LAW SOCIETY'S SUBMISSIONS ON THE CONSULTATION PAPER ON PROPOSED LEGISLATIVE AMENDMENTS FOR THE IMPLEMENTATION OF THE CIVIL JUSTICE REFORM

The Law Society of Hong Kong published its *Report on Civil Justice Reform, ("Law Society's Report")* prepared by its Working Party on Civil Justice Reform in April 2002, and welcomes the publication of the *Consultation Paper on Proposed Legislative Amendments for the Implementation of the Civil Justice Reforms* in April 2006 *("Consultation Paper")*.

The Law Society notes the Judiciary has accepted a majority of the Law Society's recommendations to improve the existing system, in particular that the reforms should proceed by way of amendments to the existing Rules of the High Court, High Court Ordinance, and other relevant legislation, rather than a wholesale introduction of a new set of rules as in England and Wales.

The *Consultation Paper* has been reviewed by the members of the Working Party on Civil Justice Reform on behalf of the Law Society. Its members are set out below, the majority of whom were also involved in preparation of the *Law Society's Report*.

Andrew Jeffries	Chairman
D. Nigel Francis/Warren P. Ganesh	Member/Alternate
Barry P. Hoy	Member
Nicholas D. Hunsworth	Member

James E. Jamison	Member
Jeffrey H. Lane	Member
Allan C. Y. Leung	Member
Mary B.L. Thomson	Member
Neville J.J. Watkins	Member
Kenneth W.Y. Wong	Member
Joyce Wong	Secretary

In this Submission, the Law Society has identified those of the Recommendations originally set out in the *Chief Justice's Final Report on CJR* on which it has comments in the light of the proposed implementation of them as set out in the *Consultation Paper*. We do not here refer to those Recommendations on which the Law Society has no further comments, either: (a) because it agrees with *the Consultation Paper* proposals, or (b) because the Law Society's comments are on differences of principle, which have already been debated and decided upon by the Judiciary / Steering Committee.

This response to the *Consultation Paper* inevitably includes a significant amount of detail, commenting on detailed drafting and rule amendments. Nevertheless, we would draw attention to the following matters which the Law Society's Working Party considers are important issues arising from the *Consultation Paper*, or left unresolved by it:

1. The proposals on active case management are strongly supported, but it is our considered view, and one supported by the experience of our colleagues in England in particular, that without the introduction of a docket system, allocating to a case consistently a procedural judge or master, it will be very difficult for much to be achieved by this case management (See comments under Recommendations 2 – 4, 52, and 82 below).

2. Given the significant work that has been done on digital certificates and other technology, we were disappointed to see that proposals for electronic filing, and the use of at least telephone, and possibly video hearings has not been progressed. Experience

from our colleagues in Singapore in particular, but also in England, confirms that telephone hearings can be extremely efficient in saving time and costs not only for solicitors/barristers, but also for the court (See comments under Recommendation 87 below).

3. In the light of disappointing experience in England on the use of a single court appointed expert, we have serious reservations about whether this proposal remains practicable (see comments under Recommendation 107 below).

4. Important proposals are set out under comments on Recommendations 131-136 in relation to an overhaul and simplification of the process of inter-partes taxations of costs.

5. The proposal to amend Section 52A(2) of the High Court Ordinance to allow costs orders against non-parties appears to us to be new, not part of the earlier consultation and recommendations. The issue is presently before the Court of Final Appeal, and we believe has not been adequately consulted upon, for what is in fact a substantial change to the powers of the Court (See comments at section X below).

The Law Society would welcome an opportunity to discuss, in a meeting or otherwise, the issues arising out of the *Consultation Paper* with the Steering Committee, or other learned members of the Judiciary addressing these issues, and otherwise to answer any questions or provide further information or clarification at your convenience.

A. Recommendations 2-4: Overriding Objective and Case Management powers

"Recommendation 2: A rule should be introduced identifying underlying (rather than overriding) objectives of the system of civil justice to assist in the interpretation and application of rules of court, practice directions and procedural jurisprudence and to serve as a statement of the legitimate aims of judicial case management.

Recommendation 3: The underlying objectives referred to in Recommendation 2 should be stated as (i) increasing cost-effectiveness in the court's procedures; (ii) the expeditious disposal of cases; (iii) promoting a sense of reasonable proportion and procedural economy in respect of how cases are litigated; (iv) promoting greater equality between parties; (v) facilitating settlement; and (vi) distributing the court's resources fairly, always recognizing that the primary aim of judicial case management should be to secure the just resolution of the parties' dispute in accordance with their substantive rights.

Recommendation 4: Rules should be introduced (along the lines of CPR 1.4) listing available case management measures and conferring (along the lines of CPR 3.1) specific case management powers on the court, including power to act of its own motion, exercisable generally and (unless excluded) in addition to powers provided by specific rules, in the light of the underlying objectives referred to in Recommendation 2."

1. These Recommendations provide that overriding *"underlying objectives"* should be introduced as new rules at the beginning of the Rules of the High Court ("RHC"), together with the court's new case management powers and duties. The Recommendations set out in some detail what the *underlying objectives* should be, and the case management powers which should be available by reference to the equivalent English Civil Procedure Rules ("CPR") provisions. These

Recommendations have, to this extent, been faithfully implemented by the addition of new Orders 1A and 1B. We have the following comments:

1. Order 1A: "*Underlying Objectives*"

(a) **Order 1A r.1**

The phrase used is "*underlying objectives*". This contrasts to the CPR phrase of "*overriding objectives"*. In our view it is preferable to use the English terminology. The word "*overriding*" conveys a better understanding of the nature and status of these objectives, intended to apply as background principles throughout all the remainder of the RHC. When the CPR was first introduced, there was for a long period significant uncertainty about what the *"overriding objectives"* meant, and many cases were taken to appeal on whether a particular exercise of a judicial discretion met the *overriding objectives* or not. The vacuum of authority has therefore now been filled to a significant extent in England and Wales, and it would be preferable in Hong Kong to adopt the same terminology. This would make it clear that much of the learning and case law on the meaning and use of the *overriding objectives* would be applicable in Hong Kong. The alternative would be at least uncertainty as to whether *underlying objectives* are something different to *overriding objectives*, or at worst a vacuum leading to more uncertainty, applications and appeals until their meaning and effect is established by precedent.

(b) **Order 1A r.1(b)**

It would be better to ensuring that a case is dealt with "*fairly*" as well as expeditiously, in line with the CPR.

(c) **Order 1A r.1(c)**

This is vaguely worded "*to promote a sense of reasonable proportion*". It would be better simply to say *"to promote reasonableness, and procedural economy in the conduct of proceedings*." These words also match better the CPR. We agree

with the decision to omit the CPR reference to "*proportionality*", which has been the subject of significant argument and controversy in England.

(d) **Order 1A r.1(f)**

"*….to ensure that the resources of the court are distributed fairly*".

Again, it is a little uncertain what this means or is intended to cover. Does this mean that, in exercising its discretion to list a case, cases will be transferred to quieter courts (or Judges moved)? Such would be a macro issue of judicial resources, beyond the scope of the individual piece of litigation. This objective might properly be that the resources of the court are used efficiently, and are not allowed to be wasted by frivolous applications or delay.

We suggest the wording for this objective might be "*to ensure that the resources of the court are used efficiently*".

(e) **Order 1A r.4(2)(j): Application by the Court of *underlying objectives***

New rule 4(2)(j) on case management provides the court with some duty to deal with cases without the parties needing to attend court, but it should be stated to be "*where practicable*" or "*where in the interests of the underlying objectives*".

2. Order 1B: Court's General Powers of Management

(a) **Order 1B r.2(a)**

Under the court's general powers of management, we have a concern with rule 1B(2)(a) that the court may shorten the time limit for compliance with any rule. We do not believe the court should have the power to shorten primary time limits otherwise set out in the rules. In theory, the court could shorten time for acknowledgment of service or time to appeal and other fundamental time limits which we do not believe would be due process. We noted a number of instances from our respective practices where pressure had been brought to bear on Appellants to lodge a notice of appeal before the time for appealing had expired.

We express concern, in the light of this experience, about possible misuse of this power.

This rule should be modified to be subject to some qualification so that primary time limits otherwise set out in the rules (namely time for acknowledgment of service, challenge to jurisdiction, service of defence or lodging an appeal) may not be shortened (see also new rule Order 1A 2(2)).

(b) **Order 1B r.2(2)**

Under new Order 1B, rule 2(2), the court may make orders of its own motion. This should be expressly stated to be subject to sub-rule (5) where parties have a right to apply to have an order set aside, where they have not been able to appear or make representations. In rules (2) and (3), all parties should be notified of the court proposing to make an order of its own motion, not just those parties likely to be affected. This is part of the fundamental principle of justice being seen to the done, and the court may well benefit from an update from all parties on the status of the action, or submissions from all parties on the facts and circumstances which bear on the particular issue.

Like with the new power to abridge time, we also have serious reservations about the new power of the court to make dispositive orders dismissing a case without hearing the parties, and with then only a very short period of time to apply to have a hearing held, or to have the matter overturned. Such orders of own motion should not be made without a full hearing before the parties concerned in any case where the order would effectively dispose of the case (e.g. summary judgment, strike out, refusal of jurisdiction or dismissal for want of prosecution).

(c) **Order 1B r.2(3) and (6)**

The time limits in the proposed new Order 1B, Rule 2(3) and (6) are thought to be too short to serve the interests of justice at 3 and 7 days respectively, especially where public holidays intervene and the handling solicitor may be away. These should be 14 days in line with the time limit in new rule 3.

(d) **We have grave reservations about whether the proposed scheme of case management can achieve more than a modest improvement in the system of Civil Procedure without the introduction of a docket system – see comments made under Recommendation 52.**

B. Recommendation 8: Pre-Action Protocols

"Recommendation 8: In exercising its discretion, the court should bear it in mind that special allowances may have to be made in relation to unrepresented litigants, if it is the case that, not having access to legal advice, they were unaware of any applicable protocol obligations or, if aware of them, that they were unable fully to comply with them without legal assistance."

1. We express concern over the attitude of the court towards unrepresented litigants who fail to observe court procedures. The court should be alert to the fact that there are unscrupulous litigants in person with unmeritorious cases who deliberately opt to act in person to avoid having to *"play by the rules"*.

C. Recommendation 17: Disputing Jurisdiction

"Recommendation 17: Order 12 r.8 should be amended to the extent necessary to bring into its scheme for disputing the court's jurisdiction, applications for the court to decline to exercise jurisdiction over the plaintiff's claim and to grant a discretionary stay of the action."

1. **Order 12 r.8**

(a) We have no particular comment on the draft amendments to Order 12 rule 8. However, the issue of whether or not the defendant has submitted to the jurisdiction by some other step in the proceedings remains an area of controversy and argument, and this should be clarified. It is expressly stated that notice of intention to defend is not such a submission provided a challenge to jurisdiction

application is duly made, but we submit that consideration be given to spelling out the following applications for: an extension of time to challenge jurisdiction, or asking for security for costs for the challenge application, or asking for a stay pending the outcome of foreign proceedings, are not a submission to the jurisdiction.

(b) It is noted that the CPR provides expressly that once a challenge application is made, time for service of a defence is extended until after the disposal of such an application. This has pros and cons, but avoids the debate about whether an express extension of time is needed, and whether that in itself is a submission to the jurisdiction. This should be spelled out in Order 12 rule 8.

