立法會CB(2)1255/07-08(01)號文件
LC Paper No. CB(2)1255/07-08(01)

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Preliminary Comments on the Proposed Changes to the Rules of the High Court

Introduction

1. I generally welcome the Civil Justice Reform and my preliminary comments below relate only to some details and must not be misunderstood as any criticisms on my part to the CJR.

Order 2

2. I have reservation on the proposal under Order 2 that any sanction for non-compliance stipulated in a Practice Direction or pre-action protocol (apart from the RHC or a court order) shall have automatic effect unless the defaulting party applies for and obtains relief from the court:

   (1) Practice Direction and pre-action protocol differ from the RHC in that they are not vetted by the legislature with prior consultation and with the usual safeguard.
   (2) They differ from a court order in that any sanction imposed therein is not tailor-made by a Master/Judge after taking into account the circumstances of a particular case, with the safeguard of an appeal.
   (3) In any event, it is uncommon for the PD or pre-action protocol to provide for any fixed sanction (other than giving the court a discretion or power to impose penalty upon default).
   (4) The proposed change will provide unchecked but unnecessary power on the judiciary to introduce automatic sanctions via PD or pre-action protocol, and may also lead to satellite litigation on applications to obtain relief from such sanctions.

Order 24

3. For pre-action discovery against potential parties and pre-trial discovery against non-parties, it is proposed, in my view correctly, that discovery should be confined to the "directly relevant" documents. However, the rules on post-action mutual discovery between parties will remain basically unchanged. I appreciate that given the highly controversial views expressed as to whether we should cut down the scope of general discovery, the judiciary may not see fit at this stage to abolish the Peruvian Guano test of relevance. However I think the present rules should still require some modifications in order to make it work in practice.

4. In particular, the 14-day period for automatic mutual discovery upon close of pleadings is simply not complied with by both parties in most cases in practice. Indeed in my experience, apart from the most simple cases involving few relevant documents, it is unreasonable to expect the parties and lawyers to be able to complete the discovery process within this 14-day period if they are required to faithfully search for and list out all relevant documents (including the train of inquiry category).

5. The end result is that notwithstanding the CJR, the parties will either continue the present practice of getting time extension for discovery (whether by mutual inaction, mutual consent or applications to the court), or by purporting to comply with the 14-day period by filing a list of documents which only cover some, but not all, relevant documents. Both are undesirable, and the resulting delay in mutual discovery will also impact on the parties' ability to faithfully complete the case management questionnaire within 28 days upon close of pleadings under Order 25 and the case management hearing.

6. I would suggest the following modifications (on the basis that the judiciary does not wish to go so far as to do away with the Peruvian Guano test of relevance):

   (1) Require the parties to make mutual discovery only of the "directly relevant" documents within 14 days (or perhaps 21 days) upon close of pleadings.

   (2) Then require the parties to state in the case management questionnaire whether there are any "train of inquiry" documents (or other relevant documents on the Peruvian Guano sense), and if so the standard direction/order (subject to the court's power to limit discovery) to be given will be further mutual discovery of all relevant documents within, say, another 21 days.

7. I believe the proposed two-stage discovery process should serve as a reasonable compromise, taking into account the reservation by some that justice will only be done with "full" discovery. The advantage is that the parties can first focus their minds and resources on the directly relevant documents and be more likely to be able to comply with the 14-day (or 21-day) discovery period. It will also make it easier for the parties and the court, after reviewing the documents disclosed at the first stage, to decide whether it is still necessary for the second stage full discovery.

Order 32

8. The proposed Order 32 r 11A allows the Master to determine an interlocutory application on papers or adjourn the application to be heard by him or another Master/Judge. R 1A (4) however provides that "Where the determination of the application is adjourned for hearing of the summons, no further evidence may be adduced unless it appears to the Court that there are exceptional circumstances making it desirable that further evidence should be adduced." I have reservation on this provision:

   (1) First it is unclear what is meant by "where the determination of the application is adjourned for hearing of the summons". If one is talking about the stage when the Master first decides to adjourn the application for a hearing on a fixed date, then this provision seems to run contrary to r 11A(3) where the Master is expected to give directions for the filing of evidence and arguments between the adjournment and the actual hearing.
   (2) At present, the usual practice is that in order to do justice to the case, the Master will allow introduction of further evidence before the hearing so long as it will not result in an adjournment and there is no undue prejudice to the other party which cannot be compensated by a costs order. The parties' lawyers will often adopt a cooperative approach in giving consent so long as there is no such prejudice.
   (3) However, with the introduction of this new provision, I fear that it would only encourage unnecessary arguments and hence costs on whether "exceptional circumstances" exist. It will also result in injustice if no "exceptional circumstances" exist but justice for a fair hearing requires the reception of the additional evidence.

