SUBMISSION TO THE SUBCOMMITTEE ON DRAFT SUBSIDIARY LEGISLATION RELATING TO THE CIVIL JUSTICE REFORM

RESPONSE TO JUDICIARY ADMINISTRATION'S MARCH 2008 PAPERS

I refer to the Judiciary Administration's letter of 18 March 2008.

My responses to the points made in the Judiciary Administration's paper CJRS 6/2008 follow. I address the issues of major concern first (I also adopt the Serial No. scheme in the paper) –

Major concerns

SN3. I note that the Steering Committee has reviewed the wording of O.1A, r.1(d), and proposes revising it to read "to ensure fairness between the parties". Whilst this is a welcome improvement on the ambiguity of the previous wording, "fairness" is still a very broad term. With respect, the expression "equal footing" (as in CPR 1) would provide a tighter form of words whilst still achieving the aim of ensuring the proverbial level playing field between the parties. Further, there is a body of English case law on this wording which, whilst in no way definitive or binding, may be of assistance to the Hong Kong courts when the "new" RHC are in place.

SN13. I note the response in respect of O.22, r.2(4). If no objections were raised to the previous wording of O.22 then I do, of course, accept the "majority opinion albeit it is not one that I share. The Steering Committee and Subcommittee may, however, find it useful to take note of the wording of CPR 36.4(2) which is designed to protect plaintiffs from defendants who make "empty" offers -

> "36.4 (1) Subject to rule 36.5(3) and rule 36.6(1), a Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money.
> (2) But, an offer that includes an offer to pay all or part of the sum, if accepted, at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer."

I share the Steering Committee's view that government departments and insurers should not necessarily receive special treatment. In my view, all defendants should be treated equally.

I also note the response with respect to O.22, r.20(2). I retain, but do not propose to repeat, my previous objections to this provision. I do note, however, that my concern that it is a punitive measure is shared by the Bar Association.

SN20. I note the comments concerning CPR 35.6. With respect to the views of the Academy of Experts, I did not encounter any abuse of the rule in the manner it described to the CJR Working Party during my time in practice in England (my area of practice, professional negligence litigation, involved instructing expert witnesses in many cases). I am also unaware of such abuse being referred to in the reported cases. This absence of abuse may not be unconnected with the attitude of the courts, as can be discerned from the following passage of the Admiralty and Commercial Court Guide -

> "H2.19 (b) The court will pay close attention to the use of this procedure [CPR 35.6] (especially where separate experts are instructed) to ensure that it remains an instrument for the helpful exchange of information. The court will not allow it to interfere with the procedure for an exchange of professional opinion at a meeting of experts, or to inhibit that exchange of professional opinion. In cases where (for example) questions that are oppressive in number or content are put, or questions are put for any purpose other than clarification of the report, the court will not hesitate to disallow the questions and to make an appropriate order for costs against the party putting them."

The Subcommittee and Steering Committee may also be interested in a survey of litigation solicitors carried out by Smith & Williamson in 2002, which discovered that only 64% of them had taken advantage of CPR 35.6 and, of those, 91% found it "useful" (www.legalweek.com/Articles/111840/A+meeting+of+minds.html.) This survey, carried out at about the same time as the Academy of Experts would have prepared its comments for the CJR Working Party, does not suggest widespread abuse of the rule. For this reason, I share the view expressed in the notes to CPR 35.6 in *The White Book Service* (Sweet & Maxwell) that -

> "This is a useful provision, perhaps particularly so in fast track cases… It enables a party to obtain clarification of a report prepared by an expert instructed by his opponent. In a given case, were it not possible to achieve such clarification or extension of a report, the court, for that reason alone, may feel obliged to direct that the expert witness should testify at trial"

It should also be noted that CPR 35.6 has been adopted in Singapore (O.40A r.4) and that the New South Wales Uniform Civil Procedure Rules enable parties to seek limited clarification of a single joint expert's report (rule 31.41). It is respectfully suggested that CPR 35.6 could be adopted in Hong Kong also and that the Commercial Court's warning or the New South Wales restriction to only ten questions per expert could be used to prevent its possible abuse.

I note that the Judicial Administration has not responded to my comments relating to CPR 35.14; parties' unhappiness with a single joint expert's report; or a protocol on the instruction expert witnesses. I presume that these points are still under consideration.

Other points

SN5. I am aware of the Working Party on Mediation and look forward to receiving further information on the promotion of mediation and its integration with the RHC in due course.

SN11. I note that the sole intention behind the introduction of statements of truth is to ensure that parties do not knowingly advance false cases. As I advised in my submission of 3 March 2008, the secondary purpose for their introduction in England – to avoid the need for affidavits and witness statements at interim hearings – has not been fulfilled.

SN15. I note and welcome the intentions in respect of O.24, r.15A.

Once again, I am grateful for the opportunity to express my opinions to the Subcommittee and Steering Committee and I would, of course, be delighted to continue to assist with their work if this assistance is required.

The views expressed in this submission are mine alone and no liability attaches to any other person, the University of Hong Kong or the Faculty of Law for the same.

GM 20.3.08

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