2. **Order 12 r.8(6)**

Order 12 rule 8(6) contains the curious procedure that if the challenge application is dismissed, a further acknowledgment of service should be lodged. This is an unnecessary additional step which might be deleted. The court in dismissing such a jurisdiction application should simply give directions for the service of the defence and further conduct of the action as appropriate.

D. Recommendation 18: Default Judgments and Admissions

"Recommendation 18: Provisions along the lines of Part 14 of the CPR should be adopted in relation to claims for liquidated and unliquidated sums of money with a view to enabling defendants to propose payment terms (as to time and installments) in submitting to entry of judgment by default."

1. The proposal recommends 4 new forms should be appended to the Acknowledgment of Service, which when presented bilingually could result in the addition of at least another 12 A4 pages of standard forms to the Writ. We consider new simplified forms should be drafted for the sake of clarity and to save unnecessary wastage of paper.

2. Order 27 already provides for admissions and judgment on admissions and Order 47 rule 1 empowers the court to stay execution of *fi fa* writs by payment of installments. However, we note the proposed amendments do not appear to address the issue as to how Orders 27 and 47 rule 1 should be dealt with in the new rules.

This is a potential anomaly and should be addressed.

E. Recommendations 22 and 23: Defences to be substantive, not mere bare denials or non-admissions

"Recommendation 22: Proposal 10 (requiring defences to be pleaded substantively) should be adopted.

Recommendation 23: An exception to the general rule deeming the defendant to have admitted any untraversed allegation of fact in the statement of claim should be created along the lines of CPR 16.5(3) so that a defendant who ahs adequately set out the nature of his case in relation to which the untraversed allegation is relevant, is deemed not to admit and to put the plaintiff to proof of such allegation.

Recommendation 24: Proposal 10 should not be extended to pleadings subsequent to the defence."

1. The *Law Society's Report* recommended that both bare denials and bare non-admissions should not be permitted, but the proposed change deals only with bare denials. As the proposed amendments intend to narrow the scope of a dispute, a defence consisting of bare non-admissions can be as frustrating as one consisting purely of bare denials. However, we submit there can, on occasions, be a legitimate place for a defence consisting of bare non-admissions, if the defendant knows little or nothing about the facts underlying the claim and is content simply to put the claimant to proof without advancing any positive case. The narrowing of the legislative proposal is presumably taking that into account.

However, we submit there is a case for giving fuller effect to the original recommendation, along the following lines:

"Where an allegation … is met by a non-admission, the party who does not admit the allegation shall …if he intends to put forward a different version of events from that given by the claimant, state his own version, failing which he is to be taken as intending merely to put the claimant to proof of the facts alleged and shall be precluded at trial from adducing evidence of any different version of events without leave of the court."

F. Recommendation 25: Tender before action

"Recommendation 25: The defence of tender before action should be extended to apply to claims for unliquidated damages.

The following is the proposed amendment to the Law Amendment and Reform (Consolidation) Ordinance:

"Notwithstanding any rule of law, in proceedings for a monetary claim, whether liquidated or unliquidated, it is a defence for the defendant to prove that before the claimant commenced the proceedings, the defendant had unconditionally offered to the claimant:

(a) the amount due where the claim is liquidated; or

(b) an amount sufficient to satisfy the claim where the claim is unliquidated."

1. The section as currently drafted leaves out the requirement (part of the common law in the case of liquidated claims) that to take advantage of the defence the defendant must pay into court the sum allegedly tendered. This provision must be added.

2. There does not seem to be any difference intended between "*the amount due*" and "*an amount sufficient to satisfy the claim*", and it would be better to replace the two sub-paragraphs with "…*offered to the claimant an amount sufficient to satisfy*

the claim", which would adequately cover both permutations. That would avoid problems in applying the clause to claims which start life unliquidated but have become liquidated by the time proceedings have begun.

3. *"An amount sufficient to satisfy the claim*" is presumably intended to be a sum certain in cash. It is presumably not intended that a defendant could make in the abstract an offer to pay an amount sufficient to satisfy the claim (this will be clearer once the requirement for payment-in has been added). The words *"being a sum certain in money"* could be added to eliminate any possible ambiguity.

4. In summary, the following amended draft is suggested:

> *"Notwithstanding any rule of law, in proceedings for a monetary claim, whether liquidated or unliquidated, it is a defence for the defendant to prove that:*
>
> ***(a)** before the claimant commenced the proceedings, the defendant had unconditionally offered to the claimant an amount*, ***being a sum certain in money sufficient to satisfy the claim; and***
> ***(b) the defendant had no later than at the time of serving his defence paid the sum offered into court and notified the claimant of that payment-in."***

G. Recommendations 26-32: Statements of Truth

"Recommendation 26: Proposal 11 (requiring pleadings to be verified by a statement of truth) should be adopted as modified and supplemented by Recommendations 27 to 32.

Recommendation 27: The rules should indicate the level or class of officer or employee who may sign a statement of truth verifying pleadings on behalf of a party that is a corporation, a partnership or an analogous organization or association.

Recommendation 28: The rules should set out (along the lines of 22PD3.7 and 22PD3.8) the effect in law of a legal representative signing a statement of truth to verify a pleading on behalf of the party concerned.

Recommendation 29: Insurers (or lead insurers) and the Hong Kong Motor Insurers Bureau should be authorized to sign a statement of truth to verify a pleading on behalf of the party or parties concerned (along the lines of 22PD3.6A and 22PD3.6B).

Recommendation 30: The period allowed for defendants to file their defence should be increased to allow adequate time to plead substantively to a plaintiff's claim and to verify the defence.

Recommendation 31: The possibility of proceedings for contempt being brought against a person who verifies a pleading by a statement of truth without believing that the factual allegations contained in the pleading are true should be maintained, but the rule should make it clear that such proceedings (to be brought, with the leave of the court, either by the Secretary for Justice or by an aggrieved party) are subject to the general law of contempt and to be contemplated only in cases where sanctions for contempt may be proportionate and appropriate.

Recommendation 32: A rule should be adopted making it clear that a party who has reasonable grounds for so doing, may advance alternative and mutually inconsistent allegations in his pleading and verify the same with a statement of truth."

1. These are to be given effect in a new Order 18 rule 20A and a new Order 41A, the detail of the new rules being in the latter.

It seems clear that statements of truth verifying pleadings (also true of the reforms in England and Wales) will not mean, and are apparently not intended to mean, what they say. For a pleading the proposed appropriate verification is: "*I believe that the facts stated in this [defence] are true*". However, it is clear from the discussion of inconsistent alternative claims that this is not supposed to be taken literally.

The Chief Justice's Working Party notes in its Final Report that the new rule *"is aimed at excluding dishonest or opportunistic and speculative claims. It is not intended to exclude honest claims reasonably advanced on the basis of incomplete information which points to alternative sets of fact ...*".

We consider this to be an unsatisfactory compromise, which will either devalue the verification and/or cause concern to more scrupulous litigants.

It appears that the intention is that parties will still be permitted to plead (and verify) facts which they do not know for sure are true, but which they honestly believe "*with reasonable grounds*" are an appropriate way of putting their case. There is a strong case for recognising a distinction between the guarantee of veracity given on a witness statement and on a pleading.

We recommend a more appropriate formula could be adopted and suggest the following:

> "***I put forward the facts in this pleading in good faith, and to the best of my knowledge and information they are a proper and appropriate statement of the facts relevant to my [claim/defence]".***

There will inevitably be an increase in the time taken to prepare pleadings which have to be verified, especially in the case of corporate parties where the pleading must be verified by a director, the company secretary or a manager. This will often mean that the verification will be coming from someone who has no personal knowledge of the facts being verified. In order to take account of this, we recommend the following:

(a) time for service of a Defence is to be increased from 14 to 28 days.

(b) time for service of a Reply remains 14 days.

It should also be noted that in complex proceedings these time limits are often inadequate.

H. Recommendation 38-43: - Sanctioned Offers and Payments

"Recommendation 38: Proposal 15 (for introducing sanctioned offers and payments along the lines of CPR 36) should be adopted as modified and supplemented by Recommendations 39 to 43.

Recommendation 39: The defendant's position under Order 22 should in substance be preserved, but with the addition of the relevant ancillary provisions found in CPR 36.

Recommendation 40: While parties should be encouraged to settle their disputes by negotiation, offers made before commencement of the proceedings should not qualify as sanctioned offers save to the extent that a pre-action protocol which has been adopted in relation to particular specialist list proceedings provides otherwise in respect of such specialist list proceedings.

Recommendation 41: A sanctioned offer or payment should be required to remain open for acceptance for 28 days after it is made (such 28 day period falling before commencement of the trial), unless leave is granted by the court for its earlier withdrawal. Thereafter, the offer could be withdrawn and if not, would continue to be capable of acceptance.

Recommendation 42: The rules should make it clear that the court will continue to exercise its discretion as to costs in relation to any offers of settlement which do not meet the requirements to qualify as sanctioned offers.

Recommendation 43: The rules should make it clear that a plaintiff may qualify for an award of additional interest along the lines of Part 36 where he makes a sanctioned offer which satisfies the prescribed requirements, but not otherwise."

The procedure for making sanctioned offers and payments will be implemented by way of a new Order 22 (Sanctioned offers and payments) and Order 22A (Sanctioned offers and payments miscellaneous provisions) to replace the existing

Order 22. We have considered the issues for response by looking at these two newly-drafted orders separately.

A. The proposed Order 22

1. General

To the extent of implementing Recommendations 38 to 43, most of the provisions in the proposed Order 22 have been borrowed directly from Part 36 of the CPR, which is considered as one of the most successful features of the *Woolf* reforms.

Generally, the Recommendations have been correctly and completely implemented in the proposed amendments. There are, however, a number of ancillary matters to which further consideration should be given. These are set out in the following paragraphs.

We also attach to these submissions a manuscript mark-up of the proposed Order 22 to reflect the comments made below in **Appendix 1**.

2. Inconsistency in terminology r.6(2)

The heading of the proposed rule 6 refers to mixed claims consisting of "…*money and non-money claims*" whereas the proposed rule 6(2)(b) uses the terminology "*balance of the offe*r" to refer to the non-money part of the offer. This appears to be one of the few deliberate departures from the wording of the Part 36 provision.

We consider that the reference to "*balance of the offer"* does not appear to help and instead, the same terminology used in the heading i.e. *non-money claim* (and used in the same sub-section of Part 36, CPR Rule 36.4) should be used throughout the proposed Order to avoid ambiguity and to ensure consistency throughout.

3. **Moratorium pending determination of application to withdraw r.7(6) and r.9(4)**

It has been suggested that the Recommendations and the proposed amendments do not deal with how the sanctioned offer/payment is to be dealt with once an application to withdraw has been made during the 28 day period, i.e. does the offer/payment remain capable of being accepted prior to the determination of the application to withdraw or is there a stay on the offer/payment while such application is pending?