9. I therefore suggest the deletion of r 11A(4). Even without such a general rule, the Court already has ample power to impose restrictions on the filing of further according to the circumstances of a particular case.

Order 35

10. I have reservation on the proposed Order 35 r 3A which allows the court power to give directions for trial to limit the number of witnesses, the time for examination and cross-examination of witnesses, for submissions and for trial.

11. I note the safeguard provision that the court must not detract from the principle that each party is entitled to a fair trial. However, I just cannot see how the court may give such a direction without jeopardising a fair trial. At present the court has ample power to stop or curtail any evidence, questioning or submissions which are not relevant to the case. However, if

the witness's evidence and the examination questions are relevant, I fear any directions to limit the number or time will result in relevant evidence not being put before the court, thereby affecting a fair trial.

12. It is better to discourage verbose by way of costs sanctions, rather than by a direction to limit number and time.

Order 53

13. I have reservation as to whether it is necessary under the new Order 53 to require the applicant for Judicial Review to serve the notice of application for leave on the proposed respondent and other interested parties, who may file an A/S setting out his grounds of objection or support for the leave application. I think the current ex-parte procedure for leave application works well in practice (given that the court may on a case by case basis require notice be given to the proposed respondent or other interested parties).

14. Introducing this new procedure for all leave applications will result in unnecessary costs and delay in ordinary cases. For example, if the application clearly cannot satisfy the leave requirement, then at present the proposed respondent will not be bothered at all by the application and need not incur any legal costs, as the court will quickly screen out such an unmeritorious application. If the application is clearly arguable and so leave should be given, again the proposed respondent needs not be bothered with the leave application at all and will just need to deal with the substantive application.

15. Apart from unnecessary costs, with the proposed changes, the court may naturally wish to wait for the response from the proposed respondent before granting leave, thus resulting in delay.

16. Hence, I think the proposed changes will only be useful in borderline cases, but at present the court already has the power to give necessary directions for ex parte hearing on notice to the respondent, if it has doubt as to whether leave should be granted.

Order 62

17. I have reservation on the proposed introduction of Order 62 r 8D, which provides sanction against the legal representative on taxation (e.g. personal liability for costs if guilty of delay or neglect or put the other party to unnecessary expense at the taxation hearing; disallowing his fees if he delays in proceeding with taxation or if more than 1/6th of the bill is taxed off):

18. First, this provision, while akin to a wasted costs order, does not at the same time contain the procedural safeguards as in the wasted costs order procedure.

19. Sometimes, the legal representative may be pursuing or not pursuing a particular issue/approach based on instructions, and so it is unfair that he shall bear personal liability. For example:

    (1) The phrase "put the other party to unnecessary expense" is too wide and may impose personal liability on the legal representative if he objects to certain items based on instructions.
    (2) The lawyer may not file the bill of costs for taxation within the three months' period for a variety of reasons, which do not involve any misconduct or neglect on his part (e.g. the order is being appealed or that it is not clear whether the other party can pay the judgment award let alone costs at that time or because the lawyer has to attend to other applications in that case).
    (3) The fact that more than $1/6^{th}$ of the bill being taxed off may not arise out of any neglect or misconduct by the legal representative. It may either arise out of instructions of the party, or a particular Master adopting a stringent approach on the hourly rate or counsel's fees etc (in which event the lawyer may be put in a position of conflict as to whether to advise the client to seek a review/appeal against the taxing master's decision).

20. This provision may also encourage a party to threaten the other party's lawyers with personal liability and result in unnecessary satellite litigation.

<u>Fixed costs under O 62</u>

21. I note that the fixed scale of costs for obtaining default judgment is to be increased to $10,000, at the suggestion of the profession. However I have reservation as to whether it is desirable:

    (1) First, it may infringe the indemnity principle if in a simple case the lawyer's fee for obtaining default judgment in less than $10,000, which is not uncommon in my experience.
    (2) In a more complicated case or in cases where front-end loaded costs need to be incurred as a result of a pre-action protocol, the fixed fees of $10,000 will not be sufficient.

22. I suggest that a more realistic fixed fee of $5,000 may be set so that the indemnity principle will most unlikely be infringed. To satisfy the profession's concern, one may provide that the party may obtain a higher

fixed fee of $10,000 by filing a certificate confirming that the amount of actual legal costs is not less than $10,000, or may apply to the court for taxed fee.

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29 February 2008