litigation process, particularly if taken on appeal, which is currently as of right in the CFI. In order to reduce the number of interlocutory applications of doubtful or little value, the following changes are proposed –

(a) making orders "self-executing", i.e. prescribing an appropriate sanction which automatically applies for non-compliance without the need to apply to the Court for enforcement;

(b) dealing with interlocutory applications on paper as far as practicable; and

(c) penalising unwarranted interlocutory appeals with appropriate costs and other sanctions.

28. The proposed amendments in Part13 of the Draft RHC seek to give effect to the above changes.

Procedures for costs assessment

29. It is proposed that changes be introduced to the procedures for costs assessment to –

(a) provide for summary assessment of costs, whereby the court, can assess the amount of costs payable and then order payment to be made within a certain period of time;

(b) empower Masters to do provisional taxation on paper without a hearing; and

(c) empower Chief Judicial Clerks to tax costs if the amount of the bill of costs does not exceed the sum of $200,000 (currently $100,000).

The introduction of summary assessment of costs is aimed at discouraging unwarranted interlocutory applications. The proposed changes are also intended to dispense with the present elaborate and lengthy taxation procedures, thereby saving time and costs. Parts 14, 21 and 22 of the Draft RHC seek to give effect to the above changes.

30. In line with the objectives of streamlining procedures, reducing undue delays and better deployment of the Court's resources, the CJO amends the HCO to (i) allow a vexatious litigant order be made not only on the application of the Secretary for Justice, but also on the application of an "affected person" as defined; (ii) extend the Court's power to make a wasted costs order (which currently applies to solicitors

only) to barristers; and (iii) clarify that the Court of Appeal comprising two Justices of Appeal has jurisdiction to hear or determine interlocutory applications of pending appeals on paper without a hearing. The proposed amendments in Parts 11, 15, and 20 of the Draft RHC set out the detailed procedures to be adopted following these changes in the HCO.

Miscellaneous Amendments and Logical Extensions

31. The CJO amends the HCO to (i) extend the CFI's jurisdiction to grant interim relief in aid of proceedings outside Hong Kong; and (ii) empower the Court to order costs against a non-party. The proposed amendments in Parts 9 and 24 of the Draft RHC set out the detailed procedures to be adopted following these changes in the HCO.

32. Part 5 on dispute as to jurisdiction expressly allows applications for the court to decline exercising jurisdiction over a plaintiff's claim and granting a discretionary stay of the action.

33. The amendments in Part 25 of the Draft RHC are technical and minor amendments, mainly for clarification and tidying-up of existing rules.

PUBLIC CONSULTATION

34. In November 2001, the Working Party published an "*Interim Report and Consultative Paper*" containing various recommendations on changes to the civil justice system for seven months of consultation. During the consultation period, the Judiciary held various public seminars and briefings and almost 100 written submissions were received. Most of the proposals received significant support from those who responded in the consultation exercise, including the Bar Association and the Law Society. A few proposals attracted mixed views, for example, those relating to pre-action protocols, pleadings, discovery, leave to appeal and judicial review. The Working Party has made suitable amendments to these proposals in the Final Report. Having examined all the responses, the Working Party submitted its Final Report in March 2004.

35. In April 2006, the Steering Committee decided on a package of proposed legislative amendments, and issued a "*Consultation Paper*

on Proposed Legislative Amendments for the Implementation of the CJR" for a 3-month consultation ending in July 2006. The Steering Committee received 30 responses including responses from the two legal professional bodies, commenting mostly on technical and drafting details. The Steering Committee subsequently held meetings with the two legal professional bodies for detailed discussions. It accepted a number of comments from respondents and accordingly revised the package of proposed legislative amendments.

36. The Administration of Justice and Legal Services ("AJLS") Panel of the Legislative Council has been briefed from time to time on the CJR recommendations and the proposed legislative amendments. Specifically, the Working Party conducted briefings for the AJLS Panel and other interested members on both the Interim Report and the Final Report in 2001 and 2004 respectively. The Judiciary Administration briefed the AJLS Panel on the Consultation Paper on Proposed Legislative Amendments at the meeting on 26 June 2006, and the outcome of the 3-month consultation exercise at the meeting on 12 December 2006. The Panel had no objection in principle to the proposals and looks to examining the details of the Bill and the proposed amendments to the subsidiary legislation in due course.

37. The Steering Committee issued a set of "*Revised Proposals for Amendments to Subsidiary Legislation under the CJR*" for 1-month consultation in October 2007. Nine responses were received, including those from the two legal professional bodies and various Government Bureaux/Departments. Most of the comments received are technical in nature. The Steering Committee adopted many of the suggested amendments in the latest draft RHC.

Judiciary Administration
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