The existing Order 22 does not deal with this either, although paragraph 22/1/19 of the *White Book* states that:

> "*The court may grant leave to withdraw money paid in, even where, at the date of the application for leave, it is still open to the plaintiff to accept the money; acceptance of the money by the plaintiff between the date of the application for leave and its hearing will not necessarily serve to defeat the application, although it may be an important consideration in deciding whether or not leave to withdraw should be granted (Manku v Seehra [1985] CILL 224; (1985) New LJ 236)*"

This may be an opportune time to consider whether a stay should be introduced in the proposed Order 22. If a stay is favoured, protections can be put in place in relation to the application to withdraw. For example, if the application to withdraw is unsuccessful, the 28 day period is deemed not to have run during the period between the date of the application and the determination thereof, so that the time for acceptance is not affected. There should be no impact on the right to costs during this time if the application is refused and the offer/payment subsequently accepted.

4. **Reduction of Offer r.7(6), r.9(4), r.11(3) and (4)**

The proposed Order 22 envisages withdrawal of and improvement to sanctioned offers or sanctioned payments, *but makes no mention of reduction of sanctioned offers or sanctioned payments.* Part 36 provides for reduction of sanctioned payment if permission of the court is given ("A Part 36 payment may be withdrawn *or* ***reduced*** only with the permission of the court" - Rule 36.6(5), emphasis added).

We consider it appropriate to introduce such flexibility in the proposed amendments and suggest that rules 7(6)(a) and 9(4) could be amended to read "… ***may not be withdrawn or reduced …unless the Court gives leave*** …"

5. **Default in Honouring Terms of Offer r.20**

It is considered necessary to clarify the means by which the court deals with a default in honoring the terms of a sanctioned offer. For example, the proposed rule 20(6) provides that a party may apply to the court to seek remedy for breach of contract without starting a new claim.

The proposed legislative amendment is unclear. Is it intended that judgment will be entered against the defaulting party, with the non-defaulting party then free to enforce such judgment; or is the stay of proceedings lifted as in a Tomlin Order?

6. **Payment out of money paid into court (existing r.5 and r.8)**

The existing Order 22 deals with the payment out of money paid into court by way of two provisions, namely rule 5 (where the payment made is by way of a settlement offer) and rule 8 (where the payment is made into court under an order). Under the new provisions, the provisions relating to payment out have been taken out of Order 22 and are dealt with under Order 22A. However, it appears that whilst the proposed Order 22A has adequately dealt with the existing rule 5, it does not adequately deal with the existing rule 8. Further comments are made on this point in Section B below.

7. **Reference to Prime Rate r.22**

This rule allows a qualified plaintiff to an award of additional interest, which is calculated by reference to the *"prime rate"*.

The term "*prime rate*" (also known as "*best lending rate*") is commonly used in Hong Kong to refer to a bank's lending rate (particularly in relation to mortgage transactions). *However, it is not a defined term*. The *prime rate* is set by banks individually (c.f. "*base rate*" in England and Wales which is set by the Bank of England) and can vary amongst banks (there are at present two different *prime rates*). As a result, uncertainty is bound to arise if the additional interest is calculated by reference to "*prime rate*".

We suggest the reference to the *prime rate* should be changed to the *judgment rate*. Whilst the *judgment rate* is ordinarily higher than the *prime rate*, given the court's discretion in the fixing of the rate ("… not exceeding 10% ..." above *prime rate*), the resulting interest rate does not necessarily have to be any higher than what has been intended in the proposed amendment.

B. The proposed Order 22A - Miscellaneous provisions governing payments into court

1. Money remaining in Court Order 22A r.1

(a) Inadequacy of Wording

The wording of the proposed Order 22A rule 1[1] is intended to cover the existing rule 5 (where the payment made is by way of a settlement offer) and rule 8 (where the payment is made into court under an order). However, as the wording of the proposed Order 22A is based on the existing rule 5, it does not seem adequately to cater for the existing rule 8 scenario.

[1] Order 22A r.1: (1) If any money paid into court in an action is not accepted (whether or not in accordance with Order 22), the money remaining in court shall not be paid out except in pursuance of an order of the Court which may be made at any time before, at or after the trial or hearing of the action. (2) Where an order under paragraph (1) is made before the trial or hearing, the money shall not be paid out except in satisfaction of the cause or causes of action in respect of which it was paid in.

We illustrate the point as follows:

Order 22A r.1 reads:

"If any money paid into Court in an action is not accepted .....(own emphasis added)" and hence, the provision would not apply if

(1) the money paid into court was not capable of being accepted such as where the money is paid into Court pursuant to a Court order to discharge an injunction (rather than for the purpose of settlement); or

(2) it is not sought to be paid out to satisfy the cause or causes of action in respect of which it was paid in.

(b) New suggested wording

In light of the issue highlighted above, we propose that Order 22A r. 1 should be amended along the following lines:

"(1) *Subject to Order 22*, if any money *is* paid into Court in an action ~~is not accepted~~ (whether or not in accordance with Order 22), *any* ~~the~~ money remaining in Court shall not be paid out except in pursuance of an order of the Court which may be made at any time before, at or after the trial or hearing of the action.

(2) Where an order under paragraph (1) is made before the trial or hearing, *and the remaining money has been paid into Court in accordance with Order 22,* the money shall not be paid out except in satisfaction of the cause or causes of action in respect of which it was paid in".

I. Recommendations 49 to 51: Interim Remedies and Mareva Injunctions

"Recommendation 49: The mode of commencing an application for a Mareva injunction in aid of foreign proceedings or arbitrations, including possible initial ex parte applications, should be prescribed and provision made for the procedure thereafter to be followed.

Recommendation 50: The relevant provisions should state that such Mareva injunctions are entirely in the court's discretion and that in the exercise of that discretion, the court is to bear it in mind that its jurisdiction is only ancillary and intended to assist the processes of the court of arbitral tribunal which has primary jurisdiction.

Recommendation 51: Provision should be made empowering the court to make such incidental orders as it considers necessary or describe with a view to ensuring the effectiveness of any Mareva injunction granted, to the same extent that it is able to make such orders in relation to purely domestic Mareva injunctions."

1. Order 11

We note a new paragraph 21M is to be introduced to the High Court Ordinance to specifically facilitate applications for interlocutory and interim relief in aid of pending or on-going overseas litigation or arbitration, notwithstanding the absence of substantive domestic proceedings, in circumstances where ultimately those proceedings are capable of producing a judgment which could be enforced in Hong Kong under any ordinance or at common law. In essence, this permits applications to be made for injunctive relief in aid of all overseas litigation and/or arbitration save and to the extent that they would not give rise to a judgment of a superior court that will be enforceable in Hong Kong. Largely, this restriction extends only to those countries where judgments may be contrary to public policy or obtained by fraud.

The amendment seeks to remedy the significant difficulties caused by the decision in *Mercedes Benz AG v Leiduck [1996] 1 AC 284*. In that decision, the Privy Council held that the High Court had no inherent extra-territorial jurisdiction to grant injunctive relief in circumstances where the applicant was unable to demonstrate that its claim came within the jurisdiction of the High Court pursuant to its power to allow service of process on litigants overseas where the claim fell within one of the several sub-categories of Order 11 rule 1.

In short, if the claim did not fall within one of the sub-categories of Order 11 rule 1, the court could not grant leave to serve out, or, indeed, any other relief. Whilst no amendment is proposed to Order 11 rule 1 to specifically overcome this specific jurisdictional problem, Section 21M (3) expressly grants jurisdiction to the High Court to order such relief. Section 21M (4) gives discretion to the court to refuse an application if it is satisfied that notwithstanding such jurisdiction, it would be *"unjust or inconvenient"* for the court to grant the application.

The failure to amend Order 11 rule 1 to specifically refer to the proposed new Section 21M *may create difficulties* in the future as once *Mareva* relief is granted, leave to serve out will also be required for purpose of service out. Section 21M (5) contemplates the changing of the rules for service out in such circumstances, but, perhaps surprisingly offers no consequential amendment to Order 11.

We note the "*presence of assets*" test has not been accepted, although the Steering Committee has recognised the need of overseas litigants to preserve assets in Hong Kong, and to overcome the difficulties created by *Mercedes Benz AG v Leiduck [1996] 1 AC 284*.

2. The Law Society called for statutory intervention to overcome the problems, and the clear intention of the proposed Section 21M is to remedy these difficulties: Jurisdiction to make orders in aid of foreign proceedings has been created.
We submit that Order 11 should be further amended to create a further sub-category to allow service out of proceedings in circumstances where Section 21M relief has been obtained.

J. Recommendations 52-60 and 62: Case Management, Timetables and Milestones

"Recommendation 52: Procedures should be introduced for establishing a court-determined timetable which takes into account the reasonable wishes of the parties and the needs of the particular case.

Recommendation 53: As the first part of the summons for directions procedure, the parties should be required (i) to complete a questionnaire giving specified information and estimates concerning the case with a view to facilitating case management by the court; and (ii) to propose directions and a timetable to be ordered by the court, preferably put forward by agreement amongst the parties, but with the court affording unrepresented litigants leeway in their observance of these requirements.

Recommendation 54: Unless it appears to the court that a hearing of the summons for directions is in any event desirable, the court ought to make orders nisi giving such directions and fixing such timetable for the proceedings as it thinks fit in the light of the questionnaire and without a hearing. However, any party who objects to one or more of the directions given, should be entitled to have the summons for directions called on for a hearing.

Recommendation 55: Where, at the summons for directions stage, the court's view is that a case management conference is desirable, the court should fix a timetable up to the date of the case management conference, that date constituting the first milestone, with further milestones to be fixed when the case management conference is held.

Recommendation 56: A date for a pre-trial review and the trial date or the trial period should be fixed as milestone dates either at the summons for directions or at any case management conference held.

Recommendation 57: Where all the parties agree to a variation of time-limits for non-milestone events in the timetable, they may effect such variations by recording the agreement in counter-signed correspondence to be filed as a matter of record with the court, provided that the agreed variations do not involve or necessitate changes to any milestone date.

Recommendation 58: Where a party cannot secure the agreement of all the other parties for a time extension relating to a non-milestone event, a court should have

power to grant such extension only if sufficient grounds are shown and provided that any extension granted does not involve or necessitate changing the trial date or trial period. It should be made clear in a practice direction that where an extension is granted, it is likely to involve an immediate "unless order" specifying a suitable sanction.

Recommendation 59: A court should have power, on the application of the parties or of its own motion, to give further directions and to vary any aspect of the timetable, including its milestone dates, but it should be made clear in a practice direction that a court would only contemplate changing a milestone date in the most exceptional circumstances.

Recommendation 60: Where the parties fail to obtain a timetable, the court should not compel them to continue with the proceedings. However, where a pre-trial milestone date has been set, the court should, after giving prior warning, strike out the action provisionally if no one appears at that milestone hearing. A plaintiff should have 3 months to apply to reinstate the action for good reason, failing which the action should stand dismissed and the defendant should automatically be entitled to his costs. Thereafter, the defendant should have a further three months to reinstate any counterclaim, which would also stand dismissed with no order as to costs in default of such application.

Recommendation 62: The recommendations made in this Final Report regarding timetables and milestones should not apply to cases in the specialist lists save to the extent that the judges in charge of such lists should choose to adopt them in a particular case or by issuing appropriate practice directions and subject to what has previously been recommended regarding the retention of a Running List."

