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Subcommittee on Draft Subsidiary Legislation
Relating to the Civil Justice Reform

Response to the Judiciary Administration's Papers in March 2008

Introduction

1. As stated in my earlier submissions dated 29 February 2008, I generally welcome the Civil Justice Reform. I further welcome the further changes proposed by the Judiciary Administration as summarised in its paper CJRS 6/2008 in response to, inter alia, some of my comments.

2. I fully respect the views taken by the Steering Committee which depart from my comments and I do not intend to repeat my differing views. I just wish to set out below my quick response in relation to certain issues for the Steering Committee's further consideration.

Part 12 - Discovery: Serial No.14

3. What has not been addressed is the fact that 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. I believe the key question is whether in the majority of cases it is realistic and reasonable 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). If the answer is in the negative, keeping this rule unchanged is highly unsatisfactory, and the court taking "greater charge of the proceedings at the case management conference stage" is simply not an answer. We don't wish to see that after the CJR, this rule on discovery will continue to be honoured in its breach in the majority of cases in practice (or the unnecessary applications for extension of time).

4. My preferred position is to confine the automatic mutual discovery to "directly relevant" documents, but to allow for a wider scope of discovery upon consent of the parties or application to the court if the circumstances of a particular case justifies it. However, as stated in my earlier submissions, 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. This explains my suggested two-stage approach on automatic discovery.

5. I further appreciate that my suggested two-stage approach may involve substantial changes to the present design and so may not be viable given the shortness of time left before the intended promulgation of the rules. I however suggest that at the very least, the 14-day period of automatic full discovery should be extended to 21 or 28 days after close of pleadings so as to afford a more realistic and achievable time frame (and so that the court may be more vigilant in ensuring compliance thereof). Indeed, if one looks at the existing RDC, one can see that in a District Court case the automatic directions under O 23A r5 actually allow for 35 days upon close of pleadings for mutual discovery (21 days for filing the memorandum plus another 14 days for discovery).

Part 22 – Part II of Second Schedule to Order 62: Serial No. 24

6. I note the Steering Committee's response that the fixed cost of $10,000 for default judgment is subject to the indemnity principle and that the "solicitor should bring to the court's attention for a lesser amount". I am afraid as the rules presently stand, it is not clear whether the fixed cost is subject to the indemnity principle, and in any event, the solicitors may not appreciate this aforesaid duty expected on them.

7. I suggest that in order to give effect to the same, a requirement should be added under the rules that the plaintiff must produce a certificate by his handling solicitor that the legal costs paid or payable for the application are not less than the fixed costs claimed (c.f. O 13 r 4(1) for a precedent of a requirement for a solicitor's certificate, though for different purpose). The rules may also be amended to make it clear that the fixed cost of $10,000 does not apply to a litigant in person.

Part 23 – Judicial Review: Serial No.27

8. I welcome the removal of the service requirement at the leave application stage in the light of my earlier submissions. However, it appears that the Steering Committee is not aware of my other comments made orally at the LegCo Sub-committee hearing on 29 February 2008. At the hearing, I also expressed reservation on the proposed introduction of Order 53 r 3A to exclude the respondent's right to set aside the order for leave. With or without the originally proposed change requiring service on the proposed respondent, the leave application is still in the nature of an ex parte application. Hence as a matter of principle, the court should be allowed to

entertain an application to set aside any ex parte order. In particular, the requirement for full and frank disclosure should remain and the court should be allowed to set aside the leave order for material non-disclosure: see the recent case Kan Hung Cheung v Director of Immigration HCAL 74/2007, 13 February 2008, where A Cheung J set aside the order for leave on this ground.

9. Now with the removal of the service requirement, there is a much stronger reason to retain the right on the part of the respondent to apply to set aside the ex parte leave order, as the respondent is not given any opportunity to address the court at all. Hence I suggest the deletion of O 53 r 3A.

Eric TM Cheung
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