CJRS 21/2008

Subcommittee on Draft Subsidiary Legislation Relating to the Civil Justice Reform

Appeals to the Court of Appeal Re: Totally Unmeritorious Leave Applications

Purpose

On behalf of the Judiciary, the Judiciary Administration presents this paper, which sets out the Judiciary's response to the Subcommittee's views on the proposed O.59, r.2A(8) in the latest draft Rules of the High Court (Amendment) Rules 2008 ("Draft RHC"), which seeks to deal with the problem of totally unmeritorious applications to the Court of Appeal ("CA") for leave to appeal. 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.

Background

2. At the meeting on 5.5.2008, the Subcommittee noted **CJRS 16/2008** on the revised procedure for applications to the CA for leave to appeal, and expressed reservation about the proposed O.59, r.2A(8), viz. -

> "(8) Where the Court of Appeal determines the application on the basis of written submissions only, it may, if it considers that the application is totally without merit, make an order that no party may under paragraph (7) request the determination to be reconsidered at an oral hearing inter partes."

The Subcommittee was concerned whether the above provision would deprive the aggrieved party of the right to an oral hearing, and in some cases, might result in injustice. The Judiciary Administration was requested to convey the Subcommittee's comments to the Steering Committee.

Steering Committee's Considerations

3. The Steering Committee has noted the Subcommittee's views, and would like to set out below the relevant considerations for the proposed O.59, r.2A(8).

Problem of Unmeritorious Applications

4. The problems of and associated with "totally" unmeritorious appeals (often from litigants in person but not restricted to this class) have been experienced in Hong Kong for some time and, in the view of all judges who have experience in these matters, need to be addressed. Obvious examples of the problems associated with such applications include (i) delays, (ii) the proliferation in costs for innocent parties quite apart from the inconvenience and, often, the worry, and (iii) the clogging up of the courts diary in hearings to deal with such applications at the expense of other litigants with more meritorious matters to be resolved. With the coming into effect of the provisions requiring leave to appeal from interlocutory orders from the Court of First Instance, it becomes all the more important that the problem of unmeritorious appeals is effectively addressed. If unchecked, the problems will be exacerbated.

Statistics

5. The statistics on (i) applications for leave to appeal and (ii) renewal applications in the past 3 years from 2005 – 2007 are appended below -

Year	**(a) Leave Applications to CA**	**(b) Renewal Applications %: (b) / (a)**	**(c) Renewal Applications Refused %: (c) / (b)**
2005	225	31 (14%)	26 (84%)
2006	153	33 (22%)	27 (82%)
2007	118	30 (25%)	21 (70%)

6. The above statistics indicate that in each of the past three years, on average, about 20% of leave applications were followed by renewal applications. Of the renewal applications, about 80% were refused leave. The proportion of such applications highlights the need to address the problem of unmeritorious appeals.

Amendments in the Civil Justice (Miscellaneous Amendments) Ordinance 2008

7. To screen out unmeritorious appeals and to streamline procedures, the Civil Justice (Miscellaneous Amendments) Ordinance 2008 ("CJO"), enacted in January 2008, contains amendments to the HCO to provide, among other things, that (i) one or two Justices of Appeal ("JAs") can deal with applications for leave to appeal on paper without a hearing (see new s.34B(4)(aa)); and (ii) refusal of leave by the CA is final (see new s. 14AB). The proposed O.59, r.2A(8) is in line with the objectives to screen out unmeritorious appeals and to streamline procedures, thereby enabling the court and judicial resources to be more fairly distributed and utilized.

Access and hearing rights are not absolute

8. It is well-established in the international jurisprudence that the access and hearing rights are not absolute but may be subject to appropriate restriction. A limitation on the access and hearing rights may be valid provided that (i) the restriction pursues a legitimate aim; (ii) there is a reasonable proportionality between the means employed and the aim sought to be achieved; and, (iii) the restriction is not such as to impair the very essence of the right. See paragraphs 48-51 of the Final Report.

9. In many jurisdictions, leave to appeal is often dealt with on paper, without a hearing and without reasons for dismissal of the application. The requirements of HKBOR 10[1] and Art 6(1)[2] of the

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[1] All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

[2] In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

European Convention on Human Rights are more easily satisfied in relation to applications for leave to appeal since they generally follow one or two layers of public hearings with reasoned judgments and raise only narrow questions relating to known criteria for granting or refusing leave. Where the application for leave to appeal is to a final court of appeal, even less is needed to meet the requirements of the right to a fair and public hearing. Thus, where, on the face of the application for leave to appeal, read in the light of the (usually) two judgments below, there is no reasonable basis for the grant of leave, the procedure under rule 7[3] of the Hong Kong Court of Final Appeal Rules (Cap. 484A) may be invoked. See paragraphs 77 – 82 of the Final Report.

Practice under the Civil Procedure Rules ("CPR")

10. The proposed O.59, r.2A(8) is modeled on the English CPR 52.3, which provides that an application for permission to appeal may be considered by the appeal court without a hearing. If an application is refused without a hearing, such decision would then be subject to the appellant's right to have it reconsidered at an oral hearing, possibly before the same judge. If the Court of Appeal considers that the permission application is without merit, it has the power to order that no request for reconsideration can be made by the applicant.

Consultation

11. The proposed O.59, r.2A(8) was included in the Steering Committee's "*Revised Proposal for Amendments to Subsidiary Legislation*" published in October 2007. The Law Society has no comment on the proposed provision. Having considered the Bar's comments, the Steering Committee has suitably revised the wording of the proposed r.2A(8) to make it clear that it only applies to "totally unmeritorious appeals". The Bar has raised no further comments on the wording of the latest O.59, r.2A(8).

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[3] **Rule 7 - Application that discloses no reasonable grounds, is frivolous or fails to comply with Rules**

(1) Where the Registrar is of the opinion either on the application of the Respondent or of his own motion that an application discloses no reasonable grounds for leave to appeal, or is frivolous or fails to comply with these Rules, he may issue a summons to the applicant calling upon him to show cause before the Appeal Committee why the application should not be dismissed.

(2) The Appeal Committee may, after considering the matter, order that the application be dismissed or give such other directions as the justice of the case may require.

Conclusion

12. The problems associated with totally unmeritorious appeals exist now and these are likely only to get worse with the coming into effect of the CJR proposals. However unmeritorious, the court (comprising up to three Judges) will have to set aside time to read what is often voluminous and indigestible material (especially from unrepresented litigants) as well as the time taken for the hearing itself. As stated above, this valuable court time is at the expense of more worthy matters and litigants.

13. The proposed O.59, r.2A(8) seeks to deal with the problem of, it is to be emphasized, "totally" unmeritorious appeals. Under the proposed O.59, r.2A, when at least two JAs have come to the view that an application for leave to appeal is "totally" unmeritorious and no rational basis has been shown as to why there should be an oral hearing, it seems difficult to justify an insistence that there be an automatic right to be heard orally. The Judiciary does not believe that O.59, r.2A(8) is disproportionate to the problem of applications which are "totally without merit".

Judiciary Administration
May 2008