1. We note the docket system has not been endorsed, which will lead to a lack of effective case management as actions move between different Masters. The success of the proposed case management system will depend upon how firm a Judge will be in enforcing the original directions and preserving the integrity of milestone dates. In an adversarial system, the starting point is that the parties' solicitors are free to progress or delay the action to the best of their abilities, and it

is not entirely clear that the proposed amendments, without having docket system Judges overseeing the directions they have previously given, will be strong enough to support the well-meaning validity of milestone dates against the inherent flexibility that is permitted by the existing and indeed amended rules.

2. It is the experience of Members, themselves and from their overseas colleagues, that case management is very much enhanced by the presence of a single procedural Judge/Master who deals with the case throughout and up to trial. In England now, and also in arbitrations, where the same panel presides throughout, the Judge has the ability to keep in mind the history of the case and in particular the excuses made by advocates last time. It is otherwise all too easy to repeat excuses before a new Judge, unfamiliar with the case, which a Judge who had heard the last application would see through straightaway. It is unrealistic to expect a Judge coming new to a case on a procedural matter to read up and understand all the issues to date. A case not allocated to a procedural Judge belongs to no-one and the court will not be in a position to case manage it.

K. Recommendation 69: Vexatious Litigants

"Recommendation 69: All applications to have a person declared a vexatious litigant should be made directly to a single judge."

1. The proposed new section 27 of the Civil Justice (Miscellaneous Amendments) Bill appears satisfactory, although there is one small point which may be worth making. The provision aims at allowing persons who have been made party to vexatious litigation to apply for a vexatious litigant order defines the necessary status as:

"..a person who -

(a) is or has been a party to any of the vexatious legal proceedings; or

(b) has directly suffered adverse consequences resulting from such proceedings.

This may accidentally introduce a preliminary issue of locus on such applications, requiring a decision as to whether the proceedings are in fact vexatious before it can be decided whether the applicant has standing. It would be better if the text made clear that ***allegedly*** vexatious proceedings were enough to found locus. The revised language in Section 27(7) would then read:

"(7) "In subsection (1), "affected person" ( ) means:

a person who -

(a) is or has been a party to *allegedly* vexatious legal proceedings *brought by the person against whom an order is sought*; or

(b) *alleges that he* has directly suffered adverse consequences resulting from such proceedings."

L. Recommendation 82: Interlocutory Applications

"Recommendation 82: Where the court considers one or more procedural directions to be necessary or desirable and unlikely to be controversial between the parties, it ought to have power, of its own motion and without hearing the parties, to give the relevant directions by way of an order nisi, with liberty to the parties to apply within a stated period for that order not to be made absolute."

1. Docket System and Case Management

We generally agree with the proposed amendments. However, we specifically commented on Case Management in the *Law Society's Report* (see Chapter 6, and 7.2.1 on Timetables, and 7.6.1 on Judiciary Administration), and noted that in order to ensure the system will work, a docket system should be introduced. In addition, adequate time must be given to the Judge and/or the Master, who has been allocated the case from its inception to trial, to ensure the case is properly monitored, and to consider whether, and if so how, such order nisi for procedural directions should be made.

This point we note was also echoed by the query made by the High Court Masters (see paragraph 506 of the Final Report on Civil Justice Reform) asking how the court would be able to take the initiative unless dedicated judicial officers are generally seized of cases under a docket system. See also comments under Recommendation 52 above.

2. **Order 1B**

Comments are made on this proposed new Order under Section A in Recommendations 2-4.

M. Recommendations 85 & 86: Interlocutory Applications

"Recommendation 85: All interlocutory applications (other than time summons and applications for relief against the implementation of sanctions imposed by self-executing orders previously made) should be placed before the master who may either determine the application on the papers and without a hearing or to fix the summons for hearing either directly before a judge in chambers or before a master.

Recommendation 86: Rules and practice directions should be issued, in respect of the setting of the timetable and the filing of evidence, skeleton arguments and costs statements to enable the master to exercise his discretion as aforesaid. A practice direction setting out an abbreviated procedure for dealing with time summonses, allowing them to be dealt with promptly either on paper or at a short hearing should be issued."

1. We generally agree with the proposed amendments. However, as the proposed new mechanism will change the listing and management of interlocutory applications we have the following observations:

(a) We wish to emphasise the importance of providing continuous training programmes for the Masters in case management techniques and for continuous assessment.

(b) It is equally important for the Judiciary administration to provide full administrative support to enable the Masters to implement case management of the cases, particularly interlocutory applications.

(c) The Masters should be allocated sufficient time to review the files before the hearings to enable them to make considered decision on whether it is necessary to hold a hearing before making any orders and if not to enable them time to consider the appropriate directions which should be given before the first hearing date is fixed.

N. Recommendation 87: Use of Telephone or Video conferencing facilities

"Recommendation 87: The Working Party recommends that the proposal for provision to be made for dispensing with attendance at hearings through using telephone or video conferencing facilities should not be pursued."

1. We note that one of the reasons for dropping this proposal was based on the observation that there would only be a slight savings of costs because Hong Kong is a geographically small jurisdiction and disproportionate resources would be needed for this proposal to be put into effect.

2. However, from a practitioner's point of view there is an opportunity to save not only time but also costs for all concerned, in particular short court hearings of 3 minutes or 15 minutes. The experience of practitioners attending these lists testifies to the fact that often long delays occur, especially those cases involving

litigants in person. Relatively long waiting time means wasted costs for the clients as these costs are not recoverable under party and party taxation.

3. These short hearings usually deal with procedural directions and therefore it should not be difficult to put into place a system for such hearings to take place without the physical presence of the parties.

4. We note that if the resources available are limited and thus video conferencing would be disproportionate allocation of resources, telephone conferencing should be used as this would not involve a significant investment.

5. **As the Court will have a duty under the new O.1A, r.4(2)(k) to conduct *active case management* we submit that using technology should be actively considered and the Steering Committee should reconsider its decision not to proceed. As the major legislative exercise will be taking place at the end of this year we recommend that provisions should be made in the draft rules to allow for future adoption of technological advances such that these provisions will come into force on a "*date to be announced*", or resourcefully feasible to hold hearings without parties' physical presence.**

O. Recommendations 88, 89 and 92: Summary Assessment of Costs

"Recommendation 88: The court should, whenever appropriate (whether as a response to an unwarranted application or unwarranted resistance to an application, with a view to saving costs or otherwise), make a summary assessment of costs when disposing of interlocutory applications.

Recommendation 89: Rules and practice directions along the lines indicated in this section of the Final Report should be adopted to regulate the making and implementation of orders for the summary assessment of costs.

Recommendation 92: Judges and masters should be empowered to make provisional summary assessments of costs, whereby the assessed sum must

promptly be paid but allowing either party, at the end of the main proceedings, to insist on a taxation of the relevant costs with a view to adjusting the quantum of the payment made, but with the party who insists on such a taxation being at risk as to a special order for the costs of the taxation and other possible sanctions in the event that the taxation does not result in a proportionate benefit to him."

We generally agree with the proposed amendments but have the following observations on drafting:

1. Order 62 r.9A(4) and (5)

(a) The drafting in the proposed Order 62, rules 9A(4) and (5), is unclear as these two rules fail to address the position in relation to the situation the receiving party (rather than the paying party) is dissatisfied with the amount of costs awarded in the summary assessment and wishes to apply for taxation. In this event, if the taxed costs are materially less than the amount summarily assessed and paid, the receiving party should be subjected to the possibility that the court will impose sanctions. In addition, if this scenario is reviewed under the proposed Order 62 rule 9A(4)(a) then we fail to understood why the "*materially exceeding*" concept has not been adopted.

(b) We also consider the possible sanctions in the proposed Order 62 rule 9A(4) (referred to as "such order as it considers appropriate") are too wide and/or uncertain as we do not know what order can or should be made under this limb. As these orders could be made against the losing party, it could lead to the situation where both parties to the taxation (i.e. not only the one who takes out the taxation) will be at risk of facing sanctions, depending on its result.

P. Recommendations 91-97: Wasted Costs

"Recommendation 91: All judges and masters who may be involved in the summary assessment of costs should undertake training and attend conferences designed to enhance and keep current their knowledge regarding professional

costs and to promote consistency of approach in making summary assessments.

Recommendation 92: Judges and masters should be empowered to make provisional summary assessments of costs, whereby the assessed sum must promptly be paid but allowing either party, at the end of the main proceedings, to insist on a taxation of the relevant costs with a view to adjusting the quantum of the payment made, but with the party who insists on such a taxation being at risk as to a special order for the costs of taxation and other possible sanctions in the event that the taxation does not result in a proportionate benefit to him.

Recommendation 93: Proposal 33 (for including negligence not amounting to misconduct as a ground for making a wasted costs order) should not be adopted.

Recommendation 94: Rules along the lines of paragraphs 53.4 to 53.6 of the CPR Practice Direction on Costs, modified to exclude reference to liability based on negligence, should be issued providing guidance for the exercise of the court's decision and discouraging disproportionate satellite litigation in relation to wasted costs orders.

Recommendation 95: Applications for wasted costs orders should generally not be made or entertained until the conclusion of the relevant proceedings.

Recommendation 96: Rules should be issued making it clear (i) that it is improper to threaten wasted costs proceedings with a view to pressurizing or intimidating the other party or his lawyers; and (ii) that any party who wishes to put the other side's lawyers on notice of a potential claim for wasted costs against them should not do so unless he is able, when doing so, to particularize the misconduct of such lawyers which is alleged to be causing him to incur wasted costs and to identify evidence or other materials relied on in support.

Recommendation 97: Barristers should be made subject to liability for wasted costs under O62 r8."

1. We have no comments on the proposed amendments to the enabling legislation, the High Court Ordinance and the District Court Ordinance, and the HCR. There are however two issues of principle which need to be addressed.

2. **Inspection of Privileged Material**

(a) In the original CPR, there was a provision permitting the court to direct that privileged material should be made available for inspection by the court and, if the court so directed, to the other party. This provision has now been revoked in the CPR. We have considered the introduction of such a provision in Hong Kong.

(b) **We would not support such a provision. There may be issues relating to the Bill of Rights and the protection of privileged information. In addition, we are nervous in principle in allowing inroads into the concept of legal professional privilege.**

3. In England, the CPR lays down when it is appropriate for the court to make a wasted costs order. The circumstances are only if :-

"(1) the legal representative has acted improperly, unreasonably or negligently;

(2) his conduct has caused a party to incur unnecessary costs; and

(3) it is just in all the circumstances to order him to compensate that party for the whole or part of those costs." (c.f. section 53.4 at 48PD.4 CPR 41st Update February 2005)

The present draft Rules give no indication of what the appropriate circumstances for the court to make a wasted cost order are. We suggest a similar provision to that in the CPR should be adopted.

Q. Recommendations 98-100: Witness Statements and Evidence

"Recommendation 98: Proposals 35 and 36 (for the introduction of legislation and rules empowering the court to give directions defining the issues on which it requires evidence; what evidence it requires; and how the evidence is to be placed before the court) should not be adopted.

Recommendation 99: A practice direction should be issued giving notice of the court's intention to curb excessive and prolix examination and cross-examination by more stringently excluding irrelevant evidence and, where relevance of the evidence has been rendered marginal by repetition and prolixity in examination or cross-examination, treating the evidence produced by further reiteration as inadmissible on the ground that it is insufficiently relevant to qualify as admissible.

Recommendation 100: Proposal 37 (for introducing greater flexibility in permitting a witness to amplify or supplement his witness statement) should be adopted, replacing O 38 r 2A(7)(b) by a rule along the lines of CPR 32.5(3) and (4)."

1. Recommendation 98 dealt with Proposals 35 and 36. These were controversial proposals to allow management of evidence in court by controlling cross-examination, limiting evidence on particular issues or otherwise. The Law Society strenuously objected to this, as an unreasonable fetter on a party's basic right to present its case. By Recommendation 98, these proposals were dropped, and this is reflected in the *Consultation Paper*.

2. However, Recommendation 99 proposed that a practice direction should be issued giving notice of the court's intention to curb excessive or prolix examination and cross-examination by more stringently excluding irrelevant evidence, and where the relevance of the evidence has been rendered marginal by repetition and prolixity, treating the evidence as inadmissible.

3. **This practice direction does not appear in the *Consultation Paper*, which is a material omission. We note that principles on controlling evidence are included in the proposed changes to Order 35, which in fact adopt the Law Society's own recommendations. However, we would ask that it be clarified whether it remains the intention to make further changes by way of practice direction on this important area, and if so we recommend that this be done**

by way of primary rules changes, again given its potential significance to due process.

R. Recommendations 101-107: - Expert evidence

"Recommendation 101: Proposal 38 (for giving the court greater discretionary powers to exclude expert evidence) should not be adopted.

Recommendation 102: A rule along the lines of CPR 35.3 declaring that expert witnesses owe a duty to the court which overrides any obligation to those instructing or paying the expert should be adopted.

Recommendation 103: A rule along the lines of CPR 35.10(2) combined with Part 36 of the NSW rules should be adopted, making it a requirement for the reception of an expert report or an expert's oral testimony that (a) the expert declares in writing (i) that he has read the court-approved Code of Conduct for Experts and agrees to be bound by it, (ii) that he understands his duty to the court, and (iii) that he has complied and will continue to comply with that duty; and (b) that his expert report be verified by a statement of truth.

Recommendation 104: A Code and a Declaration for Expert Witnesses, approved by the court as envisaged in the preceding Recommendation, should be adopted after consultation with interested parties initiated on the basis of a draft code adapted from the Academy of Experts' codes set out in Appendix 3 to this Final Report.

Recommendation 105: Proposal 39(d)(for requiring expert reports prepared for use by the court to state the substance of the instructions forming the basis of such reports, abrogating legal professional privilege to the extent necessary for this purpose) should not be adopted.

Recommendation 106: Proposal 39(e) (for permitting experts independently to approach the court for directions) should not be adopted.

Recommendation 107: The court should be given power to order the parties to appoint a single joint expert upon application by at least one of the parties, subject to the court being satisfied, having taken into account certain specified

matters, that the other party's refusal to agree to a Single Joint Expert is unreasonable in the circumstances."

A. Evidence by a Single Joint Expert Order 38 r.4A

1. Recommendations

Recommendation 107 of the Chief Justice's Working Party was that "*the Court should be given power to order the parties to appoint a single joint expert upon application by at least one of the parties, subject to the Court being satisfied, having taken into account certain specified matters, that the other parties' refusal to agree to a SJE is unreasonable in the circumstances.*"

Recommendations 102, 103 and 104 have no bearing on this particular issue.

2. Reconsideration of introduction of single joint expert

The Chief Justice's Working Party was first appointed with the following terms of reference "*To review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed*." We are of the view that Recommendation 107 regarding the appointment of a single joint expert does not comply with these terms of reference in that:

It is the Judge's role in an adversarial system like ours to reach a conclusion as to who is right and who is wrong having heard arguments from both sides. Under our current system, the Judge often hears contradicting factual and expert evidence and yet, the Judge is more than capable of assessing where the truth lies to reach his own conclusion. Why should expert evidence be treated any differently to factual evidence just because the experts are being remunerated for their work provided that the experts are not presenting evidence that is not sustainable? Where the Judge is only presented with the views of a single joint expert, the Judge's role of evaluating the evidence is undermined as there is no

other alternative option available to him to enable him to disagree with the expert should he want to. Within an adversarial system, we therefore fail to see how a single joint expert will ensure and improve access to justice; and

Whilst the appointment may save time for the court (since it will only need to hear evidence from one expert), it does not save costs (on the contrary, it would increase them since each party still appoints their own expert to assist them, inter alia, in making presentations to the joint expert, with oral examination of the joint expert and with submissions on what the joint expert says).

Further, it is worth noting that the proposed Order 38 rule 4A works in a different way to its UK counterpart. In the CPR, the court is expected of its own motion to order the appointment of a single joint expert where it considers it appropriate. However, under the proposed Hong Kong provision, the court can only order the appointment where at least one party applies for such an order. The court does not have the power to make the appointment of its own motion. Under the proposed Hong Kong provision, it is therefore a prerequisite that at least one of the parties desires the appointment of a single joint expert - that in itself, is unlikely to encourage the other parties to agree to such an appointment. Whilst the proposed Hong Kong provision provides that the court can still make an order where it considers that the other party's disagreement is unreasonable, the requirement that the request has to be made by at least one of the parties seems to go against the whole concept of the single joint expert being an impartial expert.

A great deal of commentary in the British legal press is of the opinion that the single joint expert is not working as well as Lord Woolf might have first envisaged. Even the UK Civil Procedure Rules Committee ("CPR Committee") felt it necessary to revisit the issue and is currently looking at changes to the CPR regarding the question of the circumstances in which a single, or joint experts are to be instructed. The need to amend arose out of the apparent inconsistency between the approaches adopted by different levels of Judges and even different

Judges sitting at the same level when deciding whether to allow the evidence of single or separate experts. Whilst it was felt that it was inevitable that there be different approaches applicable to different cases, the uncertainty and inconsistency was undesirable. As a result of this, the CPR Committee is considering amending the relevant English practice direction to include a number of non-exhaustive considerations that the court should take into account when considering whether to appoint a single joint expert. One of these includes the need for the court to consider whether an expert has already been appointed by a party. We opine that this is a good idea and have put together a similar list of non-exhaustive considerations at paragraph A5(b) below for consideration.

Due to the reasons set out above and those already stated in our previous Report, we take the view that the Chief Justice should seriously reconsider the question of whether a single joint expert should be introduced into our system. We maintain the view that Recommendation 107 should not be adopted given that it is difficult to envisage the procedure being widely used. However, if the Chief Justice is minded to proceed with the Recommendation, we consider that the glaring omission in the current proposed legislation must be resolved, namely, the mechanism to identify and choose a single joint expert where the parties cannot reach an agreement between themselves (see further comments made under Order 38 rule 4A(1) & (4) in sub-paragraphs 3 and 6 below).

Our further comments on the issue of expert evidence are also set out below**.**

3. Order 38 r.4A(1)[2]

(a) Drafting Ambiguity

The heading of the proposed Order 38 rule 4A(1) refers to a *"single joint expert"*. We prefer this phrasing to the words "*one expert witness only*" which allows the

[2] Order 38 r.4A: "In any action in which any question for an expert witness arises, the Court may, at or before the trial of the action, order that two or more parties to the action shall appoint one expert witness only to give evidence on that question."

possibility that the parties might be limited to one expert each rather than one expert jointly. The phrase *"single joint expert"* should be used consistently throughout the entire set of rules.

(b) Practical Difficulties

As currently drafted, the court has the power to make an order that a single expert be appointed. However, there is no default position should the parties be unable to agree on the identity of the expert. This fails to take account our valid concerns that parties may have difficulty agreeing who should be appointed or the manner of their instruction. In England and Wales where the CPR currently allow the appointment of single joint experts, the court may specify the manner in which the expert is to be identified.

(c) Drafting Solution

The omission and the ambiguity could be remedied by the following drafting:-

> **"In any action in which any question for an expert witness arises, the court may, at or before the trial of the action, order that two or more parties to the action shall appoint a *single joint expert* to give evidence on that question. *In the absence of agreement between the parties as to the identity of the single joint expert, the court may:-***
> **(a) select the expert from a list prepared or identified by the parties; or**
> **(b) direct that the expert be selected in such other manner as the court may direct."**

4. Order 38 r.4A(2)[3]

(a) Drafting

As drafted, the court has a wide discretion but little guidance is given as to the terms and conditions of appointment of the designated single joint expert.

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[3] Order 38 r.4A(2): "An appointment pursuant to an order made under paragraph (1) may be subject to such terms and conditions as the Court thinks fit."

(b) Practical Difficulties

We alluded to the problem which is likely to be encountered in complex cases of how the parties will instruct the single joint expert; what issues he will consider and on what information. The current drafting does not address this issue directly.

In the CPR, the court (and the parties) are given guidance as to the sort of issues to consider, namely who instructs the expert, how the expert should be instructed, directions as to fees and expenses, limits on the amount of fees that the expert can incur, payment into court to cover experts' fees and joint and several liability of the parties for the experts' fees and expenses.

(c) Drafting Solutions

One option is to take the more structured approach adopted in England and Wales of providing a list (non-exhaustive) of the types of orders and directions the court might make. If that approach is not favoured, an alternative form of wording which might give both the parties and the court more clarity might be:

"Where an order is made under paragraph (1), the court may give directions as to such terms and conditions, including the scope of the expert's instructions, and payment arrangements, as the court thinks fit."

5. Order 38 r.4A(4)[4]

(a) Drafting

As currently drafted, Order 38 r.4A(4) does not fully address our recommendation that certain specified matters be taken into account in the court's decision to appoint a single joint expert. While reference is made to a *"practice direction issued for the purposes of the rule"*, no such practice direction is appended to the

[4] Order 38 r.4A(3): "Notwithstanding that a party to the action disagrees with the appointment of 'one expert witness only' ['one expert witness only' should be replaced by 'a single joint expert'] to give evidence, the Court may make an order under paragraph (1) if, having taken into account such matters as are specified in a practice direction issued for the purpose of this rule, it is satisfied that this agreement is unreasonable in all the circumstances of the case."

amendment rules. We note that in relation to the Code of Conduct for expert witnesses and the statement of truth recommended, those documents have been included in the amendment rules. This suggests there may be a hiatus between the commencement of the amendment rules and the preparation of the clarifying practice direction.

(b) Practical Difficulties

The CPR have been in operation for a number of years now and practitioners have noted that the flexibility of the discretion which allows for the appointment of single joint experts has in some instances resulted in appointments in unsuitable cases, leading to escalation of costs. Frequently where a single joint expert is appointed, the parties will appoint their own expert advisers to assist in the instruction of the single joint expert, to analyse his evidence and to help with cross examination on those aspects critical to their own case. In some cases[5], parties have sought and been given leave to call their own expert to give evidence in addition to the single joint expert.

To address this situation, the Civil Justice Council's Experts' Committee in England and Wales is proposing to amend the current Practice Direction dealing with the expert evidence provisions of the CPR, to provide guidance. Suggested issues to be taken into account include:-

(i) the value of the claim and the importance of the issue on which expert evidence is sought, proportionate to that value;
(ii) whether difficulties are likely to arise in instructing the single joint expert;
(iii) whether given the nature of the issues in the case there is likely to be a range of expert opinion which might make it difficult for a single joint expert to opine objectively;
(iv) whether there are already party appointed experts;

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[5] See for example Maston v Lewis [2004] All ER (D) 59 (Nov).

(v) whether the assistance of an expert is necessary for the preparation of the case requiring conferences between the expert and other witnesses, rendering a single expert impractical;

(vi) whether there is a significant risk that a party will instruct its own shadow expert and if so the implications as to cost.

Another factor which might be taken into account is whether the services of party appointed experts might help widely differing parties narrow their differences.

Rather than setting out exhaustively in the rule itself the guidelines that the court might take into account, we strongly suggest that the practice direction be issued simultaneously with the amendment rules so as to avoid duplicating the experience of England and Wales in this matter during the interim period before the issue of the practice direction. In practice, practice directions are only often issued after the relevant rules have come into force. However, the present situation is unusual in that the rule expressly refers to a particular practice direction. Hence, it is not unreasonable to expect the practice direction to be made available simultaneously with the proposed new rules. Subject to this comment, the only suggested amendment would be to use the words *"single joint expert"* to replace the phrase *"one expert witness only"* throughout to avoid the ambiguity mentioned above.

7. Order 38 r.4A(5)[6]

(a) Drafting Ambiguities

As currently drafted, the court is permitted to rescind a previously made order. It is not spelled out that an application must be made before the court will do so. This must be implicit however in the fact that ordinarily the trial judge will not become aware of the substance of expert evidence until immediately before trial,

[6] "Where the Court is satisfied that an Order made under paragraph (1) is inappropriate, it may rescind the Order and allow the parties concerned to appoint their own expert witness to give evidence."

by which stage time constraints will make it impractical for the parties concerned to appoint their own expert witnesses.

The use of the term "*rescission*" creates ambiguity as to cost and the status of any work already done by the single joint expert.

If the parties have proceeded some way along the road to instructing an expert and insurmountable controversy has arisen, which has meant that the value of a joint expert is questionable, then substantial costs could have been incurred by that date already. Thought needs to be given as to how these costs will be treated on taxation. Should they be costs of the litigation or should the party who suggested the single joint expert bear them, since ultimately their application resulted in the waste of costs? (This may require some amendment or cross-referencing to Order 62 or left for argument on taxation).

Rescission also leaves the possibility for one of the parties to adopt the previously appointed single joint expert as their own party appointed expert, taking the benefit of work done up to that point under the parties' joint instruction and at their joint cost. As the court might already be aware of the identity of the joint expert at this stage, the way is also open potentially for perceptions of bias, if the previous single joint expert's evidence is given greater weight than that of the new comer.

In any event, if the order is to be rescinded, thought needs to be given to the effect of a rescission, including cost consequences and what role if any the single joint expert will play in the remainder of the proceedings.

8. Other considerations

Another matter left silent in the drafting of this section is the question of costs generally. Should costs of appointing *"shadow experts"* be recoverable on

taxation? Should wasted costs of the rule 4A order, if rescinded, be recoverable? This may have implications in relation to Order 62.

B. Order 38 r.37C(3)[7]

1. Drafting

Rule 3 disapplies the requirement that the expert read and comply with the Code of Conduct in respect of an expert witness who has been instructed before the commencement of these Rules.

2. Practical considerations

Apart from not applying the rule retroactively, it is difficult to understand the rationale for this exemption.

If the exemption applies only to written reports, then it would be appropriate to disapply the rule in respect of a report which has already been exchanged or disclosed prior to the commencement of the rule, so as to avoid the need to re-serve the report.

That needs not, however, relieve the expert of the obligation to comply with the duties in the Code of Conduct in relation to his oral evidence. This might lead to an expert who has submitted a written report in contravention of the Code having to retract parts of his previous report. However, relaxing the provision so that the expert is permitted to exercise a lower standard of professionalism and independence undermines the purpose of the Rule. We can see no apparent policy reason for so doing.

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[7] Order 38 r.37C(3): "This rule does not apply in relation to an expert witness who was instructed before the commencement of this rule."

(3) Drafting solution

If the purpose of the exemption is to avoid the need for reports to be re-issued containing the declaration, a more appropriate drafting solution might be:-

"1. A report disclosed under Rule 37 is not admissible in evidence unless the report contains a declaration in writing by the expert witness that

(a) he has read the Code of Conduct set out in Appendix D and agrees to be bound by it;

(b) he understands his duty to the Court; and

(c) he has complied with and will continue to comply with that duty.

2. Nothing in paragraph 1 shall apply in relation to a report disclosed before the commencement of this Rule.

3. Oral expert evidence is not admissible unless the expert witness has declared in writing, whether in a report disclosed under Rule 37 or otherwise in relation to the proceedings, that:

(a) he has read the Code of Conduct set out in Appendix D and agrees to be bound by it;

(b) he understands his duty the Court, and

(c) he has complied with and will continue to comply with that duty."

C. Expert Report to be Verified by a Statement of Truth Order 38 r.37A and Order 41A

1. Requirement that expert report be verified by a Statement of Truth

(a) Recommendations

The Chief Justice's Working Party recommended the adoption of a rule along the lines of CPR 35.10(2) combined with Part 36 of the New South Wales' rules, making it a requirement before an expert report or expert oral testimony can be admitted that:

(a) the expert declares in writing

(i) that he has read the Court's Code of Conduct for Experts and agrees to be bound by it

(ii) that he understands his duty to the Court, and

(iii) that he has complied with and will continue to comply with that duty and

(b) that his expert report be verified by a statement of truth

The reference to *"requirement"*, coupled with the reference by the Chief Justice's Working Party's to there being *"overwhelming support"* for this proposal, tends to suggest the *"requirement"* should be "mandatory".

(b) Order 41A r.2

(i) Drafting

Paragraph (1) of this rule provides for mandatory verification by a statement of truth. The word *"shall"* indicates that this is not discretionary. However, Order 41A r.2 paragraphs (3) to (5) provide that in certain circumstances the court may direct that no statement of truth is necessary.

(ii) Practical considerations

It is hard to conceive of any circumstances in which any expert report needs not be so verified, given the firm views of the Chief Justice's Working Party in support of such statements.

(iii) Order 41A r.7

Order 41A rule 7 is inconsistent with Order 41A rule 2 and Order 38 rule 37B.

In the latter two rules, the requirement for the statement of truth appears mandatory (see the use of the term *"shall"* in both paragraphs). A mandatory obligation however needs to be coupled with a sanction for breach.

Order 41A rule 7 allows the court discretion to admit evidence notwithstanding a failure to comply with the mandatory requirement for the statement of truth. This

dilutes the effect of the provision and is counter to the Recommendations of the Chief Justice's Working Party.

D. Duty to Provide Experts Witness with a Copy of the Code of Conduct (Order 38 Rule 37B[8])

1. Recommendations and Drafting

This Rule imposes a duty on the parties instructing expert witnesses which goes beyond the recommendations of the Working Party, however we have no comment on this enhanced proposal. There appear however to be no sanctions against the instructing party for breach of this duty. The penalties as to admissibility of evidence are linked instead to the expert's declaration that he has read the copy of the Code of Conduct, which need not have been provided by those instructing him. We have no other comment on the drafting of this rule.

APPENDIX D
CODE OF CONDUCT FOR EXPERT WITNESSES
ORDER 38 RULE 37B

1. Recommendations and Drafting

(a) The Code of Conduct has been introduced in line with the Working Party's recommendation 104. It is stated in that recommendation that the Code will be Appendix D to the Rules. We have not been able to check that the proposed Code accords with the actual Code of Conduct that the Chief Justice's Working Party

[8] Order 38 Rule 37B: "The party who instructs an expert witness shall as soon as practicable provide the expert witness with a copy of the code of conduct set out in Appendix D."

had in mind (refer to Appendix 3 of their Final Report), as the proposed Code has not been provided in the Consultation Paper.

S. Recommendations 109 – 118: Leave to Appeal

"Recommendation 109: An appeal should lie as of right from the master to the judge (whether from a decision on the papers or after a contested hearing) but with the introduction of fresh evidence for the purposes of the appeal precluded save in exceptional circumstances.

Recommendation 110: Interlocutory appeals from the CFI judge to the Court of Appeal should be subject to a condition of leave to appeal save in relation to (i) defined classes of interlocutory decisions which are decisive of substantive rights; and (ii) certain other defined categories of decisions, including those concerning committal, habeas corpus and judicial review.

Recommendation 111: Where leave to appeal is required, the court should have power to limit the grant of such leave to particular issues and to grant leave subject to conditions designed to ensure the fair and efficient disposal of the appeal.

Recommendation 112: A procedure designed to avoid separate oral hearings of applications for leave to appeal should be adopted, generally requiring any application before the CFI judge to be made at the original hearing and, if refused, for any further application for leave to be made in writing and usually dealt with by the Court of Appeal comprising two Justices of Appeal, on the papers and without an oral hearing. Where considered necessary, the Court of Appeal should be able to direct that there be an oral hearing before the original two judges or before a panel of three judges.

Recommendation 113: A refusal of leave to appeal by the Court of Appeal in relation to such purely interlocutory questions should be final. Where, however, the Court of Appeal hears the appeal, it should be open to the parties to apply for leave to appeal to the Court of Final Appeal in accordance with section 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance.

Recommendation 114: Proposal 43 (for introducing a requirement for leave to appeal against a final judgment of the CFI) should not be adopted.

Recommendation 115: Leave to appeal from the CFI judge to the Court of Appeal should only be granted where the court considers that the appeal would have a reasonable prospect of success or that there is some other compelling reason why the appeal should be heard.

Recommendation 116: Proposal 45 (for a rule against granting leave to appeal from case management decisions unless a significant point of principle is raised) should not be adopted.

Recommendation 117: Proposal 46 (for a rule generally against granting leave to appeal from a decision itself given on appeal) should not be adopted.

Recommendation 118: Proposal 47 (for the Court of Appeal to adopt a special procedure for dismissing certain applications for leave to appeal) should not be adopted."

We make the following observations and comments.

1. **Order 58 r.1(5): Recommendation 109**

The proposed new Order 58 rule 1(5) refers to no further evidence being received on the hearing of an appeal except on *"special grounds"*. This is the same wording used in relation to appeals to the Court of Appeal in Order 59 rule 10(2), save for the omission of the previous qualification in Order 59, *("other than evidence as to matters which have occurred after the date of the ……. hearing".)*

We recommend that a similar qualification should appear.

2. **Section 14AA High Court Ordinance: Recommendation 110**

(a) Proposed s.14AA High Court Ordinance (added). This proposed additional section deals with the requirement for leave in relation to interlocutory appeals. The proposed wording allows for the imposition of such conditions as are considered *"necessary, in order to secure the just, expeditious and economical*

disposal of the appeal" and imposes a threshold requirement of, inter alia, the appeal having a *"reasonable prospect of success"*. We agree with the proposed threshold requirement. However, for the sake of clarity and consistency, the test for the imposition of conditions (to the grant of leave to appeal an interlocutory order) should reflect the wording of the original Recommendation (no.111); namely, such conditions *"designed to ensure the fair and efficient disposal of the appeal"*. Whilst in practice not too much may turn on the different wording, in the absence of any further clarification by the Steering Committee, the Recommendation should be adopted in its original form.

(b) **Order 58 r.21**

We do not support any requirement for leave to appeal in respect of decisions having a final effect.

3. **Recommendation 111**

We agree with the recommendation, save that the test for the imposition of conditions (to the grant of leave to appeal an interlocutory order) should reflect the wording of the original Recommendation.

T. Recommendations 119 – 121: Appeals

"Recommendation 119: Subject to Recommendation 120 below, Proposal 48 (for introducing further case management provisions for appeals to the Court of Appeal) should not be adopted in the form put forward.

Recommendation 120: Applications which are interlocutory to pending appeals should be dealt with on paper by two Justices of Appeal, who should have power to make any orders necessary without a hearing, giving brief reasons for their decision; or, alternatively, to direct that there be a hearing before themselves or before a panel of three judges (the last option being dictated where the two judges are unable to agree).

Recommendation 121: Proposal 49 (for having appeals by way of review in place of appeals by way of re-hearing) and Proposal 50 (for applying the same approach to all appeals) should not be adopted."

1. We consider that all appeals, including appeals from Masters, should require formal grounds of appeal. This will in turn require that Masters give written reasons for decisions. Even if the appeal is still to be a re-hearing, the requirement to file a notice of appeal will serve to narrow the scope of the appeal.

U. Recommendation 122: Costs Transparency

"Recommendation 122: The principle that the costs should normally "follow the event" should continue to apply to the costs of the action as a whole. However, in relation to interlocutory applications, that principle should be an option (which would often in practice be adopted) but should not be the prescribed "usual order." Costs orders aimed at deterring unreasonable interlocutory conduct after commencement of the proceedings should be given at least equal prominence in practice, with the court being directed to have regard to the underlying objectives mentioned in relation to Recommendation 2. These powers should not apply to pre-action conduct."

1. We are in agreement with the amendments to the RHC to effect Recommendation 122 although we question the necessity for the new Order 62 rule 3A. Given that Order 62 rr.3(3), (4), (5), (6) and (7) all vest in the court a general discretion (*"unless the court otherwise orders"*), the court can at any time take account of any matter which will include misconduct or neglect arising under Order 62 rule 7. **We are not clear as to the rationale for the express statement in the new Order 62 rule 3A.**

V. Recommendations 131-136: Taxing the Other Sides Costs

"Recommendation 131: Proposal 57 (for the abolition of a special rule governing taxation of counsel's fees) should be adopted.

Recommendation 132: The procedure for making sanctioned offers and payments should be extended to pending costs taxations, save in relation to legally-aided parties.

Recommendation 133: Proposal 59 (for use of benchmark costs as the presumptive amounts allowable in a taxation of costs) should not be adopted, without prejudice to use of costs indications for guidance.

Recommendation 134: The court should have a general discretion to conduct provisional taxations on the papers, with any party dissatisfied with the award being entitled to require an oral taxation hearing, but subject to possible costs sanctions if he fails to do materially better at the hearing.

Recommendation 135: Rules or practice directions, backed by flexible costs sanctions, should be introduced requiring the parties to a taxation to file documents in prescribed form, with bills of costs supported by and cross-referenced to taxation bundles and objections to items in such bills taken on clearly stated grounds.

Recommendation 136: Rules conferring a broad discretion on the court in respect of the costs of a taxation and giving guidance as to the exercise of such discretion should be introduced along the lines of CPR 44.14 and CPR 47.18, suitably modified to fit local circumstances."

1. We are in general agreement with the drafting of the RHC to implement the above Recommendations. Where we have a question mark is on the procedure which will be operated on taxation.

   The new Order 62 rule 13A gives to the Taxing Master power to give directions as to the conduct of the taxation. This is fine in the sense the enabling rule should be in general terms. However, there will presumably need to be Practice Directions or a code of conduct prescribed by Taxing Masters so there is consistency in the directions which are given. For example, it would be

undesirable for one Taxing Master to direct that a bill of costs should be prepared in a certain way or supported by certain documents whilst another Taxing Master gave a different direction. (We articulate below our thoughts generally on how Order 62 can and should be reformed.)

This is a matter which should not delay the implementation of new rules but to which thought should be given by the taxing masters.

We note from page 9 of the *Consultation Paper* that views are invited as to scale costs in the First Schedule and fixed costs in the Second Schedule to Order 62. At present, the only amendments to the First Schedule are the deletion of the provision relating to discretion between bands of costs, clarification of certificates for counsel and the deletion of the presumption that counsel's fees should be allowed on taxation unless they are excessive and unreasonable. We agree with all three of these amendments.

We set out in more detail below our views on the First Schedule generally where we consider radical changes are needed to achieve the overall aim of CJR by making taxation speedier, cheaper and more efficient.

2. **The Second Schedule**

Paragraph 1 of Part 1 of the Second Schedule refers to a date of 1 January 1966 (cannot reference to this date be deleted?). It is not clear whether scale costs have not been altered since that date. Our research certainly shows there have been no changes since 1982 when the monetary jurisdictions of the courts were markedly different ($5,000 in the Small Claims Tribunal and $60,000 in the District Court). The amount of $1,050, which are the fixed costs payable by a defendant if he settles a claim in a writ, represents about 15 minutes of time for a partner on a taxation and bears no resemblance whatsoever to the cost of preparing a writ.

If the present figures are to be retained, there is a respectable argument they are so derisory that it would be simpler to delete the provision for fixed costs altogether. Alternatively, the fixed costs should be put at a more realistic level.

We would also advocate there should be one item of fixed costs included in the writ so that if the defendant wishes to settle the claim, he can do so by payment of the amount of the claim (plus interest which is pleaded to be due pursuant to the new provisions) and fixed costs of the issue of the writ. We suggest the additional fixed costs relating to additional defendants, substituted service and the entry of judgment in default of defence should all be abolished. This would remove paragraphs 1, 2 and 4 from Part 2 and paragraph 1 from Part 3.

We suggest a realistic figure for the fixed costs of preparing a writ and all ancillary matters is $10,000.

We note the amendments to delete paragraph 2(b) of Part 3 (the applicant's costs for a garnishee order) but leave in the garnishee's costs at the very low levels of $50 if no affidavit is used and $100 if an affidavit is used.

We suspect the majority of garnishee orders are addressed to banks. It might be preferable to have a Practice Direction to the effect that a bank would adequately satisfy a garnishee order if it were to write a letter to the plaintiff's solicitors advising of the amount standing to the credit of the judgment debtor's account or, if there is no credit, the fact the account is overdrawn. Banks customarily have their own fixed charges for the despatch of letters for the benefit of customers and it would be preferable for the reference to fixed costs to be deleted and replaced by some arrangement whereby the Hong Kong Association of Banks agrees with the court a fixed amount which a bank is entitled to charge for the despatch of such a letter. As for garnishees who are not banks, rather than having a fixed

amount included for costs in the Second Schedule, costs could be left at the discretion of the master who hears the application. The preparation of a pro forma garnishee affidavit should not take very long and perhaps there should be a rule of thumb that the costs order should be a certain amount, say $1,500. This would be analogous to the present rule of thumb that the court will order payment of a fixed sum, normally $500, for the costs of issuing and attending upon a time summons.

Similarly, the cost of preparing a writ of execution being $170 should either be abolished or replaced by a realistic sum. Again, writs of execution are pro forma documents and a figure of say $2,500 should be adequate.

It should be remembered when considering increases in fixed costs that a writ in the High Court is by definition for an amount in excess of $1,000,000. If fixed costs are to be retained for a few thousand dollars, this will still represent considerably less than 1% of the amount of the minimum claim in the High Court jurisdiction.

3. **The First Schedule**

The First Schedule to Order 62 is the gospel to which reference is made when preparing a bill of costs for taxation. There are essentially three issues which need to be addressed:-

(a) The mechanical and attendance items 1-4 in Part 1.
(b) The format of bills for taxation by reference to item 5 of Part 1.
(c) Paragraph 1(2) Part 2 which has come to be known in the colourful phrase of the Registrar as the "seven pillars of taxation".

We consider the overriding aim should be to prepare a bill of costs in chronological form which is calculated by reference to the time spent by fee earners and which also records disbursements as they are incurred chronologically.

The present format of bills, very often prepared by law costs draftsmen, are broken down into various headings by reference to the categories listed in item 5 of Part 1. This is not a requirement of item 5: the 13 matters listed at item 5(a)(i)-(xiii) are simply the matters which the Taxing Master is required to have reference to. The present way in which bills are broken down into these various categories means they are difficult for the taxing master to read and understand and do not correspond to the way solicitors keep files. On any one day in a particular matter, it is perfectly possible a solicitor might attend court, peruse documents and correspond with the other side. A well-trained litigator will make an attendance note of the totality of the work he has done on that day and the time he has spent. That attendance note is unlikely to be broken down into the different categories listed at item 5(a)(i)-(xiii). If the solicitor's time for that one day appears in three different parts of the bill of costs for taxation, there is an inevitable likelihood of duplicative claims being made and the taxing master gets no real feel for the time which the fee earner is committing to the file on a particular day or during a particular period.

We therefore propose that bills of costs should be in chronological order. However, so the bill does not read like an old-fashioned Hong Kong mortgage with no punctuation from beginning to end, a bill should contain mile posts. These mile posts would be pleadings and other documents filed in court (e.g. lists of documents, interrogatories, etc.). Other mile posts would be substantive interlocutory hearings and of course trial.

The time frame between the mile posts represents a particular stage of proceedings and it is relatively easy to see from the bill what preparatory work and disbursements are done relating to the work leading up to the mile posts. This means one does not have to go, as at present, from one part of the bill of costs to another because the work which is done is broken down into different categories which bear little relationship to how a solicitor actually runs a litigation file. We

set out below a specimen of how, using an *Excel* sheet, it would be easy to produce such a bill of costs.

Date	Particulars	Disbursements	Profit Costs	Mile Post Event
	Search fee	150		
	Expert reports	50,000		
	Correspondence **<u>Fee Earner A</u>** P & P Letters out 1.2.3003 10 mins 2.3.2003 5 mins P & P Letters In 1.2.2003 10 mins 2.3.2004 15 mins Client letter out Etc			
	DOCUMENTS Prepared/ considered Experts report 30 mins Searches 2 mins Searches 2 mins			
	Personal Attendance 1.2.2003 2 hours			
	Letter before action			**Pre action Protocol**
	Instructions to counsel			
	Counsel fees			
	Correspondence **<u>Fee Earner A</u>** P & P Letters out 1.2.3003 10 mins 2.3.2003 5 mins			

	P & P Letters In 1.2.2003 10 mins 2.3.2004 15 mins Client letter out Etc			
	Documents Prepared/ considered Draft writ 30 mins Searches 2 mins Searches 2 mins			
	Copies			
				Issue Writ

As for the seven items in paragraph 1(2) of Part 2 of the First Schedule, we agree these items should remain. However, our experience is that, on taxation, lip service is paid to these factors but no real, critical evaluation is given to a bill of costs to determine whether more or less should be allowed on a taxation by reference to these factors. One obvious example is the fact that the maximum amount generally permitted on a taxation for an experienced solicitor is $4,000 per hour. This is so whether the case is one involving hundreds of millions dollars or one million. It is also so regardless of whether the solicitor has undertaken advocacy at interlocutory levels, often against counsel and even leading counsel, as opposed to sitting behind counsel. A premium is very rarely given to a solicitor for undertaking this type of work notwithstanding he is generally saving his client money. Indeed, ironically, on a taxation, the winning party is likely to recover from the losing party counsel's fees which he has incurred to a far greater extent than solicitor's fees. This simply encourages the often unnecessary instruction of counsel and must be quite contrary to the overall aim of CJR which is to reduce the cost of litigation. The effect of this may be

partly ameliorated by the deletion of the present paragraph 2(5) of Part 2 of the Second Schedule but, in practical terms, wherever counsel is instructed in a hearing before a judge in the Court of First Instance, the vast bulk of counsel's fees will be recoverable on a taxation. If a solicitor undertakes the advocacy himself, he is likely to recover no more than he would by simply sitting behind counsel during the hearing notwithstanding the considerable saving to his client and, indeed, the other side if it is the losing party and has to pay the costs on taxation.

In general terms, we consider the historical approach of the court towards taxation is inconsistent with the underlying purpose of taxation. Whilst we accept the principle of a party and party taxation is that the winning party should only recover those costs which are strictly necessary to the prosecution of the action, the approach of the taxing masters has been to start from a false premise which is that charge-out rates are fixed by reference to an arbitrary scale as opposed to the market. If in practical terms a client is required to pay in the market $5,000 per hour for the services of a senior litigation solicitor, why should he suffer an automatic cut of 20% on a taxation by the imposition of a maximum rate of $4,000? Party and party taxation is designed to allow the winning party to recover what he has actually spent to achieve his victory whilst disallowing the frills that may have gone into such a victory. An obvious example is that very often two fee earners might attend throughout a heavy trial but, on a taxation, allowance will only be made for one. The winning party bears the expense of the second fee earner. However, at the moment, he does not even recover the full cost of the first fee earner.

It is our submission allowance on taxation should be for the true cost of the fee earner rather than a cost referable to a scale which is insensitive to movements in market forces.

W. Recommendations 144-149: Judicial Review

"Recommendation 144: Rules along the lines of CPR 54.1 to 54.3, suitably adapted, retaining the present terminology, should be adopted for defining the scope of judicial review proceedings in Hong Kong.

Recommendation 145: Provision should be made to enable persons wishing to be heard at the substantive hearing, subject to the court's discretion, to be heard in support of, as well as in opposition to, an application for judicial review.

Recommendation 146: Applications for leave to bring a claim for judicial review should be required to be served with all supporting evidence on the proposed respondent and on any other persons known by the applicant to be directly affected by the claim, unless the court otherwise directs.

Recommendation 147: Persons served should be given the choice of either acknowledging service and putting forward written grounds for resisting the application or grounds in support additional to those relied on by the applicant; or declining to participate unless and until the applicant secures leave to bring the claim for judicial review.

Recommendation 148: If leave is granted, the order granting leave and any case management directions should be required to be served by the applicant on the respondent (whether or not he has acknowledged service) and on all interested parties who have acknowledged service, such persons then becoming entitled, if they so wish, to file grounds and evidence to contest or to support on additional grounds, the claim for judicial review.

Recommendation 149: Proposal 73 (for expressly empowering the court, after quashing a public authority's decision, itself to take that decision in certain circumstances) should not be adopted."

1. Introduction

On comparing Recommendations 144-49 with the Steering Committee's proposed amendments to Order 53, it is considered the proposed changes do implement the Recommendations.

However, we make the following suggestions or observations:

2. **Current Practice**

The existing procedure for applications for leave to seek judicial review of a decision do not require service of the proceedings on the putative respondent, or notice to any person or body which may be 'interested' in the proceedings. In practice, it is not uncommon for the decision-maker to be represented at an early stage, even prior to the issuance of proceedings. Often a request will be made for a copy of the proceedings to be served on the putative respondent or the Department of Justice will readily accept service.

This service is ex-Rules and has no basis or requirement. Up until the filing of a Notice of Motion under the existing rule 5, the proceedings are *ex parte*. In some cases the court will invite the attendance of the intended respondent at an oral application, or communicate to the putative respondent in writing. The application for leave becomes *ex parte on notice*.

3. **Order 53 r. 2A and 2D**

The proposed new rules 2A to 2D represent a shift from that present position and essentially require the application for leave to be *ex parte on notice* not only to the intended respondent but to all persons or bodies whom the applicant considers have a legitimate interest in the matter. *How this will work in practice is unclear.*

While the putative respondent is now required to be notified and served with the application for leave, giving them better notice of proceedings against them, the trade off should not be that the respondent cannot apply to set aside ex-parte leave once granted. Whilst in many cases the respondent(s) will be ready to oppose leave, and will choose to do so, in many other cases the respondent will not be ready, and cannot fully participate. It should be clear that service on such respondents or interested parties does not ***oblige*** them to attend and oppose leave, nor do they lose their right to challenge leave that is given merely by having been

served. If they wish to participate they should file an acknowledgement, as prescribed by the new draft rules, but they may choose not to, either because they cannot get ready, cannot afford to, or wish to see first if leave is granted before incurring costs. Failure to acknowledge should not be counted against them in the full proceedings, if leave is granted.

The fact that notice must now be given means that many respondents will incur legal costs, and if leave is refused will seek to recover those costs from the applicant. Admittedly, at present, there is always the risk that an application for leave may involve the respondent if the court chooses to provide the respondent with such opportunity.

Although is it not *compulsory* that the respondent will be involved at the leave stage, we think that it is likely the respondent will want to be involved in most cases.

If the respondent chooses to contest the application for leave, and leave is granted, it is submitted the court should normally award the costs of the leave hearing to the applicant, irrespective of the outcome of the substantive hearing, and there should be a specific provision in Order 53 or Order 62 for this.

4. **Order 53 r.2C**

This rule provides that an acknowledgement of service may be filed within 21 days after service of the notice of application for leave. We refer to our comments on the proposed Order 1B rule 2 (a) in relation to the power to abridge time, and request that consideration be given to clarifying the position to ensure primary time limits such as this may not be shortened.

5. **Order 53 r.2D(2)**

The Steering Committee should note and correct the "typo" "*judicial hearing"* should read *"judicial review"*.

6. **Order 53 r. 5B**

(a) We consider the proposed new rule 5B to be unclear: *"At the hearing of the application for judicial review, the applicant may not seek to rely on grounds other than those for which he has been given leave to apply for it unless the leave of the Court has been given."*

In relation to the words "… *unless the leave of the Court has been given.*" It might be better worded in the neutral "… *unless the leave of the Court is given*" to allow for the possibility that in an exceptional case the applicant may be permitted to rely on new grounds advanced at the substantive hearing. The existing rule 6(2) – which is to be repealed – seems more generous. We are not aware of any abuse of the existing rule, and see no reason why the wording needs to be changed.

(b) In relation to the words "*the applicant may not seek to rely on grounds other than those for which he has been given leave to apply for it unless the leave of the Court has been given"* query whether, in order to promote a *"level-playing field"* a similar restriction should also explicitly apply with respect to a respondent's detailed grounds for opposing the application for judicial review or, for that matter, with respect to "*any other person*" who supports the application on the basis of "*additional grounds*".

7. **Order 53 r. 5D: "Court's power to hear any person"**

Order 53 rule 5D provides that "*any pers*on" may apply for leave to file evidence or make representations at the hearing of the application for judicial review provided they act "*promptly*". We suggest criteria should be adopted to ensure that "*any person*" must be able to demonstrate sufficient interest in the proceedings in order to justify coming within this provision.

8. **Practice Direction SL3**

In theory much has already been done to require applicants to provide details in support of applications for leave to apply for judicial review by the introduction

of a new *Practice Direction SL3* ("Directions made by the Judge in charge of the Constitutional & Administrative Law List", and the Amendment thereto, 1 February 2006). It may be too early to determine whether this is working as effectively in practice as was intended.

X. Proposed amendments to Section 52A(2) High Court Ordinance (Cap.4): "No order as to costs against non-party to relevant proceedings"; and Clause 2 of the Civil Justice (Miscellaneous Amendments) Bill

A. Costs against non-parties to relevant proceedings

1. Introduction

We note that the Steering Committee proposes the repeal of s.52A(2) of the High Court Ordinance (Cap.4) and thereby removes the general prohibition that prevents cost orders being made against non-parties to relevant proceedings. As far as we are aware, this was not considered by the Chief Justice's Working Party in its Final Report. Indeed, irrespective of the merits of the respective arguments as to whether s.52A(2) should be kept or repealed, it is questionable whether this issue should properly be included in the *Consultation Paper*.

2. S.52A(2) High Court Ordinance (Cap.4)

This section (and general prohibition) is generally understood to prevent the Hong Kong courts from exercising a discretion to award costs against a non-party to relevant proceedings. S.52A(2) distinguishes Hong Kong from certain other principal common law jurisdictions, notably England and Wales (see s.51 of the Supreme Court Act 1981). The so-called *"protection"* afforded to non-parties in Hong Kong has been a topical and keenly observed issue in recent proceedings e.g. *Re Aurasound Speakers Limited [2005] 4 HKLRD 382*. Similar might be said with respect to *"intervening"* parties e.g. *Re "M V Liberty Container", CACV No.327 of 2005, 30th March 2006, [2006] HKEC 746*. We are aware of other proceedings (not yet reported) which may test the scope of s.52A(2).

The Court of Final Appeal is also due to consider the ambit of s.52A(2) and its application to a person served (with leave) out of the jurisdiction solely for the purpose of exposing them to a liability for costs. Such a case is due to come before the Court of Final Appeal on 21–22 July 2006 (*AXA Versicherung AG v The Hong Kong Housing Authority*, *FACV No.4 2006*). That judgment is expected to clarify the circumstances in which an overseas *"party"* can be *"brought into"* Hong Kong proceedings solely for the purpose of exposing it to a liability for costs.

B. Conclusion

We consider that the Steering Committee should (amongst other things) review the Court of Final Appeal judgment in the above case, prior to determining further whether to repeal s.52A(2). We should also like more time to consider this issue and to refer it to our Civil Litigation Committee. The repeal of s.52A(2) would be a significant development and should not be done without proper consideration of the merits for and against. We do not say that there are no merits in its repeal; far from it. There are some forceful arguments to be made for exposing *certain* non-parties to a liability for costs if they can be shown to have funded and controlled litigation in Hong Kong and for their own purposes (for example, they are not *"pure funders"*). However, this issue justifies further consideration. This is not a matter that can simply be resolved by reference to other jurisdictions, when those other jurisdictions have different and (sometimes) more varied arrangements for funding legal costs in civil proceedings.

The implications of the repeal of s.52A(2) also need to be considered insofar as they may affect a party's access to justice.

The same issues raised with respect to s.52A(2) apply equally with respect to the proposal to repeal s.53(2) of the District Court Ordinance (Cap.336).

The Law Society of Hong Kong

12 July 2006

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These submissions and this document have been prepared for the sole purpose of documenting the Law Society's response to the Hong Kong Judiciary Steering Committee's Consultation Paper. The submissions and this document do not constitute legal advice and should not be relied on as such.

APPENDIX 1

Manuscript mark-up of the proposed Order 22

[9] Order 22A r.1: (1) If any money paid into court in an action is not accepted (whether or not in accordance with Order 22), the money remaining in court shall not be paid out except in pursuance of an order of the Court which may be made at any time before, at or after the trial or hearing of the action. (2) Where an order under paragraph (1) is made before the trial or hearing, the money shall not be paid out except in satisfaction of the cause or causes of action in respect of which it was paid in.